Cosmopolitan Subjects: Critical Reflections on Dualism, International Criminal Law and Sovereignty

Lessons for the African Union from the Yugoslavia Tribunal

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Abstract

Is contemporary international criminal law (ICL) compatible with sovereignty and traditional international law (IL) as it is comprehended by the doctrine of Dualism, as understood by the great majority of international jurists, scholars, government representatives and those working at the tribunals? What the literature has entirely missed is that three most important figures in the initial creation and institutionalization of ILC for the Yugoslavia Tribunal in 1994 – Antonio Cassese, Cherif Bassiouni and Theodor Meron – all shared a commitment to a monistic view based on expansive and radical interpretation of ICL in which international criminal jurisdiction (IICJ) – because it makes individuals its sole legal subject – as radically legally, politically and even ontologically incompatible with – and inherently to superior – sovereignty, as well as all those institutions based on traditional sovereign IL (e.g., international humanitarian law, the UN Charter system, and human rights). Normatively, they call for “the humanization” or individualization of international law marked by direct and unmediated relationships between IICJ institutions and the individual. Practically, they acknowledge ICL’s basis in modern statist domestic criminal law and Security Council power means that it is necessarily a unitary, top-down and subjecting power, incompatible with the claims of both dualists and pluralists. If the monists are correct, the African Union (AU) must be very careful not to presume that what one likes about international courts (African, treaty- or sovereignty based tribunals) can be easily separated from what one does not like (UNSC power, ICC), because it was ICL itself, not the tribunals, which is fundamentally anti-sovereign. As a result, this article concludes that ICL itself is now too closely ground in IICJ to think that it could be separated in an African court.

Keywords

African Criminal Court – African Union – international criminal law – sovereignty – individual international criminal jurisdiction – dualism – monism – pluralism – humanization – Yugoslavia Tribunal (ICTY) – Tadić Decision – International Criminal Court (ICC) – Antonio Cassese – Cherif Bassiouni – Theodor Meron

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A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.

*TADIĆ DECISION*¹

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At present . . . the dualist conception is no longer valid in its entirety.

A. CASSESE²

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1 Introduction: International Criminal Law (ICL) and the End of Sovereignty in International Law (IL)?

Is individual international criminal jurisdiction (IICJ), as embodied in the precedent and practice of contemporary international criminal law (ICL), compatible with sovereignty and traditional international law (IL) – as it is comprehended by the doctrine of Dualism? Whether explicitly or implicitly, the great majority of international jurists, scholars, government representatives, activists, and those working at the tribunals in the late twentieth and early twenty-first century have tended to both comprehend and advocate for the further expansion of international criminal law through dualist language

1 *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995), para. 97 (p. 18), written by Chief Judge Cassese (hereafter *Tadić Decision*).

2 A. Cassese, *International Law*, 2nd edn (Oxford University Press, New York, NY, 2005), p. 216.

and presumptions.³ Both dualists and pluralists tend to hold the position that, either as a matter of empirical reality or normatively (though in practice these are inevitably united), the spheres of both domestic national law and global law (ICL) are, and will remain in the future, meaningfully juridically separate and distinct, both as a matter of theory and in practice.⁴ As a result, dualists believe that the new ICL regime has done nothing more than place limited, reasonable, and dualist obligations on sovereignty, without fundamentally undermining sovereignty itself, either internally (in national law) or externally (in ICL), whether now or in future. From this perspective, the decision to create *ad hoc* (and even some hybrid) international criminal tribunals, join the ICC, or create an African Criminal Court is not related to the question of sovereignty.

What both the dualist and the broader international criminal law literature have entirely missed, however, is the fact that the three most important figures in the initial creation and institutionalization of international criminal law (for the Yugoslavia Tribunal in 1994) – Antonio Cassese (first President of the ICTY and Chief Judge of Appellate Chamber) and Theodor Meron (President 2003–2005, 2011–present; Appellate Chamber Judge since 2001), as well as Cherif Bassiouni (who did the most to advocate for the initial creation of the ICTY and the terms that it took) – have all been members of what one might call the International Criminal Law School (ICLS) who shared a commitment to a *monistic* view in which they understand ICL as radically legally, politically and even ontologically *incompatible* with – and ultimately *inherently superior to* – *sovereignty*, as well as all those institutions based on traditional sovereign IL (including international humanitarian law, the UN Charter system, and human rights).⁵

3 For the literature on ICL and on the ICTY, the only works that recognize the importance of the ICL interpretation of ICJ for sovereignty are: Cassese, *supra* note 2; T. Meron, *The Humanization of International Law* (Martinus Nijhoff, Leiden, 2006); C. Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers, Irvington, NY, 1996).

4 On Pluralism literature, see esp. K.M. Clarke, *Fictions of Justice: The ICC and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, Cambridge, 2009). Also see S. Roberts, 'Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain', 42 *Journal of Legal Pluralism* (1998), 95–106; S. Roberts, 'After Government? On Representing Law without the State', 68 *The Modern Law Review* (2005), 1–24.

5 See Cassese, *supra* note 2, 13–21. See also T. Meron, 'War Crimes Tribunals: The Record and the Prospects: The Contribution of the Ad Hoc Tribunals to International Humanitarian Law', 13 *American University International Law Review* (1998), 1509–1539.

At the core of the ICLS monist position, now entrenched for international law through twenty years of precedent, practice and custom, is an expansive and radical interpretation of ICL and the *Tadić* Decision which holds that the decision to make individuals the sole legal subject recognized provides sufficient legal and precedent basis for an interpretation of ICL with no conceptual or residual links to the legal concept of sovereignty. Understood in these terms, the original creation of individual international criminal jurisdiction (or IICJ), in 1994, marked a fundamental moment of rupture and reorganization in the system of international law about which Cassese has written that, with IICJ: "At present . . . the dualist conception is no longer valid in its entirety."⁶

Other than their own academic writings however, the potentially world-historical importance of this process of *individualization* radically outside of sovereignty, which Meron calls "the *humanization* of law," has passed without notice.⁷ The critical exception to this is Cassese's now canonical textbook on IL, which has remained throughout this entire period without peer in law schools.⁸ Against the dualists, Cassese has argued to generations of IL and ICL students that, however long it may appear that traditional sovereignty-based IL and individual international criminal jurisdiction may initially appear to coexist separately, the fact that ICL no longer recognizes any legal subjects, except *individuals* (technically "persons"), means it cannot provide a legal subjectivity for recognition for the legal concept of sovereignty, or the protection of that specific legal form.

For Cassese, Bassiouni and Meron, ICL is an institution that has been carefully and consciously defined as absolutely legally outside and without reference to sovereignty. As a result, ICL can see the sovereign in the legal clothes of the individual but not *vice versa*. Furthermore, against pluralisms, Cassese believes ICL will ultimately be triumphant, because its legal basis in UNSC Chapter VII power is super-sovereign and because it follows the logic of a modern statist domestic criminal court system means it is necessarily a *single, unitary, centralized, top-down, compulsory, and subjecting* institution relations into IL. In sum, while the present empirical reality may appear dualist, *Tadić*, like a cosmopolitan *Marbury v Madison* (establishing precedent for the superiority of federal power and judicial review in the US in 1803) remains as an open constitutional signifier waiting to be called in perhaps generations later (slavery, civil rights), but it is not necessary that it have to do anything more than establish a superior jurisdiction, as we shall see in Section 3.5.

6 Cassese, *supra* note 2.

7 Meron, *supra* note 3.

8 See Cassese, *supra* note 2.

At the core of this inquiry, then, will be the question of how we should interpret the relationship between triumph of the ICL school within IL, with the additional fact that all three were never open about the their equally partisan advocacy for a radical interpretation of non-sovereign IICL, for a monistic account of ICL and sovereignty, and ultimately for cosmopolitan or world law. All three in their academic writings make clear that they see sovereignty as the concept and institution whose juridical terms must be overcome if human beings are to achieve their possibilities, and they honestly believe international criminal law is both the necessary and ideal institution to replace sovereignty. That said, it is also clear that the central figures in creating ICL *all understood* clearly that what they were doing, in 1994, was *destroying the sovereignty system*. All this, of course, occurred without a public debate about what they were doing, and without taking a clear stand about how their interpretation differed from traditional IL or from the dualists or pluralist who supported ICL. Certainly one can dispute the accuracy of their account, empirically or normatively, but law is not just a policy that can be changed if we do not like it. It is deeply structured in precedent, practices, institutions, people, and especially in law school pedagogy.

