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THE INFLUENCE OF CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA ON CUSTOMARY INTERNATIONAL CRIMINAL LAW

I. Foreword

The idea of this project first took shape in my mind sometime in autumn 2008, as a consequence of my ongoing projects in that period.

At the time, I had already been trying about four years to specialize in the field of international criminal law and international humanitarian law, and one main aspect in this specific area always seemed blurry and unpredictable for me – the institution of international customary law. Akehurst, in an early edition of his book, asked how is it possible to make law by practice? I too have asked myself the same question, and even more, I have reached the same “dead end” as Akehurst – how can something be accepted as law before it has actually developed into law?¹ By asking his question rhetorically, Akehurst can avoid a clear answer. In fact, he considers it sufficient to mention that this is nevertheless established doctrine, accepted by states, international tribunals and most writers alike.²

Starting from the premise that custom does exist in international law, I have concentrated on the manner in which international tribunals apply customary international law in their case-law.

Being aware of the completion strategy of the International Criminal Tribunal for the former Yugoslavia (ICTY), which was due to finalize by late 2010,³ thus putting an end to one of the most important projects in the field of justice at the international level,⁴ my analysis has focused intensively on this court’s jurisprudence. As a consequence of the foreseeable closure of the Court’s activity, I was asked to scrutinize its latest decisions, in order to create a compendium of the Tribunal’s work for each year.⁵ When

researching the Appeals Chamber's decision in *Martić*,⁶ I stumbled upon a new interpretation given by the court to the meaning of the term "civilian" in the context of crimes against humanity.⁷ From there on, I started to look carefully at the manner in which the ICTY – through major cases dealt with by its different Chambers – not only takes custom into account, but goes beyond it, by shaping or reshaping notions and institutions which are part of international criminal law, or, in my preferred phrasing, the way in which the ICTY's jurisprudence is influencing customary international criminal law.

II. Custom and customary international law

1. General aspects

Custom is the oldest source of international law, as well as of law in general. Therefore, an almost unanimous definition can be found in every domestic legal system, which makes reference to an "unwritten rule, which is binding"⁸ upon everybody.

Although generally accepted as an unwritten rule, custom is so to say "codified", when it is ranked as one of the general sources of international law, in the Statute of the International Court of Justice (ICJ).⁹ Customary international law is classically defined in Article 38 (1) of the Statute of the ICJ, as "evidence of a general practice accepted by law". However, scholars, among whom Higgins stands out, have stated: "it is generally accepted that is custom that is the source to be applied and that is practice which evidences the custom".¹⁰ In fact, as Barker and many others have already mentioned, Article 38 could more correctly have been phrased to read "international custom as *evidenced* by a general practice accepted as law",¹¹ a way in which these provisions can actually have effect. However one chooses to read this definition – either literally or interpreting it in a positive manner – it is undisputed at the international level that in order to be regarded as custom, two elements must be envisaged: the objective element of state practice and, subsequently the subjective element, known in the traditional doctrine as *opinio juris sive necessitates* – "the belief that a particular practice is accepted as law".¹²

In the *Nicaragua* case, the ICJ confirmed the doctrinal approaches up to that time, by stating that custom is constituted by these two elements – the objective one of a "general practice" and the subjective one, "accepted as

law".¹³ In the *Continental Shelf case*, the World Court once again stated that the substance of customary international law must be "looked for primarily in the actual practice and *opinio juris* of States".¹⁴

As has been shown, there is unanimity as regards the elements needed for a fact to rise to the level of custom. In the following, my analysis will try to discover the conditions which need to be fulfilled by each of these two elements. Before embarking on this, I should mention that I will first concentrate on the international public law aspects, or to, be more accurate, on the formation of international customary law in general. Afterwards, due to the subject of my study, I will deal with aspects specific to the construction of customary international *criminal law* and thus identify, although included in the vast concept of customary law, important distinctions in the formation of each of these branches.¹⁵

2. The formation of customary international law

As Thirlway pointed out in 1972, the creation of new rules of customary law, even when there is from the outset little disagreement as to their desirability, is a slow process. To appeal to custom to attempt to impose upon states rules which they may be disinclined to accept is a difficult task.¹⁶ Perhaps because of this reality, in agreement with the ICJ's above-mentioned judgments, the element of state practice is therefore heavily taken into consideration.

2.1. State practice

The objective element of custom formation, namely, *state practice*, seems relatively uncontroversial, but this is only in theory. In practice, when considering the decentralized system which characterizes international public law, one can see what a difficult task is to identify whether a particular rule of law exists and if so, whether it takes the form of custom.¹⁷ The traditional formation of custom at the international level has in recent years been hampered by the rapid increase in the number of states and of international organizations of one sort or another, which are also increasingly recognized as subjects of international law. Since the existence, and even more the establishment, of a customary rule of international law depends on a large measure of agreement among states, the widening of the international community increases the difficulty of ascertaining undoubted rules of law.

One can note that the process of identifying and giving relevance to a particular state practice for the sole purpose of discerning a particular rule of customary international law is “not an easy one”.¹⁸ The problem can be quite easily solved by answering a question that is (again, in theory) straightforward: what is state practice?

Certain writers, among them D’Amato, have asserted that state practice is limited to physical acts of the state, and even more, some voices consider that a particular rule of customary law can be deemed to exist only after it has been “enforced” by the state actually doing something.¹⁹ Such an interpretation, because of its restrictive character, has been criticized by other authors, among whom Akehurst must be mentioned; he shows that although the main evidence of customary law is to be found in the actual practice of states, a

“rough idea of a state’s practice can be gathered from published materials – from newspaper reports of actions taken by states, and from statements made by government spokesmen to Parliament, to the press, at international conferences and at meetings of international organizations; and also from a state’s laws and judicial decisions, because the legislature and the judiciary form part of a state just as the executive does.”²⁰

Agreeing with Akehurst, Michael Byers has observed that D’Amato’s approach “leaves little room for diplomacy and peaceful persuasion, and perhaps, most importantly, marginalizes the less powerful states in the process of customary international law”.²¹ Therefore, Akehurst’s idea of including in the concept of “state practice” any act or statement by a state (or one of its organs, we might add) is more likely to add to the formation of customary law,²² without endangering the law of diplomacy.²³

Following this approach, custom is to develop from each act that can – one way or the other – be imputed to the state itself: declarations, agreements, decisions of the judicial, executive or representative political bodies etc.

All these material acts, performed by the aforementioned organs, when repeated²⁴ over a certain span of time²⁵ establish a certain general practice, thus fulfilling the objective element of custom.

2.2. *Opinio juris* and the paradox of chronology

“The philosopher’s stone which transmutes the inert mass of accumulated usage into the gold binding rules”²⁶ or a mere fiction to disguise the creative power of judges?²⁷

A necessary element of customary international law, *opinio juris* can be literally translated as the belief “that an act is legally necessary and is intended to allow a proper distinction to be made between law and mere usage”.²⁸ As uncontroversial as it is that the subjective element is determinative of customary international law, from the beginning of the nineteenth century when it was first formulated by Geny,²⁹ no one can tell for sure what its exact prerequisites are.

As Barker pointed out, in the case of established rules of customary international law, this does not present any particular problem. Thus, when a practice has evolved over a long period of time, the identification of a specific date at which time a new rule of customary international law has emerged is of minor importance. The problem is with regard to the formation of new rules of customary international law, and with respect to changes in the generally recognized rules of customary law. Although Barker simply calls it a “particular problem”,³⁰ in my opinion we are in fact in the presence of the most important aspect regarding the formation of customary law. It is exactly what Akehurst first imagined in the late ’60s, but regarding both the material and subjective elements of custom: how can something be accepted as law before it has actually developed into law?³¹ Byers has recently worked intensively on this aspect, naming it the “chronological paradox”, which requires that “states creating new customary rules must believe that those rules already exist, and that their practice, therefore is in accordance with the law”.³² Thus the requirement that there be a legal obligation to follow a certain rule “would seem to make it impossible for new rules to develop, since *opinio juris* would only exist in respect of those rules which are *already* in force”.³³ Indeed, Byers touches on the most difficult aspect of customary international law: the moment zero, when a new rule of customary international law *seems to emerge* and there is little or no practice, and certainly no general belief that the rule in question *already* is law. Following the conservative approach regarding the subjective element, we see no solution regarding this issue. It is our belief that from the traditional point of view, it is impossible for a new customary rule to appear or for an existing one to develop. Byers makes an in-depth analysis of all major arguments which have been put

forward as a solution to this paradox,³⁴ but even he recognizes (together with Barker³⁵), that the clearest solution is still that of Akehurst, who argued that regarding *opinio juris*, a more flexible attitude must be taken: the conservative term “belief” must be replaced by “statements”. He has asserted, further, that there is no requirement that state actors genuinely believe that any statement as to the legally binding nature of a particular rule is in fact law. However, if other states react by making similar statements, that may well result in the development of new customary rules of international law.³⁶

We agree completely with Akehurst’s solution. From a theoretical point of view, he merely transposes a general principle of criminal law in the specific area of custom formation to the international level: it is generally accepted that subjective elements, such as *mens rea*, purpose or motive can be inferred only from objective elements. This is the case here, as belief can be inferred only from objective acts, among which statements stand out as being the closest to the subjective side, representing its materialization.

