Permanent International Criminal Court. Institutional Development of the International Humanitarian Law

RUBIKON, No. 3-4 (1999): 34-43.

The article is the outcome of the research on the International Criminal Court, which I conducted during my internship at the World Federalist Association in Washington D.C. in May-July 1999.

Summary of the article

The article consists of three parts: the first one treats about the theoretical and institutional development of humanitarian international law. The second part examines the concepts of international humanitarian law and universal jurisdiction. The final chapter addresses the issue of the limits, which were introduced to the Statute of the International Criminal Court during the Rome Conference and which were connected with the jurisdiction of the future Court.

I. The article starts from the analysis of a) theoretical evolution of the international crimes and b) institutional development of judicial organs responsible for prosecuting those who were accused of committing international crimes.

a) In the article I present an incremental development of a customary law and a growing number of international treaties, which address humanitarian issues and a proper conduct of war. I start from the work by Hugo Grotius "On the Law of War and Peace", where he explored basic principles of humanitarian treatment of the victims of war. Then, I proceed with the study of various conventions of the nineteenth and twentieth centuries, which are relevant to the international crimes. I conclude the chapter with the assessment of the decisions and verdicts of the International Criminal Tribunals for Rwanda and Former Yugoslavia, which establish important precedents in the field of the international humanitarian laws.
b) The second chapter includes an institutional evolution of judicial organs responsible for the implementation of the international humanitarian laws. I begin with art. 227 of the Treaty of Versailles, in which the victorious Allies envisaged a special tribunal to prosecute Wilhelm II of Hohenzollern. Then, I examine the Nuremberg and Tokyo tribunals and their Charters. Subsequently, I describe the efforts of the UN International Law Commission to establish a permanent International Criminal Court. Finally, I analyze the establishment of the International Criminal Tribunal for Former Yugoslavia and the International Criminal Tribunal Rwanda.

II. After describing developments, which paved the way to the Rome Conference and signing the Statute of the International Criminal Court in 1997, I provide a definition of the international humanitarian law. The international humanitarian law is defined as an international law, derived from various international agreements (e.g. treaties,

conventions) and customary law[1], which refers to the most serious crimes, considered by the states a grave breach of the international laws and international customs.

After specifying the concept of the international humanitarian law, a notion of universal jurisdiction is considered. Universal jurisdiction, having its roots in a customary law, is understood as "jurisdiction over persons suspected of certain grave crimes under international law, no matter where these crimes occurred, even if they took place in the territory of another state (not a party to a treaty or convention covering these crimes- MB), involved suspects or victims who are not nationals of their state or posed no direct threat to the state's own particular security interest" [2].

III. Based on the notion of universal jurisdiction and on the earlier analysis of the development of international humanitarian law, the article focuses on the jurisdiction of the International Criminal Court as it is formulated in the Statute (art.5 of the ICC Statute). I delineate the ICC jurisdictional domain by specifying certain limits on the court jurisdiction enacted to its Statute. For example, art. 16 gave the Security Council a "delay power", art. 17 confirmed a principle of complementarity[3], and art.124 provided a seven-year jurisdictional phase-out for new signatories.

The article concludes that despite a great number of international conventions, strengthened by the judicial precedents of the International Tribunal and a notion of universal jurisdiction, the founding fathers of the ICC, although further codifying the international humanitarian laws, were not willing to equipped the Court with a jurisdiction that would ensure that international crimes will not go unpunished. Thus, the Court, in relation to certain crimes, will only prosecute people who are nationals of the state, which ratified the ICC Statute (*a national principle*) or people who committed their crimes on a territory of the state, a signatory to the Statute (*a territorial principle*)[4]. The proposals to extend the Court's jurisdiction to include a state with a custody of the accused or a state of nationality of the victims were unfortunately rejected[5].

---

[1] Customary law is understood as a "general practice accepted as law" (Art. 38 of the Statue of the International Court of Justice). It may be argued that despite the fact that a particular state is not a party to a certain treaty, it is still bound by a principle of international customary law codified in that treaty. This is because a treaty may have such a wide acceptance, so as it reflects the practice of all states, thus binding all of them (even those, which are not parties to a treaty).

[2] Universal jurisdiction, 14 principles on the effective exercise of universal jurisdiction, Amnesty International, May 1999

[3] *Complementarity principle* in the legal system can be compared to the *subsidiarity principle* in the economic and political system of the European Union. Both principles stress the same thing: what is feasible to be done effectively on the national level shall not be a responsibility of the international organ.

[4] Art.12, paragraph 2, point a) and b) of the Rome Statute of the International Criminal Court.

[5] Such caution approach is quite surprising (to say the least) since the "current international law (based on the idea of universal jurisdiction- MB) allows a state in custody of a suspect to try that person on charges of genocide, crimes against humanity and war crimes" J. Podgers, "War crimes court under fire", ABA Journal/ September 1998, p. 67.