If the monists are correct in their interpretation, we now face a clear and critical choice between sovereign institutions and cosmopolitan criminal law, based on the logic of international individual criminal jurisdiction. For the African Union, this means ICL itself is not well enough understood, by either experts or practitioners, to risk its use with new institutions on which so much will depend, much less make it predictable enough to claim to represent “the rule of law.” More fundamentally, the AU and wider international community support various courts must be careful if they presume that what is good about the courts can be easily separated from what is bad. In the monist’s account, it is international criminal law itself which is fundamentally anti-sovereign. As a result, while important recognition of the preference of treaty-based to UNSC-based tribunal or between African and International court may seem initially preferable. This article concludes that ICL itself is now too closely ground in IICJ to think that it could be separated in an African court.

2 International Criminal Law Monism in Theory: Cassese

Before going further, it will be worth looking closely at how Cassese theorizes with what he sees as the radical difference between international criminal law and traditional IL and what is at stake in IICJ for the ICLS school, given that as a scholar he has certainly been the single most important, systematic, and

consistent advocate of cosmopolitan criminal law. Furthermore, and as we have already seen, he has also been the key jurist in the creation of the ICTY, as well as the author of the key global law case law precedent in the *Tadić* Decision. In a brilliant, clear and remarkably forthcoming discussion, which appears only in newer editions of his famous introductory *International Law* textbook, he addresses what he sees as one of the great weaknesses of contemporary thought and practice on global law, and the dualist position in particular, its tendency to accept an easy naturalization of traditional international law (and anything else law-like) as law.⁹ As a result, it cannot make sense of how significant the distinction is between IL and ICL, or the fact that the transition could not easily have been piecemeal or customary because the terms of IL had been carefully constructed in terms which offered no possible legal recognition for anything extra-sovereign. Cassese's concern here is not primarily legalistic, but rather tactical: This is to issue a kind of warning to sympathetic pluralists and dualists that the understandable Kelsenian and pluralist desire to naturalize and celebrate all non-state law-like institutions *as law* conceals how much is required to overcome the legal concept of sovereignty in a context where it has defined itself, for 300 years, through its absolute monopoly on the right to be both the sole legal subject and sole legal object in traditional international law. The language of human rights, humanitarian law and the UN system cannot be enough because they are all fundamentally sovereign: Sovereign agreements to sovereign obligations. This is the humanization of law is supposed to address.

Whatever specific form it takes, the dualist naturalization of IL is possible, Cassese argues, only through a fundamental mis-characterization of what I will here call the *ontological* form of traditional sovereignty and international law. Specifically, this has occurred through the success of Hans Kelsen's famous monist pure theory of law to re-describe the old system of *international law as a proper law*. This reverses the traditional account and interprets IL as prior and constitutive of sovereignty as prior to its sovereign parts, and this, in turn, has allowed sovereignty to be misunderstood as a part of a complex system of *collective and correlative rights* between states (i.e., *parts of* some preexisting whole called international law).¹⁰ The success of this reading has made it possible for a much larger number of for both scholars and observers of global law to increasingly naturalize the view that international law is an extant legal system. They can, therefore, quite logically insist that, legal niceties aside, something enough like global law has already existed for three centuries, and we ought to see global criminal law as nothing more than the next small step – if

9 *Ibid.*, 213–217.

10 *Ibid.*, 16.

perhaps not perfectly legalistic (e.g., the *ex post facto* nature of crimes against humanity for the Nuremburg tribunal and the legal fiction of customary law for the ICTY) – in a natural and perhaps inevitable evolution. The process is thus understood as nothing more than the development from either one system of collective and correlative rights (international law) to a slightly more sophisticated one (cosmopolitan criminal law), or from material to formal legality. Indeed, the dominant emerging response to the global law of the Yugoslavia tribunal for both progressive-liberal cosmopolitan scholars and activists has been the attempt to reject the priority the modern definition of law in favor of a picture of a plurality of competing definitions or cultural traditions attempting to define what law is.¹¹ In this account, international law always was real enough law, if we just slightly expand our definition in retrospect.

According to Cassese, this is both logically and historically inaccurate. Sovereignty, he says (contra Kelsen), is prior to the system (international law), and must be understood, both juridically and ontologically speaking, as *a series of reciprocal relationships* between two individual states (creating mutual obligations in exactly the same manner as Roman law contracts, and based on the presumption of the priority of the sovereigns to their agreements). He neatly summarizes his argument as follows:

International rules [i.e., the classical system of “international law”], even though they address themselves to all States (in the case of customs) or group [sic] of States (in the case of multilateral treaties), confer rights or impose obligations on *pairs of States* only. As a result, each State has right or obligation in relation to one other State only.¹²

What the naturalization and evolution theories miss is how much is at stake, logically and juridically, in the difference between international law and cosmopolitan law. The fact is this process could not been slowly evolving for 300 years. The two systems are ontologically distinct and irresolvable, and there can be, whether juridically or logically, no halfway house or common ground between reciprocal relationships and correlative rights and obligations. For this reason, says Cassese, the sovereignty-based modern state order and international law remained largely definitive of the global order from its inception up until 1994 (this includes the UN system), and what has changed towards cosmopolitan law (esp. the genocide convention) has been almost entirely

¹¹ See *supra* note 4.

¹² Cassese, *supra* note 2, 14.

limited to the post-War II period.¹³ If these can perhaps exist side by side for a while as two competing systems, ultimately (if left unregulated) the latter will win out because sovereignty must be defended from law if it is to survive.

Where most scholars have tended to view this in binary or dualist terms (national law vs. global law), Cassese views the current global order as defined by the coexistence of three ontologically distinct and irresolvable forms of legal relationships. As we have seen, in the first (which is coterminous with what we call international law based on treaties between sovereign states, and which Cassese calls international rules) relations are based on *reciprocal obligations* between preexisting pairs of sovereigns, which take the exact form of private contractual agreements.¹⁴ As a legal concept and entity, this is the form that sovereignty takes.¹⁵ In this context, the violation of one state's sovereignty by another invokes a claim by one state only against the other, and this claim is not legal, properly speaking, since there is no general or compulsory element, and no precedent is established. Fully distinct from this are two other types of relationships, which contemporary scholars and public debate tend not to differentiate as the process of what is called globalization.

The second of these involves the development of new obligations on states – and Cassese cautions that this is much more limited than most observers realize – which he calls *community rights* in which obligations are towards all the member states of the international community (*erga omnes*) and which take the form of correlative or public rights which can be exercised by states, even when uninjured, in the name of the international community.¹⁶ The sole subjects of this system remain states, however. The problem with most accounts, says Cassese, is that the institutions representing this logic have been much more limited in both frequency and importance than most observers believe, either because like common Article 1 of the Geneva Conventions of 1949 they stipulate obligations for states to all other states but provide no non-sovereign mechanism for enacting them, or because like the UN Charter they contain contradictory provisions.

Finally, says Cassese, it was only in 1994, with the creation of the proper cosmopolitan law of the Yugoslavia tribunal, that the third type comes into existence, based on the principle of a relationship between every individual and the collective world community. The natural end of this *telos* – and this is what Cassese himself is ultimately arguing for normatively – is a “human

¹³ *Ibid.*, 17, Meron agrees, *supra* note 5, 14.

¹⁴ *Ibid.*, 14.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, 16 and 64.

commonwealth or *civitas maxima*,” based on the notion of the common good for the world community.¹⁷ Viewed as a kind of post-sovereign ancient constitution or neo-Medieval law without a state, these three forms of relationship might appear to coexist for a time, and indeed this apparent overlapping complexity of the present moment is the ideal of the cosmopolitan legal pluralists. What that view misses miss, says Cassese, is that the new international criminal law is law (properly so called in the Austinian sense), and criminal law in particular, and, because it is extrapolated from modern statist criminal law, it is necessarily a single *unitary, top down, and subjecting institution*. As a result, and because the internal relations of the three logics are inherently in conflict, all “development” towards “global” legal ideals cannot be viewed as steps along a single path, but must be viewed as three conflicting and inherently contradictory legal systems and imaginaries. Should it mean anything for our picture of ICL that these are the views of the man many consider its founder, and who did more than anyone else to build our contemporary understanding and practice of what international criminal law is?

