

**In Search of Justice:
Through Courts and without Courts**

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Increased homogeneity of value-normative space in the international community was one of the expected outcomes of the end of the Cold War and victorious march of liberal ideology in the “second” and “third” world countries. This outcome meant homogeneity both in terms of declared values and means of achieving them. It seemed that the international community’s division into supporters of “peace and progress” and proponents of “freedom and human rights” was over. In the end of the XX century various countries and political groups united in a similar rhetoric for the sake of “peace”, “sustainable development” (which became considered the best form of progress), “human rights protection” and “democracy”. The notions of morality and justice lost the negative connotations of the Cold War era, used to condemn ideological adversaries, and came into political fashion again. However, now the main condemnation leitmotif was the notion of “double standards”, emphasizing noncompliance of international actors’ rhetoric with their actions. Does it mean that reference to the notion of justice is a new phenomenon, which calls to creation of a new set of values and norms? No doubt, this phenomenon is not new. New is the persistent aspiration of international community for achieving “justice” and for suppressing “injustices” in international relations.

In the present article examination of justice in international relations is limited to international law, regulating behavior of parties involved in armed conflicts. This is what in the XIX century was called “law and customs of war” and was in the course of the XX century codified under the collective title as “international humanitarian law” (IHL). After the end of the Cold War the international community’s fight against “injustices” was embodied in strengthened institutional basis of the international

criminal justice and extrajudicial forms of justice restoration.

Referring to the notions of justice and fairness, it is useful to examine the origin of these words. The notion of *justice* as fairness is linked in Romance and Germanic languages with the notion of *justice* as judicial procedure through the common Latin root *jus* (Latin - law): *just* means *fair, deserved*, while *justice* means both *fairness* and *judicial procedure*. This fact reflects semantic and conceptual unity of the above-mentioned notions, hence such legal terms as “bring to justice”. In Russian the notion of *justice* as judicial procedure (“*pravosudiye*”) is also linked to that of *justice* as fairness (“*spravedlivost*”) through the common origin in the word “*pravo*” (right). However, in the Russian language the notion of *justice* as judicial procedure is associated with the system of restoring rights by way of legal proceedings¹, and words *justice* as judicial procedure (“*pravosudiye*”) and *justice* as fairness (“*spravedlivost*”) do not have the semantic unity, which is present in Romance and Germanic languages. The word “*yustitsia*” in Russian is a transliteration of the Latin *justitia* (justice as both fairness and judicial procedure), but retains only one meaning and applies to “functioning of judicial bodies“.² Identified semantic peculiarities become evident when one discusses the problem of achieving and implementing justice in international relations.

There are numerous approaches to interpretation of justice and to the means of achieving it. The two most clearly defined ones are understanding justice as *objectivity, impartiality, compliance with law and fair grounds* and understanding justice as *compliance with truth*.³ The first approach finds its reflection in the so called “procedural justice”, i.e. in strict observation of certain norms and regulations. This

¹ S. Ozhegov, N. Shvedova. *Dictionary of the Russian Language: 80,000 words and idioms / Russian Academy of Sciences*. Institute of Russian Language. – 4th edition, modified. – Moscow: Azbukovnik, 1999. P.577.

² *Ibid*, P.915.

³ *Ibid*, P.757.

approach is personified in the goddess of justice Nemesis, blindfolded and holding scales and a vengeful sword. The second approach is to a larger extent associated with strife for an ideal state of society, which would overcome the imperfections of law and justice system. Despite all inconsistencies, it is clear that the legal and judicial system, aimed at restoring and protecting justice, is inseparable from values and ideal perceptions about what is truthful and right and how to restore justice or compensate for the damage in case of injustice.

