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SOME THOUGHTS ON THE RULE OF LAW IN INTERNATIONAL LAW

Ever since the concept of Rule of Law made its appearance in the England of the 17th century¹, it has lent itself to several interpretations and has been given various definitions. In continental Europe the efforts to define it produced *Rechtsstaat* in Germany and *État de droit* in France². In the 19. century Albert V. Dicey, a British authority on constitutional law described it as the “absolute supremacy or predominance of regular law as opposed to arbitrary power”³. The author of the present article, would by no means attempt to present the diversity of interpretations and still less to offer comments on them, but will confine itself to stating that what we have here is a fundamentally important axiom of law, which is taken to comprise values like justice, legal certainty, equality before the law, freedom, division of powers, and legality as well as prohibition of arbitrary exercise of power, etc.

As regards operation of the Rule of Law in international law, pre-eminent authors were sceptics, and referring to the special nature of international law maintained the view, as late as the middle of the 20th century, that in international law the Rule of Law could prevail only with considerable limitations⁴. Other authors consider irrelevant to subject the system of international law and diplomacy to evaluation on the basis of the criteria derived from municipal law; while they admit that “It would be absurd if it were not possible to evaluate the workings of the international system in terms of the Rule of Law”⁵. According to Thomas M. Franck “Like any maturing legal system, international law has entered its post-ontological era. ... The questions to which the international lawyer must now be prepared to respond: ... Is international law effective? Is it enforceable? Is it understood? And, the most important question: Is international law fair?”⁶ Although there are authors who question the concept of the “maturity” of international law⁷, one should admit that in international law there is a tendency of constitutionalisation⁸.

This is true so much the more as the efforts at having the Rule of Law prevail can also be traced in international law. Even at the end of the 19th century the Convention for the Pacific Settlement of International Disputes, adopted at the first Hague Peace Conference in 1899, expressed in its Preamble that the Contracting Parties “Desirous of extending the *empire of law* (my italics – V.L.), and of strengthening the appreciation of international justice;”. Also, a similar idea is embodied in the UN Charter, where the peoples of the United Nations spelling out their determination “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained...”.

It appears that by our days the international community have come to regard international law, too, as being sufficiently “ripe” for calling it to account the application of the principles of the Rule of Law. At the World Summit of 2005, held with this in mind, the heads of state and government expressed their commitment to the purposes and principles enshrined in the UN Charter and to a universal world order wherein the Rule of Law will be reached both at the national and in international level.

I.

In the pertinent literature of our days all authors are agreed that the Rule of Law operates in international law in a way necessarily different from that in municipal legal systems, for certain elements that are decisive to the Rule of Law in municipal laws are doubtless absent from international law.

Thus one cannot speak of division of powers in international law, chiefly because there exists no independent legislative power therein, the norms of international law being enacted by the subjects of international law themselves, and it is the very States that adopt the rules restrictive of their own freedom of action.

At the same time, however, there is also in international law a special system of hierarchy of norms which in municipal laws is usually referred to as the hierarchy of sources of law.

That hierarchy in national legal systems is founded upon the place and role as defined by the Constitution and assigned to the legislators within the system of state organs⁹, that is to say that the hierarchy of the sources in municipal laws corresponds to the place which the legislators occupy in the structure of state organs. In international law

there is no ground to speak of a hierarchy of sources of law adjusted to the standing of law-makers in a system of some sort, because all norms of international law, whether treaty law or customary law, derive from the legislative activities of States as subjects of international law on an equal footing.

Yet all of that is not to imply the absence of some hierarchical order in respect to the sources of international law. It should be said at the outset that on this point that we are not referring to the so-called *Grundnorm* and that the order of hierarchy describe bellow is not identical with the Kelsen-Merkl theory of degrees.

The hierarchy of norms in international law rests on the kind of binding force which the States making the rules of international law attribute to the different norms.

