III.

INTERNATIONAL CRIMINAL LAW

THEORETICAL AND PRACTICAL IMPACT OF INTERNATIONAL CRIMINAL LAW ON INTERNATIONAL LAW

Katarína Šmigová

Abstract: The article aims to examine the impact of international criminal law on international law from both a theoretical and a practical perspective. The first part focuses on changes in the perception of State sovereignty and changes in the position of the individual at the international level. Particular examples from international diplomatic law and the law of treaties, as well as from international human rights and humanitarian law, are subsequently presented. The conclusion summarises the development as a process of the humanisation of international law, focusing on the individual, whereas a State keeps its position as the primary subject of international law.

Resumé: Článok sa zaoberá vplyvom medzinárodného trestného práva na medzinárodné právo tak z teoretického ako aj praktického hľadiska. V prvej časti sa zaoberá zmenami v poňatí suverenity štátu a v postavení jednotliva na medzinárodnej úrovni. Následne prezentuje príklady, kedy vývoj medzinárodného trestného práva ovplyvnil všeobecné medzinárodné právo, a to najmä príklady z diplomatického a zmluvného práva, z medzinárodného práva ochrany ľudských práv a z medzinárodného humanitárneho práva. Záverom autorka poukazuje na vývoj humanizácie medzinárodného práva, ktoré sa čoraz viac zameriava na jednotlivca, pričom štát naďalej ostáva primárnym subjektom medzinárodného práva.

Key words: State sovereignty, development of international criminal law, humanisation of public international law

On the Author: The author is a teaching assistant at the Faculty of Law, Paneuropean University, Bratislava, and a member of the Slovak Society of International Law, focusing her research on those areas of public international law that are related to the individual, i.e. international human rights law, international criminal law and international humanitarian law.

The year of 2010 was a significant milestone in the development of international criminal law since a definition of aggression was adopted by consensus on 11 June 2010 in Kampala during the first Review Conference on the Rome Statute of the International Criminal Court. Apart from this visible landmark in the area of prohibition of the use of force, the development of international criminal law has influenced the development of general international law in many other ways. The issue of this influence will be covered in the presented contribution.

This article aims to examine the impact of international criminal law on general international law from the perspective of the *raison d'être* of law. According to classical international law, international law governs relations between various

states and regulates the operations of the many international institutions.[1] To that end, it is directed towards the maintenance of international peace and security.[2] By comparison, international criminal law aims mainly to prosecute individuals for the most serious international crimes.[3] However, this paper argues that by seeking justice, one contributes to peace, and therefore no clash between these two values appears here. *Vice versa*, a systemic harmonisation of international law may also be attained through the development of international criminal law.

The paper consists of four parts. The fist part will examine the theoretical impact, namely the change in the understanding of the concept of sovereignty of States as provided in art. 2, para 1 of the United Nations Charter (the UN Charter).[4] The change of the position of the individual as a subject of international law will be discussed accordingly. The second and third part will focus on the practical influence of international criminal law on international law. The second part will point out relevant examples of the development of international law in the area of law of diplomatic relations, international law of treaties, international human rights law and international humanitarian law. Since international law has many subparts, the third part of this contribution will briefly present other aspects of the impact of international criminal law, apart from the impact of its core provisions. These include the strengthening of cooperation in the area of transnational crimes that some scholars, e.g. Bassiouni, include into the sphere of international criminal law.[5] The fourth part will conclude the article, arguing that the basic impact of international criminal law, as the other side of the same coin with international human rights law, lies in the change in the approach towards the position of the individual.[6] Two examples of potential future development will be submitted as well.

I. State Sovereignty in relation to the Individual

State sovereignty as the exclusive power of a State over its own territory and towards other actors of the international forum has constituted the non-debatable basis of the Westphalian system. A State, as an entity consisting of a population, territory and an effective government is the primary subject of international law.[7] However, because a State does not exist in a vacuum, States were invited not only to coexist with other states but also to enter into different types and levels of mutual cooperation. Nevertheless, the notion of sovereignty has remained the basis for these

[1] Shaw, M. N.: *International Law* (5th ed.). Cambridge: Cambridge University Press 2003, p. 2.