John Rawls, the author of the “Theory of Justice”, unites two approaches to understanding justice as follows: “Justice is the first virtue of social institutions, as truth is of systems of thought”⁴. John Rawls interprets *justice as fairness*, and under fairness he understands such principles of social cooperation, with regards to which there is a social contract, reflected in a code of rules and obligations of those who participate in this social cooperation. A crucial underlying principle of such understanding of justice is equality.⁵

Principles of justice, reflected in contemporary legislation and judicial systems, national as well as international, go back to ancient philosophy and Roman law. According to the ancient tradition, law was considered one of the forms of achieving justice in relations between people, because, as ancient philosophers believed, law reflected human ability to cognize principles of social order through inherent human rationality. The result was a belief in “natural law”, which people ought to cognize and observe. Traditions of Roman law and ancient philosophy introduced the following crucial elements into the modern systems of justice: rationality, belief in inalienable universal “natural human rights” and the link between

⁴ J. Rawls. *Theory of Justice/ Transl.* by V.V. Tselishev. – Novosibirsk: Novosibirsk State University Publishing House, 1995. P. 19. Further Rawls is writing: “We should arrange and respect the social institutions as direct principles of truthfulness and justice” (P.126); “Accepting that legal order is a system of public rules, addressed to rational individuals, we can explain prescriptions of justice, that are associated with the rule of law. These are prescriptions that would be the foundation of any system of rules, perfectly embodying the legal system idea. This, of course, does not mean that existing laws satisfy these prescriptions as necessary in all cases. Rather these maxims result from a certain ideal perception, which, as expected, laws should come close to, at least for the most part”. P. 211.

⁵ Rawls John. *Theory of Justice*. P. 25-30.

the political organization (state) and the law.⁶

With regard to international relations the notion of justice is primarily employed in the development of international law, and in particular in public law, regulating behavior of states. International law is a self-constraint voluntarily accepted by sovereign states for the sake of creating *public good*, i.e. predictable, controllable and favorable environment for international cooperation. Despite the difficulty of identifying its "founding father", the origin of international law is associated with a Dutch lawyer Hugo Grotius, whose major work is a treatise "On the Law of War and Peace", written in 1625. There he laid down the principles of "justice" in international relations, various interpretations of which are still in use today. Grotius' principles included division of law into private and public and the definition of *just war* principles.⁷

International humanitarian law embodies perceptions of "truth", put down in the form of a code of rules and obligations by the belligerent parties to comply with declared principles; it also defines actions aimed at punishing criminals and restoring justice. This article examines the problem of justice in the international system through the use of only one of the branches of law. Such approach is justified partially because international law as such is expected to overcome the limitations of national jurisdictions and to move on from the so called "natural state" of international relations by extending the principles of justice to supranational level.⁸

International humanitarian law is meant to regulate the most problematic

⁶ Many Latin sayings that survived till present day reflect these principles. For instance, *Justitia regnorum fundamentum* – Justice is the foundation of kingdoms. Or - *Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia (Ulpianus)* - Jurisprudence is the knowledge of things divine and human, the science of the just and the unjust.

⁷ See H. Grotius. *On the Law of War and Peace*. Three books, in which the natural law and the law of nations are explained, as well as the principles of public law. Moscow: Ladomir, 1994

⁸ "Natural state" of international relations, or more precisely "wild" nonregulated relations, was opposed to organized and rationally regulated social order in the framework of political organization (state). The terms "natural state" and "natural rights" have in a fact an almost opposite meaning. As for the problem of warfare, for a long time there has been a tradition of looting the populated areas after their conquest, committing mass murders of defeated adversaries, especially of the male population; it was a reflection of "natural state" of international relations. Victors possessed absolute power over life, property and other material and nonmaterial attributes of defeated adversaries. Attempts to regulate international sphere in fact reflected the need to introduce an element of legality and order into international relations anarchy.

sphere of state interaction – the state of war, and to introduce the principles of humanism into the least humane form of interaction in the international arena. The difficulty of regulating this sphere was twofold: in wartime legal regulation within belligerent countries was normally restricted⁹, while national violence-constraining legislation did not as a rule apply to the adversary.¹⁰ The state of war has for a long time been outside of the domain of norms, laws, and moral principles. *International humanitarian law was initially supposed to overcome several existing constraints. It was meant to: 1) overcome primarily national character of law regulating the use of violence; 2) create legal protection for belligerent parties in circumstances when normal law is either absent or revoked; and 3) extend new perceptions of justice and humanism to international relations as an example of the new truth.*