It is indisputable that the so-called *ius cogens* norms stand at the top of the hierarchy of norms in international law. In the science of international law much attention has been given to defining the concept of *ius cogens* and listing the norms thereof¹⁰. It can be considered as generally accepted that a norm is classified as *ius cogens* if States may not depart from it, not even by common accord in their *inter se* relations. For a definition of *ius cogens* norms, reference is most often made to Art. 53 of the 1969 Vienna Convention on the Law of Treaties, which runs as follows: "... a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

At the next level of the hierarchy one can find the United Nations Charter, under Art. 103 thereof, which reads that: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". There is a compelling need to give some explanation of this provision. On the one hand, Art. 103 obviously applies to agreements between United Nations Member States only, and the obligations under the Charter take precedence over those under any other international agreement as between Member States. On the other hand, this provision refers merely to treaty norms, without bearing on customary law¹¹.

As concerns the relationship between *ius cogens* and the Charter, the latter contains some provisions – such as para. 4 of Art. 2 prohibiting the threat or use of force – which clearly qualify as *ius cogens*, meaning that States must refrain from the use of force or acts of aggression. However, there are also provisions in the Charter that are not considered as norms of *ius cogens*, and States may by common accord depart from them.

If, at the time of its conclusion, a treaty is in conflict with a *ius cogens* provision of the UN Charter, that treaty is null and void under the terms of Art. 53 of the 1969 Vienna Convention on the Law of Treaties. If, however, such conflict exists with a Charter provision other than one of *ius cogens*, the treaty will not be null and void, but will be inapplicable as against the Charter. More accurately, in case of a conflict between the two, the obligations under the Charter will prevail over those arising from a treaty¹².

For quite some time, international law or international jurists have been grappling with the problem of determining the criteria by which a norm of general international law can be declared to be one of *ius cogens*. To tell the truth, Art. 53 quoted earlier of the 1969 Vienna Convention is, to some extent, misleading in this case, for, under the said provision, regarded as *ius cogens* is a norm which the international community of States have declared to be peremptory, prohibiting any departure from it. This provision gives rise to the problem that States may, in a treaty, actually deem any international norm to be one admitting of no departure from it. This is clearly evidenced by the existence of numerous treaties in which the signatories expressly prohibit themselves from departing from certain provisions of the given treaty. Nevertheless, one would be mistaken in thinking that such a stipulation would operate to turn a treaty provision into *ius cogens*. This was precisely the point highlighted by the International Law Commission in emphasizing that it is the particular nature of the subject-matter of a norm of general international law (e.g. the importance of an object protected by law) rather than the form of that rule which imparts a *ius cogens* character to a particular norm¹³.

Regarding the essence of *ius cogens* Jiménez de Aréchaga, former President of the International Court of Justice points out that "The international community recognizes certain principles which safeguard values of vital importance for humanity and correspond to fundamental moral principles: these principles are of concern to all States and protect interests which are not limited to a particular State or group of States, but belong to the community as a whole"¹⁴. The author was referring, *inter alia*, to the prohibition of the use or threat of force and of aggression, the prevention and repression of genocide, piracy, slave-trade, racial discrimination, terrorism, and the taking of hostages¹⁵.

So, while in municipal laws the legislator's will may, in principle, put any norm at the highest level of the sources of law, and this is indeed done in practice, as a long list of instances could be cited in evidence that when the Constitution of a State contains provisions which it certainly was needless raising to the rank of constitutional rule, such norms were nonetheless accorded, by the legislator's act of will, the status of source of law of the highest level. By contrast, in international law, it is only norms relating to certain special objects that may become norms of the highest level.

Returning now to the hierarchy of the norms of international law, one should say that the other norms of treaty law that cannot run counter to *ius cogens* norms or the UN Charter are to be found on the third level of the system. These rules of treaty law, irrespective of how the relationship between international and internal law is conceived of, override in any case the internal law of States, since according to a well-established rule of customary international law codified by the 1969 Vienna Convention, internal law may not be invoked as justification for failure to perform a treaty obligation¹⁶.

II.

Owing to the Rule of Law, in modern times States are characterized not only by the separation of powers, but, by a system of checks and balances which prevents that one branch becoming supreme and allows one branch to limit another.