[2] *See* Art. 1, para. 1 of the United Nations Charter.

[3] See Art. 1 of the Rome Statute of the International Criminal Court.

[4] Art. 2, para. 1 reads as follows: The Organisation is based on the sovereign equality of all its Members.

[5] Bassiouni, M. C. (ed.): *International Criminal Law*. New York: Transnational Publishers 1986, II.

[6] For criminalisation as a last stage in the development of human rights protection *see* Bassiouni, M. C.: International Criminal Law and Human Rights, 9 *Yale Journal of World Public Orde*r 1982, pp. 193-216, p. 193.

[7] Warbrick, C.: States and Recognition in International Law. In: Evans, M. D.: *International Law* (2nd ed.). Oxford: Oxford University Press 2006, p. 218.

inter-State relations. On the other hand, State sovereignty, because of the existence of other States, cannot be absolute; it is automatically limited by the sovereignty of other States. Moreover, the concept of sovereignty has been shaped by other influences, one of which is presented in this part, i.e. the scope and exercise of State sovereignty in relation to the individual.

One part of State sovereignty consists of prosecuting crimes on its own territory.[8] The territorial principle of jurisdiction, alongside with the active nationality principle of jurisdiction, has been considered as one basic ground for the criminal jurisdiction of a State.[9] However, that is not always sufficient since crime does not recognize State borders. Moreover, although the concept of State sovereignty had been absolutely confirmed by hundreds of years of development of international law, it was challenged during World War II, when voices calling for justice became stronger and stronger. Germany was not about to prosecute its own representatives, nevertheless justice needed to be done. Therefore a new development was triggered, i.e. international criminal law, the prosecution of individuals at the international level.[10] It in effect meant that the exercise of criminal jurisdiction was transferred to the international community, although only in relation to the leading Nazis. The other suspected war criminals were tried by national courts under Law No. 10 enacted by the Allied Control Council.

Crimes are committed by individuals, not by abstract entities, as Nuremberg judge Jackson said that time.[11] However, apart from the claims of aliens against foreign States, this was the first time that an individual was successfully brought before a court at the international level.[12] Although the Nuremberg and Tokyo trials have been criticised as victors' justice, their principles were unanimously adopted by a General Assembly Resolution.[13] Individual criminal responsibility, the non-applicability of a defence based on the claim of immunity of high officials, and the concept of command responsibility are examples of what was introduced to international law.

A parallel development of international human rights law also took place. One could argue that States could have continued in the direction of international criminal responsibility of the individual rather than in the direction of international

[8] Brown, B. S.: Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals, 23 *Yale Journal of International Law* 1998, pp. 383-436, p. 424

[9] Hafner, G.: Die internationale Strafgerichtsbarkeit. In: Neuhold, H., Hummer, W., Schreuer, C.: *Österreichisches Handbuch des Völlkerrechts, Band 1: Textteil*, Wien : Manzsche Verlags – und Universitäts-buchhandlung 2004, p. 533

[10] Šturma, P.: *Mezinárodní trestní soud a stíhaní zločinů podle mezinárodního práva*. Praha: Karolinum 2002.

[11] Nazi Conspiracy and Aggression, Opinion and Judgement, p. 60. The document is available [online] at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Nazi-opinion-judgment.pdf [last visit 25 June 2011].

[12] Apart from Peter von Hagenbach tried in 1474. *See* Hafner, G.: Sovereignty vs. Global Public Order: The Development of International Criminal Jurisdiction. In: *Medzinárodný trestný súd na začiatku 21. storočia*. Zborník z medzinárodnej konferencie, 27. september 2006, Bratislava, Slovenská spoločnosť pre medzinárodné právo, p. 14.