3 Monism in Practice: The ICTY and International Criminal Law (ICL)

3.1 *The Security Council, Individuals and International Law*

How should we understand what is at stake for international law and the global order in this transition for the school of international criminal law (ICL)? Whatever reservations one might have about the general processes of the legalization and criminalization of the global legal order, the single most important material constitutional implication of cosmopolitan law, for the proponents of ICL, was the result of a factor that was never publicly debated, either by the UN Secretary-General’s international lawyers (who did much of the initial work Report), or by UN Security Council, and whose full scope and implications have been almost entirely ignored in scholarship, except by Cassese, Bassiouni, and Meron.¹⁸ What changed for the first time on May 25, 1993, with Security

¹⁷ *Ibid.*, 16 and 217.

¹⁸ The sole exception until recently was the international lawyer Danilo Zolo, who has called international criminal jurisdiction the “great institutional invention of the twentieth century,” but this is not the basis of his arguments, see D. Zolo *Invoking Humanity: War, Law and Global Order* (Continuum, New York, NY, 2002), x; also see D. zolo, ‘Peace through Criminal Law?’, 2 *Journal of International Criminal Justice* (2004) 727–734. More recently, the political scientist Kathryn Sikkink has a chapter section devoted to an interview with Bassiouni, describes the as “individual criminal accountability” and elaborates by saying:

Council Resolution 827 (which created the Yugoslavia tribunal, or ICTY), is that *individuals* became the *sole* recognized *legal subjects* of this new international criminal law (this is true for all international criminal law cases, from the *ad hoc* (Rwanda), hybrid (Sierra Leone, Cambodia, and Lebanon), as well as for the ICC).¹⁹ As Article 6 of the so-called ICTY “Statute” reads, the tribunal exercises solely *personal jurisdiction*, which it defines as “over natural persons,” a legal phase of art that means individual human beings – no other terms of jurisdiction are even mentioned.²⁰

This idea of individual subjects seemed so inherently necessary to the idea of criminal law that it hardly raised any eyebrows for most participants and observers at a moment when so much else was changing so quickly with law. As Michael Scharf, a member of the US legal advisory team, described the process, attention (esp. for the US delegation headed by UN Ambassador Madeline Albright) seemed to have been focused on issues of internal legality (e.g., as opposed to sovereign, political or global constitutional questions). In his account, their priorities at the moment were, first, challenging the growing public claims by Serb politicians that they were being painted with the brush of collective guilt, and, second, remedying what was viewed as one of the great historical scandals for global law advocates, the inclusion (primarily under US influence) of the Anglo-American collective crime of conspiracy in the Nuremberg Statute (and, of course, ever after as possible precedent).²¹ They were also being pushed publicly and privately by Cherif Bassiouni, as we shall see in a moment, to hold “individuals” accountable. In the end, Albright famously announced before the Security Council: “Truth is the cornerstone of

“Some think of it as the process of the ‘criminalization of international law,’ but it could also be thought of as the ‘individualization’ of international law,” in *The Justice Cascade* (W.W. Norton, New York, NY, 2011), 100. It is important to note that this clarity is likely to be the product of the fact the Zolo is an Italian who knows Cassese especially well, and Sikkink interviewed Bassiouni extensively and makes these points in that context. Jean L. Cohen has recognized the more general “direct focus on the individual . . . as the subject of cosmopolitan law and justice” in what she calls “cosmopolitan liberalism.” J.L. Cohen, ‘Sovereign Equality vs. Imperial Right: The Battle over the “New World Order”’, 13 *Constellations* (2006), 485–505, at 486.

19 UNSC/RES/827 (1993), 25 May 1993.

20 Statute of the International Criminal Tribunal for the Former Yugoslavia (originally adopted 25 May 1993) UNSC/RES/827.

21 M.P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial since Nuremberg* (North Carolina Academic Press Durham, NC, 1997), 7–9, 12, 54, 58.

the rule of law, and it will point towards individuals not peoples, as the perpetrators of war crimes.”²²

Whatever the exact reasons were, both Secretary-General Boutros Boutros-Ghali and the team working under his Legal Counsel Carl-August Fleischhauer (which played the most significant role in drafting the ICTY statute that established cosmopolitan criminal law) seem legitimately to have missed what was at stake – for the ICL project – in the difference between a sovereign state exercising the right to punish criminals in non-traditional fora (as at Nuremberg and with international humanitarian law under the Geneva Conventions) and the UN Security Council legislating the creation of individual international criminal jurisdiction (IICJ), which rejected, without any substantive debate or discussion, three hundred years of legal opinion and practice establishing the state’s monopoly on the right to represent its citizens in international law. This project for what Meron has, quite appropriately, called this the “humanization” of international law is now established precedent for all ICL cases, as the result of Cassese’s potentially world-historically important ICTY Appellate decision, which rejected Tadić’s interlocutory appeal challenges and formally established individual jurisdiction for the first time, say that: “A *State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.*”²³

3.1.1 Albright, the End of the Cold War, and the Decision

While the idea of Madeline Albright making the decision to create the new the new ICL must look to any observer like as clear an example as one can find of Carl Schmitt’s famous statement that he who names the enemy is sovereign, with Slobodan Milosevic as the enemy.²⁴ Even this masks a great deal of political complexity and power politics that, it is argued here, was previously – and is now again – irreproducible, which served to make 1994 a low ebb for both Chinese and Russian power. The first prong is obviously the end of the Cold War after 1989. In particular, the Russian Federation, under Yeltsin, was momentarily in a uniquely pro-Western posture seeking recognition into the crucial economic and political international institutions, at the lowest ebb of its international power before or since, and under intense international pressure to create a non-adversarial role for itself in the post-Cold War era through supporting institutions like the ICTY. The second prong of this was the truly

22 Madeline Albright (US rep.), UNSC Provisional Verbatim Record (25 May 1993), UN Doc S/PV/3217.

23 See Cassese, *supra* note 2 (italics added), Meron, *supra* note 3.

24 C. Schmitt, *The Concept of the Political* (University of Chicago Press, Chicago, IL, 1995).

surprising support of two consecutive US governments for the ICTY. Attention is usually paid to the Clinton administration, and especially to the role of UN Ambassador Albright, but, given the infamous anxiety of Clinton administration foreign policy makers about being labeled idealist, especially after Somalia, the more important factor was certainly the remarkable – and even bizarre – support of the lame duck George H.W. Bush administration under Secretary of State Lawrence Eagleburger, longtime Henry Kissinger protégé. Under the direction of realists like James Baker and Bret Scowcroft, foreign policy under Bush, had resolutely refused to label what was happening in Balkans a genocide (the term used was “ethnic cleansing”) precisely because that would have required intervention under the terms of the genocide convention, and most US officials, according to Michael Scharf (at the time Attorney-Advisor for UN Affairs at the State Department) favored domestic trials in the former Yugoslavia. However, after Bush’s defeat in the 1992 election, when Baker was appointed White House Chief of Staff, Eagleburger was named as his replacement for the final *six weeks* of the Bush presidency.²⁵ It was in this truly tiny window that Eagleburger (whose positions fit more closely with dissenters within the State Department) had his famous conversion after talking with Elie Wiesel, and became, in Samantha Power’s words, an “unlikely midwife to the justice movement” with his famous December 1992 speech at the peace conference in Geneva in which he named the names of ten alleged Serb war criminals and their crimes and warning that “a second Nuremberg awaits the practitioners of ethnic cleansing”.²⁶ This was the first public diplomatic mention of the possibility of an international tribunal by the international community, and what is truly startling is that the announcement appears to have been made *without White House authorization or knowledge!*²⁷

3.2 *Creating International Criminal Law (ICL): The ICTY and the ICL School*

Although it has not been sufficiently commented upon by scholars, this paper is an effort to give a sense the truly remarkable scope and breadth of the role played in the shaping of the initial creation of international criminal

25 Eagleburger was Secretary of State from 8 December 1992–20 January 1993. Before that he had served as Acting Secretary of State from 23 August 1992–8 December 1992. See Scharf, *supra* note 21, 42.