In international law the separation of powers by no means exists or functions the way it does in municipal laws, not only with legislative power lacking, but even checks and balances showing no trace. In the system of the United Nations, often apostrophized as a world government, in the ambit of international law and in the organizational structure of the United Nations there is no forum which, like the supreme courts or the constitutional courts of States, would be empowered to review the legality of acts by different principal organs.

Under the terms of the UN Charter the International Court of Justice is undoubtedly the highest judicial forum of the United Nations, but the Charter did not confer on it the right to exercise any control of legality over the activities of other principal organs. This is borne out by the documents of the San Francisco Conference, according to which all organs of the United Nations have power to interpret the Charter in their daily work without any judicial review¹⁷.

This notwithstanding, the International Court of Justice has been confronted, in several cases, with the responsibility of deciding upon the legality of certain actions by the United Nations or its organs. Mention may be made of advisory opinions, in which the Court had to pronounce on the validity or legality of a previous action taken by an international organization¹⁸, that is to say that the Court was requested *post factum* to state its views on the matter. The best known among those cases are doubtless the advisory opinions given on *Certain Expenses of the United Nations* (Article 17, paragraph 2, of the Charter) and on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

One must not overlook the fact, that advisory opinions have no binding force under the terms of the Charter and the Statute, so in the said cases the Court did not practically hand down any judgements, but gave advisory opinions, which, in a considerable number of instances, entailed rather far-reaching consequences. Yet, at the same time, there were concluded, under the auspices of the United Nations, a range of treaties (e.g. headquarters agreements), which refer to the Court's advisory opinion regarding certain disputes connected with the given treaty as "decision", thereby inevitably "smuggling" into international law the concept of "binding" advisory opinion in respect of the parties concerned¹⁹.

In fact, the matter of judicial control over the legality of actions of certain United Nations organs emerged in the 1990s, in the so-called Lockerbie Cases between Libya and the United States and Libya and the United Kingdom (relating to the explosion by Libyan terrorists over Lockerbie of Scotland of PanAm 103 Flight on 21 December 1988). The key question of the legal cases concerned the jurisdiction of the highest judicial forum of the United Nations to consider the legality of the action taken by the Security Council²⁰.

Lying behind the question raised by Libya in the Lockerbie Cases was actually that of whether there is a limitation of some sort on the powers of the Security Council in its appraisal of a situation, and if there is any, what it is, and which organ other than the Security Council is also authorized to establish the existence of such limitations²¹. As can be seen, what the Court was requested to do was to judge the legality of an action by one of the most important political organs of the United Nations.

Precisely for this reason, many authors in the pertinent literature liken the Lockerbie Cases to the *Marbury v. Madison* Case²², which was decided by the Supreme Court of the United States in 1803 and in which that Court while upholding the legality of a disputed act of a political branch of government, gave itself the ultimate power to determine whether the political branch has acted constitutionally²³. The similarity of the Lockerbie Cases and the *Marbury v. Madison* is self-evident for the added reason that the issue of judicial review of decisions of political organs is unclarified²⁴ both in the United Nations Charter and in the Constitution of the United States.

In the Lockerbie Cases the International Court of Justice although did not, in point of fact, rule out the possibility of judicial review of the legality of a UN principal political organ's decision, the Security Council's action in imposing sanctions it adjudged *intra vires*²⁵.

In connection with the International Court's review of the legality of Security Council's actions one cannot but agree with the authors claiming that the Security Council may not act without any control, but that the Court's power of judicial review of legality is concurrently limited. The Court does have some power of judicial review, but that power does not imply a right to replace, by its own discretionary decision, statements made by the Security Council concerning the existence of threats to international peace, a breach of peace or acts of aggression, or political steps to be taken in pursuance of such statements. At the same time, however, as it was held by the Court itself "... the Court, as the principal judicial organ of the United Nations, is entitled indeed, to ensure the rule of law within the United Nations system and, in cases properly brought before it, to insist on adherence by all United Nations organs to the rules governing their operations"²⁶. In the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* some States wanted to have the opinion of the Court regarding the legality of the General Assembly's action requesting for an advisory opinion²⁷.

