

International Criminal Law I: The History of International Criminal Law

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ABSTRACT

This text outlines the basic features of the history and development of international criminal law and international criminal justice, with a special emphasis on the establishment of the permanent International Criminal Court, which the author treats as a new beginning rather than the end of the development of international criminal justice. The author also provides an overview of the history of international criminal justice, closely associated with the general history of civilisation and military history.

The author includes some selected and significant moments for the development of the international criminal law: 1) the trial in Breisach of the Duke of Burgundy, Sir Peter von Hagenbach, in 1474, in the context of the juvenile stage of international criminal justice; 2) the idea of an international war crimes court, unrestrained by state borders, articulated after the war between Prussia and France; 3) the attempt at trying the former German emperor, Leipzig war crimes trials and parallel proceedings in France and Belgium after the WWI; 4) the activities of some international organisations between WWI and WWII and an unsuccessful attempt at establishing an international criminal court against terrorism; 5) the Nuremberg (IMT) and Tokyo Trials (IMTFE) after the WWII, with an explanation that the principles developed by the International Military Tribunal in Nuremberg represent an extremely important basis for the further development of international criminal law and that criminal law applied at Nuremberg formally became the backbone of international criminal law; 6) the establishment of the *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR); 7) the hybrid tribunals, with combination of national and international elements and 8) the perspectives of the International Criminal Law after the adoption of the Rome Statute and establishment of a permanent international criminal court (ICC).

The author concludes that, when it comes to the future of the International Criminal Court, one should be neither an optimist nor a pessimist, as for what lies ahead of the first permanent form of international criminal justice, the old truth holds that a glass half filled with water may be seen as either half-full or half-empty.

KEYWORDS

history, international criminal law, international military tribunals at Nuremberg (IMT) and Tokyo (IMTFE), international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), permanent international criminal court (ICC)

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1. Introduction

A historical overview and analysis of the development of international criminal justice cannot be reduced to a mere consideration of purely dogmatic, legal-technical, practical or theoretical questions of international criminal law. Just as the concept of international criminal law itself is complex, and contains a very specific relationship between two large areas or branches of law – criminal law and international law, so the history of international criminal law, especially in relation to specific trials, has developed with the influence of both these areas of law, but at the same time with a strong influence of general historical factors/. This is the reason why, in reviewing the dominant points of the development of international criminal law, and especially some cases of international criminal trials, great attention must be paid to the historical background of these forms of international criminal justice. Also, in the analysis of the historical development of international criminal law, due attention must be paid to historically documented or notorious cases of committed war crimes and other international crimes that have never been prosecuted as the result of international political influences. In this sense, the history of international criminal law consists of both the activity of various forms of international criminal justice, in the form of specific trials, as well as their inactivity, although there were legal prerequisites for this, i.e. the absence of a trial for which there were sufficiently strong legal and factual grounds.

Hence the necessity that in considering the history of international criminal justice, attention must be directed to certain factual and general historical circumstances that have had a great impact on specific legal issues, and also on certain actions or inactions of various forms of international criminal justice. Without a harmonious consideration of both the legal issues in the historical development of international criminal law and the general historical circumstances that have acted in relation to the prosecution or non-prosecution of specific international criminal cases, it is not possible to properly understand the history of international criminal law, which is nevertheless a part of the general history of mankind. That general history of mankind is, for the most part, the history of war, which, coupled with the fact that in a war, war crimes and other international crimes are inevitable, postulates a dominant link between major historic events, the defining moments in the history of war in particular, and specific international criminal trials. The history of international criminal justice is very closely connected to the war/military/general history of mankind/human society.

International criminal law has, so far, not developed as a “directly applicable legal system”. In theory, and particularly in relation to the two most important cases of international criminal trials (IMT/IMTFE), it is pointed out:

‘An ideal directly applicable system would include not only a judicial body, but a vertically integrated and comprehensive international criminal system,

which would consistently contain all the components that exist in national criminal systems, namely: prosecution, adjudication, enforcement of sanctions, and applicable law. The International Military Tribunals at Nuremberg (IMT) and Tokyo (IMTFE) represent such a comprehensive and vertically integrated system of law enforcement. But these two precedents have their own special place in the annals of legal history, and to this day such an international justice system has not yet been established, perhaps thanks to the refusal of states to relinquish their sovereignty in this area.¹

In fact, the conditions for a certain upheaval in relation to this issue have been created by the entry into force of the Rome Statute, which, of course, did not lead to the creation of a specific international coherent judicial system, which would encompass all the elements that exist in today's national legal systems. However this is not necessary, so with regards to the member states of the Rome Statute – because on the one hand, they are obliged to have in their legal system, in accordance with the rule of complementarity, all the necessary criminal law instruments provided for in the Rome Statute, while on the other hand, their national criminal judiciaries have primary jurisdiction, while only under certain conditions and in the alternative – jurisdiction belongs to the International Criminal Court.²

International criminal justice has not evolved in a linear fashion, but rather through a series of legal and occasionally (para)legal cases, developing under specific historical circumstances. The historical circumstances, and above all a great division between *victors in war* and *the defeated* in war, were, among other things, the key to whether a trial would be pursued after the war at all, who would be tried and often-times in what way a trial would be conducted. This post-war division between winners and vanquished, the basic factor which contributed to the fact that the international criminal law, generally did not have a universal character. The idea of establishing an international criminal court is not a new one, it originates from the 19th century, and it arose as part of the general understanding of international justice as a means of resolving international disputes, where the greatest theoretical obstacle to the realisation of this idea was the understanding of sovereignty as the basic feature of states, which prevented their subordination to any authority outside themselves.³ The turning point came with the establishment of a permanent international criminal court.

1 Bassiouni, 2003, p. 387.

2 Škulić, 2004, p. 211.

3 Milojević, 1997, p. 91.

2. The Case of Peter Von Hagenbach

One of the important historic moments in the context of beginnings of international criminal justice, i.e. the juvenile stage of development of international criminal justice, was the trial in Breisach of the Duke of Burgundy, Sir Peter von Hagenbach, in 1474. As the governor of an occupying power, Hagenbach was charged with a number of crimes – murder, rape and the confiscation of private property.

The citizens of Breisach established a “multinational tribunal” of 28 judges, eight nominated by Breisach, and two by each of the other nearby regions. Hagenbach pleaded superior orders, arguing that he had only carried out the Duke’s orders, but was nevertheless found guilty, sentenced to death and executed.⁴

From the point of view of modern criminal law standards, the Breisach trial can hardly be considered a serious international criminal trial, but it certainly has a certain historical significance, and in the manner of defence of the defendant and the final verdict, it seems that it anticipated some issues that are of great importance in modern international criminal law, which primarily refers to acting on a superior’s orders, individual criminal responsibility and command responsibility.

Some authors suggest too, that the “war crimes trial” of Conradin von Hohenstafen, in Naples, in 1268, might be one of the harbingers of an international criminal court.⁵ He was the Duke of Suabia and was tried, convicted and executed for initiating an unjust war.⁶ That trial cannot be considered a credible international criminal trial either, particularly in the light of the current prevailing concepts.

3. Early Attempts After WWI

The idea of an international war crime court, unrestrained by state borders and prompted to act by the failure of a national judiciary to prosecute, was explicitly articulated in the second half of the 19th century, when Gustave Moynier of Switzerland, the then president of the International Committee of the Red Cross, and appalled by the atrocities of the Franco-Prussian War, proposed that an international criminal court be established as a response to the war crimes.⁷ The war between Prussia and France (1870-1871) was one of the first modern wars, and a prelude to the unification of Germany. Gustave Moynier’s idea of an international war crime court was the First Valid Concepts of International Criminal Court as a Manifestation of “Universal Justice”.

4 Bring, 2001, p. 11.

5 Bassiouni, 1999a, p. 3.

6 Bantekas and Nash, 2003, p. 325.

7 Fastenrath, 1999, p. 632.

The idea of Gustave Moynier that arose after the victory of Prussia over France did not actually come to life, just as similar ideas of individuals, no matter how respectable they may be and how noble their ideas may be, have little chance of being implemented, until they become at the same time “ideas,” or rather, political ideas of the current great powers and powerful political “players” on the world stage. Therefore, the next serious attempt of this kind did not come until after the end of the First World War, although of course such ideas had already appeared during this war, but more as part of the war propaganda and general war effort, than as a serious legal and political attempt.

