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A HUMAN BEING – A VALUE, INSTRUMENT OR SUBJECT OF INTERNATIONAL POLICY?

Value of a human life. Traditional international law declared abstract entity – a state – as the one which sovereignty and right to determine the internal and international policies were a valued in international conversation. No human right agreements and declarations were adopted, no conferences and international organizations effectively advocating protection of human life held. Constant wars and persistent violation of a right to life, liberty and security.

What was the war of the past? No massive killings, ethnic cleansings and inhuman treatment of captives? Or perverted perception of these acts as an inherent part of legitimate armed fight of a state? The answer would be unambiguous.

XX century had faced two tendencies: increased cruelty and inhumanity during armed conflicts and their legal prohibition. The II World War killed millions of combatants and members of civilian population, and international community had started legal discussion of urgent necessity for developing a system of legal norms which would have protected human life. Nuremberg and Tokyo Tribunals made possible to execute a natural right of international community of behalf of humanity to condemn inhuman acts during war. International law recognized a human life as the highest value; numerous conventions were developed and signed. States, being still just abstract entities, had been declaring their loyalty to human rights, overtaking initiative to propose a new international treaty protecting a human being from a state's abuse.

Number of the inter-government organizations were established, hundreds of books written on human rights. States, including the USSR, had been amending their constitutions – «pasting and copying» the International Covenant of Civil and Political Rights provisions into their texts; at the same time developing nuclear weapons; signing Hague and Geneva conventions and working on weapons of mass distraction development. The international life whirled around developing costly instruments of protection and extermination of people. The value of human being had become a real pricey value.

Instrument. When a value is at question, it is natural that speculations arise around it; so that the *value* had become an instrument of influence. However, international policy makers bargaining human lives forgot about the *homo sapiens* nature of respected goods and their ability to interfere, impact and change a sale details. Terrorist acts, committed by civilians, have become an instrument of international influence, with the global consequences. Thousands of people were killed by «non-

state actors» seeking for certain deal and justifying their acts by unfair policy of states. Thirteen conventions and other anti-terrorist instruments and mechanisms could not and cannot eliminate the phenomenon of terrorism unless there are two factors: hypocrisy of states' policy and impunity.

Subject. The theory of international law has traditionally advocated the idea of states and their formations as the only subjects of international law. The rare arguments, often supported by the concept of human rights value and European Court of Human Rights role, for the recognition of an individual as a subject of international law, have been easily contested by the statement that it is a state's prerogative to establish, adopt and implement human rights legal and institutional instruments, including giving an individual right to claim against a state.

However, one would agree with an assertion that a term «subject» means active party of certain relationship with an ability to influence its outcome. Not dwelling on the details of today international relations, it would be fair to accept the role of terrorists it their development. 9/11, USA and Middle East issues, Israel-Palestine, Russia-Chechnya – all the conflicts and ramifications, both at the international and domestic level, have been accompanied, and in some cases caused by the terrorist attacks. All of them are committed with a use of force (arms), violence and with an aim to get a certain response from a certain state. States change there international policies and adopt new international legal norms because of the terrorists or owing to them. Is it time to accept that they are subjects, not international law in general, but international humanitarian law? Is it time to recognise terrorists as combatants?

Who is responsible? The abovementioned question would not be so important, remaining a topic of discussions among academicians, unless the answer would not mean responsibility impact for both individuals who commit terrorist acts and the states which policy allows them or causes them. When terrorism is in question, it is important to prevent impunity not only of individuals, but, not explicitly, of states. The existing international legal system have all instruments for achieving this goal: it would be sufficient to universally recognise terrorist attacks and their perpetrators as war crimes and combatants respectively. The contemporary war is different from the wars of the past, and dispute around terrorism definition and other scholasticism should not prevail upon the need of transformation of the international legal theory.

Recognition terrorists as combatants violating international humanitarian law would allow the following:

- Including individual criminal responsibility for terrorism into the subject-matter of International Criminal Court as a war crime element, and, therefore, preventing impunity through two main mechanisms – individual criminal responsibility within international or domestic jurisdiction and international legal responsibility of a state for not fulfilling its obligation to prosecute international crimes;
- Recognising prosecution for terrorism as an *erga omnes* obligation;
- Making states accountable for terrorist attacks as for breaching international humanitarian law (besides for breaching international anti-terrorist conventional obligations).

Including terrorism into the subject-matter jurisdiction of the International Criminal Court as part of war crimes would help to avoid impunity of perpetrators. The adoption of the Statute of the International Criminal Court (ICC) was a major step in a longstanding effort to establish a permanent forum of international criminal justice,[1] although the attempts to create a universal judicial mechanism for prosecuting criminals responsible for committing the most serious crimes, were undertaken since the beginning of twentieth century, starting from the World War I and continuing after Nuremberg Tribunal establishment. It is crucial to use this mechanism in prevention and punishment of the contemporary crime of the international character – terrorism.