The basics of the international humanitarian law (IHL) were introduced in the second half of the XIX century. The First Geneva Convention “For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field” was adopted in 1864 by all independent states existing at the time. This Convention listed the first “truths” of humane behavior in war: humane attitude towards wounded and dead, both one’s own and adversary’s; rendering medical assistance to all belligerent parties without discrimination; immunity of medical personnel from military attacks. In 1899 another Convention was adopted to extend humane principles to the members of armed forces at sea. Besides, the so-called Hague Conventions were then adopted to codify the *law of war*, including the norms of treating prisoners of war and rules of conducting military operations. Those Conventions also stipulated the “means of inflicting damage upon adversary in sieges and bombings”, as well as the rules of

⁹ Quincy Wright noted that one of the constant reflections of the state of war are the “special legal norms”, i.e. *abnormal law*. See. Wright Q. *Study of war*. - Chicago, 1969. P. 8.

¹⁰ Cicero’s statement is widely known: *Silent leges inter arma* (For among arms, the laws fall mute). Or another similar Roman saying: *In hostem omnia licitia*. (Everything is allowed against the enemy) // Quoted from Dictionary of Latin Proverbs: 2,500 units / Ed. by Y.N. Borovskiy – Moscow: Russkiy Yazyk, 1982. P. 375, 359.

occupation.

In the course of World War I there was a frequent violation of international humanitarian law norms, including capture of medical staff and cruel treatment of prisoners of war. After the war, Geneva Conventions were extended to include additional provisions on protection of a number of other groups, including war correspondents. At the same time the Hague Law developed, and restrictions were placed upon the use of especially dangerous types of weapons, such as chemical and bacteriological weapons, poisonous gases, explosive bullets, etc.

In the course of World War II, mass crimes were committed against both soldiers and civilians. As a result, more documents aimed at expanding the sphere of IHL application were adopted after the war. They include the 1948 Convention “On the Prevention and Punishment of the Crime of Genocide” and four 1949 Geneva Conventions – to protect the wounded in the field; to protect the wounded at sea; to protect the prisoners of war and the civilian persons.¹¹ In 1977 two Additional Protocols to the 1949 Geneva Conventions were adopted: Protocol I “relating to the Protection of Victims of International Armed Conflicts”, and Protocol II “relating to the Protection of Victims of Non-International Armed Conflicts”. The Protocols accommodated the changes in the character of armed conflicts, i.e. the increased number of internal conflicts, involving irregular armed forces such as guerrilla fighters or insurgents.¹²

¹¹ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949; Convention (III) relating to the Treatment of Prisoners of War. Geneva, 12 August 1949; Convention (IV) relating to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

¹² Expansion of the range of combatants, who are protected by IHL, by including participants of irregular military formations and adoption of the Additional Protocol II, extending IHL application to domestic conflicts, were made as a result of pressure by third world countries, where wars of national liberation and anticolonial wars were raging. As H.P. Gasser notes, this provision of 1977 Additional Protocols gave rise to the most heated debates among the 1974-1977 Diplomatic conference participants. In fact, the wording, that is now part of the Protocols, allows combatants to go underground and hide among civilians, which makes implementation of discrimination principle problematic. According to a number of developed countries, inclusion of such a phrasing meant legitimizing guerrilla forms of struggle, and could, as the critics believed, promote terrorism. // H.P. Gasser. *International Humanitarian Law. Introduction.* – International Committee of the Red Cross: Moscow, 1995. P. 76.

The above-mentioned documents establish the following principles of humane conduct of armed conflicts:

- The parties to a conflict must at all times distinguish between the civilian population and combatants in order to spare the civilian population and civilian property. Neither the civilian population as a whole nor individual civilians may be attacked.
- Attacks may be made solely against military objectives. People who do not or can no longer take part in the hostilities are entitled to respect for their lives and for their physical and mental integrity. Such people must in all circumstances be protected and treated with humanity, without any unfavorable distinction whatever.
- It is forbidden to kill or wound an adversary who surrenders or who can no longer take part in the fighting.
- Neither the parties to the conflict nor members of their armed forces have an unlimited right to choose methods and means of warfare. It is forbidden to use weapons or methods of warfare that are likely to cause unnecessary losses or excessive suffering.
- The wounded and sick must be collected and cared for by the party to the conflict which has them in its power. Medical personnel and medical establishments, transports and equipment must be spared.
- The red cross or red crescent on a white background is the distinctive sign indicating that such persons and objects must be respected.
- Captured combatants and civilians who find themselves under the authority of the adverse party are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions. They must be protected against all acts of violence or reprisal. They are entitled to exchange news with their families and receive aid. They must enjoy basic judicial guarantees¹³.

