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THE LIABILITY OF AN INDIVIDUAL IN MODERN INTERNATIONAL LAW

Introduction

The problem of international legal subjectivity remains contestable until today. The reason for this state of affairs is the fact that none of the norms of international law defines the very term of subjectivity or contains a catalogue of entities subject to this law. What is more, these norms hardly ever refer to the term “subject of international law”.¹ As a result, there is no consensus about the uniform criteria of international legal subjectivity.² It is commonly accepted, however, that a subject of international law is an entity that has rights and obligations resulting directly from international law.³ Legal capacity defined as above is supplemented by one more component that is referred to in the doctrine as capacity to act (capacity to perform acts in law),⁴ and that consists in one’s capability to shape their own position within the sphere of international law by means of their own actions. Full international legal subjectivity therefore encompasses the capacity to have rights and obligations resulting directly from international law and the

¹ An example of a change in this trend and a sign of incorporating the indicated term into the acts of international law can be, e.g. art. 3 of *Vienna Convention on the Law of Treaties*, which refers to “other subjects of international law”, *Konwencja Wiedeńska o Prawie Traktatów*, (in:) A. Łazowski (ed.), *Prawo międzynarodowe publiczne. Zbiór przepisów*, Kantor Wydawniczy Zakamycze, Kraków 2003, p. 69–100.

² B. Wierzbicki (ed.), *Prawo międzynarodowe publiczne*, Temida 2, Białystok 2001, p. 51.

³ W. Góralczyk, S. Sawicki, *Prawo międzynarodowe publiczne w zarysie*, Wydawnictwo Prawnicze LexisNexis, Warszawa 2004, p. 115–116.

⁴ R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, Wydawnictwo Prawnicze LexisNexis, Warszawa 2004, p. 117.

capacity to acquire them. In light of the norms of modern international law the above definition allows to determine the circle of its subjects which – what is important – changes in time.⁵

It is beyond all doubt that they are states that are traditionally regarded as entities that acquire rights and obligations directly from international law. They are the ones that take a major part in establishing norms of international law, being the subjects thereof at the same time.⁶ States, being sovereign organisms, are therefore the main subjects of international law with full authority, while their subjectivity is of primary nature, i.e. results from the very fact that a state exists.⁷

The development of international law led to the emergence of new categories of entities that derive their rights and obligations directly from the norms of this law. Ones that are listed among them are international organisations, non-sovereign territorial organisations (e.g. Wolne Miasto Gdańsk /*Free City of Danzig*/ or presently Monaco), nations, parties to war or insurgents.⁸ However, although the subjectivity of a state is of primary nature, the subjectivity of international organisations, parties to war, etc. does not have this property. This results from the fact that they are states that, being sovereign, full and primary entities, decide about their creation, legal capacity and capacity to perform acts of international law. The scope of rights and obligations vested in these entities (their legal capacity) and their capacity to shape their own international legal position (their capacity to act) is therefore a derivative of the will of states expressed in the form of international law that they establish. Their subjectivity thus has to be described as secondary.⁹

In the context described above the international legal subjectivity of an individual remains a controversial issue. In essence, the question about their subjectivity becomes a question of whether an individual has any rights and obligations that arise directly from international law. In other words, an individual may be recognized as a subject of international law provided that it can be successfully proven that this law directly vests in them certain rights and obligations and – at least to some extent – the capability to shape their own international legal position.

⁵ W. Góralczyk, S. Sawicki, *op. cit.*

⁶ W. Czaplinski, A. Wyrozumka, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, C. H. Beck, Warszawa 2004, p. 131.

⁷ *Ibidem*, p. 133.

⁸ W. Góralczyk, S. Sawicki, *op. cit.*, p. 138–143.

⁹ R. Bierzanek, J. Symonides, *op. cit.*, p. 118.

Modern international practice shows that an individual increasingly becomes a beneficiary of rights arising directly from international law. This is the case particularly in the sphere of human rights and means of control existing in that system and entitling entities such as natural persons to lodge individual complaints to international bodies (e.g. the Human Rights Committee or the European Court of Human Rights).¹⁰ The right of individuals to raise petitions also existed in the system of governance of internationally controlled dependent territories.¹¹ Thus, in exceptional situations where the state is a party to certain international agreements,¹² the individual is a subject of laws arising directly from international law. These have their source in the will of states. The individual themselves neither establish any standards of international law, nor are they able to change it (with their actions). Hence, in this sense, the subjectivity of an individual is of limited, incomplete and secondary nature.

In modern international law, however, the subjectivity of an individual is not proven only by rights that they can derive directly from the norms of this law. When referring to the definition of international legal subjectivity presented above, one should notice the aspect of it that relates to obligations derived directly from international law. By acknowledging the international legal subjectivity of an individual it is assumed that obligations provided for in this law are binding for the individual, which means, in short, that the individual has no right to violate orders or bans included in the norms of international law. Any violation of these norms by the individual requires to hold the individual accountable. At present we are therefore dealing with a situation where the component that determines the shape and scope of the international legal subjectivity of an individual consists in not only their rights, but also their obligations, the fulfilment of which may be required from such an individual on the grounds of interna-

¹⁰ For more information about modern systems for human rights protection see, e.g. B. Banaszak, M. Jabłoński, K. Complak, R. Wieruszewski, A. Bisztyga, *System ochrony praw człowieka*, Kantor Wydawniczy Zakamycze, Kraków 2005; R. Kuźniar, *Prawa człowieka: prawo, instytucje, stosunki międzynarodowe*, Scholar, Warszawa 2006.

¹¹ W. Góralczyk, S. Sawicki, *op. cit.*, p. 145.

¹² Such agreements include, but are not limited to: *Międzynarodowy Pakt Praw Obywatelskich i Politycznych* [International Covenant on Civil and Political Rights], Dziennik Ustaw [Journal of Laws] 1977, No. 38, item 167 with the annexed *Protokół Fakultatywny* [Optional Protocol], Dziennik Ustaw [Journal of Laws] 1994, No. 23, item 80 and *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności* [Convention for the Protection of Human Rights and Fundamental Freedoms], Dziennik Ustaw [Journal of Laws] 1993, No. 61, item 284, (in:) A. Łazowski (ed.), *Prawo międzynarodowe publiczne. Zbiór przepisów*, Kantor Wydawniczy Zakamycze, Kraków 2003, p. 280–299 and 315–333.

tional law.¹³ In this context the problem of the liability of an individual for violating international law becomes a matter of utmost importance, as it forces us to answer the following questions. Does a violation of any international agreement by an individual result in the individual's liability under international law? Is there a defined catalogue of offences that an individual shall be liable for? Are treaty norms the only source of this liability or is it also possible to demonstrate the existence of common norms regarding this matter? Are the norms of international law that regulate the liability of an individual a complete solution or are they only fragmentary? Finally, are the currently existing legal and institutional mechanisms an effective tool for enforcing the liability of individual and what practical problems hinder their functioning?

The history of criminal liability of individuals

History indicates that there have been cases of departure from the rule that only states are liable for the acts of their leaders or persons acting upon their command. The first examples of punishing natural persons that are referred to in the doctrine relate to war crimes and date back as far as to the 15th century.¹⁴ However, the most famous historical precedents involve leaders of states, or parties, that were defeated in wars. Napoleon Bonaparte was exiled to Saint Helen's Island, whereas Jefferson Davis – the president of the Confederate Southern States – was brought to court after the Civil War.¹⁵

The problem of the liability of an individual returned after World War I. In the Versailles Treaty¹⁶ allied and associated powers publicly arraign William II of Hohenzollern, formerly German Emperor, of a supreme offence against international morality and the sanctity of treaties and decide to constitute a special Tribunal “to try the accused, thereby assuring him the guarantees essential to the basic right of defence” (art. 227 of the Treaty). Despite that, William did not face the Tribunal, as he found shelter in the territory of the Netherlands, that in turn refused to extradite him.¹⁷

¹³ W. Czapliński, A. Wyrozumska, *op. cit.*, p. 456.