3. Customary international criminal law

Until now, in accordance with the major voices in international public law doctrine, we have referred to the formation of custom at the international level, the so-called “customary international law”. In this section, without repeating ourselves, we will try to present succinctly the elements specific to our domain of international criminal law and international humanitarian law.

From the outset, we start with the conclusions drawn by Akehurst, Byers or Thirlway, and so clearly summarized by Barker: in order for “customary law to be a dynamic and flexible system of law, rigid application of *opinio juris* must be avoided”.³⁷ All of these conclusions are correct regarding international law in general, in order to permit it to evolve.

One must ask, what is different regarding the formation of customary international criminal law? When trying to answer this question, we should bear in mind that this field deals with breaches of fundamental human rights at the international level, where recent decades have seen an emerging trend in the protection of these values. Unfortunately, many states still perceive the most important “tool” in realizing justice at the international level³⁸ – through the mechanism of international judicial bodies – as a possible means to breach their sovereignty and legitimize

this in international law. Thus, states often tend to be frustrated by the course of international justice, and diplomatic relations can easily be endangered. In this context, one can see why states are likely to look upon the formation of a new rule of customary international criminal law even more reluctantly. And, as a paradox, this happens exactly when the formation of new customary rules should be accepted more easily, as the whole purpose is the protection of fundamental values.

Bearing in mind these two hypotheses – state reluctance and the need for an easier and faster formation of custom – it seems we are caught in a vicious circle. Even the more flexible approach proposed by Akehurst, and endorsed by so many others, is likely to be inefficient. But even more, one significant difference must be underlined. All, even Cheng, refer, when dealing with the objective element of custom formation, only to *state* practice. In fact, some conservative international public law scholars (among them Constantin and Sur), explicitly deny other practice than that of a state and its organs. According to Sur,³⁹ subjects who intervene in the process of custom formation at the international level are not identified *per se*, but are identifiable. This because the origin of custom is to be found in the behavior only of certain subjects of international law, namely sovereign states. Constantin's opinion is even more explicit.⁴⁰ Constantin rejects the idea that the practice of international organizations, of certain particulars or of any other entities can present any relevancy as regards the formation of custom. It is his opinion that only the practice of primary subjects of international law can be taken into regard (those being the sovereign states), while the practice of any other subjects can present some interest only as sub-systems of those organizations.⁴¹

In reading these lines, which are undeniably correct and in accordance with views expressed by the conservative doctrine in international public law, I have stumbled upon an insuperable conundrum. In recent years, as I have mentioned in the *Foreword*, one lasting subject of my concern has been customary international criminal law, which I knew was heavily influenced by the jurisprudence of the international courts: from the ICJ to the ICTY,⁴² ICTR and, last but probably not least, the more recent International Criminal Court (ICC).⁴³

It is my opinion that we are in the presence of an apparent contradiction created by the rigid and conservative doctrine specialized in dealing only with international public law. Indeed, international public law has as its object to regulate relations between states (as primary subjects of international law) and other subjects, among them international

organizations, etc. But one can no longer consider nowadays that only states, through their practice, can create custom. The formalistic and rigid approach must be abandoned, since the ICJ in its 1949 Advisory Opinion in *The Reparations Case* has pointed out the growing relevance of such organizations in international public law.⁴⁴ Even more, it is accepted in the doctrine that resolutions of the General Assembly of the United Nations (UN) create instant custom, especially if they are unanimous or a substantial number of states vote for them, and that they are of a general norm-creating character.⁴⁵ Constantin explains that such custom will be accepted only within that sub-organization.⁴⁶ Even from the conservative point of view, this will mean that it be accepted among the members of the organization. In the present case, we are talking about the UN, so its 192 member states⁴⁷ will recognize that specific rule as custom, and as Barker mentioned they will do so instantly.⁴⁸

So, we think that conservative and rigid interpretations must be looked upon very carefully, since they contradict the ideals and purposes of the UN. Maybe it will be for the best to read Constantin and Sur between the lines, as follows: in principle, state practice can create, develop or shape customary law. Still, some international organizations, due to mass membership of states, have reached a level of legitimization at the international level.⁴⁹ In fact, the practice of such institutions can be seen as an indirect practice of state, since the decisions adopted at this level depend on the consent, majority or even unanimity of member states. Of course, not all international organizations have risen to this level of recognizance at the international level, but those who have, now play the same role as the ancient primary subjects of international law, the states. We consider that some organizations have already reached this status, such as the United Nations and its organs, the most important for us being the ICJ. The principal judicial organ of the United Nations, the ICJ has not only the moral force, but also the legal status to influence the way in which customary law develops. Our view has support in both practice, as the ICTY already mentioned in *Tadić* that it includes international practice as a source of customary law, as well in doctrine, where acts of international organizations are considered "expressions used to describe that many states act in a same way on an international sphere"⁵⁰ and indeed, "a development away from the state-domination of international law".⁵¹

To draw a conclusion, leaving aside the rigid and formalistic approaches of conservative doctrine, we consider, alongside others, that

some international organizations have reached a level of recognizance beyond doubt and have the power, through their practice, to develop and influence custom formation. And, because of the character of some of these institutions – here we mention the UN especially – the custom created within those organizations is to be seen as custom at the international level.

At the international criminal law level, we think that the subjects who fit this description best, maybe even shadowing the primary subjects of international law (states), are the international criminal tribunals. In fact, international judicial bodies exist which, through their orders, decisions and especially judgments, come to acknowledge the existence, formation or even rejection of a custom. Not even the most rigid approach can deny that, in these cases, the judgment pronounced actually influences custom. For that, we will refer briefly to the ICJ's decision in the *Arrest Warrant Case*,⁵² due to the majority decision which did not mention the irrelevance of official capacity of the accused at the time when he or she allegedly committed international crimes.⁵³ This has been seen as a major setback in international criminal law, as the "majority opinion in *Congo v. Belgium* casts doubt on whether, as the Law Lords alleged in *Pinochet*, a *customary international law* norm has emerged abrogating official immunity for serious international crimes".⁵⁴ Rispin criticizes the ICJ, as she considers that it failed to recognize an already existing rule of customary international criminal law, and thereby set back the evolution of head-of-state immunity to the act of state doctrine and absolute immunity. Can one say, in these circumstances, that the ICJ, through this judgment, did not influence customary international criminal law? In our view, it is obvious that both doctrine and jurisprudence have, at least in the international criminal law fields, recognized the relevance of the judicial decisions by international courts as regards the formation of custom.

On this topic, many voices have argued this for years, based even on less technical, but maybe more powerful or persuasive and surely more enthusiastic arguments.⁵⁵ We mention here professor Bassiouni, who acknowledges that the

"process of international law reflects the delicate balance between the principles of national sovereignty and the need to regulate the multifaceted relations and interests of states with one another and with those of the international community. Inter-state process, however are primarily designed *for states*, and as a result they are not particularly well suited to

the needs of international criminal law, whose subjects are individuals. Moreover, inter-state process regulates state-to-state relations rather than national legal processes, whereas international criminal law's norms are directed towards persons".

Departing from the fact that international criminal law has as its subjects individuals, and not states, Bassiouni is trying to rethink the fundamentals of this subject, one of these being the formation of custom. Without mentioning it explicitly, he states that at this level, the most important function belongs to justice applicable to individuals "irrespective of the dictates of national law",⁵⁶ though "essentially dependent on the cooperation of national criminal justice systems".⁵⁷

Thus, agreeing with Arajärvi, we too consider that "the construction of customary law by courts should not be necessarily be limited to the traditional model based on state practice and *opinion juris*."⁵⁸ In the next section, we will focus on how this hypothesis finds support in the case law of the ICTY.

III. The ICTY and customary international criminal law

1. Acknowledgment and reshaping of custom, or plain temerity?

Until now, we have tried to present the notion of custom, and specifically its formation, in international public and criminal law – and we hope we have succeeded in this endeavor.

In the following, we will focus on the case-law of the ICTY to see how the theoretical principles described above are met with in practice, applied to some of its cases. Due to lack of space and because of the technicality of some issues, we will deal only with two problems, which suit our analysis best and which, due to the different responses they provoked, are seen (at least by us) as opposite poles of the ICTY's influence, through its jurisprudence, on customary international criminal law. So, we will deal first with the much debated case of a head of state's immunity and, lastly, with the problem of the "effective control test" over occupied territories.

2. Head-of-state immunity. The Slobodan Milošević and Milan Milutinović cases

As we will show, the Milutinović case is tied to the Milošević case and relies heavily on this in both the factual and the legal aspects. Therefore, we will focus primarily on the Milošević case and deal with Milan Milutinović only at the end, to see whether the conclusion drawn by the Tribunal from the first case was applied there as well.