26 S. Power, *A Problem from Hell: America in the Age of Genocide* (Harper Collins, New York, NY, 2003), 291.

27 V. Morris and M. Scharf, *An Insider's Guide to the International Criminal Court for the former Yugoslavia, Vol. 1* (Transaction Publishers, New York, NY, 1994), 30, fn 111.

law (ICL) – *in practice* – by Cassese, Bassiouni and Meron, all well known as the three most important ICL school scholars of this era. We are now already two decades into experiment with the individualization and criminalization of international law, and, if one is to contextualize this adequately, it is crucial to begin from the fact that it has already become hard to remember how difficult it was to even speak about international law and human rights in the legal academy before that time – much less about ICL – which even Cassese, Bassiouni and Meron all admit was not taken seriously by scholars. In fact, it was only taught in three law schools: NYU (where Meron taught), DePaul (where Bassiouni taught) and Wayne State.²⁸ All three concur on how unlikely the choice of an ICL lawyer to head a major international law project would have been, previously. Even traditional international lawyers themselves not yet in the mainstream in the US academy, viewed ICL as a fringe movement, precisely as they might world government advocates today. The question of how and why it came to seem possible that all projects for cosmopolitan and pluralist law came to see themselves as having common and non-conflicting cause with ICL is an important one that would benefit scholarship. This paper is an attempt to begin some of the process of what might call a genealogy of the first moment of its creation, in which much of the interpretive and practice edifice was briefly visible in the creation of the Yugoslavia Tribunal, before precedent and custom naturalized it.

3.2.1 Cherif Bassiouni and the Rise of the ICL School

It would be hard to understate the role of Cherif Bassiouni, the Egyptian ICL scholar who taught for many years at DePaul University Law School in the USA, in driving the decision to create what was described as the world's first international criminal tribunal since Nuremberg, as well as the specific – and remarkably determinative form that IICJ and ICL took in the ICTY.²⁹ Bassiouni was initially a member of the Commission of Experts (established pursuant to Security Council Resolution 780, to investigate violations of international humanitarian law in the former Yugoslavia), and he was available to step in to the position of Chairman (1993–1994), following the resignation of Professor Frits Kalshoven of the University of Leiden. In that capacity, he directed the investigation of crimes in the former Yugoslavia and oversaw the writing of

28 Sikink, *supra* note 18 on Bassiouni; A. Cassese, 'Introduction', in *The Path to The Hague: Selected Documents on the Origins of the ICTY* (United Nations, ICTY, The Hague, 2001). See also M. Bassiouni, *Introduction to International Criminal Law*, 2nd revised edn (Martinus Nijhoff, Leiden, 2013), cxxi.

29 See Bassiouni and Manikas, *supra* note 5.

the report whose voluminous attachments provided much of the evidence on which the OTP would initially work.³⁰ Most fundamentally, however, the pick of Bassiouni marked the *first moment* of the remarkable emergence of what then still remained the tiny school that called what it did international criminal law. It also helps to show how quickly and completely ICLS has all but eclipsed traditional IL lawyers of the old school as the dominant hegemonic interpreters of what is meant, both legally and in common parlance, by the term IL. The importance to this paradigm shift cannot be overstated, although its importance has nowhere been adequately treated in the literature.

Yet, even within ICL, Bassiouni had perhaps the most radical and expansive interpretation of ICL, in which he believed that contemporary precedent and customary authority for IICJ already existed in advance of the creation ICTY, and sufficient to make it properly legal.³¹ For Bassiouni, the ease of his shift to ICL, both legally and practically, was ensured by his framing of his work not through the traditional hard language of the IL lawyers or of sovereignty, but rather working backwards logically and conceptually from what he has described as the “ridiculous” absence of the individual in international law.³² His work also showed him to be a fairly clear and openly partisan advocate for a both ILC and ultimately world law.³³ This was the figure who most tirelessly and openly advocated, both publicly and behind the scenes (esp. with UN Secretary Generals Boutros Boutros-Ghali), for an ICTY based on a fully instituted ICL to hold individuals accountable, and one can clearly hear the echoes of his work in the taking up of the language of individual responsibility Ambassador Albright in her famous 1993 speech at the Security Council.³⁴ If the literature on the ICTY has largely viewed Bassiouni as both *the* crucial figure who drove the process with his tireless energy, he was also viewed as openly activist and partisan in his support international criminal trials, and he ultimately proved too controversial to be named to as Chief Prosecutor for the ICTY.³⁵

30 C. Bassiouni, ‘The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia’, 18 *Fordham International Law Journal* (1994), 1191–1211.

31 See Bassiouni and Manikas, *supra* note 5.

32 Quoting Bassiouni: “everything was established on the basis of a relationship to governments. And I had the image of the individual being a package you know, that one government wraps up and puts in the mail and send to the other government. And I said, ‘This is ridiculous.’ Conceptually this is not right,” Sikkink, *supra* note 18, 100.

33 *Ibid.*

34 See Scharf, *supra* note 21.

35 *Ibid.*, 48–49, 75–77.

3.2.2 Antonio Cassese, Tadić, and ICL

In seemingly stark contrast, the well-known and respected Italian ICL jurist Antonio Cassese was viewed by the key people at the UNSC and S-G as a careful and respected scholar, who took special pleasure in his role drafting the tribunal's rules.³⁶ Yet his writings clearly show him to have been no less of a partisan of global criminal law against sovereignty.³⁷ As we shall see, however, Cassese critically took a more legalistic and almost surprisingly traditional IL approach to what had come before 1994, which perhaps masked some of his normative monism. Where Bassiouni was well known as someone who interpreted IL as providing a fully legal basis for creating the full edifice of ICL (either for *ad hoc* tribunals or a permanent ICC) through either customary law or his belief that Nuremberg was precedent, Cassese rejected both grounds. Furthermore, it was his work that was cited in the field more than any other (then and still), and his textbooks on IL and ICL (now through numerous editions) are all but canonical, especially in the UK and Europe.³⁸

However significant Bassiouni's role might have been, then, Cassese's was even greater for two reasons. First, he was chosen by the UN to be the first President (or chief executive administrator) for the ICTY, the first tribunal in history to operate on the logic of IICJ. He was also the effective head of the judicial branch itself and the first Chief Judge in the Appeals Chamber (which would hear all appeals from the ICTY, the ICTR, and ultimately become the Appeals Chamber for all *ad hoc* and hybrid international criminal court cases). The Presidency was also responsible for writing the ICTY Rules of Procedure and Evidence, which obviously had to be accomplished before anything else could happen, and which they completed in a remarkable two months.³⁹ Though eleven judges were chosen, his stature and their lack of expertise with ICL (nine were domestic civil service lawyers or judges, and none were experts in ICL) meant that Cassese is generally understood to have had a huge role and intellectual influence on the initial shaping of the ICTY, and, with regard to the Rules themselves, he accomplished this almost entirely on his own and without any kind of international oversight.⁴⁰

36 *Ibid.*, 66–67.

37 Cassese, *supra* note 2, 216.

38 *Ibid.*; and A. Cassese, *International Criminal Law* (Oxford University Press, New York, NY, 2003).