¹⁴ J. Nowakowska-Małusecka, *Odpowiedzialność karna jednostek za zbrodnie popełnione w byłej Jugosławii i Rwandzie*, Wydawnictwo Uniwersytetu Śląskiego, Katowice 2000, p. 15.

¹⁵ *Ibidem*.

¹⁶ English text of the *Versailles Treaty* is available at: <http://net.lib.byu.edu/~rdh7/wjw/versailles.html>.

¹⁷ W. Góralczyk, S. Sawicki, *op. cit.*, p. 171.

In the period between World War I and World War II the issue of defining rules of liability for international crimes received greater attention from scholars and international law organisations than from international bodies or governments of states.¹⁸ The reason for this was the fact that efforts were primarily concentrated on establishing anti-war law, which resulted in signing the Briand-Kellog Pact,¹⁹ in the year 1928 that delegatized war. Thus, as indicated by J. Nowakowska-Małusecka, an initiation of war operations itself, regardless of possible violations of the *ius in bello*, became an international crime.²⁰

The end of World War II made the issue of the liability of an individual a very significant problem of current interest. Trying and punishing Hitler's war criminals became a very important component of shaping the post-war reality. Members of the German Army and members of Hitler's party who were guilty of committing atrocities in occupied countries were tried and punished in countries where they had committed their crimes, under the applicable national law. Contrary to the above, for the so-called head criminals, "whose crimes are impossible to localize in the territory of a single state",²¹ an international military tribunal was established. The scope of liability of the main war criminals was based on the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of August 17th, 1945. The Agreement was annexed with the Statute of the International Military Tribunal.²² It has to be emphasized that it was the first time an international agreement explicitly specified three categories of crime – crimes against peace, war crimes and crimes against humanity. It was also the first time in history that it was made possible to hold state officials (supreme state officials) accountable under international law, regardless of the liability of the state for the actions of its organs

¹⁸ K. Karski, *Realizacja idei utworzenia międzynarodowego sądownictwa karnego*, "Państwo i Prawo" 1993, No. 7, p. 66.

¹⁹ *Traktat Przeciwojenny podpisany w Paryżu dnia 27-go sierpnia 1928 r.* [Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy. Signed at Paris, August 27, 1928], *Dziennik Ustaw* [Journal of Laws] 1929, No. 11, item 88. Polish text is available at: http://wiki-source.org/wiki/Pakt_Brianda-Kelloga.1928.

²⁰ J. Nowakowska-Małusecka, *op. cit.*, p. 17.

²¹ W. Góralczyk, S. Sawicki, *op. cit.*, p. 172.

²² Porozumienie międzynarodowe w przedmiocie ścigania i karania głównych przestępców wojennych Osi Europejskiej, Karta Międzynarodowego Trybunału Wojskowego, Londyn, 8 sierpnia 1945 r. [International Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, London, August 8th, 1945], (in:) M. Flemming, *Międzynarodowe prawo humanitarne konfliktów zbrojnych. Zbiór dokumentów*, Akademia Obrony Narodowej, Warszawa 2003, p. 489–493.

(bodies). In the Nuremberg Trial 22 major war criminals were indicted, of which 13 were sentenced to death, 2 received life imprisonment and 4 others received sentences of from 10 to 20 years in prison. 3 persons were acquitted.²³ Hitler, Himmler and Goebbels were not among the accused as they had all committed suicides. The International Military Tribunal explicitly pronounced that international law may also impose obligations on natural persons. It decided that an individual who acts on behalf of the state shall bear liability if their actions are recognized as crimes.²⁴

The Nuremberg Tribunal was not of permanent nature (and neither was the Tokyo Tribunal). After it had completed its tasks, it ceased to exist. Its activity, however, did have repercussions, whereas the principles concerning the liability of an individual, that the functioning and ruling of the Tribunal were based on, were of permanent nature. These rules – the so-called “Nuremberg principles” – were soon codified. Already at the beginning of 1946 the General Assembly of the UN approved them by its Resolution no. 95(I).²⁵ Furthermore, in 1950 the International Law Commission of the UN formulated a closed list of “the Nuremberg principles”²⁶ and presented them to the General Assembly as Principles of International Law. This was also the form in which the Assembly adopted these Principles.²⁷

“The Nuremberg Principles” were of exceptional significance. First of all, they indicated and defined categories of acts punishable as crimes under international law (Principle VI). These are: crimes against peace, war crimes and crimes against humanity. For committing these crimes an individual is held accountable (and punished) under international law. Secondly, “the Nuremberg Principles” define conditions on which an individual shall be held liable. For example, the act of committing one of the defined crimes is punishable under international law and the fact that internal law does not

²³ J. Nowakowska-Mańusecka, *op. cit.*, p. 19. See also: K. Karski, *op. cit.*, p. 69–70.

²⁴ Whereas the International Military Tribunal for the Far East (the Tokyo Tribunal) established in January 1946 pronounced sentences against 25 people, of which 7 were sentenced to death, 16 to life imprisonment and 2 received lesser penalties. See J. Nowakowska-Mańusecka, *ibidem*.

²⁵ *Resolution No. 95(I) of December 11th, 1946*, English and French text available on the official website of the General Assembly: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/033/46/IMG/NR003346.pdf?OpenElement>.

²⁶ *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal with commentaries*, “Yearbook of International Law Commission” 1950, vol. 2 http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf.

²⁷ See *Resolution No. 488(I) of December 12th, 1950*, English and French text available on the official website of the General Assembly: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/060/86/IMG/NR006086.pdf?OpenElement>.

impose a penalty for this act does not relieve an individual who committed it from this responsibility (principle II). Similarly, the fact that a person acted as Head of State or responsible government official (Principle III) or pursuant to order of their Government or of a superior (Principle IV) also does not relieve this person from responsibility. “The Nuremberg Principles” also provide certain minimum protection for the rights of an individual accused of a crime under international law – under such circumstances everyone has the right for a fair trial (Principle V).

The momentous importance of “the Nuremberg Principles” also consists in the fact that the principles contained in them and defining the responsibility for certain acts became, already upon the moment of formulation thereof, a factor that accelerated the development of common law.²⁸ Today they are commonly accepted to such an extent that it is justified to say that there exists a common norm regarding the discussed scope of matters.

Post-war international legal regulations concerning the liability of individuals

Sadly, after World War II the accomplishments of the Military Tribunal in the form of the codified “Nuremberg Principles” have not been put into extensive practice. What turned out to be particularly difficult was the adoption of complex, permanent legal and institutional solutions regarding the international liability of an individual. The idea of establishing the criminal tribunal of permanent character revived.²⁹ However, as M. Płachta indicates, the idea of creating a permanent tribunal was smouldering, “fuelled by theoretical deliberations raised at numerous conferences, without any hope for realisation”.³⁰

Evidently, certain initiatives were taken in the discussed matter. Soon after the war ended, in 1947, the General Assembly of the UN requested the International Law Commission to develop a code of crimes against the peace and security of mankind. These works resulted in the adoption of the draft code in 1996.³¹ The catalogue of crimes contained there is broad and

²⁸ J. Nowakowska-Małusecka, *op. cit.*, p. 20.

²⁹ K. Karski, *op. cit.*, p. 70.

³⁰ M. Płachta, *Międzynarodowy Trybunał Karny*, Kantor Wydawniczy Zakamycze, Kraków 2004, p. 82.

³¹ *Draft code of crimes against the peace and security of mankind*, English text available on the official website of the International Law Commission: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7-4_1996.pdf.

includes: crime of aggression (art. 16), crime of genocide (art. 17), crimes against humanity (art. 18), heavy war crimes (art. 20) and crimes against the United Nations and associated personnel involved in operations of the UN (art. 19). The fact that a state may be held accountable for crimes has no effect on individual liability and vice versa. It should be remembered, however, that regardless of the significance of the regulations contained in the draft penal code, to this day the code itself has remained only a draft of an international agreement.