On 22nd May 1999, the Office of the Prosecutor of the ICTY filed an indictment against Slobodan Milošević and four other Serbian officials (Milan Milutinović, Nikola Sainović, Dragoljub Ojdanić, Vlado Stojiljković), for alleged crimes against humanity committed against Albanians in the province of Kosovo, between 1st January – 20th June 1999.

Recorded with number IT-99-37⁵⁹ on 2nd May, the indictment was confirmed on 24th May by Judge David Hunt,⁶⁰ in accordance with the provisions of Article 19 para. (2) of the ICTY Statute and Rule 47 from the Rules of Procedure and Evidence.⁶¹ On 27th May, the indictment was made public.⁶² On the same day, warrants for arrest were issued against all the persons charged.⁶³

On 1st April 2001, Milošević was arrested by Serbian police, and on 28th June he was handed over to the officials of the ICTY.

In addition to the first indictments, two others were issued and later confirmed by judges of the ICTY, for crimes allegedly committed by Milošević in Croatia and Bosnia and Herzegovina.

Still, the doctrine always focused primarily on the Kosovo indictment.⁶⁴ The reasons behind this are easy to see: the consequences of the first indictment – from the level of media to the most delicate legal aspects – could not be compared with the amended forms of the same indictment or with those citing Croatia or Bosnia and Herzegovina. Triggering the procedure against a sitting head of state was directly linked with the Kosovo indictment, all the others being mere amendments or being seen as amendments, though completely distinct, regarding completely different charges. Thus, the Kosovo indictment was saluted by numerous voices from the doctrine, being seen as the long awaited sign that the ICTY would not focus only on low- or mid-ranking defendants – of whom Duško Tadić and Dražen Ermedović⁶⁵ had hitherto been the most important cases.⁶⁶ Indeed, throughout the confirmation of the indictment by Judge Hunt, it became obvious that the ICTY was moving on to the next stage

of its activity, namely, charging and convicting high-ranking political and military leaders, those actually responsible for the atrocities committed on the territory of former Yugoslavia.⁶⁷

Therefore, one can easily see the major impact of the Kosovo indictment; the ICTY, departing from its previous jurisprudence, as well as from the case-law of any other international criminal forum, focused directly on the top of the hierarchical chain – the head of state. The Milošević case was the first ever in which an international criminal court confirmed an indictment regarding crimes under international law allegedly committed by a sitting head of state.⁶⁸ This was also a precedent because it was the first time when an international tribunal would be the competent instance.⁶⁹

As some authors have correctly pointed out, attempts have been made in the past in the same field, the most important being proceedings against the former Emperor of Japan, but the case was closed before it actually began, for rather political than legal reasons.⁷⁰ Likewise, the conviction of Jean Kambanda⁷¹ by the ICTR is proof of another similar case, but not so relevant, due to the fact that Kambanda was only prime minister of Rwanda and, more importantly, at the time of the trial he was no longer in office.

The symbolic relevance of the Kosovo indictment must not be underestimated, as it took place almost simultaneously with extradition proceedings regarding the former head of state of Chile, General Augusto Pinochet.⁷² Despite all these arguments, the indictment was received with skepticism by many political and legal analysts, as the enthusiastic desire for “justice to be done” whatever the price has been considered to have a “boomerang effect”, putting at risk the peace process in the territory of former Yugoslavia. On the other side, to quote Pope Paul VI, “If you want peace, work for justice” – the immunity otherwise offered to Milošević would have been not only “immoral” but also “illegal”. In conclusion, the indictment underlines the need to fight whatever the cost against impunity for serious crimes under international law, when the perpetrators are top actors from the international political scene.

Once the indictment was confirmed, and once Milošević had been handed over to ICTY officials, it soon became obvious that the world was to witness a trial that would revolutionize international law in general, and head-of-state immunity in particular.

On 8th, November 2001, Trial Chamber III had to deal with two motions submitted by Slobodan Milošević on 9th and 30th August 2001. In his

motion, the defendant contested the jurisdiction of the Tribunal, due to his status as former head of state.⁷³ The Office of the Prosecutor fulfilled its obligation and submitted counter-arguments on 16th August and 13th September 2001. The *amici curiae* appointed by the Court submitted their conclusion regarding the motifs invoked by the defendant in his motions.⁷⁴

The Trial Chamber systematically analyzed the arguments put forward by the defendant, who was trying to prove that he was protected by immunity, and that therefore the ICTY could not claim jurisdiction in the case. Milošević challenged the legality of Article 7 para. (2) of the ICTY Statute, regarding the irrelevance of official capacity. The *amici curiae* appointed by the Court also tried to argue that this provision was not valid under international law. In response to these challenges, the Office of the Prosecutor affirmed that the aforementioned provision reflected customary international law, and that the ICTR had already convicted Jean Kambanda on a similar text found in its Statute.

The Chamber reiterated, in part, some of the arguments of the Office of the Prosecutor, and tried to emphasize the legitimacy of Article 7 para. (2), based on the fact that international customary law already incorporated it as a rule. Going back in time, the judges stressed that the origin of this rule can be found in the evolution of criminal legal responsibility doctrine, after the Second World War, with its codification in Article 7 of the Nuremberg Charter and in Article 6 of the Statute of the International Military Tribunal for the Far East. The fact that this rule had already become custom is also supported by its embodiment in other normative instruments enacted at the international level, as well as its mention in decisions by various courts.

In the follow up, the Chamber enumerated some relevant acts, such as the Convention on the Prevention and Punishment of the Crime of Genocide,⁷⁵ Principle III of the Nuremberg Principles,⁷⁶ Art. 6 from the Statute of the ICTR, Art. 6 para. (2) from the Statute of the Special Court for Sierra Leone, Art. 27 from the Rome Statute of the International Criminal Court, Art. 7 from the Draft Code of Crimes against the Peace and Security of Mankind,⁷⁷ etc.

The Court focused on the Rome Statute of the International Criminal Court, the judicial forum designated to deal with all international crimes for the future, as well on the Draft Code enacted by the International Law Commission. In the Court's view, these two instruments show the customary character of the rule that a head of state cannot invoke his or

her official capacity to elude criminal responsibility when charged with crimes found in the Statute of an international court.⁷⁸

Moreover, the Chamber presented some decisions of the Nuremberg Tribunal, later used in drafting the Nuremberg Principles. Thus, since 1947 case-law has proved that:

“The principle of international law, which under certain circumstances protects the representative of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings; the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law.”

Finally the Court found that even in the more recent and much-reported *Pinochet* case before the House of Lords, the same conclusion was drawn: the former Chilean president was not entitled to the protection granted by immunity, as regards charges of torture and conspiracy to commit torture. In particular, Lord Millett stated: “In future those who commit atrocities against civilian populations must expect to be called to account if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defense.”⁷⁹

In the light of all these arguments, the defendant’s motion was rejected.

In the follow up, we will try to synthesize the conclusions drawn from the Milošević case, regarding head-of-state immunity.

Regarding substantive immunity, *Milošević* confirmed the *Pinochet* case law, without adding anything new. Thus official capacity as a head of state of the accused does not preclude indictment, nor, eventually, conviction. This because of Article 7 para. (2) from the ICTY Statute, which explicitly provides for the irrelevance of official capacity, when crimes found in the Statute have been committed. Secondly, as the Trial Chamber stated “the authors of these acts cannot shelter themselves behind their official position [...] if the State in authorizing action moves outside its competence under international law”.⁸⁰

With respect to procedural immunity, we recall that the Kosovo indictment was the first ever issued against a sitting head of state. Obviously, this also applies to the warrant of arrest.⁸¹ It was therefore considered that immunity cannot shield a defendant, despite his status. Perhaps he will be protected by immunity *ratione materiae*, but not *personae*.⁸² This is novel as regards diplomatic protection in international law, and hitherto it was considered that such immunity would function absolutely, without exception, during the mandate. Any other interpretation would have been hitherto considered to contravene diplomatic law, because the head of state *is the state* and his indictment would mean indicting the state *per se*.⁸³ This is exactly what the British Lords considered, a few days before the issue of the arrest warrant, when referring to the *former* head of state, Augusto Pinochet. The Kosovo indictment, as well as the warrant of arrest issued by Judge Hunt, represented a bold attempt to re-write known rules at the level of international law.

Still, the future would prove whether this was the birth of a new custom, or plain temerity, to be rejected by the world community. The auspices were not good, as on 13th March 2001, the French Court of Cassation⁸⁴ decided that the sitting head of state of Libya, Muammar Ghaddafi, accused of complicity in terrorism, could not be charged in France, as he enjoyed absolute immunity through his mandate.