[13] UN GA Res. 95 (I) from 11 December 1946.

human rights law. However, only the concept of rights, not that of duties, was pushed forward. On one hand, this was due to the atrocities of World War II. On the other hand, it is true that an international criminal court was referred to already in the Convention on the Prevention and Punishment of the Crime of Genocide, a convention that was adopted even earlier than the Universal Declaration of Human Rights.[14] However, had it been developed further already at that time, the concept of individual criminal responsibility could have gone further in relation to State sovereignty (maybe a different development of universal jurisdiction) than the concept of human rights and State responsibility for their violations, because of three reasons. First, the concept of individual criminal responsibility at the international level limits the exercise of State criminal jurisdiction if the State is unable or unwilling to perform it. Second, it may politically stigmatize a particular State, since even if it is an individual, not a State, that is found guilty; such individuals are usually the highest officials of the relevant State. Finally, the development of international human rights law was not supposed to achieve such a high level of protection of individuals as is the case nowadays.

Nevertheless, on the whole, the Nuremberg trial improved the concept of war crimes, introduced the concept of crimes against humanity, and even tried a crime against peace. The last mentioned crime included into the indictment of leading Nazis was an important step in relation to the prohibition of the use or threat of force as a principle that was incorporated into the UN Charter and that has the status of a customary norm.[15]

Despite an enthusiastic beginning in the post-war development, the Cold War and the East-Western conflict influenced the development of international criminal law and therefore influenced international law as well. For example, although the International Law Commission prepared a Draft Code of Offences against the Peace and Security of Mankind in 1954,[16] and obtained a new mandate in 1978 which was renamed in 1988, because of the existing conditions of the Cold War, it was allowed to really move forward only after the fall of communism.[17] Despite many expectations on the part of the international community with regard to its own future of improved cooperation after the year of 1989, the international conflict was replaced by an increased amount of internal conflicts. To the extent that some of these reached a level where they posed a threat to international peace and security, the UN Security Council decided to adopt decisions providing measures to maintain, and in some cases to restore, international peace and security.[18] One of these was the establishment of the International Criminal Tribunal for ex-Yugoslavia (ICTY) and the International Criminal Court for Rwanda (ICTR). These tribunals were

[14] UN GA Res. 260 (III) from 9 December 1948.

[15] *See* the Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), ICJ decision from 27 June 1986, para 34.

[16] *Yearbook of the International Law Commission,* 1954, vol. II.

[17] *Yearbook of the International Law Commission*, 1996, vol. II, Part Two.

[18] *See* Art. 39 of the UN Charter.

an important milestone in the development of international criminal law. Their statutes were prepared on the basis of the outcome of the Nuremberg trial and their jurisprudence elaborated the principle of individual criminal responsibility, the non-applicability of immunities and the concept of command responsibility. Although the establishment of these was challenged by States, the judgements of the tribunals contributed to the development of international criminal law and other parts of international law, e.g. international humanitarian law.[19]

Another milestone in the development of international criminal law, as well as its impact on the development of international law, will be discussed in the second part of the article, specifically the establishment of the International Criminal Court (ICC). One has to acknowledge that the ICC was set up as a treaty-based judicial body. However, during the negotiations on the Rome Statute, the basic principles of international criminal law were confirmed and set forth in a more detailed way. Moreover, as for State sovereignty itself, the concept of complementarity was introduced by the Rome Statute, leaving it to the ICC itself to decide whether a State is genuinely unable or unwilling to undertake prosecution. On the other hand, the ICC, not having any police force of its own, is entirely dependant on the cooperation of States.

The whole background presented above was focused on State sovereignty, as it seems that such sovereignty has gradually become more limited. However, one has to take into account that every single step was accompanied by the consent of States.[20] It is therefore argued that State sovereignty has not really been curtailed. It is merely the exercise of sovereign powers that has been transferred to other international actors by the consent of States themselves. The same argument is used in the following part, which looks at the impact, in particular, on the law of diplomatic relations and the law of treaties. Although the position of the individual has undergone change in the last sixty years, the State is still the primary subject of international law.

II. Limits on Exercise of State Sovereignty

a) International Law of Diplomatic Relations

The law of diplomatic relations is said to have created a special regime in the area of international law, it is also said to be one of its oldest parts.[21] During the development of this area of law, the concept of diplomatic immunities was created. The maxim *par in parem non habet imperium*[22] was justified first by an extraterritorial

[19] *See* part II c).