Nevertheless, this does not mean that post-war international law does not at all govern in a binding manner the liability of an individual for violations of international law. Such regulations do exist, although they are fragmentary and provided in a number of international agreements.³²

The liability of an individual for violating the laws of war is provided for in the Geneva Convention Relative to the Treatment of Prisoners of War from 1949 (Geneva Convention III).³³ It authorizes a fighting state to punish members of other state's armed forces who violated the provisions of the convention, and requires from the other state the same treatment for members of its own armed forces. The responsibility for **crimes of genocide** is regulated in the Convention from 1948 on the Prevention and Punishment of the Crime of Genocide.³⁴ It states that persons committing genocide or any other acts enumerated in the convention will be punished, whether they are constitutionally responsible rulers, public officials or private individuals. The parties thereto undertook to enact legislation that would allow to punish the guilty. Persons charged shall be tried by competent tribunals of the State in the territory of which the act was committed, or by an international tribunal appointed by the Parties (no such tribunal has been appointed to this day). Modern international law also defines the scope of liability of individuals for terrorist acts – a number of conventions obliges parties thereto to punish such individuals under their internal law or to extradite them. Conventions adopted the principle of *out dedere out punire*. These are conventions that relate to international airline terrorism: The Tokyo Convention from 1963

³² W. Czaplński, A. Wyrozumska, *op. cit.*, p. 457.

³³ Konwencja Genewska o traktowaniu jeńców wojennych [The Geneva Convention from 1949 Relative to the Treatment of Prisoners of War], Dziennik Ustaw [Journal of Laws] 1956, No. 38, item 171.

³⁴ Konwencja w sprawie zapobiegania i karania zbrodni ludobójstwa, uchwalona przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 9 grudnia 1948 r. [The Geneva Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of United Nations on December 9th, 1948], Dziennik Ustaw [Journal of Laws] 1952, No. 2, item 9.

on Offences and Certain Other Acts Committed On Board Aircraft,³⁵ the Hague Convention from 1970 for the Suppression of Unlawful Seizure of Aircraft³⁶ and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.³⁷ Apart from that, terrorist acts are addressed in: the Convention from 1973 on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomats³⁸ and the Convention from 1979 Against the Taking of Hostages.³⁹ The above listing is not complete. It could be supplemented with items including, but not limited to, regulations concerning worldwide repression adopted against piracy (the Convention on the High Seas from 1958⁴⁰ and the Convention on the Law of the Sea from 1982⁴¹).⁴²

The conventions referred to above show that the problem of the liability of an individual for violating international law has already been tackled more than once. What was missing, however, was a binding agreement that would address the problem comprehensively. It should be emphasized that

³⁵ Konwencja w sprawie przestępstw i niektórych innych czynów popełnionych na pokładzie statków powietrznych, sporządzona w Tokio dnia 14 września 1963 r. [The Convention on Offences and Certain Other Acts Committed on Board Aircraft signed at Tokyo on 14 September, 1963], Dziennik Ustaw [Journal of Laws] 1971, No. 15, item 147 (annex).

³⁶ Konwencja o zwalczaniu bezprawnego zawładnięcia statkami powietrznymi, sporządzona w Hadze dnia 16 grudnia 1970 r. [Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December, 1970], Dziennik Ustaw [Journal of Laws] 1972, No. 25, item 181 (annex).

³⁷ Konwencja o zwalczaniu bezprawnych czynów skierowanych przeciwko bezpieczeństwu lotnictwa cywilnego, sporządzona w Montrealu dnia 23 września 1971 r. [Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September, 1971], Dziennik Ustaw [Journal of Laws] 1976, No. 8, item 37 (annex).

³⁸ Konwencja o zapobieganiu przestępstwom i karaniu sprawców przestępstw przeciwko osobom korzystającym z ochrony międzynarodowej, w tym przeciwko dyplomatom, sporządzona w Nowym Jorku dnia 14 grudnia 1973 r. [Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomats, signed at New York on 14 December, 1973], Dziennik Ustaw [Journal of Laws] 1983, No. 37, item 168 (annex).

³⁹ Międzynarodowa Konwencja przeciwko braniu zakładników, sporządzona w Nowym Jorku dnia 8 grudnia 1979 r. [International Convention Against the Taking of Hostages, signed at New York on 8 December, 1979], Dziennik Ustaw [Journal of Laws] 2000, No. 106, item 1123.

⁴⁰ Konwencja o morzu pełnym sporządzona w Genewie dnia 29 kwietnia 1958 r. [Convention on the High Seas signed at Geneva on 29 April, 1958], Dziennik Ustaw [Journal of Laws] 1963, No. 33, item 187 (annex No. 2).

⁴¹ Konwencja Narodów Zjednoczonych o prawie morza, sporządzona w Montego Bay dnia 10 grudnia 1982 r. [The UN Convention on the Law of the Sea, signed at Montego Bay on 10 December, 1982], Dziennik Ustaw [Journal of Laws] 2002, No. 59, item 543 (annex).

⁴² W. Czapliński, A. Wyrozumska, *op. cit.*, p. 457–459.

pursuant to these regulations an individual is usually held accountable for violating international law before domestic courts. It is worth noting, by the way, that the Constitution of the Republic of Poland from 1997 also provides for such an arrangement.⁴³

Coming back to the primary thread of our deliberations it should be stressed that, generally speaking, the interwar period (between World War I and World War II) was the time when the discussion began on the need and purpose to establish a permanent penal tribunal for punishing individuals responsible for violating certain norms of international law. However, despite the lively debate and intensive works on a draft of such an agreement, continued also after World War II, events from the beginning of the 90s and their extent made the international community face an entirely new challenge. Meeting this challenge – massive genocide, crimes against humanity and severe breaches of the Geneva Conventions that took place in Somalia, in the territory of former Yugoslavia and in Rwanda – turned out to be very difficult. The reason for that was the lack of international agreements concerning the discussed subject that would bind states, international agreements that would address the issue comprehensively. So what was the response of states to these events and what was its legal basis?

In 1993 and 1994 the Security Council condemned the violations of human rights in Somalia and indicated that the perpetrators of these acts will be “held individually responsible”.⁴⁴ However, in the sphere of international law, no special tribunal was appointed for the purpose of judging these crimes.

The situation was different in the case of Yugoslavia and Rwanda.

International Criminal Tribunals for the former Yugoslavia and Rwanda (Reasons and legal grounds for their establishment, jurisdiction and activities)

The process that led to the establishment of the International Criminal Tribunal for the former Yugoslavia began in 1991, when Croatia and Slovenia proclaimed independence. This started an open military conflict and

⁴³ See art. 42 of Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [Constitution of the Republic of Poland of 2 April, 1997], *Dziennik Ustaw* [Journal of Laws] 1997, No. 78, item 483.

⁴⁴ Compare Resolutions of the UN Security Council concerning Somalia (from 1993, No. 865, 885, 886, and from 1994, No. 946, 953), text available on the official website of the Security Council: http://www.un.org/Docs/sc/unsc_resolutions.html.

ruthless ethnic fights, especially in Bosnia and Herzegovina. Mass murders, rapes, ethnic cleansing, torture and inhumane conditions in detainment centres and camps shocked the world's public opinion. The Security Council condemned the policy that had been implemented and called for ceasing thereof. In a resolution adopted in 1992 (no. 764)⁴⁵ the council reaffirmed that persons who committed grave breaches of the provisions of the Geneva Conventions from 1949 would be individually responsible. It also appointed a Commission of Experts and authorized it to investigate and analyse the situation. As a result of the efforts of the Commission a report was presented in which it was stated that humanitarian law had been violated in the former Yugoslavia. Considering the remarks of the Commission of Experts and Special Rapporteur of the UN Human Rights Commission, the Security Council took appropriate steps in order to appoint an international tribunal. On 22 February 1993 it adopted resolution 808⁴⁶ that obliged the UN Secretary General to present within 60 days a report on the issue, together with concrete proposals.