This decision made Judge Hunt's findings seem only minor attempts, characterized by superficiality and enthusiasm, at best. Applauded by human rights activist, intentionally ignored by politicians and not sufficiently analyzed in doctrine, Judge Hunt's decisions, as well as the decision of 8th November seemed, indeed, only divagations from the normal course of immunity, with no real consequences for the future

Still, this changed dramatically in 2002, when the ICJ in its *Congo* decision, although generally recognizing immunity, left the door open. In its famous *obiter dictum*, the World Court, at number 3, stated that: "an *incumbent* or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction". Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda.⁸⁵ It is our opinion that, through this dictum, the ICJ explicitly accepted the ICTY decisions, considering that the *ratione personae* immunity will not function if the defendant is charged by a competent international court (of which the ICTY itself was named as an example).

The future proved Judge Hunt to be right. Charles Taylor was charged by the American Prosecutor David Crane, working within the Special Court for Sierra Leone,⁸⁶ although Taylor was at that time the sitting head of state of Liberia. More recently, in 2008, the Office of the Prosecutor from the International Criminal Court become more and more involved in prosecuting the president of Sudan, Mr. Omar al-Bashir for his involvement in the Darfur crisis.⁸⁷ In July 2008, the Office of the Prosecutor requested Pre-Trial Chamber I to issue a warrant of arrest for al-Bashir, on the basis of Article 58 of the Court's Statute⁸⁸. On 4th March 2009, a warrant of arrest was issued.⁸⁹

We have promised some remarks on the *Milutinović* case⁹⁰. He was acquitted by the Trial Chamber, but what interest us the most is that the Court at no moment dealt with the question of immunity, but touched the merits directly. Equally, neither the Office of the Prosecutor nor the defense team mentioned immunity at any time. In our view, the reason for this is simple: the case law at that time, especially the *Milošević* case, proved that immunity could not even be invoked.

3. The ICTY versus the ICJ. Tadić versus Nicaragua. "Effective control" versus "overall control" and the 2007 Genocide Case

In 1984, Nicaragua filled an application instituting proceedings against the United States, arguing, *inter alia*, that the United States had violated their international legal obligations to Nicaragua by using armed forces against it. The complaint referred to the support given to about 10,000 mercenaries by the US, who organized, trained, supported and directed them in order to fight against the Sandinista government in Nicaragua.⁹¹

The legal question the Court had to answer was that of United States responsibility for acts both of its own organs and for acts of paramilitary units (the aforementioned mercenaries) acting on its behalf.⁹²

The Court established a close relationship between American officials and the mercenary forces (*contras*), whom US authorities financed, trained, equipped, armed and organized. Although no evidence was found to support the idea that the *contras* were created by the Americans, the Court had to find whether the US was in fact responsible for the actions of the *contras* against the legitimate government of Nicaragua.

In dealing with this problem, the ICJ established two different tests, namely "complete dependence" and "effective control". The first was used to determine whether the mercenaries acted as *de facto* state organs,

while the latter was necessary in establishing whether the US directed and controlled operations and was, therefore, responsible for the actions of the *contras*.

Here the Court did not clearly specify the level of dependence and control needed to fulfill the test, but only stated that complete dependency is necessary. In the end, the Court considered that although US support was “crucial” to the *contras*, it was insufficient to demonstrate their complete dependence.⁹³ The main argument used by the judges was that the actions of the mercenary forces continued throughout 1984, although proof was found that US aid had ended completely by then.

Still, the most important part of the Court’s reasoning was dedicated to the more delicate issue of “effective control”. The Court considered that even if US participation was “preponderant or decisive in financing, organizing, training, supplying and equipping the *contras*”, this was still in itself insufficient to fulfill the requirements of “effective control”.⁹⁴ For the majority of the judges, the acts committed by *contras* could have been attributable to the US only if there were evidence that effective control existed over these forces in the course of events when the alleged violations were committed. As the Court stated, proof was required “that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law”.⁹⁵

The “effective control” test used by the ICJ has ever since been considered the relevant test in attributing to foreign state acts of military forces acting on the territory of other states.⁹⁶

More than 10 years later, the issue was once again put to the test, this time by the ICTY in the *Tadić* case. Bosnia and Herzegovina proclaimed independence from the Socialist Federal Republic of Yugoslavia in March 1992, but a large community of Serbs still lived within the territory of Bosnia and Herzegovina. These declared the independence of the *Republic Srpska* from Bosnia and Herzegovina, with the support of the Federal Republic of Yugoslavia. Tadić was accused of having committed, *inter alia*, grave breaches of international humanitarian law, provided by Article 2 of the Statute of the ICTY.⁹⁷ Article 2 provided jurisdiction to the ICTY for the commission of grave breaches of the 1949 Geneva Conventions, but for this matter, according to the Conventions, the conflict needed to be characterized as international. The Appeals Chamber of the ICTY found that an internal conflict might become an international one in two cases: if another state intervenes with its armed forces in an internal

conflict, or if one of the parties to the internal conflict acts on behalf of another state.⁹⁸

The Appeals Chamber pointed out that international humanitarian law – the *lex specialis* applicable in the case – provides for some kind of test to determine whether certain irregulars belong to a party to a conflict. Still, the Court was unable to identify what level of control is necessary.

Although acknowledging that the *Nicaragua* case dealt with state responsibility, while *Tadić* involved individual responsibility, the Court soon realized that the preliminary question was the same in both cases – attribution.⁹⁹ The Chamber established that the test put forward by the ICJ in the *Nicaragua* case is of utmost importance, and interpreted it in the sense that is not only necessary to show effective control of the irregular forces, but also to prove that specific instructions regarding certain operations had been given.¹⁰⁰ In the following, the Court departed from the traditional test proposed by the ICJ, which was unanimously recognized in the preceding decade. The ICTY considered the “effective control” test as a part of the “complete dependence test”¹⁰¹ and as it were announced its innovative intentions by stating that it failed “to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.”¹⁰² After establishing that no “rigid and uniform criteria” is provided for the attribution to states of actions performed by individuals, the Appeals Chamber made a distinction between individuals and armed groups. The Court then held that as regards the former, the “effective control” test might be necessary, but as regards the latter, this threshold will be too high and thus should be replaced by the better suited “overall control” test. By identifying certain distinctions between individuals and armed groups – including chain of command, a certain set of rules, symbols of authority, et c.¹⁰³ - the Appeals Chamber moved on and concluded that in order to attribute acts of a military or paramilitary group to a state, the “overall control” test of coordinating and helping in the general planning of the military activities will suffice.

As Kirss points out, the *Tadić* case is usually referred to in connection with the “overall control” test, and few have noticed that the Appeals Chamber actually sees the “complete dependence test” and “effective control” as one.¹⁰⁴ Perhaps the lack of clarity in the *Nicaragua* case, maybe the inconsistent arguments found there¹⁰⁵ or – most likely, in our opinion – the need to identify an international conflict, made the Appeals Chamber render a decision which casts confusion on the findings of the

ICJ in *Nicaragua*, as well as on the meaning of attribution in international law. Albeit admitting that the issues in both cases were different, James Crawford¹⁰⁶ and Shaw¹⁰⁷ have referred to both decisions and have noticed the inconsistency between the proposed solutions, as the ICTY seemed to “replace”¹⁰⁸ the *Nicaragua* decision in relation to “effective control”, finding the “overall control” test to be applicable also in international law of state responsibility.¹⁰⁹ Following the decision in *Tadić*, the ICTY Trial Chambers have relied completely on findings of the Appeals Chamber, and have delivered similar judgments in the *Kordic and Čerkez*,¹¹⁰ *Blaškić*,¹¹¹ *Nalatić* and *Martinović*¹¹² cases, taking the “overall control” test as already proven and recognized in international law. Without reopening the discussion of the motives behind the solution in *Tadić*, the Appeals Chamber, starting in 1995, actually tried to create a new trend in the attribution to another state’s organs of acts committed by individuals or armed groups.

In 2007, the ICJ delivered its judgment in the *Genocide case*,¹¹³ which, as Kirss noticed, among others “heavily contributed to the settlement of the *Nicaragua/Tadić* conflict”.¹¹⁴ The Court opted to make a clear distinction between “complete dependence” and “effective control”. in order perhaps to correct its previous ambiguous decision from *Nicaragua*.¹¹⁵ The Court emphasized the distinction several times in the merits and stated that to identify “effective control” it must be shown that instructions or directions have been given to the perpetrators by another state’s organs, or that these organs have exercised direction or control over the material authors in other ways.¹¹⁶ Kirss stressed that is “quite remarkable how many times the Court pointed out that complete dependence and effective control are used for different situations and answering different questions”.

In its decision, the ICJ set the standard, by clarifying confusion imputable to itself in the past. Still, it was obvious that the ICJ wanted to send a clear message to the ICTY, so that the latter reconsider its interpretation of the *Nicaragua* case.

As the future was to show, the Appeals Chamber of the ICTY took into consideration the warning of the ICJ and, in the *Aleksovski* decision, it was mentioned that the Court can depart from its earlier decisions for “cogent reasons in the interest of justice”, one of said reasons being that a previous decision is based on a wrong legal principle.¹¹⁷ In fact, as the Appeals Chamber mentioned in *Aleksovski*, maybe it is appropriate to

reconsider a previous decision, when the ICJ tells you that you have erred in your reasoning.