During the First World War the Allied leaders, i.e. the leaders of the triple entente, as an international military/war coalition, developed a new concept, that once victory was achieved defeated enemy leaders should face criminal charges for violations of international law, committed during the war. On 25th January 1919, during the Paris Peace Conference, the Allied governments established the Commission of Responsibilities with the task to make recommendations to that effect. As a result, articles 227–230 of the Treaty of Versailles stipulated the arrest and trial of German officials defined as war criminals by the Allied governments. Article 227 of the Treaty of Versailles made provision for the establishment a special tribunal, presided over by a judge from each of the major Allied powers.

The Treaty of Peace with Germany signed in Versailles prescribed too, that the former German Emperor should be called to account for ‘a supreme offence against international morality and the sanctity of treaties’, and that ‘a special tribunal will be constituted to try the accused’, but the intent never materialised, because the Netherlands, where the former monarch, Wilhelm II Hohenzollen, lived in exile, refused to extradite him.

The attempt at trying the former German emperor is believed to be one of the first cases taking into consideration ‘international individual criminal responsibility’ for violating ‘the rules of international customary law of war’.⁸ One of the theoretical highlights is that public international law does not provide for an opportunity to punish a state in terms of criminal law, which is based on the “concept of personal guilt,” and the first attempt at punishing an individual directly based on the rules of international law was made against Kaiser Wilhelm II after World War I.⁹

Under Article 227 of the Treaty of Versailles, the former German monarch, the commander-in-chief of Germany’s military forces, was also charged with command responsibility, regarding the crimes committed by members of his armed forces. The literature suggests that a trial of the former German emperor would be a kind of “the victor’s trial” of the defeated. Aside from Wilhelm II, the list of major criminals included Theobald von B. Hollweg, the chancellor of the German Empire (1909-1917), a German field marshal, Paul von Hindenburg, and General E. Ludendorff.

8 Malekian, 1999, p. 162.

9 Buergenthal et al., 2000, p. 160.

The Treaty of Versailles, *inter alia*, provided an opportunity for the victorious Allied Powers to bring before their military tribunals members of the defeated powers in World War I, which was attempted with respect to persons who had held high-ranking offices in the German Empire (even the highest-ranking, as one such attempt was made against the German emperor), but all these efforts eventually failed.

3.1. Leipzig War Crimes Trials and Parallel Proceedings in France and Belgium

Under the Law to Prosecute War Crimes and War Misdemeanour of 18th December 1919, nine war crimes trials were held in German city Leipzig against former members of the German Army and Navy who were acquitted, largely due to insufficient evidence.¹⁰

In 1920, the Allies, i.e., the main victorious states after the WW1, submitted a list of about 900 names of alleged war criminals to the German government, demanding officially and ultimately the extradition of these persons. The German government refused to extradite any German citizens to Allied states, because of the constitutional prohibition of extradition of the German citizens and proposed instead trying them within the German justice system in Leipzig. That proposal was finally accepted by the Allied leaders and in May 1920, Germany received a reduced list of 45 accused persons. However not all of these persons could be traced or it was not possible to identify them, and in other cases there was difficulty in finding credible evidence. Because of that, finally only twelve individuals from the revised list were actually brought to trial in Germany.

The “Leipzig Trials” are a clear example of the biased (in this case *in favore*) approach of “domestic” i.e. national courts in international criminal justice cases. Those former members of the German army who were found guilty in these trials were punished with relatively light sentences. Such outcomes of these proceedings have also influenced the view that it is difficult to expect sufficient impartiality of national courts in matters of war crimes trials.¹¹

Meanwhile, in other countries, especially in France and Belgium, several trials were held *in absentia* of members of the defeated German army, and sentences were passed, even to death by hanging, but these convictions and sentences were never carried out.¹²

This drastic disproportion in the decisions of different national courts in practically identical criminal cases clearly indicates major problems in the creation of universal international criminal law and, especially on a practical level, two basic and very characteristic features can be seen. On one hand, the national judiciary, as a rule, is not ready to conduct proceedings against its compatriots in a completely realistic and impartial manner, even when it comes to the most serious international

10 Wakaki, 1996, p. 13.

11 Škulić, 2005, p. 68.

12 Wakaki, 1996, p. 13.

crimes, and on the other hand, national courts are very ready to severely condemn members of the other warring party.

3.2. The Authority of Criminal Prosecution of the Victorious Powers After the First World War

The Treaty of Versailles provided, among other things, that the victorious powers had the right to conduct court proceedings before their military courts, of members of the defeated forces in World War I, which was also attempted in relation to persons who held very high positions in imperial Germany (even the highest position in the case of the German emperor). But such attempts were not fruitful in their final outcome. In the proposals for peace treaties with the other defeated states (Austria, Hungary, Bulgaria and Turkey),¹³ there were also such provisions, but in the final versions they were limited only to the general provisions on liability, which is considered to be mostly influenced by the political factor, i.e. new relations on the international scene and, as usual, the dominant interests of the great powers of the time and influential international political actors.

Namely, it is likely that the provisions on the responsibility of Turkey and its officials for crimes against Armenians were one of the reasons for not ratifying the treaty after the negotiations in Sèvres and in addition, there was probably a desire of the Allies not to hinder the major social reforms that had begun in Turkey after World War I. In 1923, another treaty was signed in Lausanne, which included an amnesty clause for crimes committed during the war.¹⁴ The Lausanne Peace Agreement, which replaced the non-ratified Treaty of Sèvres, practically confirmed the general amnesty that had previously entered into force in Turkey, thanks to which it formally prevented the prosecution of the perpetrators of serious crimes, including of the crimes against Armenians, who suffered terrible losses and whose population was almost decimated.¹⁵

13 The persecution and killing of Armenians by the Turkish authorities began even before World War I, and in 1915 there was a systematic deportation and destruction of the Armenian population in Turkey, which provoked condemnation of European public opinion, and Russia, France and United Kingdom sent a declaration to the Ottoman Empire in May 1915 containing the following warning: 'With regard to crimes against humanity and civilization..., The Allied government announces... To hold personally responsible all members of the Ottoman Government and their officials who are involved in such massacres.' Cited in Bring, 2001, p. 13.

14 See: Bassiouni, 1999b, pp. 35–36.

15 As many times before and of course, later in the history of mankind, in this case the interests of justice and fairness, as well as legal principles, were completely ignored and practically suppressed as irrelevant, in order to achieve certain political effects. Of course, such injustice, among other things, in addition to further growing distrust in international justice, has also led to some other direct effects, such as the subsequent actions of vengeful Armenians, in relation to Turkish officials, which is another indicator that often some problems that are not adequately solved in the legal field, result in the application of violence and various forms of extremism, including some terrorist acts.

3.3. The Activities of International Organisations Between WWI and WWII and an Unsuccessful Attempt at Establishing International Criminal Court Against Terrorism

The interwar period saw a flurry of energetic activities by international organisations to support the development of international criminal justice, spearheaded by intergovernmental bodies (the League of Nations and the Inter-Parliamentary Union). This drive also involved professional organisations in the domain of criminal law (the International Law Association and the International Association of Penal Law/ Association Internationale de Droit Pénal).

One of the central issues that a slew of expert bodies focused on in the interwar years was the effect of the principle *nullum crimen, nulla poena sine lege*.¹⁶ It is believed that

‘efforts towards the establishment of a permanent international criminal court were initiated by the League of Nations, and continued by the United Nations, the work of the latter developing along two paths – codification of international criminal offenses and the elaboration of a draft statute for the establishment of an international criminal court.’¹⁷

Terrorism was a serious problem in earlier historical epochs, although at that time, and especially in the century that has just passed, no one had any idea of the global scale of the problem of terrorism in general, as well as international terrorism in particular, or that terrorist attacks such as the one of September 11th 2001 in New York, could have serious international legal consequences, i.e. become the “cause of the war” and could be the reason for military intervention.