Fulfilling the resolution already in May 1993, the Secretary General presented the Security Council a report containing a draft statute of the international tribunal.⁴⁷ After the report was published, certain doubts began to appear. The first one concerned the official seat of the tribunal. Considering the on-going conflict, the tribunal was seated in the Hague. The other problem consisted in the fact that Resolution 808 did not specify legal grounds for the functioning of the tribunal, nor did it specify grounds for sentencing. The statute of the International Criminal Tribunal was still in preparation. The necessity for immediate actions precluded the long process of negotiating, signing and ratifying an international agreement on this matter, whereas the Security Council was determined to take an immediate preventive action.⁴⁸ Apart from that there was also a concern that some states of the former Yugoslavia would not sign this treaty. That is why – in

⁴⁵ *Resolution 764 (1992) of 13 July, 1992*, English text available on the official website of the Security Council: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/011/23/IMG/NR001123.pdf?OpenElement>.

⁴⁶ *Resolution 808 (1993) Adopted by the Security Council at its 3175th meeting, on 22 February, 1993*, English text available on the official website of the Security Council: <http://daccessdds.un.org/doc/UNDOC/GEN/N93/098/21/IMG/N9309821.pdf?OpenElement>.

⁴⁷ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, text available on the official website of the International Criminal Tribunal for the former Yugoslavia: <http://www.un.org/icty/legaldoc-e/basic/statut/s25704.htm>.

⁴⁸ D. Shraga, R. Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, European Journal of International Law 1994, vol. 5, p. 2, <http://www.ejil.org/journal/Vol5/No3/art4.pdf>.

accordance with the proposal of the UN Secretary General – a decision was made to appoint the International Criminal Tribunal for the former Yugoslavia⁴⁹ and adopt its Statute⁵⁰ (annexed to the report of the Secretary General). The legal basis for the establishment of the Tribunal was chosen to be Chapter VII of the UN Charter.⁵¹

The indicated chapter of the Charter refers to action with respect to threats of the peace, breaches of the peace, and acts of aggression. This decision was justified by the “serious” threat to the international peace and security, caused by the conflict in the former Yugoslavia. Thus, the appointment of the Tribunal was to contribute to ending the conflict and be one of the means to restore peace and security in this region. The Security Council therefore established the tribunal as a means of coercion, a subsidiary organ within the meaning of art. 29 of the Charter of UN.⁵² This was the first time when a tribunal was established in practice to punish individuals pursuant to chapter VII of the Charter of UN. Nevertheless, such a method of appointing the Tribunal did bring about some criticism.⁵³ Art. 29 of the Charter of UN does give the Security Council the right to appoint such subsidiary organs as it deems necessary for the performance of its functions, which might suggest that it is also authorized to establish organs of judiciary nature. However, so far such organs were established only on the basis of an international agreement, in accordance with the commonly accepted practice. That is why it was called into question whether the Security Council is entitled to establish an international tribunal.⁵⁴ This accusation was also brought forward in on-going trials, where, e.g. the defender of Tadic, argued that the Criminal Tribunal for Yugoslavia was appointed improperly. The Tribunal issued a decision in which it acknowledged its own lack of competence to review decisions of the Security Council, assuming that this problem was not subject to consideration by court. Considering the fact that the Tribunal was appointed in an exceptional situation where states were involved in an

⁴⁹ *Resolution 827 (1993) Adopted by the Security Council at its 3217th meeting, on 25 May, 1993*, English text available on the official website of the Security Council: <http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement>.

⁵⁰ *Statute of the International Criminal Tribunal for the Former Yugoslavia*, current text of the statute available on the official website of the Tribunal: <http://www.un.org/icty/legaldoc-e/index-t.htm>.

⁵¹ Karta Narodów Zjednoczonych [Charter of the United Nations], *Dziennik Ustaw* [Journal of Laws] 1947, No. 23, item 90.

⁵² J. Nowakowska-Małusecka, *op. cit.*, p. 41.

⁵³ See e.g. K. Karski, *op. cit.*, p. 74–75.

⁵⁴ J. Nowakowska-Małusecka, *op. cit.*, p. 42.

existing conflict and that it was an ad-hoc organ that would continue its functioning until the international peace and security have been restored and maintained in the area, it was acceptable to quote these legal bases for the appointment of the Tribunal.

The genesis of the appointment of the Criminal Tribunal for Rwanda should be sought in the several-centuries long ethnic conflict between the tribes of Tutsi and Hutu. On 6 April, 1994 an aircraft approaching landing at the airport in Kigala, on board of which were presidents of Rwanda and Burundi (both members of the Hutu tribe), was shot down, which began a bloody carnage that plunged the country into the chaos of a civil war. On the next day the Prime Minister of Rwanda, Belgian soldiers from the UN mission and many nuns and missionaries were killed.⁵⁵ According to data provided by the UN Information Centre, the death toll reached approx. 800 thousand people and the 100 day long carnage was actively participated in not only by militarized police and army units, but also by civilians. It was also noticeable that the acts of genocide were highly organized and took a form of an organized criminal undertaking.⁵⁶

The UN took appropriate actions with respect to Rwanda. In July 1994 the Security Council adopted a resolution, in which it appointed an independent Commission of Experts whose task – as in the case of the former Yugoslavia – was to provide the UN Secretary General with the evidence and conclusions regarding grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of acts of genocide.⁵⁷ The report presented already in September explicitly stated that the mass extermination performed by Hutu against Tutsi was an act of genocide. The Commission suggested that the statute of the International Criminal Tribunal for the former Yugoslavia should be also applied to the crimes committed during the armed conflict in Rwanda. However, in view of the Security Council it was not possible to extend the jurisdiction of the existing Tribunal over the situation in Rwanda. Under these circumstances the Security Council used the principles developed earlier for the Criminal Tribunal for Yugoslavia and on 8 November 1994 adopted a resolution (955) in which it established – in order to “restore international peace and

⁵⁵ *Ibidem*, p. 45.

⁵⁶ Data were obtained from the official website of the UN Information Centre in Warsaw, http://www.unic.un.org.pl/rwanda/wydarzenia_1994.php.

⁵⁷ *Resolution 935 (1994)*, Adopted by the Security Council at its 3400th meeting, on 1 July 1994, English text available on the official website of the Security Council: <http://daccessdds.un.org/doc/UNDOC/GEN/N94/273/51/PDF/N9427351.pdf?OpenElement>.

security” – the International Criminal Tribunal for Rwanda.⁵⁸ It was the second time that the same legal grounds for the appointment of the tribunal were assumed by referring to Chapter VII of the Charter of UN and art. 29 thereof.

The location of the official seat of the Tribunal was not indicated in the Statute. On 22 February, 1995 the Security Council chose Arusha in Tanzania for the official seat of the Tribunal.⁵⁹

What is interesting is the position of Rwanda itself regarding the appointment of the Tribunal. The government of Rwanda had fully supported the idea of establishing the ad hoc Tribunal and, being a non-permanent member of the Security Council, actively participated in the preparation of the statute. It may therefore seem surprising that during the voting Rwanda was against the adoption of the resolution, whereas China abstained. One of the reasons for this position of Rwanda was the matter of *ratione temporis* jurisdiction of the Tribunal. It was defined that it would cover the period from 1 January to 31 December 1994. The government argued that this period should begin on 1 October 1990. The next doubt concerned the structure of the Tribunal. According to Rwanda, it should have a separate Appeals Chamber and its own Prosecutor. Finally, another objection was related to the inability of the Tribunal to impose the death penalty, which is provided for in the penal code of Rwanda, and the placement of the Tribunal's seat outside the territory of Rwanda.⁶⁰

It has to be emphasized that both of the Tribunals were appointed by means of the Security Council's resolutions in order to serve as coercive measures pursuant to chapter VII of the Charter of UN. Although the Tribunals belong to subsidiary bodies of the Security Council, within the meaning of art. 29 of the Charter, they are not subject to the authority or control of the Council when it comes to the performance of their judicial functions.