The main principle of international humanitarian law is *division* of participants and purposes of military activities into *legitimate* and *illegitimate*

¹³ International humanitarian law: the essential rules/ International Committee of Red Cross. Available at - <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5ZMEEM>

(discrimination principle). Military operations can be carried out only against *combatants*, i.e. people taking an active part in warfare. *Combatants* are military personnel, and members of irregular military units, acting under command of a responsible commander and taking an active part in warfare. People who do not take part in military operations and against whom it is forbidden to use violence, according to international humanitarian law terminology, are *noncombatants* – this category includes civil population, medical personnel, clergy, journalists, diplomats and personnel of humanitarian organizations. Mercenaries, spies and saboteurs are not considered combatants (according to international humanitarian law regulations), and therefore do not enjoy legal protection. IHL proscribes recruitment of underage persons into the military.¹⁴ A key feature of international humanitarian law, as reflected in all Geneva Conventions (Article 3), is that it enters into force in case of any armed conflict between two or more “High Contracting Parties”, even if one of them does not recognize the state of war.

The logic behind IHL principles was based on understanding war as an international conflict, in which actions and will of direct participants of warfare (*combatants*) are driven by political and state goals. These goals are reflected in military commanders’ orders, and result from the so called *military necessity*.¹⁵ As soon as persons carrying out that will come out of action (due to injury, captivity or voluntary abandonment of fighting), they are no longer belligerents, and become private persons, who no longer represent a threat to the adversary. The second logical component of international humanitarian law implies that military operations are to be aimed at undermining the military component of the adversary’s power, and therefore, legitimate targets for military attacks can only include military sites and people directly

¹⁴ However, in practice teenagers and children quite often get involved into armed conflicts and become guerrilla fighters, especially in African countries and in the Middle East.

¹⁵ The notion of *military necessity* is a legal term that means the right of a belligerent party to apply force in order to achieve victory. However, this right has two important limitations: observing *discrimination* principle and implementing *commensurability* principle – i.e, correlating the necessary damage inflicted with victory probability. See F. Hampson. *Military Necessity // Crimes of War: What the Public Should Know*. Reference Book / Russian Edition. Ed. by Y.M. Kolosov – Moscow: “Text”, 2002. PP. 80-81.

involved in fighting.¹⁶

Violation of international humanitarian law is considered an international offence, which implies damage compensation, and criminal prosecution for particularly serious violations. The Geneva Conventions lay out punishment for intentional homicide, torture, intentional infliction of health damage, attacks against civilians, non-discriminate warfare, armed attacks against nuclear facilities, attacks against non-defended localities, attacks against the wounded, use of medical emblem for military purposes. The term *war crime* with regards to actions violating provisions of the Geneva Conventions became actively used after World War II. IHL has several essential features: 1) statutes of limitations do not apply to war crimes and crimes against humanity; 2) prosecution and trial over war criminals are mandatory; 3) universal jurisdiction allows carrying out judicial procedures outside the country of criminal's citizenship or outside the country where the crime was committed.¹⁷

Thus, international humanitarian law the principles of war conduct in accordance with the *just warfare tradition*. IHL embodies the principles of *just warfare (jus in bello)* and leaves out the principles defining the *just resort to war (jus ad bellum)*¹⁸. Implementation of IHL norms constitutes another component of justice. IHL also defines war crimes and possible liabilities, thus closing the “justice chain” by providing an opportunity to restore justice and punish criminals.