However, some of the roots of international concern about the problems of terrorism and terrorist activity can be traced back to the first half of the 20th century.¹⁸ At the Conference on the Fight against Terrorism held in Geneva on November the 16th 1937, two conventions were adopted; one on the prevention and punishment of terrorism (“*pour la prévention et la répression du terrorisme*”) and the other on the creation of an international court to try terrorists (“*pour la création d’une Cour pénale internationale*”). The aim of these conferences was generally “the fight against politically motivated terrorism.”¹⁹

16 Ahlbrecht, 1999, pp. 46–53.

17 Bassiouni, 1998, pp. 10–11.

18 The typical form of terrorism in the 20th century was assassination and at that time, no one envisioned terrorism with mass casualties.

19 Ahlbrecht, 1999, p. 57.

The International Community has tried, through the Convention on establishing an International Criminal Court against terrorism (ICC),²⁰ to create an effective international criminal justice system (albeit with a rather narrowly defined jurisdiction), but this idea never came to life, thanks to the outbreak of the Italo-Ethiopian war, i.e. the invasion that fascist Italy with colonialist aspirations, under the leadership of Mussolini, carried out against Ethiopia. In fact, by mid-1938, only 18 countries had signed the Convention on the Prevention and Punishment of Terrorism, while only 13 states had signed the Convention of Establishing the International Criminal Court against terrorism. Article 1(2) of the Convention on the Prevention and Punishment of Terrorism required merely three ratifications to come into force but received only one and was subsequently abandoned.²¹ In formal terms, neither of these two conventions had any legal effect. Of course, the political climate of the world community was not at all in favour of the realisation of such an idea, because it was a time of marked strengthening of fascist regimes, stabilisation of Nazi power in Germany, civil war in Spain and the feeling of a distinct political, economic and military weakness of the countries, former victors in World War I.

In addition, in political relations at the global level, and especially in Europe, there was a climate of potential revanchism and great distrust, which was a consequence of the new radically changed relations of power after World War I, and the disappearance of previously large and powerful states. The political map of Europe changed fundamentally after World War I; four empires met their end: Russia (1917), Germany (1918), Austria-Hungary (1918) and the Ottoman Empire (1922), and with the collapse of the Habsburg dual monarchy and the political upheaval in Russia, a number of new independent states were created in Eastern and Central Europe.²²

All these global, and especially European political and historical circumstances, have had a dominant influence on the fact that until the “new end” of the “new” world war and the new “division” into victorious and defeated countries, no trial for international crimes could be realised, which is a very striking indicator of the direct influence of international political factors and the real balance of power between states, in the field of international criminal law.

20 Here it is also possible to draw very interesting historical parallels with the situation at that time regarding the terrorist threat and labelling terrorism after the events of September 11th 2001 as a global threat, and the initiation of mass armed interventions by the United States in the name of dealing with terrorist groups, and above all the Muslim fundamentalist-terrorist organization “Al Qaeda”. Phenomenologically speaking, terrorism in the 1930s was primarily of an individual character, i.e. it consisted mostly of assassinations (such as the assassination of the Yugoslav King Alexander Karadjordjević by the Croatian Ustaša and Bulgarian VMRO members), while most of today’s terrorist organizations are oriented towards mass strikes on the civilian population, causing great human casualties and terrible material destruction. However, the idea of an international trial of terrorists is now less mentioned in the political public and international contacts, although there would probably be more factual predispositions for it.

21 Bantekas and Nash, 2003, p. 17.

22 Ziegler, 1994, p. 241.

4. The Nuremberg and Tokyo Trials

In the wake of the previous “unsuitable” efforts to create a viable international criminal court, came what appears to be a truly decisive step – the International Military Tribunal (IMT) was established in Nuremberg to prosecute and punish major war criminals from the defeated European Axis, whereas its “Asian counterpart”, the International Military Tribunal for the Far East was set up in Tokyo.

Certain political deals that had been reached during World War II paved the way to the Nuremberg trials, as the necessity to try those responsible for serious crimes had already presented itself. In October 1941, U.S. President Franklin Roosevelt and British Prime Minister Winston Churchill reached an agreement on a large-scale trial of Nazi leaders to be held in the future, and during the Moscow Conference in October 1943 a joint declaration was signed by Roosevelt, Churchill and Stalin, believed to be the source of the Nuremberg Trials.²³

The Charter of the International Military Court in Nuremberg was based on the London Agreement of 8th August 1945, an intergovernmental agreement by the four principal members of the Allies to secure the prosecution and punishment of the major war criminals of the European Axis.²⁴

It goes without saying that the trials in Nuremberg and Tokyo were of enormous importance, and it is undeniable that members of the Axis committed horrific crimes during World War II, but against the backdrop of common legal reasoning and standard evidentiary parameters, they were less than perfect. Yet the two trials still provide a proceeding point for most of the expositions of the roots of international criminal courts, and the experience arising from the operation thereof is essential in analysing the case-law of international criminal courts. They also constitute a rare historical example that in some respects, the principle of legitimacy may prevail over the formal principle of legality.²⁵

In fact, it is as if the scale and horror of the crimes committed, especially the mass executions and the brutal implementation of genocide against the Jews and also the Slavic peoples, especially in Russia, Poland, Serbia/occupied Yugoslavia, the creation of concentration camps and the “Holocaust”, the death camps (in the case of

23 Möller, 2003, p. 75.

24 Jescheck, 2004, p. 38.

25 Škulić, 2022a, p. 20.

German war criminals),²⁶ i.e. the mass destruction of the civilian population in the occupied territories, then torture and rape, especially during one period of the war in the Philippines in Manila, when it comes to Japanese war criminals, and the fact that both Germany and Japan,²⁷ treacherously attacked other countries without declaring war, and thus grossly violating international treaties of friendship,²⁸ that might have prompted the creators of these military tribunals not to pay much attention to some of the usual procedural and legal standards when it came to criminal cases.

In addition, it is a pity that the Allies did not have the moral strength to bring people from their own side to justice, who could certainly be charged with various international crimes. So although the Nuremberg and Tokyo trials were based on the pursuit of the principle of individual responsibility for crimes in the sense of international law, they could not avoid criticism.²⁹ Namely it is almost impossible to deny the criminal character of the mass bombing of the civilian population (e.g. in Dresden, Hamburg,³⁰ Berlin, Cologne, etc.), even at a time when the war was visibly coming to an end, and when it was absolutely clear that Germany would be defeated, as well as

26 It is interesting to recall that concentration camps are not an original German “invention” after all. They were practiced *en masse* by the British armed forces during the Boer War (1899–1902), in relation to the civilian population who were subjected to severe suffering and extremely brutal treatment in these camps, so that in October 1900 alone 3,156 of the 111,600 white Boers and 698 of the 43,800 Boer died in these camps. See: Seidler und de Zayas, 2002, p. 15. However, regardless of these historical facts, it is indisputable that the classic type of concentration camps, as an important part of the mechanism of physical destruction of undesirable peoples and ethnic groups, as well as ideological opponents (*death camps*), did not exist as such, until it was created by the decisions and practices of Nazi Germany.

27 The International Military Tribunal for the Far East was established on January 19th 1946 and was responsible for the war crimes that affected the Allies the most: war crimes against prisoners of war, which were widely practiced by the Japanese. Ambos points out that, from a subjective point of view, it was required that the responsible persons had knowledge, or at least that they did not know, negligently, that abuses were being committed in relation to the prisoners. See: Ambos, 2002, pp. 131 and 134–135.

28 Nazi German “führer” Adolf Hitler’s publicly stated position is well known: ‘all international treaties last as long as it suits our interests’, which, among other things, led the famous philosopher Karl Jaspers to express his position according to which the Nuremberg trials are a legitimate attempt to promote a new world order, which does not lose such significance, regardless of the fact that it is not based on legal grounds. In this context, a statement by Dr. Joseph Goebbels, Gauleiter of the Reich Capital, Reich Minister for National Information and Propaganda, and Reich Defense Commissar, is very interesting, in which he (Das Reich, 14th November 1943), points out: ‘As far as we are concerned, we have demolished the bridges behind us... We went all the way and finally decided... We will go down in history as the greatest statesmen or as the greatest criminals.’ Cited in Cartier, 1967, p. 362.