With few exceptions so far,¹¹⁸ the ICJ has refrained from making any reference to its relationship with other judicial forums. Still, each and every tribunal is trying to interpret and apply the law from its own perspective, and due to the absence of any formal hierarchy between them, some tend to touch upon issues not belonging to their jurisdiction or merely tangential to the merits of the case. Such a manner, though seductive in itself and perhaps leading to an increasing evolution of customary law, is often too risky, because it can lead to an artificial circumvention of the law and, in the end, hamper the cohesion of international law. This is exactly the case in *Tadić*,¹¹⁹ when in a bold manner, the ICTY tried – for various reasons – to re-interpret a term whose meaning had already been set years ago by the ICJ.

4. Conclusions. Triumph or drama of the evolution of customary law through the decisions of the ICTY?

In international criminal law, the decisions of courts play an increasing role in “custom formation, despite some academic opposition to the active role of the judge in the development (of) customary international norms”.¹²⁰ One must admit that international criminal law is moving away from traditional international public law and, even more, from traditional human rights law. The UN *ad hoc* tribunals, and especially the ICTY, have had a large impact on the formation of customary international criminal law in recent decades, just as Nuremberg had half a century previously. Thus, the decisions and opinions of the ICTY judges are used today as evidence of the state of customary international law. As other authors in doctrine have already stated,

“the acceptance of the decisions of the international tribunals on the current status of customary international law as an authoritative expression of *opinio juris* could induce state practice into the desired direction and thus fundamentally affect the compliance by the states with a new customary norm.”¹²¹

Still, as shown in the previous sections, not every decision or opinion – even if followed by numerous others from the same court, obliged not to depart from its own jurisprudence – can be considered to create or

influence a custom. As events were to prove, the decisions in the Milošević case were probably the best example of how, through its jurisprudence, the ICTY succeeded in clearly establishing a customary rule which was at the “moment zero”, in the middle of the chronological paradox mentioned earlier. But, as illustrated in the final section analyzing the “effective control” test versus “complete dependency”, sometimes the ICTY failed in its bold attempts. The ICJ proved that you cannot just go and re-write law, or maybe “write” customary law, as you wish. We will conclude with this final remark: the power of the courts to influence customary law rests in their decisions, in which custom is acknowledged or rejected. Still, in order to render such a decision, the court must be certain that the specific rule has reached the level of a custom, otherwise the future will only prove the invalidity of that decision, as was the case with the Tadić decision regarding the “effective control” test.

NOTES

- ¹ See MALANCZUK, P., AKEHURST, M.B., *Akehurst's Modern Introduction to International Law*, Taylor & Francis e-Library, Routledge, 2002, p. 39. See also, AKEHURST, M.B., "Custom as a Source of International Law" in *British Yearbook of International Law*, no. 47, 1974-1975, p. 1 et seq. On the same topic, see in detail, DANILENKO, G.M., "The Theory of International Customary Law", in *German Yearbook of International Law*, no. 31, 1988, p. 9; BARBERIS, J.A., "Réflexions sur la coutume internationale", in *Annuaire Français de Droit International*, no. 36, 1990, p. 22
- ² MALANCZUK, P., AKEHURST, M.B., *Akehurst's Modern Introduction to International Law*, precit., p. 39.
- ³ See ICTY Completion Strategy at <http://www.icty.org/sid/10016>, according to which, "the purpose is to make sure that the Tribunal concludes its mission successfully, in a timely way and in coordination with domestic legal systems in the former Yugoslavia." Altered over time, the Strategy aims at finalizing all proceedings before the ICTY (both trials and appellate work) by 2013.
- ⁴ For a general presentation of the Tribunal, from different perspectives, see, KERR, R., *The International Criminal Tribunal for the former Yugoslavia. An Exercise in Law, Politics, and Diplomacy*, Oxford University Press, Oxford, 2004, p. 41-60.
- ⁵ The compendiums mentioned were required by a Romanian publishing house. As well, a project in which I was involved in 2007-2008 required such scrutiny as part of contractual obligations. The compendium was, unfortunately, never finished. Still, at the international level, there are several efforts in that direction and I mention here probably the best in this specific domain – KLIPP, A., SLUITER, G. (eds.), *Annotated Leading Cases of International Criminal Tribunals - The International Criminal Tribunal for the Former Yugoslavia*, Intersentia, Antwerpen, volume 1, 3-5, 7,8, 11, 14, between 1999 and 2008, ongoing.
- ⁶ See, *Prosecutor v. Milan Martić*, Appeals Chambers, 8 October 2000, § <http://www.icty.org/x/cases/martic/acjug/en/mar-aj081008e.pdf>.
- ⁷ For details on this, see, NIȚU, D., "Tribunalul Penal Internațional pentru fosta Iugoslavie. Cazul IT-95-11-I. Procurorul c. Milan Martić", in *Curierul Judiciar*, no. 12, 2008, p. 59-61.
- ⁸ See, CONSTANTIN, V., *Drept internațional public*, Vest University Publishing House, Timișoara, 2004, p. 98; MIGA-BEȘTELIU, R., *Drept internațional public*, All Beck Publishing House, Bucharest, 2005, p. 67.
- ⁹ For the full text of the Statute, as well as complementary legislation, see the Court's website at <http://www.icj-cij.org/homepage/index.php?lang=en>.
- ¹⁰ See, HIGGINS, R., *The Development of International Law Through the Organs of the United Nations*, Oxford University Press, London, 1963, p. 18.

- ¹¹ BARKER, J.C., *International Law and International Relations*, Continuum, London and New York, 2000, p. 54-55. On that topic, see also, SCHABUDDEEN, M., "The World Court at the Turn of the Century", in MÜLLER, A.S., RAIĆ, D., THURÁNSZKI, J.M. (eds.), *The International Court of Justice. Its Future Role after Fifty Years*, Martinus Nijhoff Publishers, Hague, Boston, London, 1997, p. 3; LISSYTZYN, O.J., *The International Court of Justice. Its Role in the Maintenance of International Peace and Security*, The Lawbook Exchange LTD, Clark, New Jersey, 2006, p. 18-21; SZAFARZ, R., *The Compulsory Jurisdiction of the International Court of Justice*, Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1993, p. 40.
- ¹² For this, see, BARKER, J.C., *International Law and International Relations*, precit., p. 55.
- ¹³ ICJ, Case Concerning Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. USA), Merits, Judgment of 27 June 1986, p. 97 (<http://www.icj-cij.org/docket/files/70/6503.pdf>). For the printed version, see International Court of Justice. Pleadings. Oral Arguments. Documents. Case Concerning Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. USA), vol. III, p. 291 et seq.
- ¹⁴ See, ICJ, Case Concerning the Continental Shelf (Libyan Arab Jamahiryia/Malta), Judgment of 3 June 1985, § 29 (<http://www.icj-cij.org/docket/files/68/6415.pdf>). See also, ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapon, 8 July 1986, § 64 (<http://www.icj-cij.org/docket/files/93/7407.pdf>). For the printed version, see International Law Materials, no. 35, 1996, p. 809-826.
- ¹⁵ Anticipating in the same sense, see in detail, the excellent work of BASSIOUNI, M.C., *Introduction to International Criminal Law*, Transnational Publishers, Ardsley, New York, 2004, p. 12.
- ¹⁶ See, THIRLWAY, H.W., *International Customary Law and codification*, Sijthoff, Leiden, 1972, p. 16.
- ¹⁷ BARKER, J.C., *International Law and International Relations*, precit., p. 55.
- ¹⁸ *Ibidem*.
- ¹⁹ For an in-depth approach on this, see D'AMATO, A.A., *The Concept of Custom in International Law*, Ithaca, Cornell University Press, New York, 1971, p. 88.
- ²⁰ See, MALANCZUK, P., AKEHURST, M.B., *Akehurst's Modern Introduction to International Law*, precit., p. 39; AKEHURST, M.B., "Custom as a Source of International Law", precit., p. 1 et seq.
- ²¹ BYERS, M., *Custom, Power and the Power of Rules: International Relations and Customary International Law*, Cambridge University Press, Cambridge, 1999, p. 134.
- ²² *Ibidem*. Byers quotes the ICJ judgments in the Asylum Case, 1950 (<http://www.icj-cij.org/docket/files/13/1933.pdf>); the Rights of United States Nationals in Morocco Case, 1950 (<http://www.icj-cij.org/docket/>

files/11/1927.pdf), the North Sea Continental Shelf Case, 1969 (<http://www.icj-cij.org/docket/files/52/5561.pdf>), the Anglo-Norwegian Fisheries Case 1951 (<http://www.icj-cij.org/docket/files/5/1809.pdf>), as well as the above mentioned Nicaragua Case (*supra*, note 13).