[20] Even Germany might be said to have provided a certain form of a consent, although it was given under the circumstances of its position as the defeated party in a conflict. Although the ICTY and the ICTR were established by UN SC resolutions, one may argue that particular states gave their consent by signing the UN Charter. The Security Council has therefore only exercised its powers in cases involving threats to international peace.

[21] *See* the Case concerning United States Diplomatic and Consular Staff in Tehran (USA v. Iran), ICJ decision from 24 May 1980, para 92.

[22] Equals do not have authority over one another.

theory, later by a representative theory. Nowadays the functional theory is invoked to ensure that State representatives can carry out their functions.[23] Moreover, one has to distinguish between the different levels of protection afforded to different types of State representatives.[24]

However, although immunity itself was initially absolute, the developed concept has been proven to distinguish between immunity *ratione materiae* and immunity *ratione personae*. This distinction is important in relation to the period after an official ceases to hold the relevant office since immunity *ratione persone* is not absolute. In this case one has to differentiate between the *acta iure imperii* of a person as a representative of a sovereign and *acta iure gestionis* in the private sphere.[25] It may sometimes be difficult to distinguish between these two types of acts; nevertheless, one has to examine whether a particular act could have been carried out by any ordinary entity or only by a State representative.

The application of the principle of *par in parem non habet imperium* has been examined in depth in two particular cases. One of them considered especially the implementation of international obligations into national law, the other one focused on the arrest warrant issued in order to prosecute the minister of foreign affairs of a different State.

The Pinochet case was examined at all levels of the judicial system of the United Kingdom. The final decision of the House of Lords took into account not only the type of acts that were alleged against the former head of state, but also the time of implementation of the Convention against Torture, and other Inhuman or Degrading Treatment or Punishment from 1984 (CAT). According to the Lords, it was only from the time of its implementation into the national legal system that the *ius cogens* norm of a prohibition of torture could be taken into consideration. Although they failed to consider the nature of *ius cogens per se* properly, their decision provided useful reasoning in relation to the concepts to be distinguished between, i.e. immunity *ratione materiae* and immunity *ratione personae*.

The International Court of Justice (ICJ), however, focused on a different issue. It did not examine the matter of jurisdiction, as asked by e.g. judges Higgins, Kooijmans and Buergenthal in their separate opinion, but instead emphasised the reason for diplomatic immunities *per se*. It explained that international judicial bodies do not apply the principle of *par in parem non habet imperium*. On the other hand, the principle is still applicable in relations between States concerning the immunity of their current representatives. These relations are qualitatively on a different level when compared to the relations between a State and an international judicial body. On the whole, the decision of the Court does not mean that it supported the notion of impunity, since current representatives may still be held responsible after they

[23] *See* the Preambule of the Vienna Convention on Diplomatic Relations 1961.

[24] Vienna Convention on Diplomatic Relations, Vienna Convention on Consular Relations, customary rules in relation to heads of states, heads of governments, ministers of foreign affairs.

[25] *See* Arrest Warrant Case (DRC v. Belgium), ICJ decision from 14 February 2002, para 61.

cease to be representatives of their States or at the international level. The decision thus sustained the concept of immunity and at the same time pointed out other ways of finding suspected criminals responsible for committing crimes under international law.

The aforementioned decisions dealt with similar cases with different results; however, the position of a *current* representative of State, as far as international law is concerned, remains the same (emphasis added). Furthermore, as the ICJ mentioned several times under different circumstances, international law is not static. Another impact of international criminal law could thus occur in the area of a withdrawal of protection of State representatives in cases of gross violations of human rights. Nevertheless, this may become a reality only if States achieve a stage of being willing to provide such consent.

Another area of international law covers State immunity itself, as opposed to the immunity of State representatives. This concept has the same legal reasoning behind it, the principle of *par in parem non habet imperium*, which has primarily been used in this sphere. And similarly, there have been several cases dealing with clashes between *ius cogens* norms and immunity restrictions. Since these cases included individual human rights and appeared at the international level because of the claims of individuals, they are presented in subpart c) on International Human Rights Law.[26]

b) International Treaty law

This part of the article argues that the limitations on State sovereignty in relation to international criminal law may also be seen in the area of treaty adoption and implementation. The introductory remarks will focus on the fact that the principle of individual criminal responsibility at the international level for certain types of conduct has influenced the scope of State sovereignty in relation to its capacity to adopt certain type of norms.