39 ICTY, Rules of Procedure and Evidence (11 February 1994) IT/32.

40 See *supra* note 15, 66–67; see Scharf, *supra* note 21, 63–66.

3.2.3 Cassese's Rules

The importance and scope of Cassese's influence becomes particularly clear through the example of the process of writing the rules – which ultimately amount to the spontaneous creation of ICL from the smallest kernel of Security Council statutory enactment. Specifically, in a move much celebrated by legalists for its apparent restraint and deference to judges, the Council called for “the judges” (properly speaking the Presidency) to “adopt rules of procedure and evidence” (Article 15), though it said nothing more of legal import about the particular source or form of these provisions, other than that there be “fair” trials “with full respect for the rights of the accused” (Article 20).⁴¹ Cassese has been quite honest about what was at stake. In his *Presidential Statement* accompanying the promulgation of the new rules, he wrote of the rule making process that “we ha[d] little in the way of precedent to guide us.”⁴² The Nuremburg rules were “very rudimentary” (only three and a half pages), because procedure was left to the tribunals, and so the ICTY judges constructed a complete system of rules, about which Cassese says, “we hope, reflecting concepts which are today recognized as being fair and just in the international arena.” Put simply, the entire procedural apparatus of ICL was extrapolated as legally inherent in the words “fair trial,” and all this without any need for reason or explanation beyond the fact that (under these presumed legal models) all this is required of a fair trial. Remarkably, very little scholarship has recognized the importance of the Cassese's ICTY Rules for the ICL School.⁴³ Attention at that time tended to emphasize practical considerations such as time pressures, lack of resources, or the complete novelty of the hybrid civil law and common law procedural system. One exception was Michael Karnavas, an ICTY-appointed defense lawyer (for Vidoje Blagojević), who complained about the potential prejudice (to defense cases) in the adoption of rules based such “enormous discretion” given to the judges to “create an entire international criminal justice system.”⁴⁴

Even this, however, misses the ultimate legal and constitutional importance of the Rules for Cassese and the project of ICL, because they mark – according to this interpretation – the first properly global law created without *any* reference to sovereignty as the ultimate constitutional basis, and whose legal terms and categories serves as the precedent and basis for all subsequent

41 See ICTY Statute, *supra* note 20.

42 ICTY, Statement by the President Made at a Briefing to members of Diplomatic Missions 11 February 1994) IT/29.

43 See Rules, *supra* note 35.

44 M. Karnavas, ‘The International Criminal Tribunal’, *The Champion: National Association of Criminal Defense Lawyers* (1996).

cosmopolitan law practice at the ICC and elsewhere. While Cassese publicly acknowledged the novelty and lack of material precedent that existed in his Presidential report, even he has never been clear on how much was at stake with the Rules. To understand what Cassese was doing with the Rules, then, one must remember that, with the departure of Bassiouni, he alone among the figures in the ICTY advocating for ICJ (both inside the Tribunal and UN) would have fully understood what was at stake in this. This is why the institutionalization of IICJ, without mention of sovereignty, was such an important and necessary shift to bring about, and this is why the ICTY Rules were so important, because they could be *carefully crafted by Cassese, without political interference, so as to make no direct or residual reference to sovereignty and traditional IL*. The problem was that neither the UN SC (in its debates), nor the S-G's report, had ever discussed or approved of the idea that they were creating IICJ without any kind of reference to states or sovereignty.

While the new jurisdiction is still obviously limited practically, IICJ's advocates believe this now serves as *precedent for a post-sovereign world order*.

To appreciate why IICJ in the ICTY Rule is such a radical change from what traditional IL, it is useful to elaborate upon Cassese's own account the distinction between traditional IL and the new IICJ brought into being with the Yugoslavia Tribunal in 1994. The problem with idealist cosmopolitan and pluralist accounts of IL, he argues, is that first they mistake all law as essentially the same without reference to its jurisdictionally limiting *legal subject*, and second, they accept any claim to be binding a sovereign as a limit on sovereignty itself. In shifting to the question of the legal subject, Cassese is able to emphasize that traditional IL recognized only sovereigns as its subjects. Understood thus, almost every international institution or form created in history to try to develop internationally, were sovereigns, *qua* sovereigns, agreeing to be bound by certain commitments, whether post Westphalia international law based on treaties, war crimes law through the Geneva and Hague Conventions, the Red Cross, the UN Charter, or even human rights machinery. All of these may seem like limits on sovereignty, says Cassese, but they are agreements made by sovereigns, in which sovereigns remain the sole legal subjects. For Cassese, the confusion comes from the fact that all of these institutions, as well as the new courts, often have conflicting provisions, some of which may appear to be sovereign and non-sovereign even in the same document, but, if the institutions creating them remain sovereignty-based or sovereignty remains the legal subject of these institutions, they remain for him fundamentally sovereign. This is why even the ICTY Statute was not a fully sufficient legal basis for IICJ, since it was clearly the product of the UN Charter system, which is fundamentally legally sovereign in Cassese's terms.

3.2.4 Tadić Decision and IICJ

All of this would be purely academic except that when Duško Tadić's attorneys filed an interlocutory appeal with regard to the legality of the creation of the Tribunal – though in fact the case what about the creation of ICL itself for the first time – Antonio Cassese was simultaneously the President who had brought the ICTY into being, the (quasi-legislative) author of the rules of evidence and procedure (including the rights of appeal) under which the trial was being conducted, Chief Judge of the Appeals Chamber of the ICTY, Presiding Judge in the Appeal, and ultimately author of the *Tadić* Decision, which now serves as a kind of *Marbury v Madison* precedent implicit in every subsequent ICL jurisdiction. While the both the Trial Chamber and OTP felt the ICTY's creation by the UN and the terms of its jurisdiction they had established were not reviewable questions,⁴⁵ Chief Judge Cassese felt the inherent power of an appeals jurisdiction necessarily included a right of full judicial review premised on a belief that the “judicial character” of the court necessarily has a “*competence de la competence*” and emphasized especially that they are inherently an independent branch (despite the clear conflict of interest in this case with Cassese's role).⁴⁶ In this case, this meant Cassese was holding that an *ad hoc* tribunal created had a right to review the question of the legitimacy of a SC enactment.

For those who have never read it, it is surprisingly brash and open about what it is doing, both with regard to a judicial review and ultimately sovereignty: “A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.”⁴⁷ While the expansive judicial independence and review issues dominated the literature on *Tadić*'s implications for IL, the single most important element for Cassese and the ICL School was *the creation of a case law precedent that would protect IICJ from further attack in the ICTY and thus establish it as the clear legal, customary and normative model for all future international criminal tribunals (ad hoc, hybrid and ICC)*. This reasoning follows exactly the same logic in the *Marbury* case (1803), where the importance of US Supreme Court's first case was not the outcome, but the establishing of the jurisdiction's terms and future precedent. So effective has this been that IICJ has never since been raised in public debates on the creations of subsequent tribunals, ICC situations, or in case law, and Thomas Lubanga did not even bother to make an Interlocutory Appeal. Furthermore, no ICTY judge interviewed during my research in the Hague would acknowl-

45 *Tadić* Decision, *supra* note 1, para. 2 (re: Trial Chamber) and para. 4 (re: OTP).

46 *Ibid.*, para. 11.

47 *Ibid.*, para. 97.

edge that IICJ marked a significant change in IL, or was anything more than another small step in the slow and steady centuries old development of IL. Nor, finally, is it likely to be raised in the near future with IICJ partisan Theodor Meron, whose ideas track fairly closely with Cassese's on these issues, as President (2003–2005, 2011–present) and Appeals Chamber judge (since 2001).

The question remains as to why Cassese took this course of pursuing a project of an IICJ without reference to sovereignty surreptitiously and without public debate or discussion anywhere of what was at stake for sovereignty *in his own understanding* of ICL? Important too is the fact that he knew better there was no precedent for IICJ as he interpreted it, and, in fact, it was his work, with its peculiar conservatism in its account of IL, which makes clearest the deep historical and structural distinction between IL and ICL. Unfortunately, he died in 2011, after serving as the head of the Lebanon hybrid tribunal, so it is not possible to ask him directly. What is clear is that, suddenly made mainstream by the almost accidental capture of international law project by partisans of ICJ School, in 1994 Bassiouni, Cassese and Meron availed themselves of the opportunity to create an institution (IICJ) which they believe has already, at least as a matter of law, fatally ruptured sovereign international law and sovereignty.