29 Damrosch et al., 2001, p. 1326.

30 The aerial bombing operations of Hamburg and Dresden, with the massive use of incendiary bombs, were basically aimed at turning the cities into “dust and ashes”, which is metaphorically perfectly illustrated by the official name of the air attack on Hamburg – “Gomorrah”, and in the German press at the time this bombing was described as ‘the days when fire fell from the sky’.

the dropping of atomic bombs on the Japanese cities of Hiroshima and Nagasaki,³¹ which is also very difficult to justify with military reasoning, because Japan was already practically on the verge of extinction.

However, as was explained in the previous text, practice shows that the victors are mainly not being put on trial, regardless of the gravity of the crimes they could have committed. When it comes to the massive (carpet) bombing of German cities, it was a terrible and completely unreasonable military destruction of almost entire cities, with the infliction of heavy civilian losses. Such long-range Allied air strikes were also common in other cities in occupied Europe. For example, Belgrade was heavily bombed on Easter 1944, when thousands of citizens were killed and even a maternity hospital was hit, in which new born babies and their mothers died, while the German occupiers suffered quite insignificant military losses.³²

The principles developed by the International Military Tribunal in Nuremberg (IMT) represent an important basis for the further development of international criminal law.³³ The criminal law applied at Nuremberg formally became the backbone of international criminal law, given the fact that at the first session of the UN General Assembly, Resolution No. Decree No. 95 of 11th December 1946 declared it a part of General International Criminal Law. The principles adopted at the Nuremberg and Tokyo trials thus became the foundation of international criminal law, and the former British chief prosecutor at Nuremberg, even pointed out that: ‘The West German government has finally, with an extraordinary awareness of responsibility, dealt with the problem of war crimes, and the West German judiciary has applied the Nuremberg Principles in a whole series of cases.’³⁴ Indeed, in Germany there has not been much challenge to the fairness of the verdicts rendered during the Nuremberg trials or in the numerous trials held according to the “Nuremberg patterns” (especially by more serious legal writers), although of course there have been reasoned criticisms of the standards of proof applied, and also in relation to the whole conception of such proceedings.

From a formal point of view, the fact that the Nuremberg and Tokyo tribunals were not created by the international community, but only by one, at least “victorious”

31 See: Minear, 1971, pp. 99–101. An interesting observation was made by the Dutch judge Röling, who in a commentary, 12 years after the end of the trial in Tokyo, pointed out: ‘...From the time of the Second World War, two things are remembered above all: the German gas chambers and the American dropping of atomic bombs.’ Minear, 1971, p. 101.

32 Thus, these massive Allied bombings were not only directly aimed at the civilian population, but their actors often did not make a relevant distinction even between the population of Germany itself, which started the war, and the countries that were occupied, and represented the victims of Nazi Germany. Namely, if the reason for the massive bombing of German civilian targets is sometimes cited as the intention to defeat the German population more quickly by breaking the morale of the German population, even such an otherwise extremely illegal reason cannot be cited as a justification for the bombing of civilian targets in the occupied countries.

33 Ambos, 2018, p. 114.

34 Gründler and Manikovsky, 1967, p. 13.

part of humanity is sometimes rather cautiously emphasised. Thus, for example, A. Esser states:

‘Although I, as a German, do so with a certain uneasiness, it remains for me to point out that the courts of Nuremberg and Tokyo were not founded by the whole world community, but unfortunately by the victorious powers of the Second World War, and that therefore their impartiality as the so-called “justice of victors” may be questioned.’³⁵

Similarly to this, the literature puts forward the view that the most famous of all the war crimes trials so far was the trial of the main war criminals in Nuremberg, by a tribunal which ‘was created by an international agreement between the United States, Great Britain and the USSR and was primarily an inter-Allied cooperation in punishing Nazi criminals.’³⁶ The Nuremberg Trial Rules contain provisions of general and specific part of international criminal law,³⁷ as well as procedural provisions of the “fair-trial” type.³⁸ Although the Statute of the International Military Tribunal at Nuremberg and the procedure applied can certainly be criticised (starting with the effect of the principle of legality),³⁹ the fact is that these rules have become a kind of “cornerstone” for the further development of international criminal law and for the idea of the International Criminal Court, and today there is no serious systematic work in the field of international criminal law which does not pay great attention to the legal analysis of that trial.

A modified Anglo-Saxon criminal law procedure was applied before the International Military Tribunal in Nuremberg. Chief Prosecutor Jackson said: ‘The only problem was that a procedure that is acceptable as a fair trial in countries accustomed to the Continental system of law may not be regarded as a fair trial in common-law countries.’⁴⁰ In addition to the Nuremberg IMT, the Allied powers occupying Germany also engaged in a large-scale policy of prosecuting war crimes in their respective occupation zones, which were undertaken under the authority of Control Council

35 Esser, 2001, p. 344.

36 Bloxham, 2001, p. 4.

37 These rules primarily were contained in the Seven Basic Principles, the Statute and other regulations pertaining to the Nuremberg Trials.

38 Ambos, 2002, p. 384.

39 It was problematic to prosecute for crimes against peace because of the question of retroactivity. The Briand-Kellogg General Treaty of 1928 made it illegal to wage war of aggression, but it was only about the responsibility of the state, and it did not stipulate individual criminal liability. In the view of the British prosecutor Shawcross, it is indisputable that a number of international treaties prohibited aggression and treated it as an international crime, and that Germany itself accepted these international obligations, so that (regardless of the fact that the crime against peace did not exist as a crime for which individual responsibility would be strictly envisaged), there was no “substantial retroactivity” at the Nuremberg trials – there was no element of *ex post facto* in the application of the concept of a crime against peace. See: Bring, 2001, p. 18.

40 Bassiouni, 1992, p. 21.

Law No. 10, which provided for domestic prosecutions of war crimes, crimes against humanity and crimes against peace.⁴¹

In a procedural and a functional sense, the main feature of this procedure is the passive role of the court in the collection and evaluation of evidence, which was primarily the main procedural task of the parties – the prosecution and the defence, and the court’s decision in principle depended on the degree of success in its implementation. It was a classic adversarial procedure, where the prosecution and the defence in the capacity of parties presented before the court all the evidence that they believed to support their point of view, and the court in principle had a passive role in terms of presenting evidence.⁴²

In addition, the well-known German bureaucratic orderliness in this respect made it possible to obtain certain evidence of crimes, sometimes with unexpected ease, because the Germans generally kept accurate records in relation to, for example the number of people in the camps, the list of internees, hostages, military operations, etc. The material evidence of the crimes committed was largely based on documentation catalogued and collated by Nazi Germany, totalling several million pages, which on the one hand convincingly supported the accusations, and on the other hand made it almost impossible for the defence to examine these materials in a short amount of time. In the last years of the war, the German authorities tried to destroy the evidence, but there was simply not enough time to do so, because the scale of the crimes was enormous.

In addition, the Allies made great and systematic efforts to discover material evidence, especially documentation, and sometimes they were lucky. For example, a huge number of important documents were discovered quite by accident, behind a false wall in Marburg Castle. These contained, among other things, the correspondence of A. Rosenberg.⁴³ During the hearing, the witnesses and the defendants themselves were heard primarily by the parties, although the court had the opportunity to ask a question to a witness or defendant at any time. All the defendants had defence attorneys, who were mostly German lawyers, but their great handicap was their lack of knowledge and experience in Anglo-Saxon substantive and procedural criminal law.⁴⁴ The defence had a lot of trouble with so-called personal sources of evidence, which, as with regard to other evidence, was her “party” task, in accordance with the rules of Anglo-Saxon criminal procedure. Thus, for example, it is pointed out that when it comes to witnesses who were part of the “chain of command”, i.e. those who had certain military functions, during the trial they were mostly dispersed in various camps or prisons, and while the prosecution had every opportunity to use these witnesses, the defence was hardly able to do so at all.⁴⁵

41 Cryer et al., 2010, p. 119.

42 Škulić, 2024, p. 57.