An obligation of state-parties to the Rome Statute to domestically prosecute criminals for offences under the ICC jurisdiction is not explicitly written in the Statute, however, there are arguments for such a suggestion, that this obligation exists.[2] Both explicit language of the Preamble of the Rome Statute and implicit meaning of the admissibility provisions, construing principle of complementarity, make possible to suggest that there is such a duty.[3]

According to the Preamble, states agreed on the Statute «affirming that the most serious crimes of concern to the international community as a whole *must not go unpunished* and that their *effective prosecution must be ensured by taking measures at the national level* and by enhancing international cooperation», «determined to *put an end to impunity for the perpetrators* of these crimes and thus to contribute to the prevention of such crimes»; «recalling that it is the *duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*».[4]

Principle of complementarity does not constitute any explicit obligation. It is a strong presumption upon which the concept of complementing nature of the ICC was developed, that states would take all possible measures in order not to be determined as «unwilling» or «unable» to conduct domestic prosecutions.[5]

However, principle of complementarity has not only declarative character, it has very practical impact on the implementation process. This principle means that a state with jurisdictional competence has the first right to institute proceedings unless the ICC itself decides that the state «is unwilling or unable genuinely to carry out the investigation or prosecution».[6] The assumption in Rome was that such a determination would be straightforward for the ICC in either of two situations: when the state chooses not to exercise its jurisdiction («unwilling»); or when the states' legal and administrative structures have broken down («unable»).[7]

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[1] Philippe Kirsch, Reflections on the International Criminal Court. Essays in Honour ofAdriaan Bos 216 (Herman A.M. von Hebel at al. eds., t.m.c. Asser Press, Hague, 1999).

[2] Sharon A. Williams, The Rome Statute on the International Criminal Court: From 1947-2000 and Beyond, 38 Osgoode Hall L.J. 297, 303 (2000).

[3] David A. Tallman, Article 98 Agreements and the Dilemma of Treaty Conflict. 92 Geo. L.J. 1033, 1035-1036 (2004)

[4] Rome Statute of the International Court, U.N. Doc A/Conf.183 (1998), Preamble.

[5] See Antonio Cassese, Paola Gaeta & John R.W.D. Jones, The Rome Statute of the International Criminal Court: A Commentary 1860 (2002).

[6] Rome Statute, Art. 17

[7] Katherine L. Doherty & Timothy L.H. McCormack. «Complementarity» as a Catalyst for Comprehensive Domestic Penal Legislation, 5 U.C. Davis J. Int'l L. & Pol'y 147, 152 (1999).

Furthermore, if to prove that international crimes under the ICC jurisdiction are the *jus cogens* norms, it could be possible to argue general *erga omnes* obligation to prosecute them. The opinion that that the international crimes within the subject-matter jurisdiction of the court are of the *jus cogens* rank is widely supported. Accepting the view that prohibitions of genocide and use of force are universally recognized as the peremptory norms of general international law, the statement that war crimes and crimes against humanity have reached this rank have to be additionally proven. Among scholars attributing to these two categories of international crimes *jus cogens* rank norms are most authoritative international lawyers whose works were used and opinions considered by, for example, the International Law Commission, the ICJ, ICC, ICTY and other international institutions: Cherif Bassioni, Ian Brownlie, Antonio Cassese and others.

According to Cherif Bassiouni, a crime will be a *jus cogens* norm if it affects the interest of the world community as a whole because it threatens the peace or security of humankind and shocks the conscience of humanity. Other indications would be the number of international agreements that condemn or prohibit the conduct; criminalization of the offence into domestic law; and prosecutions for these crimes. He consequently states that «the following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, *war crimes*…. Sufficient legal basis exists to reach the conclusion that all these crimes are part of *jus cogens*.»[1]

Antonio Cassese notices that there are sufficient basis for addressing war crimes and crimes against humanity to *jus cogens*. Besides cases, he cites statements of various delegates at the Vienna Diplomatic Conference on the Law of Treaties,[2] where they stated that the fundamental principles of humanitarian law belong to *jus cogens* and the message of Swiss Government with reference to crimes against humanity. He also mentions the conflict between Security Council resolution 1497, of 1 August 2003, and Geneva Conventions of 1949, whose criminal provisions are 'grave breaches' «no doubt belong to *jus cogens*» and are intrangressible, that is, peremptory in nature.[3]

International criminal tribunals as well as domestic courts frequently have been referring to the peremptory character of *jus cogens* norms with regard to war crimes and crimes against humanity. In *Kupreskic*, the International Tribunal for Former Yugoslavia held that the «most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i. e. of a non-derogable and overriding character».[4]

The ICJ, in the decision of 8 July 1996 in *The Threat or Use of Nuclear Weapons* case, held that Rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and «elementary considerations of

[1] M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes, 59 Law & Contemp. Prob. 63, 68 (1996).