⁵⁸ *Resolution 955 (1994)*, Adopted by the Security Council at its 3453th meeting, on 8 November, 1994, English text available on the official website of the Security Council: <http://daccessdds.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>. Annexed to the resolution is the statute of the Tribunal – *Statute of the International Criminal Tribunal for Rwanda*, current text is available on the website of the tribunal: <http://69.94.11.53/ENGLISH/basicdocs/statute.html>.

⁵⁹ *Resolution 977 (1995)*, Adopted by the Security Council at its 3502nd meeting, on 22 February, 1995, English text available on the official website of the Security Council: <http://daccessdds.un.org/doc/UNDOC/GEN/N95/050/66/PDF/N9505066.pdf?OpenElement>.

⁶⁰ J. Nowakowska-Małusecka, *op. cit.*, p. 50–51.

The participation of interested states in the preparations looked differently. Rwanda, as indicated above, not only actively participated in the preparations, but was even the initiator of the establishment of the Tribunal. The procedure of adopting the resolution was also slightly different. While establishing the Tribunal for Yugoslavia, first the UN Secretary General was obliged to prepare the draft Statute and only then the Council accepted the draft and appointed the Tribunal. In the case of the Tribunal for Rwanda earlier experience was taken into account and the resolution appointing the Tribunal was adopted straightaway.

What is essential to our deliberations is the assessment of the scope of jurisdiction of each of the Tribunals.

While assessing *ratione personae* jurisdiction it is worth noting that only natural persons may be held accountable before these courts. Both of their Statutes contain a provision stating that they have jurisdiction over natural persons (art. 6 of the Statute of the Tribunal for Yugoslavia and art. 5 of the Statute of the Tribunal for Rwanda). This excluded the possibility of bringing legal entities (organisations, associations) before the Tribunal. From these regulations results the lack of connection with the institution of citizenship. The statutes also exclude the possibility of mitigating or waiving the criminal liability of persons accused of committing crimes only because of their position of the head of the state or government.

Ratione loci and *ratione temporis* jurisdiction were regulated differently for each of the Tribunals. The jurisdiction of the Tribunal for the former Yugoslavia extends to the territory of the former Socialist Federal Republic of Yugoslavia (including its land area, airspace and territorial waters – art. 8 of the Statute). The temporal jurisdiction extends to a period beginning on 1 January 1991 (also art. 8 of the Statute). The above date is not associated with any event. No ending date was specified – it was left for the decision of the Security Council which should make such a decision after international peace and security is restored in the region.

The Criminal Tribunal for Rwanda, on the other hand, has the authority to adjudicate in cases of crimes against international humanitarian law committed in within the surface and airspace of Rwanda, as well as crimes committed by Rwandan citizens in neighbouring states (art. 7 of the Statute). It is thus clear that the authority of the Tribunal was extended to the territories of states neighbouring Rwanda. The reason for this was the fact that throughout the years thousands of people fled persecution to Burundi, Uganda or Zaire. However, the jurisdiction of the Tribunal in relation to crimes committed in neighbouring states was limited to Rwandan citizens only. *Ratione temporis* was also defined differently by containing the tempo-

ral competence between two fixed dates: 1 January and 31 December 1994 (art. 7 of the Statute).

In its resolution 1503 from August 2003 the Security Council called on both of the tribunals to take all possible measures to complete on-going investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008 and to complete all work by 2010.⁶¹

Ratione materiae jurisdiction is defined in a similar way. The International Criminal Tribunal for the Former Yugoslavia, in accordance with Resolutions 808 and 827, deals with grave violations of international humanitarian law that is composed of both treaty and common norms. It is important that common norms are included in the grounds for sentencing, which eliminates the possible problem of states being bounded by specific convention as common law is applicable to all states. The Statute (art. 2–5) of the Tribunal lists four categories of crimes that may be prosecuted by the Tribunal. These are:

1. grave breaches of the Geneva Conventions of 1949. The Statute lists, for example: wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity, compelling a prisoner of war or a civilian to serve in the forces of a hostile power, wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement of a civilian, taking civilians as hostages.
2. Violations of the laws or customs of war, including employment of poisonous weapons or other weapons calculated to cause unnecessary suffering, wanton destruction of cities, towns or villages, plunder of public or private property, seizure or destruction of institutions dedicated to religion, historic monuments and works of art.
3. Genocide, understood as acts committed with intent to destroy, in whole or in part, a national, ethnical or religious group. This includes acts such as: killing members of the group, causing serious bodily or mental harm to members of the group, imposing measures to prevent births within the group, forcibly transferring children of the group to another group;

⁶¹ *Resolution 1503 (2003)*, Adopted by the Security Council at its 4817th meeting, on 28 August, 2003, English text available on the official website of the Tribunal: <http://www.un.org/icty/legaldoc-e/index-t.htm>.

4. Crimes against humanity, including murder, extermination, enslavement, deportation, imprisonment, torture, rapes, persecutions on political, racial and religious ground, other inhumane acts.

An important feature of the jurisdiction of the Tribunal for Rwanda is that its Statute explicitly states that the conflict in Rwanda is of a non-international character. Two categories of crimes are common for both of the Tribunals, namely genocide and crimes against humanity. Additionally, the Tribunal for Rwanda adjudicates in cases of violations of art. 3, which is common to the Geneva Conventions of 1949,⁶² and the provisions of Additional Protocol II from the year 1977⁶³ (art. 2–4 of the Statute). The provisions of these articles prohibit acts including, without limitation, attempts upon lives or bodily inviolability, taking hostages, inhuman treatment, collective punishment, terrorist operations.

In the Statutes of both of the Tribunals there are provisions stating that the Tribunals and national courts shall have concurrent jurisdiction on the same conditions, i.e. that the Criminal Tribunals shall have primacy over national courts (art. 9 and 8 of the Statutes, respectively). This means that each of the Tribunals may demand a case to be transferred to them at any stage of the procedure. Also, both of the Tribunals introduce the non-bis-in-idem principle where a perpetrator has already been tried by the Tribunal.

The Statutes of both of the Tribunals therefore identify crimes for which an individual may be held accountable. The accused may only be tried in their presence, judgments by default were rejected.

⁶² This refers to the following conventions: Konwencja Genewska o polepszeniu losu rannych i chorych w armiach czynnych [Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field], Konwencja Genewska o polepszeniu losu rannych, chorych i rozbitków sił zbrojnych na morzu [Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea], Konwencja Genewska o traktowaniu jeńców wojennych [Geneva Convention relative to the Treatment of Prisoners of War] and Konwencja Genewska o ochronie osób cywilnych podczas wojny [Geneva Convention relative to the Protection of Civilian Persons in Time of War]. They were all signed on 12 August, 1949 – see Konwencje o ochronie ofiar wojny, podpisane w Genewie 12 sierpnia 1949 roku [Conventions for the Protection of War Victims, signed at Geneva on 12 August, 1949], *Journal of Laws [Dziennik Ustaw] 1956, No. 38, item 171 (annex).*

⁶³ Protokoły dodatkowe do Konwencji genewskich z 12 sierpnia 1949 r., dotyczący ochrony ofiar międzynarodowych konfliktów zbrojnych (Protokół I) oraz dotyczący ochrony ofiar niemiędzynarodowych konfliktów zbrojnych (Protokół II), sporządzone w Genewie dnia 8 czerwca 1977 r. [Protocol Additional to the Geneva Conventions of 12 August, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted in June 1977], *Dziennik Ustaw [Journal of Laws] 1992, No. 41, item 175 (annex).*

The structures of the Tribunals were also arranged in a similar manner. It is of importance that the Statute of the Tribunal for Rwanda was based on the Statute of the Tribunal for the Former Yugoslavia. Each of the Tribunals consists of the Chambers, the Prosecutor and a Registry (art. 11 of the Statute of the Tribunal for the Former Yugoslavia and art. 10 of the Statute of the Tribunal for Rwanda). The Chambers of each of the Tribunals comprise Trial Chambers and an Appeals chamber, which ensures compliance with the principle of two instances. The term of judges of the Tribunal for Yugoslavia and Tribunal for Rwanda is the same and equals 4 years (art. 13 *bis* par. 3 and art. 12 *bis* par. 3, respectively). Each of the Tribunals has its Prosecutor. The Prosecutor is appointed by the Security Council for a term of four years (art. 16 par. 4 of the Statute and art. 15 par. 4 of the Statute, respectively). The Prosecutor is responsible for the investigation and prosecution of persons responsible for crimes identified in the Statutes of the Tribunals – according to their temporal and territorial jurisdiction (art. 16 par. 1 and art. 15 par. 1, respectively). The Prosecutor initiates investigations *ex-officio* or on the basis of information obtained from any source. Each of the Tribunals has its own Registry (art. 17 and art. 16, respectively). They fulfil duties normally entrusted on these category of bodies, i.e. they are responsible for, without limitation, administration, servicing of meetings, keeping records or publishing documents.