Considering that the principal organs of the United Nations are in a coordinate, not subordinate, relationship with one another and that they are under obligation to cooperate, may be it would be desirable that these organs should, from the legality viewpoint of their acts, request the Court's advisory opinion *ante factum*²⁸.

Of course, as against a request for *ante factum* advisory opinion, one may rightly argue that in many cases there is no time to wait until the Court delivers its decision, yet this is but part of the truth as the length of decision-mak-

ing in advisory opinions can be shortened, simply by reason of the fact that the Court is in a better position to keep of such proceedings under control, since e.g. preliminary objections may not be filed, and requests for *ante factum* advisory opinions might even be accorded priority. For that matter, the length of advisory proceedings could also be shortened by the Court deciding these cases in a chamber.

Rule of Law in international relations could be strengthened, on the one hand, by international organizations making more frequent use of the possibility offered by *ante factum* advisory opinions and, on the other hand by extending the list of those authorized to request for such advisory opinion. (For the matter of that, here one can have in mind the UN Secretary-General in the first place.) It is difficult to accept that the Secretary-General, who indisputably is not only the first official of the World Organization, but is one of the most important actors of international political life, has no right of his own to resort to the assistance of the International Court of Justice in the solution of legal matters arising within his activity. Incidentally, Court's decisions in advisory opinions would clearly have a beneficial effect on the work of all United Nations organs, and decisions supported by the Court's prestige would by all means influence the will of States underlying the decisions made in such organizations, insofar as they have to do with the requirement of the fullest possible adherence to the Rule of Law.

III.

In the last decade of the 20th century international law arrived at an important landmark of its development when the international criminal tribunals were set up to prosecute individuals responsible for acts of serious violations of international humanitarian law, namely the three *ad hoc* criminal tribunals established by the Security Council, to prosecute perpetrators of war crimes committed on the territories of the former Yugoslavia, Rwanda and Sierra Leone; and the first permanent International Criminal Court, whose Statute was adopted at the International Conference of Plenipotentiaries, held in Rome in June and July 1998²⁹. The proposal for the creation of an international court for the prosecution of persons violating international humanitarian law appeared more than 100 years ago³⁰, but it had cost two world wars, hundreds of armed conflicts taking a toll of many millions of human lives, a sea of horrors and cruelties before a permanent international criminal court was established. The most important message of the setting up of international criminal tribunals is that persons, be they even the highest-ranking political leaders of a State who have committed war crimes, acts of genocide, or crimes against humanity, must not go unpunished. The international criminal tribunals seek to punish perpetrators of grave offences, and they are farthest from any concept of collective guilt, which overshadowed as it did the activity of the Nuremberg International Military Tribunal, the predecessor of all the international criminal tribunals functioning at present.

Of the three *ad hoc* tribunals, it is especially the International Criminal Tribunal for the Former Yugoslavia³¹ (hereinafter: the "Yugoslav Tribunal") – which was set up to the prosecution of individuals responsible for serious violations of international humanitarian law committed on the territory of former Yugoslavia during the Balkan war – whose activity has received great attention. The beginning of the trial of Slobodan Milosevic on 12 February 2002 was seen as the triumph of international law and of justice, since the Serb leader was the first head of state in mankind's history to answer for his deeds before an international criminal court. As is known, Milosevic died in his prison and therefore no sentence was passed upon him, but that trial and the other cases decided or still pending before the international criminal tribunals are all indications that no one, whatever high post he or she holds, can escape being held responsible.

The Yugoslav Tribunal was established by Security Council decision 827 in May 1993. to prosecute perpetrators of serious crimes such as murder, torture, rape, enslavement, destruction of property and other crimes listed in the Tribunal's Statute, committed from 1991 to 2001 against members of various ethnic groups in Croatia, Bosnia and Herzegovina, Serbia, Kosovo and the Former Yugoslav Republic of Macedonia.