3.3 Was Nuremberg Precedent for ICL and IICJ?

Was Nuremberg precedent for ICCJ or ICL, as inevitably cited even by scholars working on its first creation for the Yugoslavia Tribunal (ICTY)?⁴⁸ In fact, Cassese never makes the case that it can be, either in his writings or in *Tadić* Decision, because, as he shows in his IL textbook, he understood all too well how clearly the judges of the International Military Tribunal at Nurnberg (IMT) had been in making clear – in the famous *Nuremberg Judgment* – that their tribunal had been created *by states* (the four European Allied powers), and that it had prosecuted the trials based on the *exercise of the sovereign legislative power* exercised after an unconditional surrender by Germany gave their sovereign power to the Allies:

The making of the Charter was the exercise of the *sovereign legislative power* by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the

48 To mention only those texts central to the ICTY literature: Morris and Scharf, *supra* 26, 2; Bassiouni and Manikas, *supra* note 3, 199, 260

occupied territories has been recognized by the civilized world (*italics added*).⁴⁹

Nor, despite the novelty of some of the crimes (strictly speaking a question of German law), did the judges understand that there was any new ground being broken in either the question of what was the source of the power to punish or in the collective nature of the prosecuting victorious Allied powers. That fact is represented by the *Nuremburg Indictment* sheet, which reads:

The United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics – *against* – Goering *et al.*⁵⁰

According to the Judgment, the four Allies were simply:

[D]oing . . . together what any one of them might have done singly; for it is not to be doubted that *any nation* has the right thus to set up special courts to administer law (*italics added*).⁵¹

The judges of the IMT also makes clear that the tribunal recognized individuals solely through their relations to state-defined laws of war, and then only for actions committed as state actors acting in furtherance of governments.⁵² In so doing they refer to Article 6 of the Nuremburg Charter which states that the Tribunal:

[S]hall have the power to try and punish persons, who, *acting in the interests of the European Axis countries*, whether as individuals or members of organizations (*italics added*).⁵³

Finally, the judges made much of the oft-neglected fact that Germany had unconditionally surrendered, and so was subject to well-established powers that went to the occupying power in war, through their ultimate control of the domestic state apparatus, including the right to punish the criminal and even

49 *Judgment of the Nuremburg International Military Tribunal* (1947) 48 (hereafter *Nuremburg Judgment*).

50 Indictment of the International Military Tribunal.

51 *Nuremburg Judgment*, *supra* note 45.

52 *Ibid.*

53 Nuremburg Charter, Article 6.

legislate.⁵⁴ Put simply, while some of the crimes with which the Nuremberg defendants were charged may have been novel, expansive and strictly *ex post facto* (esp. “crimes against humanity”), the much more significant fact was that the basis for the jurisdiction and authority to punishing the criminal remained state sovereignty, applicable there solely because the prosecuting powers had been victorious in a war.

3.4 UN Charter System, the ICJ, and Sovereignty before ICL

Nor, in Cassese’s account, could precedent for IICJ or ICL be found in the UN Charter system (including the World Court) or its powers. Formally and institutionally, the clearest recognition of this fact is the place of law within the UN-based order that immediately preceded the emerging new international criminal legality, under whose logics its legality must be understood, and against which the political and ontological scope of the transition to ICL must be measured. The Charter, of course, treats (and appear to limit) the possibility of a *judicial power* to the International Court of Justice (ICJ, aka the World Court, in The Hague).⁵⁵ To guarantee this limit, the Charter foreclosed the possibility of cosmopolitan law (criminal or otherwise), through three provisions. First (i), it explicitly limits World Court jurisdiction to states: “Only states may be parties in cases” (ICJ Statute (Article 34)). Second, (ii) the ICJ has no mandatory or compulsory jurisdiction of any kind, so all States parties must agree to have their cases heard and the decisions are purely advisory (i.e., no punishments are provided for). Less frequently mentioned, however, is the third provision (iii), which precludes ICJ judgments from having any precedent value for future developments in international law. According to the Charter, “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case” (Article 59).

These three initially curious limitations turn out to be, however, the very essence of the UN system in relation to law, and their inclusion was what was necessary to getting the support of many states for even such a drastically limited international judicial power.⁵⁶ As Payam Akhavan, one time Legal Advisor to the Office of the Prosecutor at the ICTY, wrote in response to this expansive interpretation of ICL embodied in the ICTY case law, in response to Meron’s comments in a debate:

54 *Nuremberg Judgment*, *supra* note 45, 48.

55 UN Charter.

56 Meron, *supra* note 5.

As we all know, this area of international law developed in a very haphazard way...in part, because states wanted to create ambiguities...Correspondingly, it is the area in which the greatest opportunities for progressive clarification and development exist...By expanding the ambit of humanitarian protection, do we risk creating a law that...does not remotely reflect what states are actually willing to concede?...Will a surreptitious legislative process arise...Or, will such judicial activism undermine the Tribunal's credibility in the eyes of States?⁵⁷

As Cassese was all too aware, the reason for all these limitations on the UN and the ICJ, and this was clearly understood by the still rather traditional international lawyers who drafted the UN Charter, was that a law without such a limit would – even based on nothing more than a *single precedent* of a state being made subject to law – open itself up to juristic extrapolation of a proper cosmopolitan legal system. What the lawyers drafting the UN Charter and the ICJ statute understood, if perhaps only sometimes intuitively, is that the kernel of a proper *cosmopolis* – a proper cosmopolitan sovereign order – is *inherent in our modern concept of law and legal precedent*, if one removes the jurisdictional limitations imposed by the concept of sovereignty.

3.5 *Complementarity, Security Council Chapter VII Power and Sovereignty in ICL*

Most observers believe that the Security Council's inclusion, in the so-called ICTY statute, of the legal mechanism of "complementarity" is supposed to protect sovereignty, at least with regard to the *ad hoc* and hybrid tribunals, by allowing the courts of each state a kind of joint jurisdiction? Unfortunately, the fact is that it cannot. Indeed, in constitutional terms, complementarity can, paradoxically, only make sense in reference to states that agree to the jurisdiction of the international criminal law courts. The moment they seek to assert a jurisdiction that in some ways runs counter to an ICL court, complementarity shifts from a doctrine apparently protecting states to a *compulsory* global jurisdiction requiring states to follow the legal jurisdiction of the global court. What is more, as the ICTY statute shows, complementarity is compatible with the invocation of Chapter VII powers, and was perfectly compatible with *ultimate* (which, of course, does not mean total) global legal jurisdiction over the law of the Yugoslav successor states, and the same will be true as well for every present and future *ad hoc* and special tribunal.

57 *Ibid.*

To understand why this is so, it will be helpful to remember that the coalition of support for the Tribunal, particularly among the most vocal advocates on the Council, seems to be crucially based on the widely held but inaccurate belief that the limited and strictly enumerated jurisdiction of the ICTY (i.e., territorial, temporal, and also subject matter jurisdiction limiting its jurisdiction to enumerated crimes committed in the former Yugoslavia during the war) meant that the Tribunal would be a limited endeavor:⁵⁸ “[C]ircumscribed in scope and purpose,” to use the words of the Secretary-General’s legal team’s *Report*, discussed by the Council in debating *Resolution 827* creating the Tribunal, and not, as the skeptics (esp. Venezuela, Brazil, China and Russia) feared, the ill-considered first step in a chain of precedents that would produce – in the Tribunal itself – a proper cosmopolitan law which would necessarily subject (and create precedents for the future subjection of) sovereign states.⁵⁹ To address these fears, the report goes on to state – in what its advocates seem to have sincerely believed was simultaneously a statement of fact and sufficient formal legal reservation – the creation of the Tribunal “does not relate to the establishment of *an international criminal jurisdiction in general* nor to the creation of an international criminal court of a permanent nature (*italics added*).”⁶⁰ As a result, many of the Tribunal’s advocates in the international community seem to have viewed it as nothing more than a kind of trial run to, see how things worked, with no permanent implications for the global order and a definite end date to allow the Council the opportunity to reconsider the matter in the future. This, as we shall see, was to dramatically misunderstand what is at stake in the judicial power of courts, global or otherwise.

However, pushed by the tribunal advocates who were determined to a get a symbolic unanimous vote in the Council in the context of what was believed to be a genocide in progress, the skeptics engaged in frankly wishful thinking in believing that mere formal reservations could limit the inherent *telos* of law, as they themselves had initially argued. In the long run, these states, the UN system, the broader global order, and even the development of cosmopolitan law (IL or ICL) would have been better off had they abstained on the basis of the concerns they themselves made before the Security Council on 25 May 1993, the day the Tribunal was created. There, the Brazilian representative Ronaldo Mota Sardenberg objected to the fact that the matter had involved critical legal issues “many of which were *not resolved to our satisfaction*” (*italics added*), and

⁵⁸ Statute of ICTY, *supra* note 20, Article 8.