23 There is a constant tension between the natural and logical development of the law in general and, especially, customary law and political desires, requirements and expectations at the international level, so-called *realpolitik*. This term, originating from German doctrine, is used with a pejorative sense, when dealing with international policy based on power and not on ideals, principles, arguments and morality. For discussions regarding the emerging conflict between legally based policies and *realpolitik* ones, see *Globalverfassung versus Realpolitik: Conference organized by the Republikanischer Anwältinnen- und Anwälteverein and the New York-based Center for Constitutional Rights*, in Berlin, June 2005. The most important papers presented at this conference were later published in KALECK, W., SINGELNSTEIN, M.T., WEISS, P. (eds), *International Prosecution of Human Rights Crimes*, Springer, Berlin, 2006 [for an excellent review, see SAFFERLING, C.J.M., "Book Review - Kaleck/Ratner/Singelstein/Weiss (eds.), *International Prosecution of Human Rights Crimes*, 2006", in *German Law Journal*, no. 9, 2007 (<http://www.germanlawjournal.com/print.php?id=857>). Other authors prefer the term *machtpolitik*, when referring to how the course of international justice is influenced by the politics of major states, abusing their authority at the international level. For that, see WEDGWOOD, R., *Global or Local Justice: Who Should Try Ousted Leaders*. Address to the Cornell International Law Journal Symposium: Milošević & Hussein on Trial, p. 10. Wedgwood shows that one must not assume that international courts have not learned the "rough" lesson of political influence – see International Criminal Tribunal for Rwanda (ICTR), *Barayagwiza v. Prosecutor*, Decision on the Prosecutor's Request for Review or Reconsideration, Appeal Chamber, 31 March 2000, ICTR-97-19-AR71, in *International Law Materials*, 39, 2000, p. 1181.

24 For the meaning of repetition in time, in order to consider when there is a general practice of a state or of a number of states, Barker takes into consideration five different possible reactions: following the practice, acquiescence, silence, protest and contrary practice. See, BARKER, J.C., *International Law and International Relations*, precit., p. 59-60.

25 Traditionally, this was a process that took decades, but in the twentieth century, it is now recognized that the development of custom can take place in a relatively short period. For an isolated opinion which considers that in some domains of international law, custom can develop "instantaneously" see CHENG, B., "United Nations resolutions in outer space: instant international customary law?", in *Indian Journal of International Law*, no. 5, 1965, p. 49. Barker considers Cheng's opinion to be "extremely dubious"

- and rejects it vigorously - BARKER, J.C., *International Law and International Relations*, precit. p. 57.
- 26 THIRLWAY, H.W., *International Customary Law and codification*, precit., p. 47.
- 27 BARKER, J.C., *International Law and International Relations*, precit. p. 60.
- 28 *Ibidem*.
- 29 See, GENY, F., *Methodes d'interpretation et sources en droit prive positif*, Librairie Generale de Droit et de Jurisprudence, Paris, 1919, § 110, quoted by Barker, *idem*, p. 61.
- 30 BARKER, J.C., *International Law and International Relations*, precit. p. 62.
- 31 *Supra*, note 1.
- 32 See, BYERS, M., *Custom, Power and the Power of Rules: International Relations and Customary International Law*, precit., p. 131.
- 33 *Ibidem*.
- 34 *Idem*, p. 131-133.
- 35 BARKER, J.C., *International Law and International Relations*, precit., p. 62.
- 36 See, MALANCZUK, P., AKEHURST, M.B., *Akehurst's Modern Introduction to International Law*, precit., p. 39 et seq.
- 37 BARKER, J.C., *International Law and International Relations*, precit., p. 63.
- 38 For a historical presentation of the entire class of available mechanisms in international law, see CASSESE, A., "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", in *European Journal of International Law*, no. 1, 1998, p. 3. For further details on this subject, see SCHACHTER, O., "International Law in Theory and Practice", in *Recueil des Cours de l'Academie de Droit International*, no. 9, 1982, p. 168, 178; KAHLSHOVEN, F., *Belligerent Reprisals*, Brill Academic Publishers, Leiden, Boston, Tokyo, 2005, p. 33-36; DINSTEIN, Y., *War, Aggression and Self Defence*, Cambridge University Press, Cambridge, 2005, p. 222-224.
- 39 See SUR, S., "La coutume internationale, sa vie, son œuvre", in *Droits*, no. 3, 1986, p. 112.
- 40 See, CONSTANTIN, V., *Drept internațional public*, precit., p. 103-104.
- 41 *Idem*, p. 105.
- 42 For a different approach, which takes into consideration the way in which the practice of ICTY is influenced by the practice of national courts as sources of international law, see NOLLKAEMPER, A., "Decisions of National Courts as Sources of International Law: An Analysis of the practice of the ICTY", in BOAS G., SCHABAS, W.A. (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Martinus Nijhoff Publishers, Leiden, 2003, p. 277 et seq. See, in detail, p. 281, where Nollkaemper points out that "to construe the legal relevance of decisions of national courts is to qualify them in terms of customary international law", therefore implicitly

referring to judicial decisions of domestic terms as customary law. In fact, the drafters of the ICTY Statute intended that the Tribunal should apply, in addition to treaties binding on parties, rules of customary law, in order to avoid violating the principle *nullum crimen sine lege* – in that respect, see ICTY, Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case no. IT-94-1-AR72, 2 October 1995, § 143 (<http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>) and Prosecutor v. Jelisić, Judgment, Case no. IT-95-10-T, 14 December 1999, § 61 (<http://www.icty.org/x/cases/jelistic/tjug/en/jel-tj991214e.pdf>).

43 Agreeing with us on this, ARAJÄRVI, N., “The Role of the International Criminal Judge in the Formation of Customary International Law”, in *European Journal of Legal Studies*, no. 2, 2007, p. 1 et seq.

44 See, ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949 (<http://www.icj-cij.org/docket/files/4/1835.pdf>). For the printed version, see Cour International de Justice, Recueil, 1949, p. 179. See also on this, NICIU, M.I., *Drept internațional public*, Servo-Sat, Arad, 1999, p. 11.

45 For a detailed analysis of this, see CHENG, B., “United Nations resolutions in outer space: instant international customary law?”, *precit.*, p. 49 et seq. In general, see BARKER, J.C., *International Law and International Relations*, *precit.*, p. 60.

46 See, CONSTANTIN, V., *Drept internațional public*, *precit.*, p. 103 et seq.

47 In 2006, there were 192 member states within the UN. See for that, *The United Nations Today*, Department of Public Information, United Nations, 2008. Some relevant info can be found on the Internet as well – check the UN’s website – Member States. Growth in United Nations Membership, 1945-present at <http://www.un.org/en/members/growth.shtml>.

48 See, BARKER, J.C., *International Law and International Relations*, *precit.*, p. 60.

49 On the issue of legitimization in international law, see Charles Taylor’s motion on immunity - *Applicant’s Motion made under Protest and without waiving of Immunity accorded to Head of State President Charles Ghankay Taylor requesting that the Trial Chamber do quash the said approved indictment of 7th March 2003 of Judge Bankole Thompson and that the aforesad purported Warrant of Arrest and Order for Transfer and detention of the same date issued by Judge Bankole Thompson of the Special Court for Sierra Leone, and all the other consequential and related ORDER(S) granted thereafter by the said Judge Bankole Thompson OR Judge Pierre Boutet on 12th June 2003 against the person of the said President Charles Gankay Taylor be declared null and void, invalid at their inception and that they be accordingly canceled and/OR set aside as a matter of Law*, 23 July 2003, quoted by the Appeals Chamber of the Special Court for Sierra Leone, *Decision on Immunity from Jurisdiction*, 31 May 2004, p. 2, note 2 (<http://>

www.sc-sl.org/LinkClick.aspx?fileticket=7OeBn4RulEg=&tabid=191). In the motion, Taylor asserted the lack of legitimacy of the Court, as opposed to the ICTY or ICTR, which were established through UN Security Council Resolutions, acting under Chapter VII of the UN Charter [for the ICTY – see UN Security Council Resolution 827, 1993 (<http://www.ohr.int/other-doc/un-res-bih/pdf/827e.pdf>) and for the ICTR – see UN Security Council Resolution 955, 1994 (<http://www.un.org/ictr/english/Resolutions/955e.html>)]. For a similar discussion in the context of the ICC and the possible arrest of Sudanese President Omar al Bashir, see AKANDE D., “The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities”, in *Journal of International Criminal Justice*, no. 7, 2009, p. 344 et seq.

50 ARAJÄRVI, N., “The Role of the International Criminal Judge in the Formation of Customary International Law”, precit., p. 13.

51 *Ibidem*.

52 ICJ. *Case concerning the Arrest Warrant of 11 April 2000, 14.02.2002 (Democratic Republic of Congo v. Belgium)*, <http://www.icj-cij.org/docket/files/121/8126.pdf?PHPSESSID=f6cc6f23871276600888cc64186e9f0c>. For the printed version, see *International Law Materials*, 2002, p. 536.