With the setting up of the Yugoslav Tribunal the Security Council made an unexampled decision, taking a step that gave rise, both in the pertinent literature and at numerous fora, to the question whether the Security Council is free, in performing its duties relating to the maintenance of international peace and security, to go the length of establishing a criminal tribunal. It has been widely argued that no single word on this point is contained either in the United Nations' Charter or in the documents of the San Francisco Conference, which elaborated the constituent instrument of the World Organization. Thus, to put it differently, the issue concerns the legality of the establishment of the *ad hoc* criminal tribunal.

As can be seen, the issue concerning the legality or the review of actions of certain principal organs of the United Nations was brought up again in connection with the Yugoslav Tribunal, as it had been in the Lockerbie Cases. With regard to the Yugoslav Tribunal, this problem was dealt with by that Tribunal itself in the Tadic Case. Incidentally, that situation resulted from the fact that whereas the Charter of the Nuremberg International Military Tribunal had ruled out any query the Tribunal's legitimacy, the documents relative to the establishment of the Yugoslav Tribunal did not touch upon this point.

In the Tadic Case the Trial Chamber as well as the Appeals Chamber of the Yugoslav Tribunal held that the Security Council had jurisdiction to set up the Yugoslav Tribunal, since under the Charter the Security Council has power to decide acts qualifying as "threats to the peace", and that it was solely for the Security Council to decide on measures necessary in such cases. According to the Trial Chamber, the Security Council, in adopting its decision 827 on the establishment of the Yugoslav Tribunal, "was 'convinced' that, in the 'particular circumstances of former Yugoslavia', the establishment of the International Tribunal would contribute to the restoration and maintenance

of the peace, the course it took was novel only in the means adopted but not in the object sought to be attained.”³² There is no doubt that the Charter contains nothing to suggest that Chapter VII left room for instituting an *ad hoc* criminal tribunal, but, on the one hand, the Charter confers very wide power upon the Security Council, and, on the other, the list of measures that the Security Council may decide upon under Art. 41 can in no way be regarded as exhaustive and no interpretation of Art. 41 justifies excluding the establishment of an *ad hoc* criminal tribunal, which, in the particular circumstances then prevailing, appeared to be very appropriate.³³

Nevertheless, the Trial and the Appeals Chambers had different views in respect to an eventual review of Security Council decisions. According to the Trial Chamber, the broad discretion given to the Security Council under Chapter VII, suggests that decisions taken under this head are not subject of review³⁴, which is not amenable to the power either of the International Court of Justice or of the *ad hoc* criminal tribunal³⁵. On the other hand, the Appeals Chamber did examine in detail not only its own jurisdiction, but, in addition to the matters of jurisdiction in a narrow sense, also the question of whether the tribunal had been duly established by law³⁶. The Appeals Chamber stressed that “There is no question, of course, of the International Tribunal acting as a constitutional tribunal, reviewing the acts of the other organs of the United Nations, particularly those of the Security Council, its own ‘creator’”³⁷. In order, however, to be enabled to deal with the Tadic Case, the Tribunal considered the question whether it can examine the legality of its establishment by the Security Council, solely for the purpose of ascertaining its own ‘primary’ jurisdiction over the case before it³⁸.

In evidence of the fact that the Appeals Chamber recognized that it had jurisdiction to examine the objection against its jurisdiction based on the invalidity of its establishment by the Security Council and thus the permissibility of judicial review of the Security Councils decisions, one can quote the finding of the Appeals Chamber, which reads as follows: “Obviously, the wider the discretion of the Security Council under the Charter of the United Nations, the narrower the scope for the International Tribunal to review its actions, even as a matter of incidental jurisdiction. Nevertheless, this does not mean that the power disappears altogether, particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter”³⁹.

In any case, the Appeals Chamber should be credited with having had the courage to spell out that Security Council decisions may indeed be subject to judicial review. At the same time, however, it was not the most appropriate course to follow that an *ad hoc* criminal tribunal, which was set up by the Security Council, should have been the first international judicial forum to enunciate, in its decision of a binding nature, the permissibility of judicial review of certain Security Council decisions. Such is the case all the more so since what the Yugoslav Tribunal did in the Tadic Case was, in effect, to justify the legality of its own existence or, if you like, of its birth.