The constraints on State sovereignty were presented on different occasions. One can, however, focus on the ICJ Advisory Opinion on the Reservations on the Genocide Convention. The ICJ explained that only those reservations that were not incompatible with the object and purpose of a treaty were permissible. This advisory opinion of 1951 on a convention criminalizing the conduct of genocide, the Convention on the Prevention and Punishment of the Crime of Genocide, influenced the negotiation process of the Vienna Convention on the Law of Treaties of 1969 (VCLT), in which the concept of object and purpose was presented in the articles on treaty interpretation and treaty reservation.[27] Moreover, the concept of *ius cogens* norm was presented; *ius cogens* norms as norms accepted and recognised by the international community of States as a whole as a norm that cannot be derogated and that makes every other norm void if it contradicts this norm. States thus cannot

[26] Another case concerning State immunity is being decided by the International Court of Justice, see Jurisdictional Immunities of the State (Germany v. Italy). Initial documents are available [online] at http://www.icj-cij.org/docket/index.php?p1=3&code=ai&case=143&k=60 [last visit 21 June 2011].

[27] See art. 19-23 and art. 31-33 of the Vienna Convention on the Law of Treaties.

adopt a treaty that would violate the norm on a prohibition of genocide. Although the VCLT does not provide a list of examples according to which *ius cogens* may be specified, the subsequent practice of States, such as the establishment of a permanent international criminal court having inherent jurisdiction over core crimes under international law, might be a convincing argument for the proposition that crimes such as genocide, crimes against humanity, and war crimes are part of *ius cogens*.[28]

It may still be argued that the concept of *ius cogens* norms has nothing to do with the impact of international criminal law on international law. Nevertheless, as was mentioned above, international criminal law and international human rights law are two sides of the same coin. It was only due to the fact that the concept of international human rights law was more acceptable by States to be developed, especially in the regional systems, that its development prevailed.

Moreover, as for international treaty law, the concept of State sovereignty has also been analysed because of the general rule concerning third states. According to Art. 34 of the VCLT, no treaty can create either obligations or rights for a third State without its consent. The Rome Statute has determined the jurisdiction of the ICC in such a way that even a national whose home-country was not a Party to the Rome Statute could be prosecuted.[29] Nevertheless, despite various objections,[30] the justification is rather simple.[31] Every State as a sovereign can exercise its jurisdiction over individuals who are suspected of committing crimes on its territory. And if a State decides to transfer the exercise of its jurisdiction to an international judicial body, it is simply exercising its sovereignty. The Nuremberg trial is a perfect example. Anything that the Powers could do themselves, they authorised the International Military Tribunal to do. From this point of view the general rule of no obligation upon third States has been met and no unreasoned development took place in relation to international criminal law.

c) International Human Rights Law and International Humanitarian Law as parts of International Law

As has already been mentioned, the development of international criminal law has influenced the development of international human rights law and international humanitarian law as well. The provided examples deal especially with the scope of protection extended to an individual in these areas. International human rights law invokes State responsibility. However, as this issue has been examined by some cases, the issue of State immunity may also be present in these claims. International

[28] Bassiouni, M.C.: International Crimes: Ius Cogens and Obligation Erga Omnes. In: 59 (4) *Law and Contemporary Problems* 1996, pp. 63-74, p. 74.

[29] *See* art. 12 of the Rome Statute.

[30] Wedgwood, R.: The International Criminal Court: An American View, 10 *European Journal of International Law* 1999, pp. 93-107, p. 99.

[31] Hafner, G. et all: a Response to the American View as Presented by Ruth Wedgwood, 10 *European Journal of International Law* 1999, pp. 108-123, p. 117.

accountability may thus provide the possibility to improve human rights protection especially in relation to the effective remedy provided by the relevant State.