As indicated above, the intention is that both of the Tribunals will complete their work in the year 2010, therefore we may already venture to draw first conclusions.

According to up-to-date data published by the Tribunal for the Former Yugoslavia,⁶⁴ 161 persons were indicted. Proceedings are currently in progress against 53 defendants, of which 12 are in the pre-trial stage, 12 are being processed before Trial Chambers, 2 persons were sentenced in the first instance and in the case of the last 8 the procedure is in progress before the Appeals Chamber. One person was acquitted in the first instance. There are 4 persons that are still wanted and at large, including Radovan Karadzic and Ratko Mladic who are known to the public.⁶⁵ Until today cases against 108 defendants have been closed. Seven persons received sentences of acquittal. 52 persons have been found guilty, of which 16 already served their sentences and 2 died in the course of serving theirs.

⁶⁴ Data available on the official website of the Tribunal: <http://www.un.org/icty/glance-e/index-t.htm>.

⁶⁵ Case No. IT-95-5/18 “Bosnia and Herzegovina” & “Srebrenica”, *Case Information Sheet*, “Bosnia and Herzegovina” & “Srebrenica” (IT-95-5/18), <http://www.un.org/icty/cases-e/cis/mladic/cis-karadzicmladic.pdf>.

One of the most infamous criminals sentenced by the Tribunal (to 20 years of imprisonment) was Dusko Tadic.⁶⁶ He was arrested in Munich after he had been recognized by a Muslim refugee, one of his victims. Among the greatest criminals who were charged but remain at large is – apart from aforementioned Karadzic and Mladic – Goran Hadzic, the leader of Srpska Krajina. Hadzic is accused of crimes against humanity (murders, tortures, deportations), as well as violations of the laws and customs of war.⁶⁷

However, the best known case considered by the Tribunal was the case of Slobodan Milosevic,⁶⁸ the former president of Yugoslavia. The case of Milosevic was the one in which the problem of the lack of co-operation between Yugoslavia and the Tribunal became the most apparent. Since judgments in defaults are not possible, repudiation of the jurisdiction of the Tribunal and refusals to give away an individual despite international arrest warrants become a significant problem. The establishment of the Tribunal pursuant to chapter VII of the Charter meant that states are obliged to co-operate with the Tribunal and provide all legal assistance that may be necessary at any stage of the procedure. A demand of the Tribunal to hand over a certain individual to the custody of the Tribunal should have been treated as the application of executive measures provided for in chapter VII. As shown by the casus of Milosevic, this principle was not respected by states, not only by Yugoslavia. But no sentence was ever passed on Milosevic – arrested and handed over to the Tribunal for the Former Yugoslavia in 2001, he died of a heart attack in the prison in Hague on 11 March, 2006.

The problem of the lack of full co-operation from the Balkan countries was pointed out by Carla del Ponte, the Prosecutor of the Tribunal. In her statement of 18 June, 2007 addressed to the Security Council⁶⁹ she indicated that the temptation to interfere in the functioning of the Tribunal is still existing in the activities of “respective” governments. She also presented a similar position during a meeting with members of the European Parliament that was held in Brussels on 26 June, 2007. It seems that these accusations are directed mainly to the government of Serbia. According to

⁶⁶ Case No. IT-94-1 “Prijedor”, see *Case Information Sheet, “Prijedor” (IT-94-1)*, <http://www.un.org/icty/cases-e/cis/tadic/cis-tadic.pdf>.

⁶⁷ Case No. IT-04-75 “Hadzic”, see *Case Information Sheet, “Hadzic” (IT-04-75)*, <http://www.un.org/icty/cases-e/cis/hadzic/cis-hadzic.pdf>.

⁶⁸ Case No. IT-02-54 “Kosovo, Croatia and Bosnia”, see *Case Information Sheet, “Kosovo, Croatia and Bosnia” (IT-02-54)*, <http://www.un.org/icty/cases-e/cis/smilosevic/cis-slobodanmilosevic.pdf>.

⁶⁹ *Statement by Carla del Ponte, Prosecutor, International Criminal Tribunal for the Former Yugoslavia to the Security Council*, http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/afet_26062007_pontestate_/afet_26062007_pontestate.en.pdf.

the Prosecutor, the wanted Radovan Karadzic and Ratko Mladic are most likely staying in the Serbian territory, but the Tribunal does not have any information on their location. Nevertheless, Carla del Ponte expressed an opinion that the states from that region do have appropriate means at their disposal to determine the location of and arrest the wanted.

So far the activities of the Tribunal, and particularly of its Prosecutor, demonstrated deep correlation between the possibility to perform effective investigation and prosecute suspects and the internal political situation in the countries of the described region. In terms of looking for the evidence of crimes, the Prosecutor was particularly the one who was dependent on the co-operation from national judicial administration, as well as political and military factors. The co-operation has not always been successful. Consequently, it may be alleged that the activities of the Tribunal lack the desired effectiveness. According to C. del Ponte, the fact that the greatest criminals, such as Karadzic and Mladic still remain at large gives an impression of impunity and thus undermines the credibility of the Tribunal.

Nevertheless, in her statement the Prosecutor also mentioned that recently positive tendencies have been noticeable. The co-operation with the authorities of Serbia and Montenegro recently resulted in capturing more of the wanted. The co-operation from Croatia and Bosnia and Herzegovina attained a satisfactory level. The conclusion therefore has to support the opinion of Prosecutor de Ponte that despite the alleged lack of effectiveness and slow action, during the last dozen or so years the Tribunal has had significant achievements. One proof of that is, for example, the number of high officials punished by the Tribunal.

The Tribunal for Rwanda did not experience problems resembling the ones described above. The authorities of this country are interested in punishing the guilty. The problems that affect in the activity of this Tribunal are totally different. It is not able to judge all perpetrators of crimes because the number of them is huge. It therefore concentrates on leaders, leaving other suspects for the judiciary of Rwanda. It is not rare that the Tribunal has difficulties in proving the guilt of the accused due to the lack of evidence. The Tribunal also has significant financial problems. This slows down its work. Some of the cases have been ended by now. For example, in the case of Kambanda,⁷⁰ the Prime Minister in the Interim Government of

⁷⁰ Case No. *ICTR-97-23-DP*, Case records available on the official website of the Tribunal: <http://69.94.11.53/default.htm>.