There is no question, as it was mentioned earlier, that the International Court of Justice has similarly considered the legality of actions by certain principal organs of the United Nations in several cases, but, on the one hand, these were advisory opinions, which do not have binding force, and, on the other, the International Court of Justice exercised a large measure of caution while touching upon these questions in contentious cases. For that matter, the Appeals Chamber of the Yugoslavia Tribunal subjected the Security Council’s powers to a much closer scrutiny than the International Court of Justice had done in the Lockerbie Cases in the context of relationships between the Security Council and the Court. The Appeals Chamber underlined that on the basis of Chapter VII of the Charter the Security Council certainly had authority to set up the *ad hoc* criminal tribunal as a measure taken in accordance with Chapter VII of the Charter after it had established the existence of a threat to peace.

For all this, the issue of judicial review of acts of the Security Council and the General Assembly is far from considered as closed, and that for various reasons. First, the *ad hoc* criminal tribunal, the Yugoslav Tribunal is a judicial forum established in order to prosecute individuals, not to render final decisions on questions concerning relationships between the principal organs of the United Nations. Second, and this is in fact the real problem which in that article were not addressed, notably the degree to which judicial review has a bearing on the efficiency of the international security system.

If one takes a realistic view of international relations, one should recognize that the efficiency of the international security system would be jeopardized by leaving the decisions and resolutions of the Security Council and the General Assembly open questioning their legality without any limitations⁴⁰. On that matter one should agree with the separate opinion of Judge *ad hoc* Elihu Lauterpacht submitted in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* stating “That the Court has some power of this kind (power of judicial review – V.L.) can hardly be doubted, though there can be no less doubt that it does not embrace any right of the Court to substitute its discretion for that of the Security Council in determining the existence of a threat to the peace, a breach of the peace or an act of aggression, or the political steps to be taken following such a determination. But the Court, as the principal judicial organ of the United Nations, is entitled, indeed bound, to ensure the rule of law within the United Nations system and, in cases properly brought before it, to insist on adherence by all United Nations organs to the rules governing their operation⁴¹”.

¹ Samuel Rutherford’s work of 1644, entitled “Lex, Rex”, was the first to lay the theoretical foundations of this concept.

² Cf. R. C. van Caenegem: An Historical Introduction to Western Constitutional Law. Cambridge University Press, 1995. 16.

³ See Albert V. Dicey: An Introduction to the Study of the Law of the Constitution, 1885.

⁴ H. Lauterpacht: The Function of Law in the International Community. Clarendon Press, Oxford, 1933. 399-400. One can find a similar idea in Lauterpacht’s book published 25 year later, see The Development of International Law by the International Court.

⁵ Ian Brownlie: *International Law at the Fiftieth Anniversary of the United Nations. Recueil des Cours*, 1966. 212-213.

⁶ Thomas M. Franck: *Fairness in International Law and Institutions*. Clarendon Press, Oxford. 1995. 6.

⁷ Cf. David Dyzenhaus: *The Rule of (Administrative) Law in International Law. Law and Contemporary Problems*, 2005. 153.

⁸ Cf. V. Andrea Bianchi: *Ad-hocism and the Rule of Law. European Journal of International Law*, 2002. 263-272.

⁹ Vilmos Peschka: *Jogforrösi rendszere. (the system of the sources of law)* In: *Біллам- йс Jogtudományi enciklopédia (Encyclopedia of State and Law)* Ed. Imre Szabó, Akadémiai Kiadó, Budapest, 1980. 869. .

¹⁰ See. Sir Ian Sinclair: *The Vienna Convention on the Law of Treaties*. Manchester University Press, Manchester. Second ed. 1984. 203-226. Michel Virally: *Réflexions sur le „jus cogens”*. *Annuaire Français de Droit International*, 1966. 23-29. Alexander Orakhelashvili: *Peremptory Norms of International Law*. Oxford University Press, Oxford, 2006.

¹¹ On Art. 103. see. *The Charter of the United Nations. A Commentary. Second Edition. vol. I-II*. Ed. Bruno Simma, Herman Mosler, Albrecht Randelzhofer, Christian Tomuschat, Rüdiger Wolfrum. Oxford University Press, 2002. 1294-1302.