The best example might be the case of Al-Adsani v. UK, since the decision taken by the European Court of Human Rights was interestingly 9 to 8 judges in favour of the prevalence of State immunities over the *ius cogens* norm of prohibition of torture.[32] Various concurring and dissenting opinions of judges explained why it was or was not legitimate and proportional to restrict access to a court in the case of a civil claim regarding torture against a State. The Court noted that the European Convention on Human Rights (ECHR) should be interpreted in accordance with other rules of international law and found no rule that States were not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State.[33] Individual judges pointed out various consequences that could occur if the decision were to have been different, such as the issue of the problematic execution of such a decision or the impact on diplomatic relations and even asylum law as well. The other 8 judges focused on the more important interests of an individual who was allegedly tortured and on the interests of an international community that recognised and accepted the prohibition of torture as *ius cogens*. Diplomatic relations cannot be compared in importance to these interests. Despite the fact that no judge gave any comments on the different types of analysed norms (prohibition of torture as a substantive norm and State immunity as a procedural norm),[34] in relation to the goal of this article it is important to point out that even international human rights bodies have taken into consideration the growing recognition of the overriding importance of the prosecution of international crimes. Keeping in mind the specificities of the ECHR decision making process, one will see whether a decision might be opposite in a similar case decided by a different chamber.

International humanitarian law has also been very much influenced by the development of international criminal law. It is so especially in the case of the related jurisprudence of international tribunals, namely the Nuremberg tribunal in relation to the scope of war crimes and the ICTY in relation to grave breaches. The latter has blurred the distinction between international and non-international armed conflicts in relation to these breaches of particular Conventions.[35] Despite some disagreement towards the ICTY for judicial law-making, States have taken a similar direction. During the Review Conference, the Assembly of State Parties adopted an amendment to art. 8 of the Rome Statute according to which it is a war crime to employ chemical weapons and expanding bullets, previously criminalized only when committed in international conflicts, in a non-international armed conflict as well.[36]

[32] There have been other similar cases, such as Fogarty v. UK, McElhinney v. Ireland.

[33] Decision of the European Court of Human Rights, Al-Adsani v. The United Kingdom. App. No. 35763/97, 21 November 2001.

[34] Fox, H.: *The law of state immunity*. New York: Oxford University Press, 2002. p. 525.

[35] Tadic Case, The Judgement from the Appeals Chamber from 2 October 1995, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para 94.

[36] It will come into force only for those States Parties which have ratified it, one year after doing so.

Referring to both international human rights law and international humanitarian law, one cannot forget another important influence of international criminal law, namely the impact on the status of victims. The general impact was caused by moving victims from the position of an object of international criminal proceedings to the position of a subject in such proceedings, demonstrating a change in the status of an individual at the international level.[37] Both *ad hoc* tribunals concentrated on victims as witnesses, without a right to intervene or a right to refuse to give evidence or a right to reparations.[38] By contrast, during the preparation of the establishing document for the ICC, a different approach was adopted, namely that of victim participation. This approach has made it possible for a victim to participate at every stage of proceedings before the ICC. Moreover, art. 75 of the Rome Statute has declared the victim's right to reparations and art. 79 has created a Trust Fund. Furthermore, art. 43 para. 6 has established the Victims and Witnesses Unit to provide protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of the testimony given by such witnesses. It is true that art. 68 para. 3 of the Rome Statute includes several restrictions in relation to the participation of victims in the proceedings, such as appropriateness within the proceedings as decided by the Court and the requirements of a fair trial, nevertheless, the victim's position has been radically changed if compared to ICTY proceedings. It could even be argued that the purpose of international criminal proceedings has been changed as well. Such proceedings do not merely aim to punish the perpetrators of crimes under international law but also devote attention to improving individual and collective healing. It has been proved once again that the *raison d'être* of international law has become more directed towards the individual.