Rwanda, a sentence of life imprisonment was pronounced. It is also worth recalling the case of a Belgian radio reporter who was found guilty of crimes against humanity, which in his case consisted in inciting murders of and attacks on the Tutsi and the opposing Hutu. The Tribunal sentenced him to two penalties of 12 years of imprisonment.⁷¹

To summarize the previous activities of the Tribunal it is worth quoting the following data. Until now the Tribunal has completed the trials of 33 persons. Currently there are 29 trials that are being conducted before the Trial Chambers. 6 persons are awaiting trial. There are 6 persons that are in the process of appeal. Six persons are serving pronounced sentences, 5 persons were acquitted, one person has already completed their sentence. One person died during the trial, another one died even before the trial.⁷² It is noticeable that the cases that are currently in progress before the Tribunal are against people that did not have only political or military functions. Apart from the convicted radio reporter, among the accused there are also persons such as Simon Bikindi, who not only worked in the Ministry of Youth and Sport, but was also a popular composer and singer. He is accused of taking part in crimes against humanity, genocide and murders.⁷³ In this context it is also worth noting the case of Hormidas Nsengimana – a priest and the rector of a college (Christ-Roi College) who is accused of committing acts such as crimes against humanity and genocide.⁷⁴

The analysis of the activities of the two ad-hoc Tribunals allows to formulate several conclusions relating to the problem of the international liability of an individual.

First of all – the existing regulations are not perfect. This became apparent particularly in the context of the obligation of states to prosecute and punish war criminals, which is not enforced by any sanctions that would be imposed of states failing to comply. When it comes to the Tribunal for Yugoslavia, a satisfactory level of practical co-operations between states and the organs of the Tribunal has not been attained also.

Secondly – the establishment of the Tribunals was an important step in defining the principles of the liability of an individual in modern international law. The activities of the Tribunals contributed to the application

⁷¹ Case No. *ICTR-97-32-I*, case records available on the official webpage of the Tribunal: <http://69.94.11.53/default.htm>.

⁷² Data published on the official website of the tribunal: <http://69.94.11.53/default.htm>.

⁷³ Case No. *ICTR-2001-72-I*, case records available on the official webpage of the Tribunal: <http://69.94.11.53/default.htm>.

⁷⁴ Case No. *ICTR-2001-69-I*, case records available on the official website of the Tribunal: <http://69.94.11.53/default.htm>.

of the existing norms that so far had not been enforced by anyone, e.g. the application of art. 3 which is common to all the Geneva Conventions.⁷⁵

The International Criminal Court as a permanent body enforcing the international liability of an individual

The tragedies that took place in Yugoslavia and Rwanda made the international community realize how much needed are permanent regulations concerning the criminal liability of individuals for violations of international law. Possibilities to establish the Court were investigated as early as in 1948 by the International Law Commission, acting upon the request of the UN General Assembly. The possibility to establish such a court is provided for in art. 6 of the Convention on the Prevention and Punishment of the Crime of Genocide from 1948⁷⁶ and art. V of the Convention on the Suppression and Punishment of the Crime of Apartheid from 1973.⁷⁷ In the 50s the Commission prepared a number of drafts, but they did not receive substantial support. It was not until 1994 that a draft of the statute of the International Criminal Court was successfully elaborated to later become the basis of discussion for the Preparatory Committee. In the year 1998 an UN conference was summoned in Rome in order to establish an International Criminal Court. During the conference the United States of America expressed their dissatisfaction about a number of provisions and proposed a number of amendments.⁷⁸ Upon a motion from the USA there was only one voting on the acceptance/rejection of the Statute. 120 states

⁷⁵ This article states that persons taking no active part in hostilities, including members of armed forces who laid down their arms, shall in all circumstances be treated humanely, it also prohibits violence to life and person, taking of hostages, humiliating or degrading treatment, etc.

⁷⁶ Konwencja w sprawie zapobiegania i karania zbrodni ludobójstwa, uchwalona przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 9 grudnia 1948 r. [Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December, 1948], *Dziennik Ustaw* [Journal of Laws] 1952, No. 2, item 9.

⁷⁷ Międzynarodowa konwencja o zwalczaniu i karaniu zbrodni apartheidu, przyjęta dnia 30 listopada 1973 r. rezolucją 3068 (XXVIII) Zgromadzenia Ogólnego Narodów Zjednoczonych [Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the General Assembly of the United Nations on 30 November, 1973], *Dziennik Ustaw* [Journal of Laws] 1976, No. 32, item 186 (annex).

⁷⁸ For information about the view of the USA on the International Criminal Court, see. M. Morris, *Stany Zjednoczone a Międzynarodowy Trybunał Karny*, (in:) E. Zielińska (ed.), *Międzynarodowy Trybunał Karny. USA i UE: dwa różne podejścia*, Fundacja Instytut Spraw Publicznych, Warszawa 2004, p. 125–142. See also M. Płachta, *op. cit.*, p. 1132–1209.

voted for the acceptance of the Statute,⁷⁹ 7 were against it and 21 abstained. To this day the Statute has been signed by 139 states, whereas 105 states, including Poland, became bound by the Statute by means of ratification, accession, succession, etc.⁸⁰ To enter into force the agreement needed to be ratified by 60 states, which happened on 11 April, 2002. The Statute entered into force on 1 July, 2002.⁸¹ The International Criminal Court thus became the first permanent judicial body created by means of an international agreement.

There are 18 judges of the Court who are chosen by the states being the Parties to the Statute from among their citizens (art. 36 of the Statute). The judges are elected for a term of nine years. The judges are independent in the performance of their functions (art. 40 of the Statute), which requires that they shall not engage in any other occupation of professional nature or any other activity that may affect confidence in their independence.⁸² The Organs of the Court are (art. 34 of the Statute): the Presidency, Divisions (Pre-trial, Trial and Appeals), the Office of the Prosecutor and the Registry.⁸³ The Court is officially seated in the Hague.

Under the jurisdiction of the Court are neither states nor legal entities – only natural persons (art. 25 par. 1 of the Statute). However, the Court has no jurisdiction over persons who were under 18 years of age at the time when they committed a crime. What is interesting, pursuant to art. 27 of the Statute, immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.⁸⁴ Rationae materiae jurisdiction extends to (art. 5 par. 1 of the Statute): the crime of genocide, crimes against humanity, war crimes and the crime of aggression. The inclusion of the last is of initial and provisional nature, as it was impossible to agree upon its definition. Under these circumstances the exercising of the Court's jurisdiction in cases of aggression was suspended

⁷⁹ Rzymski Statut Międzynarodowego Trybunału Karnego sporządzony w Rzymie dnia 17 lipca 1998 r. [Rome Statute of the International Criminal Court, signed in Rome on 17 June, 1998], *Dziennik Ustaw* [Journal of Laws] 2003, No. 78, item 708.

⁸⁰ Data available on the official website of the UN: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapterXVIII/treaty11.asp>.

⁸¹ J. Izdorczyk, P. Wiliński, *International Criminal Court – Międzynarodowy Trybunał Karny*, Kantor Wydawniczy Zakamycze, Kraków 2004, p. 21.

⁸² *Ibidem*, p. 38–39.

⁸³ For details of the organisation and structure of the Court see M. Płachta, *op. cit.*, p. 265–349.

⁸⁴ J. Izdorczyk, P. Wiliński, *op. cit.*, p. 62.

till the Statute is supplemented with a definition of this crime and conditions are specified on which the Court will be competent to judge the perpetrators of these crimes. In practice – pursuant to art. 123 of the Statute – it will be possible to introduce a valid definition of the crime of aggression in the year 2009 at the earliest.⁸⁵ It results from the fact that it is only then when the Secretary General will be obliged to convene a review conference. A revision of the Statute may apply in particular to the list of crimes provided in art. 5 of the Statute.

Genocide (art. 6 of the Statute) was defined as any act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Such acts include:

- killing members of the group
- causing serious bodily or mental harm to the members of the group
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
- imposing measures to prevent births within the group
- forcibly transferring children of the group to another group.

Crimes against humanity (art. 7 of the Statute) were defined as acts committed as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack. The Statute lists 11 examples of such acts, including: murders, extermination, enslavement, torture, enforced disappearance of persons or the crime of apartheid.

War crimes (art. 8 of the Statute) were defined as grave breaches of the Geneva Conventions of 1949 (art. 8 par. 2 item a) of the Statute) and other serious violations of war laws and customs (art. 8 par. 2 item b of the Statute). The categories of these acts were described in great detail and their scope was defined very widely. It should also be emphasized that the Court also has jurisdiction over some violations committed during an armed conflict not of an international character, i.e. internal conflicts – excluding internal disturbances such as riots or isolated acts of violence (art. 8 par. 2 items c) and d) of the Statute).