¹² In the Nicaragua Case (1984) the International Court of Justice referred to the precedence of obligations under the Charter. Cf. *Case concerning Military and Paramilitary Activities in and against Nicaragua. Jurisdiction of the Court and Admissibility of the Application. Judgement 26 November 1984. ICJ Reports*, 1984, 440.

¹³ Cf. *The Vienna Convention on the Law of Treaties (Travaux Préparatoires)* Ed. and pref. Dietrich Rauschning. Alfred Metzner Verlag GmbH, Frankfurt am Main, 1978. 377.

¹⁴ Eduardo Jimenez de Aréchaga: *International Law in the Past Third of the Century. Recueil des Cours*, 1978. vol. I.

¹⁵ Jimenez de Aréchaga holds that observance of these principles is rooted in the conviction of the international community of States, and is required of all members of the community, and that violation thereof meets with disapproval from all members of the community *Ibid.* 64-67.

¹⁶ *Ibid.*

¹⁷ Cf. Art. 27 of the 1969 Vienna Convention on the Law of Treaties.

¹⁸ Cf. *Documents de la Conférence des Nations Unies sur l'Organisation internationale*, San Francisco, 1945. Tome XIII. 719-720.

¹⁹ See e.g. the following advisory opinions delivered by the Court: *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal* (1954), *Judgements of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO* (1956); *Constitution of the Maritime Safety Committee of IMCO* (1960); *South West Africa case* (1971).

²⁰ For advisory opinions with "binding" force, see Roberto Ago: "Binding" Advisory Opinions of the International Court of Justice. *American Journal of International Law*, 1991, 439-451.

²¹ In the Lockerbie Cases, under the pretext of a request to order provisional measures, the International Court of Justice had to decide whether one of the principal organs of the United Nations had acted *ultra vires*, exceeding its competence as defined by the Charter, in deciding such sanctions against Libya as were to cause irreparable damage to that country.

On the Lockerbie Cases see Michael W. Reisman: *The Constitutional Crisis in the United Nations. American Journal of International Law*, 1993. 83-100.; T. Stein: *Das Attentat von Lockerbie vor dem Sicherheitsrat der Vereinten Nationen und dem Internationalen Gerichtshof. Archiv des Völkerrechts*, 1993. 206-229. Vera Gowlland-Debbas: *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie case. American Journal of International Law*, 1994. 643-677. Peter Malanczuk: *Reconsidering the Relationship between the ICJ and the Security Council. In: International Law and The Hague's 750th Anniversary*. (Ed. Wybo P. Heere) T.M.C. Asser Press, 1999. 87-99.

²² Cf. *Individual*, opinion of Judge Shahabuddin. *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie. Order of 14 April 1992. ICJ Reports*, 1992, 142.

²³ On the *Marbury v. Madison* Case, see Erwin Chemerinsky: *Constitutional Law Principles and Policies*. Aspen Law Business, New York, 1997, 36-44.

²⁴ Cf. Thomas Franck: *Editorial Comment. The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?* *American Journal of International Law*, 1992, 519.

²⁵ Cf. *Ibid.* 520.

²⁶ Cf. *Ibid.* 521.

²⁷ *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide. Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, Order of 13 September 1993. *ICJ Reports*, 1993, 439.

²⁸ In its advisory opinion the Court held that the General Assembly did not exceed its competence requesting for the advisory opinion. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion of 9 July 2004. I.C.J Reports*, 2004.

²⁹ Kenneth Keith refers to the argument of the Israel delegate in connection with the *South-West Africa (Voting) Case*, saying that a *post factum* request would elevate the International Court of Justice to the rank of international constitutional court, which the founders had no intention of doing.

Kenneth James Keith: *The Extent of the Advisory Jurisdiction of the International Court of Justice*. A. W. Sijthoff/Leyden. 1971. 228.