43 Bloxham, 2001, p. 58.

44 Kirchheimer, 1981, p. 500.

45 Knieriem, 1953, p. 196.

As an important principle of this procedure in Nuremberg, the dominant standard of the Anglo-Saxon types of processes has been established. This is the principle of fair trial, which in fact basically represents the right of the defendant to a fair trial.⁴⁶ From a formal point of view, apart from the shortcomings already explained, there were no major violations of this fundamental right of defence. However, it is another thing that in principle the defence did not comply with the rules of procedure that are by no means typical for Europe, and were in fact quite different from some of the usual procedural and legal standards for this area. In addition, in principle it is unusual for a first-instance verdict to automatically become final, which was the case here, because there were no rights of appeal against the verdicts. Regardless of all this, the gravity of the obviously committed crimes and the fact that Germany had started a war that was unprecedented in its scale and casualties, and the existence of a large amount of material evidence, were sufficient in themselves. However, there is no doubt that the absence of the right to appeal under the rules of procedure of the International Military Tribunal at Nuremberg (the same applied to the Tokyo Tribunal), regardless of the realistically low chances of success of such a legal remedy, cannot be considered to be an aspect that favoured the principle of due process and fair procedure.

The trial of the “major war criminals” of the European Axis began on 18th October 1945 in Berlin, and from 20th November 1945 continued in Nuremberg, where between the 30th of September and the 1st of October 1946 the judgment was pronounced and published, including 12 death sentences, three life imprisonment sentences, three time sentences, three acquittals.⁴⁷

In addition, certain German organisations, i.e. legal persons were declared criminal, namely the SS Units (the elite German party military units serving as protective squads), the German security service known as *der Sicherheitsdienst* (commonly known as the “SD”), the Gestapo (secret police), as well as the leadership of the National Socialist German Workers’ Party (*Nationalsozialistische Deutsche Arbeiter Partei – NSDAP*), as the leading body.⁴⁸ Membership therein was not treated as a delict in the context of criminal law, but it was a basis for the so-called denazification procedure, which effectively narrowed otherwise guaranteed civil rights in a certain period of time, denying some altogether, banned the exercise of certain duties and offices, imposed special obligations, etc. A very important principle of the Nuremberg trial was the principle of individual criminal responsibility.

46 See: Miljuš, 2022, pp. 17–18.

47 In his dissenting opinion, the Soviet member of the IMT, Judge Nikitchenko, stated that three acquittals and a life sentence for Rudolf Hess were unfounded, arguing that the three acquitted defendants should have been sentenced, and that the only justified sentence for Hess was death penalty. The Soviet judge also maintained that the General Staff and the supreme military command, *Oberkommando der Wehrmacht (OKW)* should have been declared criminal organisations. See: Maser, 1977, pp. 295–297.

48 Ahlbrecht, 1999, p. 93.

The objection of the violation of the fundamental legal principle ‘*nullum crimen nulla poena sine lege*’ was loudly taken up by critics of the Nuremberg Trials, as well as by ordinary people in Germany (“people in the street”), who felt burdened by the thesis of collective guilt, but above all by those accused in Nuremberg of crimes against peace. The illegality of aggressive war was manifested in the Kellogg-Briand Pact for the Prevention of War of 27th August 1928 and because of that the actions of individual persons, which constitute the features of crimes against peace within the meaning of the London Conference, were punishable until 1945, both nationally and internationally.⁴⁹ This was in fact the basis of the well-known thesis that the principle of legality was not substantially violated during the Nuremberg trials, that is, its substantial violation did not occur, given that it was not disputed that even before the commission of the crimes for which the defendants were charged, the initiation of an aggressive war was prohibited, albeit for states, but not strictly for individuals.

The Nuremberg Trials were conceptually intended to be a kind of great “lesson”, both to the German people in the processes of legal and factual “denazification”, and to potential future “ignitors of the world war conflagration”, which was the main reason why none of the “power factors” at that time were overly concerned with “excessive legal formalities”. This was also the reason why the Nuremberg Trials are completely legitimate, despite the fact that formally, the main actor in the judiciary function was the International Military Tribunal, composed of representatives of the four great powers, which was not based on any broader international legal basis. Besides, no one could seriously object to the strict international character and legitimacy of the IMT. For example, in a famous “classic early work” from the very extensive literature devoted to that famous trial, it is emphasised that:

“The endless devastation and indescribable mass horrors that accompanied the war, as well as the growing realisation that a subsequent war might bring about the end of modern civilization, contributed to the fact that the whole world demanded the condemnation and punishment of those responsible for the aggressions and the horrors of war.”⁵⁰

The gravity of the crimes committed during World War II by Nazi Germany and its allies was enormous,⁵¹ previously unseen and unrecorded in history, which made it quite pointless to insist on respecting all “formal” requirements, which especially applied to crimes against peace, because the commission of that act, i.e. the start of the aggressive war, was practically the initial trigger for all subsequent crimes that would be committed during the war and within its framework, and for these understandable reasons, one can hardly show or expect, great enthusiasm in proving that

49 Rückert, 1982, p. 93.

50 Taylor, 1951, p. 11.

51 Adamowitsch, 1987, p. 22.

the Nuremberg conviction for crimes against peace (crime of aggression) violated the principle of legality.

The Nuremberg Trials, or rather the legal basis for the convictions of the defendants in those proceedings formed in the Charter of the International Military Tribunal, represent a historically exceptional and even extremely rare case, which may probably occur “once in a thousand years”, in which the principle of legitimacy, based on the necessity that the perpetrators of the most serious and hitherto unprecedented mass crimes be justly punished, absolutely justifiably prevails over the principle of legality.

Compared to the trial at Nuremberg, the Tokyo War Crimes Trial is less frequently referenced in studies of the international military criminal courts following World War II. One of the reasons for this might be Japan’s physical distance from Europe, which was considered the place where the war began and actually ended, even though it effectively ended sometime later in the Far East. The International Military Tribunal for the Far East was established on 19th January 1946 and was focused on the war crimes that affected the Allies most strongly – war crimes against prisoners of war, in which the Japanese had broadly engaged.

The Tribunal was established by the Tokyo Charter, which was actually the decree issued by General Douglas MacArthur, following the blueprint developed by a U.S. lawyer, Joseph Keenan, who was later appointed as the Tribunal’s chief prosecutor. Certain differences notwithstanding, the rules applied by the IMT in Tokyo were quite similar to those used at Nuremberg. The Tokyo court found all the defendants guilty, and seven were sentenced to death.

Respect for the principle of legality was also challenged in relation to the trial in Tokyo. Namely, from May 8th 1946 to November 12th 1948, 28 leading Japanese politicians, officials and military personnel were tried before the International Military Tribunal for the Far East (IMTFE) as “major war criminals”, with the process based on the claim that Japan had pursued an aggressive, conquering and warlike policy since the early 1930s.

One dissenting opinion is very interesting and historically significant regarding the Tokyo trial. The statement of the Indian judge Radhabinod Pal, who had a dissenting opinion, is very compelling and indicative too, because he was a judge who was originally from Asia, which at that time was almost entirely under colonial rule.

In his dissenting opinion judge Pal pointed out that the situation in Japan was significantly different from that in Germany. He concluded that the constitutional system of Japan had been functional and the attitude within Japanese society had been that the emperor, military personnel and civil servants had been fully integrated into society. Pal wrote in his dissenting opinion that Japanese society had supported and helped the Japanese government. He also concluded that the defendants had acquired their positions in accordance with the Constitution and they had not abused their power at any time, nor had they usurped power and because of that, Japanese society

had experienced these processes as an inevitable evil and as the justice of the victor, without connecting this with the necessity of moral re-examination.⁵²

At the trial in Tokyo, the problem of possible retroactivity in the implementation of criminal law emerged as an important issue in relation to the conduct of proceedings for crimes against peace (aggression), because this criminal offense was not strictly envisaged as a crime for which someone would bear individual responsibility, but rather aggression, i.e. the crime against peace, was prohibited in interstate relations.⁵³ The views of individual judges from the Tokyo Tribunal regarding this issue are interesting:⁵⁴ Judge Bernard of France disputed that the charge of a crime against peace could be based on the “Pact of Paris” (Kellogg-Briand Pact) which concerned the relations of states,⁵⁵ but argued that waging an aggressive war was nevertheless illegal because it arose from “natural law”. Judge Röling of the Netherlands agreed that a crime against peace was not defined as a crime before the London Agreement, but like Judge Bernard, “provided” other rational arguments for concluding that waging an aggressive war was illegal, considering that it arose from a factual situation and that special provisions applied to this crime, similarly to the relationship between political crimes and other classic crimes in “domestic” national legislations.