¹⁶ 1868 Saint-Petersburg Declaration stipulated that “the only legal aim that states should have in the course of war consists in weakening the military forces of adversary // Declaration renouncing the use of explosive and incendiary bullets, Saint-Petersburg, 29 November 1868 – Available at “Legislation and Human Rights” portal. – <http://www.memo.ru/prawo/hum/spb-1868.htm>

The same provision is stipulated in the 1907 Hague Convention “On Laws and Customs of War on Land”.

¹⁷ Prevention of international humanitarian law violations. - Moscow: International Committee of the Red Cross, 1998. PP. 80-81.

¹⁸ *Jus ad bellum* principles refer to the process of entering into war in accordance with certain moral criteria. Six such criteria are usually identified. The first criterion is *just cause* principle, under which one understands the right for protection or self-defense and protection by others, for those who were attacked or threatened. Just cause principle is supported by *legitimate authority* principle, which points to the necessity of making a decision about the beginning of war by legitimate authorities or their authorized representatives. The third criterion of just war theory is defined as *right intentions* principle, which means that a state enters into war intending to achieve the very same just aim that it declares. The fourth criterion is *probability of success* principle, linked with the fifth criterion – *commensurability* principle. The sixth *jus ad bellum* criterion is *last resort* principle. Moral Restrictions of War: Problems and Examples / Ed. by B/ Coppieters, N. Fotion, R. Apressyan. - Moscow: Gardariki, 2002. PP. 33-40.

We can argue that international humanitarian law norms represent an attempt to introduce a consequential justice triad into international practice through: 1) *correlating IHL norms with just war concept*; 2) *specifying those principles in IHL norms with regard to international and non-international armed conflicts*; 3) *demanding compliance with declared principles and punishing for norm violation at the national and international levels.*

Presently the norms of international humanitarian law are accepted by the overwhelming majority of countries, including leading actors of world politics. The 1948 Convention on Genocide has been ratified by more than 120 countries. Four 1949 Geneva Conventions were ratified by 194 countries, 168 countries ratified Additional Protocol I, and 164 countries ratified Protocol II.¹⁹ 68 countries have ratified the addendum to article 90 of Additional Protocol I, which foresaw the establishment of International Fact-Finding Commission entitled to start independent investigations. Some developed countries have ratified the Additional Protocols relatively recently: France in 2001, Japan in 2004, the UK in 1998, and Russia in 1989. The U.S. refusal to accede to the Additional Protocols is supported by the claim that their national criminal and military legislation fully conform to the IHL principles. Japan has for quite a long time referred to the fact that its constitution forbids it to take part in military operations and therefore Japanese citizens are unlikely to find themselves in situations, regulated by international humanitarian law.

In the course of post-war proceedings and investigations, individual criminal

¹⁹ Additional Protocol I was not ratified by the following countries: Afghanistan, Andorra, Azerbaijan, Bhutan, Eritrea, India, Indonesia, Iran, Iraq, Israel, Kiribati, Malaysia, Marshall Islands, Morocco, Myanmar, Nepal, Pakistan, Papua New Guinea, Peru, Singapore, Somali, Sri Lanka, Thailand, Turkey, Tuvalu and USA. Such combination of countries often causes acid criticisms against USA and Israel. In addition to the above-mentioned countries Additional Protocol II was not ratified by North Korea, Angola, Mexico, Syria and Vietnam. //State Parties to the Following International Humanitarian Law and Other Related Treaties as of 15-Aug-2008. Available at - [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf)

liability for war crimes prevailed. Responsibility to “observe and make observe”²⁰ IHL norms was imposed on states. However, the states violating, or tolerating violation of IHL norms, could only be subject to various forms of political pressure and condemnation, and such material and financial measures as reparations and restitutions.²¹ To ensure the application of declared principles, national governments’ actions must be accompanied by the readiness of international community to collectively exert influence on norm violators. However, one should note the evident aspiration of the UN, acting on behalf of the international community, to increase the international legal responsibility of states. The examples include establishment of the International Criminal Court (ICC) and adoption in 2001 of the articles on state responsibility by the UN International Law Commission.²²

There are several ways of incorporating the norms of international humanitarian law at the national level: application of existing criminal and military criminal law while giving superiority to international norms; general definition of specific IHL norms and their inclusion into national legislation; copying international norms into national legislation and strictly reproducing crime definition and punishment.²³ In Russia, for instance, parts of international humanitarian law norms were included into the Criminal Code by way of either general definition or

²⁰ Provision of article 1, common for all four Geneva Conventions. See Geneva Conventions of 12 August 1949 and additional protocols to them. - Moscow: International Committee of the Red Cross, 2001.