III. Other Examples of the Impact of International Criminal Law on International Law

The basis of international law lies not only in the mere co-existence of States but also in their mutual cooperation. Such cooperation may have different reasons. In the area of criminal law, the aim of cooperation focuses on improvement of the exercise of State sovereignty in relation to the prosecution and punishment of people responsible for crimes. However, as has already been mentioned, crime does not recognize border lines between States. That is why cooperation between States had to be improved in the area of transnational crimes that are difficult, even impossible, to deal with successfully on the national level only.

In the field of transnational crimes (i.e. offences that include offences whose inception, prevention, and/or direct or indirect effects involve more than one

[37] *See* Haslam, E.: Victim Participation at the International Criminal Court: A Triumph of Hope over Experience? In: McGoldrick,D., Rowe, P., Donnelly, E. (eds.): *The Permanent International Criminal Court. Legal and Policy Issues*. Oxford: Hart Publishing 2004, pp. 315-334.

[38] *See* rule 85 of Rules of Procedure and Evidence of ICTY.

country);[39] states have not reached a stage where they would transfer the exercise of their sovereignty to an international body. Naturally, neither would they want to transfer it to another State. However, through the adoption of ordinary multilateral treaties they have introduced different improved approaches for prosecuting individuals for serious crimes, some of which may under certain conditions achieve the status of an international crime, e.g. trafficking in human beings as a crime against humanity.[40] Accountability has been strengthened through the so-called quasi universal jurisdiction under the concept of *aut dedere aut iudicare* that is incorporated in the counter-terrorism conventions.[41] On the whole, the end of impunity has been the goal, while still maintaining the objective that State sovereignty and State consent should to continue to play an important role.

IV. Conclusion

This article has presented the indivisible impact on theoretical and practical issues of international law made by international criminal law. The basic impact of international criminal law on international law was argued in the area of covering, detailing and subsequent harmonising aspects of international law in relation to responsibility at the international level. Such a development has included the introduction of the individual as a partial subject of international law. On the other hand, it has not changed the position of a State, since the State is still the primary subject in the Westphalian system of international law. However, the whole development towards ending impunity has changed the State-oriented approach to an individual-oriented approach. As has been submitted during the Toronto Conference of the International Law Association in 2006, the process of humanisation of international law has been strengthened since World War II. Humanisation is not perceived as a process of making international law more humane but as a process where the individual has come to occupy a position at the centre of international law, as the r*aison d'être* of State activities. Constructivists would point out the importance of shared values, especially the values of humanity and human dignity. However, one cannot forget that it is still the States that make law on the international level and that although there are *ius cogens* norms, they have to be recognised and accepted by the international community of States. Nevertheless, the role of individuals cannot be undermined especially in relation to the representatives that act on behalf of a State and in relation to civil society, a concept that has played an important role in the development of international criminal law.

As for the future possible development, two examples are provided here. The first one concerns the development of the international criminal responsibility of corporations as this concept has already been presented in several national legal systems.

[39] Mueller, G. in Williams, P., Vlassis, D. (ed.): Combating Transnational Crime: Concepts, Activities and Responses. London: Frank Cass Publishers 2001.

[40] Art. 7 (2c) of the Rome Statute.

[41] *See* Bates, E.S.: *Terrorism and International Law. Accountability, Remedies, and Reform*. A Report of the International Bar Association Task Force on Terrorism. Oxford: Oxford University Press 2011, p. 174.

Their responsibility could be covered by the machinery which prosecutes international crimes. The second one proposes a gradual change of the right of a State to provide diplomatic protection to the right of an individual to diplomatic protection. Such a legal norm has already been incorporated into some national legal systems.[42]

These two examples may strike some as being too ambitious and not aware of the international law particularities of the status of States and of essentially horizontal relations. However, the present-day position of an individual was not imaginable one hundred years ago either. To paraphrase G. B. Shaw: You see and you say why. I dream and I ask why not. In this context, one could also dream that a right to withdraw diplomatic immunities by a sending state according to the Vienna Convention on Diplomatic Relations could also be potentially changed into an obligation under circumstances of gross violations of human rights. That could be perceived as another step in the development of the principle *par in parem non habet imperium*.

[42] *See* Commentaries to the Draft articles on Diplomatic Protection 2006, art. 19.