Finally, Indian judge Radhabinod Pal, famous due to his dissenting opinion at the trial in Tokyo, refused to agree that the aggressive Japanese war had been illegal in concrete specific circumstances, arguing that this could not be inferred from the Pact of Paris, and ultimately concluded that in reality ‘only a lost war is a crime’.⁵⁶

5. The Establishment of the *Ad Hoc* Tribunals (ICTY, ICTR)

The international criminal tribunals for the former Socialist Federative Republic of Yugoslavia (ICTY) and Rwanda (ICTR) were established based on the resolutions of the United Nations Security Council, which opened the doors for contesting their legality.⁵⁷ The doctrine notes that ‘at the beginning of the 1990s, following the end of the Cold War, the United Nations activated its peace enforcement mechanisms’, and ‘this development triggered a renaissance of international criminal law, which many

52 Ahlbrecht, 1999, p. 103.

53 Škulić, 2010, p. 93.

54 Ahlbrecht, 1999, pp. 53–54.

55 With this pact, the member states of the League of Nations renounced war as an instrument of national policy and committed themselves to resolving their disputes peacefully, but although the states “condemned” war, the Pact’s shortcoming was that there was no appropriate mechanism to ensure its full implementation. In addition, this pact also did not mention any possibility of criminal responsibility of an individual, i.e. a person, for a crime against peace.

56 Ahlbrecht, 1999, p. 54.

57 The literature says: ‘The Charter of the United Nations does not provide legal grounds for the establishment of an international criminal court...’ ‘The establishment of an international tribunal by the U.N. Security Council was a new legal realm.’ See more: Satzger, 2018, pp. 155–156.

had thought a dead letter'.⁵⁸ The Statutes of the ICTY and ICTR reiterate the customary characteristics of international criminal law,⁵⁹ i.e. Statutes of both *ad hoc* tribunals that claim and strive to reflect "hard core" of existing criminal law.⁶⁰

There are fairly strong arguments that can be used to challenge this, but in terms of facticity, the work of the two tribunals in the given time is no longer disputatious, which given the gravity of the cases before them, as well as the considerable weight of the current and potential consequences of their decisions, cannot and must not be ignored.

As to the impact of the *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) on the development of international criminal law, theoretical resources suggest that in some situations, the case-law developed during the proceedings before these criminal tribunals influenced comparable solutions in the Rome Statute of the International Criminal Court, but sometimes in a direction that was quite the opposite, as it contributed to the development of completely different normative solutions in the Rome Statute.⁶¹ To illustrate the former, the Statue prescribes that a crime against humanity (contrary to the case-law developed at Nuremberg) may be committed in peacetime as well as in war or during an armed conflict, whereas the latter is confirmed by a failure to integrate the Hague Tribunal's case-law into the rules of the Statute excluding coercion as possible grounds for the exclusion of illegality or criminal responsibility.⁶² Even though the case-law of the two *ad hoc* international criminal tribunals clearly had an impact on the development of international criminal law, it appears that their influence should not be overestimated.

5.1. The Idea of Establishing an International Criminal Court and the Impact of Ad Hoc International Criminal Tribunals on Its Development

Although it is commonly considered that the "path" to a permanent international criminal tribunal began after World War II, this is not entirely true. Despite the fact that the importance of the International Military Tribunal at Nuremberg should not be underestimated, this trial was by no means the first step towards achieving a

58 Werle, 2005, p. 15.

59 Of course, this opinion/attitude (Werle) refers to the time of the creation of the both *ad hoc* tribunals (ICTY/ICTR), and since the establishment of the permanent International Criminal Court (ICC), the international criminal law, although historically rooted to a certain extent in customary law, when it comes to states parties to the Rome Statute, is primarily contained in the Rome Statute itself, as well as in other sources of criminal law (substantive and procedural), which are applied in proceedings before the International Criminal Court. Besides, in accordance with the principle of complementarity, there are adequate complementarity and essential correlation between the content of the Rome Statute, primarily the content of the provisions of material criminal law therein, and the corresponding segments of national criminal law of the state parties to the Rome Statute.

60 Werle, 2005, p. 16.

61 Schabas, 2017, pp. 12–13.

62 Ibid.

kind of supranational criminal tribunal for certain crimes.⁶³ The legal and historical significance of the Nuremberg trials, as well as those in Tokyo, is certainly momentous, although, the question can also be raised of how much *ad hoc* tribunals after the IMT and IMTFE were in fact the “right way” or at least the “shortest way” to the establishment of a permanent International Criminal Court,⁶⁴ and generally to the development of a universal and stable international criminal law system. The previously cited author, A. Eser in a cited article of his,⁶⁵ gives the title “from Nuremberg through The Hague to Rome” (Von Nürnberg über Den Haag nach Rom) to one of the chapters, which in a metaphorical way attempts to highlight the “evolutionary” and even “proper” or goal-oriented path of international criminal law, where *ad hoc* tribunals represented a kind of “precursor” to the permanent International Criminal Court.

According to some scholars (e.g. Jeffrey W. Davis, Hans Köchler, Julio Barboza, Stevan Đorđević, Zoran Stojanović),⁶⁶ the legality of the establishment of the International Criminal Tribunal for the former Yugoslavia is, at the very least questionable and can be attacked with strong legal arguments, which is constantly present in one part of the literature.⁶⁷ Critics of the legality of the ICTY point out in particular that the normal and correct approach to the establishment of an international tribunal would be to conclude an international agreement,⁶⁸ and that the legal basis amounting to a broad interpretation of the provision in Chapter VII of the UN Charter, according to which the Security Council may take action to maintain or restore peace and security, after the necessary determination that there is a threat to the peace, a breach of the peace, or an act of aggression, is not valid in a legal sense, because the term “court” can in no way be subsumed under the term “measure”.⁶⁹

Similarly, some other authors are of the opinion that ‘the ICTY was created both by powers that far exceeded those of the Security Council and that were contrary

63 Eser, 2001, p. 342.

64 See: Stojanović, 1999, pp. 6–11.

65 Eser, 2001, p. 342.

66 The views and main arguments of these authors are stated below in the text.

67 Đorđević, 1997, p. 157.

68 In fact it was quite clear from the beginning that the legally better way to form an international criminal court /tribunal, even when it comes to the “case of the former Yugoslavia”, was to use the mechanism of a multilateral international treaty, but it was assessed that this would be almost impossible in the specific concrete circumstances. Namely, in response to a request by the UN Security Council in Resolution 808 (1993), the Secretary-General recommended the idea of creating a tribunal by resolution, claiming that the possibility of establishment the tribunal by international treaty was canvassed, but rejected on the basis that it would take too long, and there was no guarantee that all the relevant States (‘in particular those in what was by then Former Yugoslavia’) would ratify that concrete international treaty. See: Cryer et al., 2010, p.123. It is noted in the literature too, that ‘the establishment of the ICTY under Chapter VII was a measure not involving the use of force and, thus, fell squarely within the ambit of Art 41 of the 1945 UN Charter, despite the fact that the indicative list of measures envisaged in that article make no reference to judicial bodies’, formally defined as a subsidiary organ under art. 29 of the UN Charter; See: Bantekas and Nash, 2003, pp. 339–340.