⁵⁹ Report of the U.N. Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, 1993 (hereafter S-G’s Report).

⁶⁰ *Ibid.*, para. 12.

he insisted that an initiative bearing such far-reaching political and legal implications ought to have included “a much deeper examination in the context that allowed a broader participation by all States Members of the UN.”⁶¹ Similarly, Li Zhaoxing of China complained to the Council that “[t]his political position [to vote for the tribunal]... should not be construed as our endorsement of the legal approach involved,” and he further argued, and quite accurately, that the creation of the tribunal was “*not in compliance with the principle of State judicial sovereignty*... [and] [t]his will bring many problems and difficulties in both theory and practice (italics added).”⁶²

What the skeptics (esp. China and Russia) understood was that a Chapter VII intervention in the sovereignty of any state, if it takes the form of a general law exercised by a court, cannot be fully limited in the way that the advocates insisted it could. What the tribunal advocate’s account missed was the fact that judicial power, as embodied in the right to issue binding orders, compel attendance of parties, or enforce judgments of even the most minimal kinds, requires the full compulsory apparatus of what lawyers call *mandatory jurisdiction* – or, as Cassese elaborates it in the *Decision*, “mandatory universal jurisdiction” (para. 80). The limited territorial, temporal, and subject matter jurisdiction of the Tribunal could limit which cases the court will allow itself to hear, but mandatory jurisdiction (here an expression of the Security Council’s Chapter VII power) can make no sense in a limited form, and must be fully present for any court to exercise even the most minimal procedural matters. Importantly, it is no less true for the new self-consciously dual jurisdiction international-state special tribunals, such as those for Cambodia, Sierra Leone and Lebanon, to which the international community has increasingly turned as an apparently more sensitive alternative, since all are either based on Council Chapter VII power or recognize the ultimate jurisdictional priority of ICL.⁶³

Put simply, you cannot have law, much less a court, without full mandatory jurisdiction. As representative Li of China pointed out to the Council, this was

61 Ronaldo Mota Sardenberg (Brazil rep) UNSC Provisional Verbatim Record (25 May 1993), UN Doc S/PV/3217.

62 Li Zhaoxing (China rep) UNSC Provisional Verbatim Record (25 May 1993), UN Doc S/PV/3217.

63 The Special Tribunal for Lebanon (STL), although originally technically a hybrid or dual body with a local legal role, was transformed after the failure of the Lebanese Parliament to pass the law empowering the Tribunal, and this led the UN Security Council to pass a resolution invoking Chapter VII, which now serves as the ultimate jurisdictional basis and thus makes it effectively an ad hoc tribunal now technically.

not simply a matter of legal semantics. This is because, in choosing to adopt Chapter VII as the basis for the Tribunal's mandatory jurisdiction, the Council created a body whose own *enumerated legal powers* would necessarily follow the same logic as the Council powers from which it was derived, and specifically the requirement that all "UN Member States must implement [Council decisions under Chapter VII] to fulfill their obligations."⁶⁴ As Li suggested, the decision to give the Tribunal Chapter VII power meant, therefore, that *every* state must (under its UN treaty obligations) recognize the jurisdictional claims of even an *ad hoc* tribunal in precisely the same way in which it would recognize a Security Council resolution. The gravity of these same concerns led the Russian representative to insist on reservations against automatic deferrals by state courts to the tribunals and to even to feel the need to state: "we believe this body will not abolish or replace national justice organs."⁶⁵

These reservations, however, have turned out to be as ineffective as the skeptics themselves initially believed they ultimately would. The so-called *Statute* of the Tribunal, passed by the Council that very day, though it formally appears to exercise strictly limited territorial, temporal and subject-matter jurisdictions with regard to crimes in the former Yugoslavia, exercises (as an expression of Chapter VII powers) a mandatory jurisdiction over not just the Yugoslav successor states, but *all* states with regard its primacy over national courts. Specifically, Article 9, with the Orwellian title "Concurrent Jurisdiction," establishes what it calls concurrent jurisdiction between the Tribunal and national courts (Section 1), only to then assert the "primacy" within that system of the Tribunal "over national courts" and require them to defer regardless of the procedural stage (Section 2).⁶⁶

What this all means is that the Yugoslavia Tribunal could, with regard to those indicted for crimes committed in the former Yugoslavia after 1991, claim primacy over any national court (i.e., not just in the states of the former Yugoslavia) into whose hands an Indictée falls. This is precisely what happened to Tadić after his arrest in Germany. Though on the surface little appears to have changed with the old system of sovereign state extraditions based on equal (*vis-à-vis* other states) and ultimate (internal) jurisdiction, with Tadić the Tribunal asserted its jurisdictional supremacy over the German courts, and, on this quite different basis (mandatory jurisdiction), he was extradited to The Hague for trial. This issue was never contested with regard to Tadić because, as a Bosnian Serb with no citizenship rights there, the German government had

64 See Li, *supra* note 58.

65 Russia rep, UNSC Provisional Verbatim Record (25 May 1993), UN Doc S/PV/3217.

66 ICTY Statute, *supra* note 20, Article 9.

no legal or sovereignty-based reason not to turn him over to the Tribunal, and so complied with the Tribunals claim of priority. Had Germany (or any country, no matter how unrelated to the Balkan conflicts) contested that claim, it is clear that its basis in Chapter VII would give the Tribunal, according to international law, primacy over its national courts.

A further provision in the ICTY Statute (Article 29 on “Co-operation and Judicial Assistance”), again because it is based on Chapter VII powers, further gives to the Tribunal the power to compel *any* state – “States shall” is the wording – to “co-operate” with investigations and prosecutions and to “comply without undue delay with any request for assistance or an order issued by a Trial Chamber.”⁶⁷ Incorporating, as this article does, the investigative and police powers inherent in the Tribunal’s prosecutorial power, the Tribunal would be, as the skeptics warned, potentially a substantial infringement on the sovereignty and legal independence of *every* state, not just the states of the former Yugoslavia. Indeed, as critics of the dual jurisdiction Lebanon tribunal have suggested, even just the investigatory process seems to be impossible without full criminal jurisdiction and the possibility of compulsion.⁶⁸

The ultimate implication of the Chinese and Russian concerns, then, were that the Yugoslavia Tribunal, as an expression of Chapter VII, has now introduced into international law (through the apparently innocuous terms complementarity and cooperation) a generalized and mandatory *compulsory* element – analogous to the sovereign power of domestic governmental power in the modern state – which was impossible within, and strictly forbidden by, the terms of the old state sovereignty system. In that older system, a state might make requests for extradition of a person indicted by its courts, but there was no legal (as opposed to political, military or economic) means to compel the other state to comply. The UN system added to the possible mechanisms an emergency provision, though this was initially understood as exception and extra-legal. By basing the jurisdiction for cosmopolitan law on Chapter VII, the emergency power of the Security Council, it is precisely that power which now presents itself to us as the rule of law.

3.6 *Modern (International) Criminal Law’s Statist Teloi*

Modern Law – and especially modern criminal law – cannot be separated from the modern State and from sovereignty, either in theory or in practice, and it brings with it much more than we think. We have seen this process already

67 *Ibid.*, Article 29.

68 See O. Nashabe, “The Special Tribunal for the Lebanon (STL): Selective justice and political manoeuvres”, 1 *International Journal of Criminology and Sociology* (2012) 247–264.

with the ICTY Rules and the extrapolation from the two words in the “fair trial, but even this is just the beginning. Before Tadić’s trial could even begin at least four of modern law’s *teloi* had already come into being with the Yugoslavia Tribunal, both marking and enacting the new cosmopolitan power to punish the criminal.