During the Roman Conference it was deemed necessary to prepare a separate document containing the definitions of all crimes and detailing their constitutive elements for the purpose of interpretation and application of relevant provisions of the Statute.

The Statute (art. 13) provides for three methods to initiate exercising of the jurisdiction of the Court:

⁸⁵ In art. 123 of the Statute it is stated “Seven years after the entry into force of the Statute”.

- a) upon a motion filed to the Prosecutor by a State Party
- b) upon a motion filed by the Security Council acting pursuant to chapter VII of the Charter of the UN.
- c) when the Prosecutor has initiated an investigation, but only in terms of explanatory or operational proceedings.⁸⁶

To be exercised, the Jurisdiction of the Court must be accepted by the state in the territory of which the crime was committed, or by the state that the perpetrator of the crime is a citizen of. Every State becoming a party of the Statute automatically accepts the jurisdiction of the Court over crimes described above. Such acceptance is not required if a case is brought before the Court by the UN Security Council (pursuant to chapter VII of the Charter).

A fundamental principle contained in the Statute is the principle of complementarity of the Court with respect to national jurisdictions (art. 1 of the Statute), which means that national courts have priority. Different relations were defined for ad hoc tribunals. The jurisdiction of the International Criminal Court may be exercised only when a state competent to exercise its own jurisdiction is not willing or able to prosecute and punish a perpetrator on its own.

The experiences of the Tribunal for the former Yugoslavia and the Tribunal for Rwanda demonstrate how important the co-operation with respective states is. Entire chapter IX regulates this co-operation. It has to be pointed out that one of the forms of co-operations is referred to in the Statute of the ICC as surrender, not extradition. The provisions of the Statute clearly oblige states to incorporate such procedures in their internal legislations that allow to realise all forms of co-operation, including the form referred to as “surrender”. Even before the Statute entered into force there appeared a problem of how to interpret this term and how to determine whether the term “extradition” encompasses “surrender”, or whether it is a new institution. The Party States do not share a uniform opinion on this matter. Among states that already ratified the Statute and assumed that “surrender” is not “extradition” that is defined in their constitutions are, without limitation, Italy, Spain, Finland and Austria. The Federal Republic of Germany, on the other hand, amended its constitution.⁸⁷ In the Polish doctrine a partition of views also became apparent during the ratification of

⁸⁶ J. Izydorzyc, P. Wiliński, *op. cit.*, p. 64.

⁸⁷ J. Kranz, A. Wyrozumska, *Ratyfikacja Rzymskiego Statutu Międzynarodowego Trybunału Karnego a interpretacja Konstytucji RP z 1997 roku: art. 90 – czy tylko klauzula europejska?*, (in:) “*Studia Prawno-Europejskie*,” t. 5 (2001), p. 27.

the Statute.⁸⁸ According to professor Wyrozumska, Kranz⁸⁹ and Płachta, the meanings of these two terms should not be considered identical.

Professor Płachta emphasizes that this term was not used accidentally, as the creators of the Statute had two objectives in mind: to “loosen” the rigor of the law and extradition procedure in relation to this form of co-operation and to dramatically reduce the catalogue of grounds on which assistance can be refused. The intention was to create a new form of co-operation between the state and the International Criminal Court.⁹⁰

A different view is expressed by professor Galicki, who believes that the essence of the institution is not determined by its name or the entity to which an individual is surrendered, but by the content of such a surrender.

Despite the fact that the Statute of the Court entered into force in the year 2002, today it is difficult to assess the real significance and effectiveness of the Court. The Court did not begin its real functioning until the year 2003 when the first panel of judges was appointed.⁹¹ It began resolving cases in the year 2004.⁹² Today its main efforts are concentrated around the African continent. Cases that are being resolved relate to violations of international law in the Democratic Republic of Congo, Uganda, the Central African Republic and Darfur (Sudan).

The incapacity of the international community and the lack of response of states to the events that took place in Yugoslavia or Rwanda explicitly prove the purposefulness and legitimacy of the Court. The events of September 11th also made the world aware of the need for closer co-operation among states to ensure security and peace. Already in the year 1999 the Parliamentary Assembly of the Council of Europe adopted a recommendation that obliged the Committee of Ministers to request that the Member States of the Council of Europe ratify the Statute “as soon as possible”. The General Assembly of the UN adopted a similar resolution in 1998. Also in the year 1999 the European Parliament adopted a resolution in which it obliged the European Commission and Council to treat the ratification as

⁸⁸ See, e.g. K. Karski, *Ratyfikacja Statutu Międzynarodowego Trybunału Karnego (Zagadnienia prawnomiędzynarodowe i konstytucyjne)*, “Państwo i Prawo”, 2001, No. 1, p. 51–63 and M. Płachta, A. Wyrozumska, *Problem ratyfikacji Statutu Międzynarodowego Trybunału Karnego (Uwagi polemiczne w związku z artykułem Karola Karskiego)*, “Państwo i Prawo”, 2001, No. 5, p. 87–97.

⁸⁹ J. Kranz, A. Wyrozumska, *op. cit.*, p. 28–33.

⁹⁰ M. Płachta, *(Staty) Międzynarodowy Trybunał Karny: triumf idealizmu nad polityką?*, “Palestra” 1998, No. 11–12, p. 173.

⁹¹ J. Izydorczyk, P. Wiliński, *op. cit.*, p. 40.

⁹² *ICC marks five years since entry into force of Rome Statute*, “ICC Newsletter June/July 2007”, http://www.icc-cpi.int/library/about/newsletter/16/en_01.html.

an important issue in negotiations with the governments of states applying for EU membership. These arguments were considered when the ratification procedure was initiated in Poland.

What can be considered a success today is not only the mere fact of having concluded the negotiations and signed the Statute of the Court – the first permanent judicial organ – but rather the fact that the Court began real functioning. It is only left to hope that it will live up to the hopes staked on it. It is an extremely important achievement as it introduces a qualitative change in the scope of the liability of an individual under modern international law. It is worth remembering, however, that there are countries like, for example, the United States that are not parties to the Statute, which may hinder the practical functioning of the Court.⁹³

Conclusion

To recapitulate it has to be emphasized that modern international law provides for the liability of an individual for violations of this law. Next to the sphere of an individual's rights and possibilities to claim these rights, it is a factor that may decide about recognizing the international legal subjectivity of an individual. This subjectivity, however, is of a secondary and limited nature. It is the state that decides how much an individual will use this subjectivity. This is demonstrated in the context of the liability of an individual by the indicated regulations in which states define material, temporal and territorial jurisdiction over acts for which an individual can be held accountable. They also define the capacity of an individual to face international organs enforcing the compliance of individuals with international law.

The previously existing and applicable regulations treated this issue only fragmentarily. The need for comprehensive regulations was detected, the effect of which is the draft penal code. It was also managed to successfully establish a permanent international tribunal competent for dealing with violations of international law committed by individuals. Liability for certain acts (defined in, e.g. the Nuremberg Principles) is accepted so commonly today that we can talk about the existence of a common norm in

⁹³ The United States did sign the Statute, but were not willing to ratify it. The current status of the ratification of the Court's Statute is available on the official website of the UN <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp>.

this field. Thus, an individual can bear responsibility for violating not only contractual, but also common norm.

In principle, individuals were tried before national courts. The Nuremberg and Tokyo Tribunals gave rise to new solutions – international tribunals. The events that took place in Yugoslavia and Rwanda revealed that the international community was not prepared to hold perpetrators of crimes accountable. Tribunals, despite objections regarding the effectiveness of the Tribunals, judge individuals guilty of certain violations. We should hope that the established International Criminal Court will measure up to the challenges. But even today it seems legitimate to state that the ICC is a new phase in determining the international legal liability of an individual and approaching the issue of the subjectivity of an individual under international law.