69 Stojanović, 2018, p. 57.

to traditional canons of statutory interpretation’,⁷⁰ and that ‘both traditional judicial doctrines and the customary practices for tribunal establishment lead to the clear conclusion that the ICTY was created illegally’.⁷¹

This part of doctrine also emphasises that the Security Council did not have the right to establish a court, because the establishment of a court is not a measure that can be taken in accordance with Chapter VII of the UN Charter, and moreover in the specific case of the establishment of an *ad hoc* tribunal, the Security Council acted not only as the creator of the court, but also went a step further and had a significant role in the process of appointing the judges of the Tribunal.⁷² But the same author (Davis), who claimed that the tribunal was established illegally, also concluded that ‘the Security Council’s action was inventive and clever, albeit unlawful’. Some scholars (e.g. Barboza) also⁷³

‘remarked that the Security Council did not possess the power to create an international criminal tribunal and that the creation of the Tribunal amounted to an unacceptable stretching of the power conferred to the UN Security Council by Chapter VII (art. 4) of the Charter’.⁷⁴

However, there are also other opinions – for example, it is emphasised that the establishment of the Hague Tribunal under Chapter VII of the UN Charter falls within the domain of a kind of discretionary right of the Security Council, that to date its practice has greatly developed and is no longer challenged by any state in the international community, and that its legitimacy is indisputable and significantly strengthened. It was founded by the international community as a whole.⁷⁵ It is also pointed out in legal theory that the solutions applied in Security Council Resolution No. 827 (1993) were introduced in practice for the global community for the first time, and that therefore they could not be perfect and indisputable in all respects, but that they nevertheless represented an important novelty which the UN should continue to develop consistently, and that it would be more disadvantageous to stop it at the beginning, but rather to ‘in addition to the existing shortcomings in the first phase, apply this form of intervention’ in order to re-establish endangered peace and security.⁷⁶

The setting up of the ICTY has given rise to some objections, like the principal criticism that the Tribunal was established to make up for the impotence of diplomacy and politics, and revealed the inhibition of both the Great Powers and the UN Security Council to find a swift and proper solution to the conflict in the former Yugoslavia.

70 Davis, 2002, p. 397.

71 Ibid.

72 Köchler, 2003, pp. 171–172.

73 Davis, 2002, p. 405.

74 Ibid., pp. 404–405.

75 Paunović, 1997, p. 126.

76 Vasilijević, 1995, p. 167.

The ICTY was therefore conceived of as a sort of “fig leaf”.⁷⁷ The objection is that in establishing the Tribunal the Security Council exceeded its powers under the Charter, adopting an act that was patently *ultra vires*, and that by creating a criminal court dealing only with crimes allegedly committed in a particular country, instead of granting to the new court jurisdiction over crimes committed everywhere in the world, the Security Council opted for “selective justice”.⁷⁸

Antonio Cassese, the first president of the ICTY, accepted a part of a criticism, but concluded that ‘however, half a loaf is better than pie in the sky’ and because of that ‘as long as an international criminal court endowed with universal jurisdiction was lacking, the establishment of *ad hoc* Tribunals proved salutary’.⁷⁹

Still, on the whole, the doctrine of international law/international criminal law does not consider or feel there is any major legal problem concerning the action taken by the Security Council acting under Chapter VII of the UN Charter and more or less routinely both *ad hoc* tribunals (ICTY/ICTR), treated as “the United Nations tribunals”.⁸⁰

The question of the legality of the ICTY must essentially be considered exclusively from the point of view of an expert assessment of the (in)validity of the legal basis for its creation, and political arguments must not play any role in this regard. It is noticeable that the judgments of the *ad hoc* tribunal, especially the one established for the territory of the former Yugoslavia, are becoming widely commented on as the basis for the further development of international criminal law, and in doing so, the commentators are primarily acting in accordance with the classic rule of Anglo-Saxon case law,⁸¹ according to which final judgments become legally binding for other identical or similar cases, i.e. they become a source of law.⁸² The most prominent representative of this doctrinal thought is certainly M. Cherif Bassiouni, who states for example, that

‘the establishment of ad hoc tribunals for the former Yugoslavia and Rwanda is very important, although they were created by the activities of the Security Council, and despite the fact that a sufficient number of judgments has not yet been produced, the establishment of these tribunals is an important indicator of how much has already been done.’⁸³

When it comes to the practice developed by the ad hoc tribunals, it seems that since the Statute and other formal sources of law of the permanent International Criminal Court now exist, the precedential influence (and the influence of practice in general)

77 Robertson, 2003, p. 300.

78 Ibid.

79 Cassese, 2003, p. 338.

80 See: Werle, 2005, p. 15.

81 See: Škulić, 2023, p. 34.

82 See: Ambos, 2002, pp. 259–360.

83 Bassiouni, 1998, p. 34.

of the ad hoc tribunals, should be completely excluded from the work of the permanent International Criminal Court (ICC). It is not correct to impose the practice that has already arisen from the decisions of the *ad hoc* tribunals, as something that is self-evident and without any explanation, to the newly established permanent International Criminal Court, because these are fundamentally different institutions.

Given the ad hoc character of the tribunals for the former Yugoslavia and Rwanda (which is clearly reflected in their names, as well as the territorial and temporal limitations in their activities), their nature, legal and even factual essence is actually their temporality and impermanence, which is unambiguously marked by the term “*ad hoc*”. Therefore the legal effect of their decisions should not be of a permanent nature in relation to other permanent institutions, primarily in relation to the permanent International Criminal Court. On the contrary, they could be possibly and very cautiously, in rare situations, applied only as a restrictive exception.

6. Hybrid Tribunals

It is a generally held view, that there is a tendency in the theory of public international law, dealing in part with international criminal law as well, for all criminal courts and tribunals before which international crimes are prosecuted, as well as certain forms of their specialised jurisdiction, to be defined as forms of international criminal justice, more precisely of the criminal justice involving an appropriate “international law component.” Accordingly, the “international criminal courts and tribunals” include: the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and in connection with these two ad hoc tribunals – the International Residual Mechanism for Criminal Tribunals, the permanent International Criminal Court (ICC), and a special category of “hybrid courts and other internationalised domestic courts and tribunals”, namely, the Special Tribunal for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the participation of international judges in criminal proceedings in Kosovo and Metohija under the UNMIK rules, established in 2000 and based on U.N. Security Council Resolution 1244 (UNMIK Regulations 64 Panels, 2000/64), Special Panels for Serious Crimes in East Timor, panels involving international judges in war crimes proceedings in Bosnia and Herzegovina, the Special Tribunal for Lebanon, the Iraqi High Tribunal, and specialised war crimes chambers in Serbia.⁸⁴

Hybrid tribunals are treaty-based courts, with a combination of national and international elements, created through an agreement between a national government and an international organisation, such as the United Nations. They are mostly locally based courts dealing with serious international crimes and generally, comprised of both international and national judges, some practitioners, and investigators and prosecutors, who are engaged in hybrid tribunals. In this category of tribunals

84 Shaw, 2014, pp. 286–309.

are the Special Panels and Serious Crimes Unit in East-Timor, the Special Tribunal for Lebanon, Extraordinary African Chambers, and the Kosovo Specialist Chambers and Specialist Prosecutor's Office. Typical examples of hybrid courts/tribunals are the Special Court for Sierra Leone (SCSL), and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The UN and the Sierra Leone government jointly established the Special Court for Sierra Leone (SCSL) in 2002, with the mandate to try persons who bear the greatest responsibility for serious violations of both international humanitarian law and Sierra Leonean law, committed in the territory of Sierra Leone since 30th November 1996.⁸⁵ The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in 2004, through an international agreement between the UN and Cambodia, to try persons responsible for crimes committed under the Khmer Rouge regime from 1975 to 1979.

7. Perspectives of the International Criminal Law

After a series of unsuccessful efforts to act upon the principles of *ad hoc* tribunals, a large part of the international community managed to establish a permanent international criminal court. The adoption of the Rome Statute and other sources of law applied in the proceedings before the permanent International Criminal Court (ICC), created the necessary normative requirements for the further and more closely aligned development of international criminal law, which prior to the establishment of the Court, had not possessed secure and stable sources, instead relying on the hitherto judicial formations, which had rather assumed an *ad hoc* character. Consequently many solutions in international criminal law depended directly on the actors involved in the criminal proceedings, above all judges, in charge of rendering judgments.