²¹ U. Palvankar classifies such actions in the following way: diplomatic pressure (protest declarations, open condemnation, diplomatic pressure upon violators through mediators, recourse of states to the International Fact-finding Commission in order to start investigation); coercive measures (retorsion, i.e. unfriendly acts, including expulsion of diplomats, rupture of diplomatic relations, termination of negotiations or refusal to ratify already signed agreements, decision not to prolong trade privileges, reduction or suspension of assistance), as well as nonmilitary reprisals (arms trade limitation, import and export flows limitation, investment ban, freezing of capitals, suspension of air transportation agreements and so on). // U. Palvankar. Measures with which states can fulfill their obligation to ensure International Humanitarian Law observation. // International Humanitarian Law Implementation. Articles and Documents. – Moscow: International Committee of the Red Cross, 1998. PP. 347-358.

²² State responsibility - Titles and texts of the draft articles on Responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading. UN Doc. A/CN.4/L.602/Rev.1 / International Law Commission, 53rd session, 2001. Available at - <http://daccessdds.un.org/doc/UNDOC/LTD/G01/638/25/PDF/G0163825.pdf>

²³ See International Humanitarian Law implementation. Articles and documents. – Moscow: International Committee of the Red Cross, 1998.

word-to-word repetition.²⁴ Therefore, crimes committed in the course of an armed conflict are to be qualified as criminal offences and examined by national courts. If investigation and punishment are impossible on the basis of existing legislation, then international agreements come into force.

Apart from accommodation of the IHL norms into national legislation, the signatory states are obliged to ensure dissemination of knowledge of IHL provisions among their citizens, especially among the military. The countries also have to see to the application of IHL norms during any military operation. In order to do that, one needs to translate IHL norms into national languages, provide mandatory training on the subject for the military personnel, ensure the presence of lawyers and IHL specialists monitoring armed conflicts, and establish special offices at large military alignments units. These activities help to establish domestic legitimacy of IHL norms and form public opinion that could constrain manifestations of criminal cruelty in the course of armed conflicts.

Prosecution for violating declared norms serves several functions: 1) suppression of criminal action, 2) prosecution of the guilty, 3) restoration of justice, and 4) damage compensation. Besides, punishment also serves to prevent new crimes and to compensate for the victim's moral damage through publicly condemning the criminals.²⁵ For the first time in history the international community resorted to punishment for violating IHL norms in 1945, when it established the Tribunal for trial and punishment of "principal war criminals of the European Axis powers". Tribunal proceedings took place in the German city of Nuremberg, and the trial went down in history as Nuremberg Tribunal. 24 people were under trial, 19 people were convicted: 12 were sentenced to capital punishment and 7 – to various terms of imprisonment,

²⁴ Section XII of the Russian Criminal Code is titled "Crimes against peace and security of mankind" and includes some of IHL norms. General definition of war crimes is given in article 356 "Forbidden means and methods of warfare"; article 359 "Mercenaries" and article 360 "Attacks against persons or organizations under international protection". Article 357 "Genocide" reproduces almost word to word provisions of the 1948 Convention the Prevention and Punishment of the Crime of Genocide // See Criminal Code of the Russian Federation. – Moscow: TK Velby, Prospect publishing house, 2005. PP. 173-175.

²⁵ See ICRC 2003. Collection of articles / Transl. from English and French. – Moscow: International Committee of the Red Cross, 2004. – 472 p.

including life sentence. Three people were acquitted, one committed suicide and one was deemed incurably ill. Defendants were charged with aggression, crimes against peace, war crimes and crimes against humanity. Similar tribunal was established in Tokyo for the trial of “Japanese militarists”. The Tokyo Tribunal functioned from May 3, 1946 till November 12, 1948. 25 people were under trial, seven of them were sentenced to death and 16 to life imprisonment.