53 See, EVANS, M.D., WICKREMASINGHE, C., “Case Concerning the Arrest Warrant of April 00 (Democratic Republic of the Congo v. Belgium)”, in *International and Comparative Law Quarterly*, vol. 50, 2001, p. 670-671. For more on the topic, see GRAY, K.R., “Case concerning the Arrest Warrant of 11 April 200 (Democratic Republic of the Congo v. Belgium)”, in *European Journal of International Law*, no. 3, 2002, p. 2 et seq.; WIRTH, S., “Immunity for Core Crimes? The ICJ’s Judgment in the Congo v. Belgium Case”, in *European Journal of International Law*, no. 4, 2002, p. 879 et seq.; AMBOS, K., *Internationales Strafrecht. Strafanwendungsrecht. Volkerstrafrecht. Europäisches Strafrecht*, Verlag C.H. Beck, München, 2006, p. 179-181.

54 See, RISPIN, S.C., “Implications of Democratic Republic of the Congo v. Belgium on the Pinochet Precedent: A setback for international human rights litigation?”, in *Chicago Journal of International Law*, 1 October 2002 (<http://www.allbusiness.com/legal/international-law/932266-1.html>).

55 See, BASSIOUNI, M.C., *Introduction to International Criminal Law*, precit., p. 11-12.

56 *Idem*, p. 12.

57 *Idem*, p. 11.

58 ARAJÄRVI, N., “The Role of the International Criminal Judge in the Formation of Customary International Law”, precit.. p. 1.

59 See, Indictment. 22 May 1999 Initial Indictment “Kosovo” (Case No. IT-99-37), at http://www.icty.org/x/cases/slobodan_Milošević/ind/en/mil-ii990524e.htm. See, Indictment, The Prosecutor v. Milošević, Milutinović, Sainovic, Ojdanic, Stojiljkovic, Case No. IT-99-37, 22 May 1999, in KLIPP,

- A., SLUITER, G. (eds.), *Annotated Leading Cases of International Criminal Tribunals - Volume 03: The International Criminal Tribunal for the Former Yugoslavia 1997-1999*, Intersentia, Antwerpen, 2001, p. 11-34.
- 60 See, Decision on Review of Indictment and Application for Consequential Orders, The Prosecutor v. Milošević, Milutinović, Sainovic, Ojdanic, Stojiljkovic, Case No. IT-99-37-I, Judge David Hunt, 24 May 1999, in KLIPP, A., SLUITER, G. (eds.), *Annotated Leading Cases of International Criminal Tribunals - Volume 03*, precit., p. 35-43. For the full text, see also http://www.icty.org/x/cases/slobodan_Milošević/tdec/en/052499rev.htm; for a review of it, see <http://www.asil.org/ilib/ilib0515.htm#j2>. For an insight, see SADAT, L.N., "The Trial of Slobodan Milošević", in *American Society of International Law Insights*, October 2002, p. 1, (<http://www.asil.org/insights/insigh90.htm>) and SCHARF, M.P., "The Indictment of Slobodan Milošević", in *American Society of International Law Insights*, June 1999, p. 1 (<http://www.asil.org/insights/insigh35.htm>).
- 61 For the full text of the Rules of Procedure and Evidence, last updated on 4 November 2008, see <http://www.icty.org/sections/LegalLibrary/RulesofProcedureandEvidence>.
- 62 Press Release: President Milošević and Four other Senior FRY Officials Indicted for Murder, Persecution and Deportation in Kosovo, at <http://www.icty.org/sid/7765>.
- 63 For details, see UN war crimes tribunal issues Milošević arrest warrant, at <http://www.independent.co.uk/news/world/europe/un-war-crimes-tribunal-issues-Milošević-arrest-warrant-753209.html>.
- 64 For a detailed analysis of the legal implications of the Kosovo indictment, as well as Judge Hunt's confirmation decisions, see SLUITER, G., "Commentary to Indictment. Prosecutor v. Slobdan Milošević, Milan Milutinović, Nikola Sainović, Dragoljub Ojdanić, Vljako Stojiljković", in KLIPP, A., SLUITER, G. (eds.), *Annotated Leading Cases of International Criminal Tribunals - Volume 03*, precit., p. 44 et seq.
- 65 ICTY, *Erdemović (IT-96-22) "Pilica Farm"*, Appeals Chamber Judgment, 7 October 1997 (<http://www.icty.org/x/cases/erdemovic/acjug/en/erd-aj971007e.pdf>).
- 66 See, WEDGWOOD, R., "Former Yugoslav President Slobodan Milošević to be Tried in The Hague for Crimes Against Humanity and War Crimes Allegedly Committed in Kosovo", in *American Society of International Law Insights*, July 2001, p. 2. See, also, AKHAVAN, P., "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities", in *American Journal of International Law*, vol. 95, no. 1, 2001, p. 19; GROSSCUP, S., "The Trial of Slobodan Milošević: the demise of head of state immunity and the specter of victor's justice", in *Denver Journal of International Law and Policy*, 12 February 2009, p. 2 (http://findarticles.com/p/articles/mi_hb3262/is_2_32/ai_n29099655); PESKIN, V., BODUSZYNSKI, M.P., "Croatia's Moments

of Truth: The Domestic Politics of State Cooperation with the International Criminal Tribunal for the Former Yugoslavia”, in *Berkeley Program in Soviet and Post-Soviet Studies Working Paper Series*, University of California, Berkeley, Institute of Slavic, East European and Eurasian Studies, p. 8 (<http://socrates.berkeley.edu/~bbsp/>).

- 67 SLUITER, G., “Commentary to Indictment...”, *precit.*, p. 44 et seq. Agreeing, see AKHAVAN, P., “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities”, *precit.*, p. 10, who shows that prevention and penalties at the international level should focus on leaders who exploit to their own benefit military forces in a “spiral of violence.”
- 68 See, SADAT, L.N., “The Trial of Slobodan Milošević”, *precit.*, p. 1.
- 69 See, WEDGWOOD, R., “Former Yugoslav President Slobodan Milošević to be Tried in The Hague...”, *precit.*, p. 1; GROSSCUP, S., “The Trial of Slobodan Milošević...”, *precit.*, p. 11.
- 70 See, VAN POELGEEST, L., *Nederland en het Tribunal van Tokio* (“The Netherlands and the Tokyo Tribunal”), Arnhem, 1989, p. 22-24, quoted by SLUITER, G., “Commentary to Indictment...”, *precit.*, p. 44. The main reason for dropping the charges against the Emperor was that his person was seen as an essential factor in the reconstruction of Japan, as well as a vital factor in fighting Communism.
- 71 See, ICTR, *The Prosecutor versus Jean Kambanda, Case no. ICTR-97-23-S*, Trial Chamber Judgment, 4 September 1998 (<http://www.ictr.org/default.htm>).
- 72 See, COSNARD, M., “Quelques observations sur le décision de la Chambre des Lords du 25 novembre 1998 et du 24 mars 1999 dans l’affaire Pinochet”, in *Revue Générale de Droit International Public*, 1999, p. 309 et seq.
- 73 Trial Chamber III, Prosecutor v. Slobodan Milošević. Decision on Preliminary Motions, 8 November 2001 (http://www.icty.org/x/cases/slobodan_Milošević/tdec/en/1110873516829.htm). For the printed version, see KLIPP, A., SLUITER, G. (eds.), *Annotated Leading Cases of International Criminal Tribunals - Volume 08: The International Criminal Tribunal for the Former Yugoslavia 2001-2002*, Intersentia, Antwerpen, 2005, p. 15 et seq.
- 74 See, *Introduction*, in the courts decision, § 1, p. 2. Also see, SADAT, L.N., “The Trial of Slobodan Milošević”, *precit.*, p. 1.
- 75 For the full text see <http://www.un.org/millennium/law/iv-1.htm>. For an in-depth analysis of the Convention, see, DE THAN, C., SHORTS, E., *International Criminal Law and Human Rights*, Sweet & Maxwell, London, 2003, § 4-003 et seq.
- 76 See, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* (http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf). According to Principle III, “The fact that a person who committed an act which constitutes a crime