The Court was established by a multilateral international treaty, the Rome Statute, in July 1998. Having been ratified by more than sixty countries, the Rome Statute entered into force on 1st July 2002. It was not until the Rome Statute took effect that the factual and normative conditions were met to implement a codified criminal law of international character. More precisely, the sources of this law are now largely unified and practically summarised by the ICC Statute and other sources, including the Rules of Procedure and Evidence and the Elements of Crimes.

In summary, the activity of the International Criminal Court should be perceived as a completely new beginning for international criminal law. It would of course be wrong to deny the importance of the case-law already created in international criminal law, but it should not be overestimated either, much less given a dominant role, as it was built under a considerably different set of normative conditions.

Contrary to the rules of the *ad hoc* international criminal tribunals exercising primary jurisdiction, or rather having a formal advantage over national judiciaries

85 Schabas, 2017, pp. 12–13.

with respect to the crimes falling within their jurisdiction, the principle of complementarity mandates that primary jurisdiction lies with the national criminal justice system of a state whose bodies are establishing the jurisdiction, and only subsidiarily, due to the absence of the necessary conditions or a relevant will for criminal prosecution to be conducted “on the national level”, shall the criminal proceedings develop before the International Criminal Court.

In other words, the national criminal courts have primary jurisdiction here, and the ICC has only subsidiarity jurisdiction. The ICC is meant to complement rather than to replace national courts, and it can only act when the national courts have been found unable or unwilling to try a case. The first aspect of the principle of complementarity has two basic effects – firstly to regulate a potential conflict of interests between national criminal courts and the ICC, and the other, to define which criminal law will apply as a primary one.

In terms of both effects of the first aspect of the principle of complementarity, the national criminal justice system and national criminal law shall enjoy an advantage, which is an excellent example of respect for the principle of state/national sovereignty in the Rome Statute. It is only logical though, as the Statute is a multinational (inter-governmental) treaty established, just like any other treaty, by a consensus that the member states/parties had reached.

The other aspect of the principle of complementarity is essentially the request for adequate complementarity and correlation between the content of the Rome Statute, primarily the content of the provisions of material criminal law therein, and the corresponding segments of national criminal law of the State Parties to the Rome Statute, the interpretation of which should not be the existence of absolutely identical norms as those prescribed by the Statute and other sources of law applied before the International Criminal Court, but the substantial content of the relevant norms of national criminal law should be similar to a necessary degree, or perhaps identical if so required. In other words, there should be no legal voids in national criminal legislation with respect to the demands of the Rome Statute.

Respect for the sovereignty of the States Parties to the Rome Statute on the Establishment of a Permanent International Criminal Court is, in particular, reflected in addition to the principle of complementarity, in the principle of *ne bis in idem*, which is defined completely differently than in the statutes of *ad hoc* tribunals (ICTY/ICTR). The principle *ne bis in idem* (the prohibition of double jeopardy) means that no one shall be tried twice for the same criminal offense. The Rome Statute contains the *ne bis in idem* principle as one of the aspects of complementarity insofar as, on the one hand, it pertains only to the crimes falling within the jurisdiction of the International Criminal Court (Article 5 of the Statute), and on the other, it is established as a rule to which certain exceptions are permitted, although there is a form of the effect of this principle that acts in absolute terms, or rather, exclusively as a rule, without any exceptions.

The principle of *ne bis in idem* applies absolutely to the decisions of the ICC, and primarily to the decisions of national courts, with some possible exceptions. In the

Statute, the principle also defines the relationship between national judiciaries, or rather specific decisions made by national courts and their legal effect, and the Court's decisions.

Perceived from a legal and technical point of view, and given the scope of the *ne bis in idem* principle and the goal orientation thereof, the Statute has defined the principle with respect to potential new proceedings before two courts: 1) before the International Criminal Court which has previously conducted criminal proceedings regarding a specific defendant, or before that court, but on the condition that criminal proceedings were previously conducted before another court regarding the same case, but that certain abuses or anomalies have been identified; 2) before another court, when the International Criminal Court has previously conducted criminal proceedings and made a decision.

Owing to this normative solution, provided by Article 20 of the Rome Statute, it is possible to differentiate between three modalities of the effect of the *ne bis in idem* principle. The first modality is regulated by Article 20, paragraph 1 of the Statute, prescribing that no person shall be tried before the Court with respect to "conduct" which formed the basis of crimes for which the person has been convicted or acquitted by the Court (procedural rule), except for the cases prescribed by the Statute (procedural exception).

The other modality of the effect of the *ne bis in idem* principle has been defined by Article 20, paragraph 2 of the Statute, mandating that no person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court. The second modality is prescribed only as a rule, and the Statute does not provide for the existence and effect of an exception. The third modality of the procedural and legal effect of the principle of *ne bis in idem* is regulated by Article 20, paragraph 3 (a) and (b) of the Rome Statute, stipulating that no person who has been tried by another court for conduct also prescribed under Articles 6, 7, 8 or 8bis of the Statute shall be tried by the International Criminal Court (rule) with respect to the same conduct, unless proceedings before another court were conducted to achieve some of the alternatively prescribed goals, involving an abuse, or a gross error: a) for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, or b) when the proceedings before other court were not conducted independently or impartially in accordance with the norms of due process recognised by international law, and were conducted in a manner which, under the circumstances, was inconsistent with an intent to bringing the person concerned to justice.

The creation of the International Criminal Court, as well as the performance of the bodies proceeding before the Court, and in the first place the Prosecutor, give hope that international criminal law may play an important role in the struggle against war crimes and other international crimes, but that there are not many reasons for excessive optimism.

This engagement has concerned African states, and has been ineffective quite often, but when it comes to the armed conflicts in progress, it may even create a "peace

versus justice” collision, urging a kind of compromise between the two values. The criminal proceedings before the International Criminal Court that involved heads of states and other senior officials from various African states has sparked objections regarding selective justice in the continent, and some states, including the Republic of Burundi, Gambia, and even the Philippines (not an African state) decided to cancel their accession to the Rome Statute.

Ever since the International Criminal Court opened its doors, the major objection to this form of international criminal justice was that major powers have not joined the Statute, namely the United States, China and Russia, as well as some very populous countries, such as India.⁸⁶ Their restraint is quite logical, because it’s difficult to imagine a war without the occasional war crime – there are always people with psychopathic traits (including members of military/armed forces), prepared to commit crimes under the circumstances permitted by a war.

In addition, the very concept of command responsibility, which in some of its forms is very close to objective responsibility, is a serious threat to military commanders, whereas some broader categories of complicity with far-reaching effects, including the concept of conspiracy, may lead to the criminal responsibility of persons very far away from the actual perpetrators of war crimes and other international crimes under the subject-matter jurisdiction of the International Criminal Court.⁸⁷ Accordingly, states that possess a capacity to wage a war simply do not want to accept any risk of their soldiers and officers being called to account before “some” international criminal court.

Of course, as opposed to some *ad hoc* international criminal tribunals, the International Criminal Court was created in a completely valid and legal way, using for that purpose a multinational treaty (the Rome Statute), and it will persist as long as the Statute persists, or rather as long as the commitment of the State Parties to the multinational treaty and the obligation prescribed therein persists. Even though some states have given up the Rome Statute, it is certain that it will remain in force in the near future.

The major powers have not expressed any intent to accede to the Rome Statute, but a large number of leading states joined it, mostly the member states of the European Union, which for candidate countries has made accession to the Union conditional on accepting the Statute as part of the concept of rule of law.

In a word, one should not be pessimistic regarding the future of the International Criminal Court, although excessive optimism is not recommended either. In terms of a conclusion about the future of the first permanent form of international criminal justice, the old truth holds that a glass halfway filled with water may be seen as either half-full or half-empty.⁸⁸

86 See: Stojanović, 2024, p. 18.

87 See: Ristivojević, 2003, p. 17.

88 Škulić, 2020, p. 78.

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