One *telos* has to do with the extrapolation of all the legal mechanisms necessary to the *trial process*. As we have just seen, for the ICTY this already includes the drafting of an elaborate and comprehensive system of rules of procedure and evidence, which are now fully determinative for future tribunals and the ICC. Much attention has been paid to the tribunal’s creation of a new hybrid legal system incorporating aspects from adversarial and continental systems, but much more important are the necessary and implicit judicial rights and powers, including the *power to issue orders, enact penalties* (including incarceration and fines), and *enforce sentences* (Articles 22–24 and 27–28). A second *telos* includes everything necessary to the constitution and operation of a *court* itself. For the ICTY, this already involves the creation of the various branches of the tribunal, including the Registry (Article 17), Trial Chamber (Article 12), Office of the Prosecutor (OTP) (Article 16), but it also involves the creation of an Appeals Chamber (Article 25), which has abrogated to itself ultimate and sole source of judicial review. More importantly, it also includes the enumeration of *full investigatory, arrest, and general police powers* (Article 18) (including the power to detain suspects in the United Nations Detention Unit located in The Hague), all presumed to be necessary to established modern understandings of prosecutorial and judicial power. A third *telos* has followed the necessary requirements of a modern *criminal justice system*. For the ICTY, this has included enumerated powers of Penalties, including imprisonment (and other forms of punishment including restitution) (Article 24), and even commutation of sentence and pardon (Article 28). In part because the Dutch government did not want the Netherlands to become the *de facto* global prison, those convicted by the ICTY are sent to serve their sentences in states which agree to take them, and Tadić, who became the first defendant to be punished with imprisonment by a global court, served out his sentence in Germany. It is the Tribunal, however, which maintains *full jurisdiction* throughout the full period of the incarceration, even in an otherwise sovereign foreign prison.

The most important and significant of these *teloi*, however, is likely to be the one that initially appears least controversial, the question of defendant’s rights. However, as soon as global law began recognizing individual (criminal) jurisdiction, basic requirements of legality, justice, and fairness for defendants (extrapolated from domestic understandings of law) has seemed to require (of the Tribunal) that global law also begins to offer – and thus potentially

become *the source and guarantee of – the full corpus of criminal defendants' rights and protections* that modern state-based legality views as the necessary cognates to criminal responsibility. The first step in this process is the ICTY's guarantee of the "Rights of the Accused," under Article 21 of its statute, but, in fact, a second stage has already been reached with the Tadić interlocutory appeal *Decision* (which is to say the case law precedent on which cosmopolitan law, including the ICC, is being built), in which Cassese's opinion effectively brought in the entire corpus of international humanitarian and human rights standards (esp. the International Covenant on Civil and Political Rights) *simply as necessary to enumerate these original Article 21 rights*.⁶⁹ Furthermore, to make this rights legally enforceable (i.e., as law) all this has been radically redefined – primarily through the never debated naturalization of the concept of "law", a term technically impossible in the previous system. In the process, human rights treaties (signed and agreed to by states) have come to be broadly interpreted as a proper cosmopolitan law subjecting states, and, as a result, *the ICCPR now operates as effectively both a global proto-criminal code, as well as a cosmopolitan Bill of Rights, applicable only to individuals*.⁷⁰ Interestingly, no ultimate basis or source (the state-sovereignty-based UN Charter, Security Council Chapter VII state of emergency power, or the world community?), or even term (sovereignty?), is yet given for who or what guarantees these rights, and the indictments refer only to "The Tribunal" versus the defendants.

4 Law, Pluralism and the Modern State

Legal pluralists and dualists of various stripes will reply that not all law is law in this sovereign and subjecting form, and this is certainly true.⁷¹ Where this account differs is that it believes the legal pluralists' emphasis on diversity of forms of law has, in failing to take seriously enough both the implications of the distinction between *sovereign law* and other forms of law, muddled and disabled political thought and served as one of the main engines driving the naturalization of the idea of cosmopolitan law (e.g., Simon Roberts). Modern law, and especially modern criminal law, has always brought with it the whole subjecting and governmental apparatus of sovereignty and the modern state. What is more, as the work of Arendt, Foucault, Schmitt and Agamben has done so much to show, it is not so easy to escape from sovereignty in a context where

69 *Tadić Decision*.

70 See gen. Meron, *supra* note 5; and S.R. Ratner, 'Why Only War crimes? De-Linking Human Rights Offenses from Armed Conflict', 4 *Hofstra Law and Policy Symposium* (1999), 75–90.

71 See *supra* note 4.

it has defined law itself for three centuries, and where every widely taught legal and political vocabulary already naturalizes sovereignty. An interesting example of this is from a conversation between Foucault and a Maoist student group on the implications of their project to set up people's courts to judge the police in Paris in 1971:

Can we not see the embryonic, albeit fragile form of the state apparatus reappearing even now... Are you certain that this is a 'neutral institution'?⁷²

5 Conclusion: Law's Teloi: Civitas Maxima as Cosmopolitan Sovereignty

In 1994, the obvious dualist retort to the ICL School's expansive interpretation of IICJ as categorically non-sovereign was to point out that it was created by the UN, through the ICTY, an institution whose basis remains sovereign State-Parties, and that long-established rules of jurisdiction and derivation of power limit both the type (i.e., judicial, legislative, executive, etc.) and scope of the legal jurisdiction.⁷³ Because neither the UN itself, nor the Security Council, have been recognized as having lawmaking or legislative power under IL, there is no way a comprehensive judicial jurisdiction could be legally created on that basis.⁷⁴ As we saw, this was the interpretation of the ICTY which was the primary issue of concern for the Chinese and Russian representatives in the SC debates in 1994; but even the skeptics were ultimately assuaged by the S-G's assurances that they did not believe they were creating a permanent ICL jurisdiction. Their example was the comprehensive preliminary S-G Report, compiled by the S-G's legal team which clearly states that the ICTY was an *ad hoc* and limited tribunal "circumscribed in scope and purpose" and – in what its dualist advocates seem to have sincerely believed was simultaneously a statement of fact and sufficient formal legal reservation – the creation of the Tribunal "does not relate to the establishment of an *international criminal*

72 M. Foucault, 'On popular justice: A discussion with Maoists', in C. Gordon (ed.), *Power/knowledge: Selected Interviews and Other Writings, 1972–77*. (Pantheon Books, New York, NY, 1980), 3. This is a conversation between Foucault and Maoist student group on their project to set up a people's courts to judge the police in Paris in 1971.

73 *Tadić* Decision.

74 *Ibid.*

jurisdiction in general nor to the creation of an international criminal court of a permanent nature (*italics added*).⁷⁵

In order to be able to bypass these claims, and because that was what was necessary to making ICJ precedent, Chief Judge Cassese's *Tadić* Decision held that requirements inherent in the "judicial character" of any court and its "*competence de la competence*," as well as in the concepts of judicial independence and fair trial, *effectively requires* the extrapolation *everything necessary* to proper legality.⁷⁶ While this started with seemingly prosaic things like the rules of procedure, crimes, and defendant's rights, the lack of any kind of specific limit on this power has meant that, in the practice of the ICTY, these *teloi* in the "judicial character" of the ICTY, as a court, quickly expanded to include much more, including the controversial US-style judicial review and separation of powers (where no such tradition existed in traditional IL or Europe).⁷⁷ All this allowed Cassese to ultimately claim that legality requires that it is not the Security Council, but rather the Tribunal, as embodied in the judiciary, is that necessarily the *source and guarantor* of the *rights* it guarantees. More problematically still, if predictably, these last *teloi* then require all that is necessary for a criminal trial, and this then requires the full power and apparatus of a court, which in turn requires investigative and police and prosecutorial power, etc.

Based on nothing more than the *Tadić* precedent, this could include everything necessary to the apparatus of the modern state, because it recognizes no limits. All of this is empirically fascinating, but it is deeply problematic legally, politically and, particularly, where it has been used covertly to radically change our broader system of law and material order in a manner that fundamentally undermines ICL. The problem is that, whatever one thinks of the traditional sovereignty-based IL system one must be wary of what it means to chose *modern* statist criminal law as the institution on which to build a global community, precisely because that community will define its account of both power and freedom through the extrapolated concept of sovereignty inherent in modern law. Make no mistake: For the ICL School monists, ICL is the first movement in the legal elaboration of a cosmopolitan sovereignty.

75 S-G's Report, *supra* note 57, para. 12.

76 *Tadić* Decision, para. 11.

77 H. Klug, 'Introducing the devil: An institutional analysis of the power of constitutional review', 13 *South African Journal of Human Rights* (1997) 185–207.