- under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law".
- 77 For the full text of the project, as it was adopted by the International Law Commission on its 48th session, in 6 May – 28 July 1996, see http://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/7_4_1996.pdf.
- 78 See, § 31 from the court's decision, in KLIPP, A., SLUITER, G. (eds.), *Annotated Leading Cases of International Criminal Tribunals - Volume 08*, precit., p. 21.
- 79 Lord's Millet opinion at <http://www.parliament.the-stationery-office.co.uk>.
- 80 For a categorical opinion on this, although lacking strong arguments and characterized more by enthusiasm and naivety, see BOWHUIS, S., "Kosovo: The Legality of intervention?", in *Australian Journal of Human Rights*, no. 4, 2000, p. 8 (<http://beta.austlii.edu.au/au/journals/AJHR/2000/20.html>).
- 81 For this see, SADAT, L.N., "The Trial of Slobodan Milošević", precit., p. 1. The author shows that the warrant against Milošević is relevant both at the juridical and political level, because is the first issued against a sitting head of state. For an opinion against Sadat, see WEDGWOOD, R., "Former Yugoslav President Slobodan Milošević to be Tried in The Hague...", precit., p. 11, where it is stressed that, although the indictment was issued while Milošević was still in office, he was arrested only after his mandate had ceased. In our opinion, Wedgwood's critique is without merit, as it confuses the execution and the issuance of a warrant. At least in theory, once the warrant was issued, Milošević could have been arrested, as the legal ground to provide for this existed at the international level. As a personal conclusion, perhaps one must see the issuance of the warrant as a law-making decision, while the moment of execution probably rested more on political reasons.
- 82 For details, see, WEDGWOOD, R., "Former Yugoslav President Slobodan Milošević to be Tried in The Hague...", precit., p. 2.
- 83 See, DOMINICÉ, C., "Quelques observations sur l'immunité de juridiction pénale de l'ancien chef d'Etat", in *Revue Générale de Droit International Public*, no. 2, 1999, p. 297-308; DUPUY, P.-M., "Crime set immunités, ou dans quelle mesure la nature des premiers empêche l'exercice des secondes", in *Revue Générale de Droit International Public*, no. 2, 1999, p. 289-296.
- 84 See, *Arrêt, Cour de Cassation*, 13 March 2001, decision no. 1414, quoted by ZAPALLA, S., "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation", in *European Journal of International Law*, no. 3, 2001, p. 596-597.
- 85 See, *Case concerning the Arrest Warrant of 11 April 2000*, 14.02.2002 (*Democratic Republic of Congo/Belgium*), § 61.
- 86 R WEDGWOOD, R., "Former Yugoslav President Slobodan Milošević to be Tried in The Hague...", precit., p. 11.

- ⁸⁷ See, KUPERMAN, A., *ICC, Making Sense of Darfur: Ocampo and Bashir: The Milošević Precedent*, 23 June 2008 (<http://www.ssrc.org/blogs/darfur/2008/06/23/ocampo-and-bashir-the-Milošević-precedent/>). Still, the author is skeptical about issuing indictments under international law, considering that it affects the management of ongoing civil wars, as was the case with Vincent Kony in Uganda, whose indictment hampered the peace process.
- ⁸⁸ See, ICC Press Release, ICC Prosecutor presents case against Sudanese President, Hassan Ahmad Al Bashir, for genocide, crimes against humanity and war crimes in Darfur ([http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2008\)/a](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/a)).
- ⁸⁹ See, International Criminal Court (4 March 2009), Warrant of Arrest for Omar Hassan Ahmad Al Bashir, (<http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>). See also BBC News, Warrant issued for Sudan's Bashir, 4 March 2009 (<http://news.bbc.co.uk/2/hi/africa/7923102.stm>).
- ⁹⁰ ICTY, *Prosecutor v. Milutinović et al.* (IT-05-87), Trial Chamber, judgment of 26 February 2009 (<http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e1of4.pdf>). See NIȚU, D., "Tribunalul Penal Internațional pentru Fosta Iugoslavie – Cazul IT-05-87, Procurorul c. Milutinović și alții – cinci înalți oficiali sârbi condamnați pentru infracțiuni comise în Kosovo, iar unul achitat, Camera de primă instanță III, hotărârea din 26 februarie 2009", in *Curierul Judiciar*, no. 4, 2009, p. 232-233.
- ⁹¹ See, Memorial of Nicaragua, Question of Jurisdiction and Admissibility, 30 June 1984, p. 1 (<http://www.icj-cij.org/docket/files/70/9617.pdf>)
- ⁹² For an excellent insight, see KIRSS, K., "Role of the International Court of Justice: Example of the Genocide Case", in *Acta Societatis Martensis*, vol. 3, 2007 - 2008, p. 149 et seq.
- ⁹³ Nicaragua Judgment, precit., § 109-110.
- ⁹⁴ *Idem*, § 115.
- ⁹⁵ *Ibidem*.
- ⁹⁶ See for that, in general, GRAY, C., "The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua", in *European Journal of International Law*, no. 5, 2003. p. 867 et seq.; CASSESE, A., "The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", in *European Journal of International Law*, no. 4, 2007, p. 649 et seq.
- ⁹⁷ See, *Prosecutor v. Tadić*, case no. IT-94-1-I, Initial Indictment, 13 February 1995, § 4.2 (<http://www.icty.org/x/cases/tadic/ind/en/tad-ii950213e.pdf>) and the First Amended Indictment, 1 September 1995 (<http://www.icty.org/x/cases/tadic/ind/en/tad-1ai950901e.pdf>).
- ⁹⁸ Appeals Chamber, § 84.
- ⁹⁹ See, KIRSS, K., "Role of the International Court of Justice: Example of the Genocide Case", precit., p. 153.

- 100 Appeals Chamber, § 100.
- 101 KIRSS, K., “Role of the International Court of Justice: Example of the Genocide Case”, *precit.*, p. 153.
- 102 Appeals Chamber, § 117.
- 103 *Ibidem.*
- 104 KIRSS, K., “Role of the International Court of Justice: Example of the Genocide Case”, *precit.*, p. 154.
- 105 See the Appeals Chamber, who considered that the “effective control” test proposed by the ICJ was not in accordance with prior judicial and state practice. The Court made reference to the decision of the Iran-United States Claims Tribunal (the Kenneth P. Yeager case), the Arbitral Award case of Stephens, and the judgments of the European Court of Human Rights in the Loizidou v. Turkey case and the Jorgić case (see KIRSS, K., “Role of the International Court of Justice: Example of the Genocide Case”, *precit.*, p. 154).
- 106 CRAWFORD, J., *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002, p. 112.
- 107 See, SHAW, M.N., *International Law*, Cambridge University Press, Cambridge, 1997, p. 704-705.
- 108 See, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, § 50, quoted in KIRSS, K., “Role of the International Court of Justice: Example of the Genocide Case”, *precit.*, p. 156.
- 109 Agreeing on this, Kirss underlines the “existing confusion over *Nicaragua* and *Tadić* Cases” (*ibidem*).
- 110 ICTY, Kordić & Čerkez (IT-95-14/2) “Lašva Valley”, Trial Chamber Judgment, 26 February 2001, § 67 (http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf).
- 111 ICTY, Blaškić (IT-95-14) “Lašva Valley”, Trial Chamber Judgment, 3 March 2000, § 97 (<http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>).
- 112 ICTY, Naletilić & Martinović (IT-98-34) “Tuta and Štela”, Trial Chamber Judgment, 31 March 2003, § 184 (http://www.icty.org/x/cases/naletilic_martinovic/tjug/en/nal-tj030331-e.pdf).
- 113 ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 27 February 2007 (<http://www.icj-cij.org/docket/files/91/13685.pdf>).
- 114 KIRSS, K., “Role of the International Court of Justice: Example of the Genocide Case”, *precit.*, p. 156 et seq.
- 115 PRAGER, W., “The Role of the International Court of Justice”, in BLOKKER, N.M., SCHEMENS, H.G., (eds.), *Proliferation of Internatinal Organizations: Legal Issues*, Kluwer Law International, Hague, 2001, p. 279-295; JENNINGS,

R.Y., "The Role of the International Court of Justice", in *British Yearbook of International Law*, 1998, p. 63. Kirss recalls that "the confusion between 'complete dependence' and 'effective control' originated in the ICJ and therefore the Genocide case might be an occasion to eliminate the mistake" (see KIRSS, K., "Role of the International Court of Justice: Example of the Genocide Case", *precit.*, p. 158).

¹¹⁶ ICJ, Genocide case, *precit.*, § 397.

¹¹⁷ See, ICTY, Aleksovski (IT-95-14/1) "Lašva Valley", Judgment of the Appeals Chamber, 24 March 2000, § 107-108 (<http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>), also quoted by KIRSS, K., "Role of the International Court of Justice: Example of the Genocide Case", *precit.*, p. 158.

¹¹⁸ See, Permanent Court of International Justice (the previous ICJ), Case Concerning Certain German Interests in Polish Upper Silesia, Germany v. Poland, Preliminary Objections, quoted by KIRSS, K., "Role of the International Court of Justice: Example of the Genocide Case", *precit.*, p. 159, footnote 101.

¹¹⁹ And in the subsequent cases from the Trial Chambers (see *supra*, notes 110-112).

¹²⁰ ARAJÄRVI, N., "The Role of the International Criminal Judge in the Formation of Customary International Law", *precit.*, p. 29.

¹²¹ ARAJÄRVI, N., "The Role of the International Criminal Judge in the Formation of Customary International Law", *precit.*, p. 30. Also see, KOLB, R., "Selected Problems in the Theory of Customary International Law", in *Netherlands International Law Review*, no. 2, 2003, p. 128.

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