[2] Finland, Lebanon, Poland, Italy, Switzerland

[3] Antonio Cassese, International Law II Edition 203, 207 (Second Ed, 2001) (2005); see also Andrew D. Mitchell, Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: Nulyarimma v. Thompson, 24 Melbourne U. L.R. 19 (2000).

[4] Available at http://www.un.org/icty/kupreskic/trialc2/judgement/ 520.

humanity»,[1] that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute *intransgressible principles of international customary law*.[2]

Therefore, if to admit that war crimes and crimes against humanity have reached *jus cogens* rank then the states' *erga omnes* obligation is to prohibit and prosecute them. In *Pinochet,* the Belgian investigating magistrate stated «[t] he struggle against impunity of persons responsible for crimes under international law is … a responsibility of all states... [W] e find that, as a matter of customary law, or even more strongly as a matter of *jus cogens*, universal jurisdiction over crimes against humanity exists, authorizing national judicial authorities to prosecute and punish the perpetrators in all circumstances[3].

Another way to suggest the existence of general duty to prosecute international crimes within the ICC's jurisdiction would be to draw analogy with other international crimes. Genocide, crimes against humanity, war crimes, torture, and apartheid are international crimes which must be prosecuted by states according to their conventional obligations. Therefore, there are no international crimes that do not impose international obligation to prosecute them. Some of them, genocide and torture, have been universally recognized as *jus cogens*, and relevant obligations *erga omnes* certainly include duty to prosecute. Thus if another international crime would reach the *jus cogens* rank, such as terrorism as part of war crimes, why would it imply possible exclusion of duty to prosecute this crime from *erga omnes* obligation which would derive from this norm, especially if this duty was there before?

Therefore, if the crimes punishable by the ICC are *jus cogens*, and obligation to prosecute is *erga omnes*, what does the complementarity principle of the Rome Statute means, implying possible «unwillingness» or «inability» of states to fulfil their *erga omnes* obligation? It seems obvious that it would be rarely used, because the good will of states to ratify the Rome Statute supports assumption of their willingness to prosecute international criminals. The logical finding would be that this principle is the most needed for those states which have negative tendencies in their legal and political systems or specific political view of ramification of joining the Rome Statute.

Number of states signed but did not ratify the Rome Statute referring to constitutional incompatibility. However, one may find rather political than legal reasons: the constitutional problems raised derive first of all from the effect of transfer of sovereignty resulting from the ratification.[4] Legal analysis done by the Member States' Constitutional Courts, interpretation and relevant legislative efforts of states clearly showed that from the legal point of view, the spirit of the Statute and its concrete provisions are coherent with the contemporary legal order of the civilized nations.

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[1] Quote: as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (I.C.J. Reports 1949, p. 22)

[2] The Threat or Use of Nuclear Weapons para. 79.

[3] Pinochet, 3 WLR (1999).

[4] Report on Constitutional Issues Raised by the Ratification of the Rome Statute of The International Criminal Court, No. CDL-INF (2001), 1 Or. Fr. Strasbourg, 15 January 2001, adopted by the Commission at it 45th Plenary Meeting (Venice, 15-16 December 2000).

The way to oblige states to become part of the judicial system, designed for ensuring prosecution of those who violated *jus cogens* norms is to recognise states' duty to ratify the Rome Statute as an *erga omnes* obligation.

The statement regarding general accountability of states for terrorist acts is controversial, since traditional concept of state responsibility does not include a notion of a state's «guilt». Accepting all existing principles of attribution of a wrongful act, although, it seems morally justified to implement such a concept with regard to responsibility for terrorism. Nuremberg Tribunal was also rather moral answer using legal means than unequivocally legitimate – scholars still dispute whether the Nuremberg judgment represented the victor's justice and contradicted the *nullum crimen sine lege* principle.[1] Admitting moral responsibility of a state, its «guilt» for the terrorist attack would reduce tension caused by irrational response to terrorism of states involved.

Obligation of a state is to ensure that it's internal and international policies prevent certain groups from intent to carry out terrorist attacks. If a state's policy and actions are insufficient for ensuring the peace and security, acts of non-state actors, aimed at this policy's change are attributable to the «guilty» state or states. Admitting mutual responsibility, when terrorist acts cross the borders, would help in resolution of long-term «low intensity» conflicts. Ascertainment of the fact of a states' «guilt» in being unable to prevent the terrorist attack may not become the authority of international body, such as ICJ or other. It would have to become an *erga omnes* obligation of a state and, consequently, be a response to a hypocritical policy of human rights protection.

[1] See, e.g. Henry T. King, Jr., The Legacy of Nuremberg, 34 Case W. Res. J. Int'l L. 335 (2002).