³⁰ The Statute entered into force upon the deposit of the 60th instrument of ratification as provided for in Art. 126 thereof, that is on 1 July 2002. Thomas Lubanga Dyilo of the Congo, who was transferred by the Congolese authorities to the International Criminal Tribunal in March 2006, is the first person to be tried by the International Criminal Court. Lubanga was a rebel leader and accused of accused of conscripting, enlisting, and using child soldiers.

³¹ That was proposed by a Swiss jurist, Gustav Moynier, who was the co-founder of the predecessor of the International Committee of the Red Cross.

³² International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

³³ *Prosecutor v. Dusko Tadic. ICTY. Trial Chamber, Decision on the Defence Motion on Jurisdiction*. 10 August 1995. para. 22.

³⁴ Cf. *Ibid.* paras. 27.

³⁵ Cf. *Ibid.* para. 7.

³⁶ *Ibid.* paras. 10-13. and 17.

³⁷ See *Prosecutor v. Dusko Tadic.* ICTY, Judgement of the Appeals Chamber on the legality of the establishment of the ICTY and on its jurisdiction, 2 October 1995. paras. 26-48.

³⁸ *Ibid.* para. 20.

³⁹ *Ibid.*

⁴⁰ *Ibid.* para. 21.

⁴¹ A similar view was expressed by Greenwood. See Christopher Greenwood: *The Impact of Decisions and Resolutions of the Security Council on the International Court of Justice.* In: *International Law and The Hague's 750th Anniversary* (Ed. Wybo P. Heere) T.M.C. Asser Press, 1999. 87-99. 85-86.

⁴² Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide. (Bosnia and Herzegovina v. Serbia and Montenegro) Order of 13 September 1993. Separate Opinion of Judge *ad hoc* Lauterpacht. *I.C.J. Reports*, 1993. 439.

Резюме

У статті розглядається деякі аспекти верховенства закону у міжнародному праві. Автор спробував представити важливу аксіому закону стосовно значення справедливості та законної впевненості.

Ключові слова: верховенство закону, міжнародне право, міжнародне співтовариство, міжнародний Судовий орган.

Резюме

В статье рассматриваются некоторые аспекты верховенства закона в международном праве. Автор сделал попытку представить важную аксиому закона относительно значения справедливости и законной уверенности.

Ключевые слова: верховенство закона, международное право, международное сообщество, международный Судебный орган.

Summary

In the article is examined some aspects on the rule of law in international law. An author made to attempt to represent the important axiom of law in relation to the value of justice and legal certainty.

Key words: rule of law, international law, international community, International Court of Justice.

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ДЕРЖАВИ-ПОКРОВИТЕЛЬКИ ТА ЇХ РОЛЬ В ІМПЛЕМЕНТАЦІЇ МІЖНАРОДНОГО ГУМАНІТАРНОГО ПРАВА

Крім ознак, притаманних механізму імplementації міжнародного права загалом чи характерних для будь-якої з його галузей, механізм імplementації міжнародного гуманітарного права наділений низкою особливостей, зміст яких визначається специфікою суспільних відносин, що регулюються міжнародним гуманітарним правом. Однією з таких особливостей є важлива роль держав-покровительок у цьому процесі.

Так, ст. 8 загальна для чотирьох Женевських конвенцій 1949 р. говорить, що ці Конвенції будуть застосовуватися за сприяння та під контролем держав-покровительок, на які покладена охорона інтересів сторін, що перебувають у конфлікті.

У жодному з існуючих міжнародних договорів немає визначення держави-покровительки. Однак більшість вчених і практиків сходяться на тому, що Державою-Покровителькою є нейтральна держава, яка отримує від воюючої держави повноваження представляти її інтереси та інтереси її громадян¹.

Практика призначати державу-покровительку бере свій початок у XVI ст. і зароджується паралельно із розповсюдженням постійних дипломатичних представництв. Однак утримувати власні закордонні представництва могли собі дозволити лише багаті держави. Тому держава, яка не мала свого посольства на території певної держави, досить часто доручала представляти її інтереси та інтереси її громадян третій державі. При цьому, довгий час така практика використовувалося лише в мирний час. В умовах війни її вперше було використано у 1870 р. під час франко-пруської війни² і вже під час Першої світової війни така практика була