Work of those two post-war tribunals laid the foundation for further development of principles of international criminal prosecution of persons who committed war crimes. It is noteworthy that *personal responsibility* of persons committing such crimes was then established. The work of the Nuremberg and Tokyo Tribunals created an important legal precedent of criminal investigation of war crimes and provided examples of IHL norm interpretation. Furthermore, the tribunals developed the principles of international justice implementation, which are still in force today.²⁶ Voluminous Nuremberg records and documents are reference books for lawyers who currently work at other tribunals. The first tribunals identified three basic types of crimes, which are prosecuted as international crimes: *crimes against peace*²⁷, *war crimes*²⁸, and *crimes against humanity*²⁹.

²⁶ 1) Each person, having committed an action, considered a crime according to international law, is held responsible for it and is subject to punishment (personal liability);

2) The fact, that under the national law there is no punishment for any action, considered a crime under international law, does not release the person, having committed this action, from responsibility under international law (primacy of international law); 3) The fact, that any person, having committed an action, considered a crime under international law, acted as a head of state or responsible governmental official, does not release this person from responsibility under international law (immunity waiver); 4) The fact, that any person acted following the order of his or her government or superior, does not release this person from responsibility under international law, if conscious choice was possible for him or her (implementation of criminal orders); 5) Each person, accused of committing an international legal crime, has a right for fair trial on the basis of facts and law (right for fair trial).

²⁷ Planning, preparation, unleashing and conduct of aggressive war or war in violation of international treaties, agreements or declarations.

²⁸ Violation of laws and customs of war, including but not limited to, murders, bad treatment, abduction to slavery or for other purposes of civilian population in an occupied territory, murder or bad treatment of war prisoners or people at sea, murders of hostages or looting of cities and villages or devastation, not justified by military necessity.

²⁹ Murder, extermination, enslavement, expulsion and other inhumane acts, committed against civilian population, or persecution for political, racial or religious reasons, if such actions are committed or if such persecution takes place during a crime against peace or a war crime, or in connection hereto.

Despite the fact that functioning of the above-mentioned courts corresponded to moral imperative of the time, it is evident that justice was done by the victors over their defeated adversaries. It is still argued that the victors had also violated the laws of war and should at least acknowledge these facts, if not be brought to justice. Almost complete destruction of Dresden as a result of bombing raids by the British aviation is considered an example of exceeding the principles of “military necessity” and “commensurability”.³⁰ Cruel treatment of Berliners by the Soviet troops after the city’s capitulation is another example of violating the principle of humanity towards civil population. Atomic bombings of two Japanese cities in August 1945 are yet another indisputable example of violating war customs. Yet those violations of humane warfare were never officially qualified as war crimes, though public discussion of these events goes on.

During the Cold War, UN attempts to bring to international justice those who violated IHL norms met constant resistance of some states. A remarkable attempt to draw attention to the mass violation of war laws by the leading world power, the USA, consisted in holding a public tribunal to investigate war crimes committed in Vietnam. This was initiated by the famous English philosopher Bertrand Russell in 1966. Many famous people of the time took part in this Tribunal; the list included scientists, lawyers, artists, and politicians.³¹ Though the verdict, condemning US for aggression and violation of law, did not have legal effect, the tribunal signaled that the international community was ready to fight for the application of humanitarian law.

The United Nations initiated the establishment of a special committee to examine cases of Israeli violation of human rights in the occupied territories and a commission to examine evidence of maltreatment of the prisoners of war in the course of Iran-Iraq war. In 1992 a special commission was established to collect facts concerning mass crimes committed during the armed conflict in Bosnia and

³⁰ Operation “Thunderclap” was carried out in February 1945 by the British aviation and in addition to destruction lead to the death of 50 to 100 people who were in the city // Berets S. Dresden. Yalta Afterword. BBC news, 13 February 2005 – http://news.bbc.co.uk/go/pr/fr/-/hi/russian/news/newsid_4261000/4261247.stm

³¹ See Russel’s Tribunal for investigating war crimes, committed in Vietnam. // Index Journal. <http://www.index.org.ru/othproj/crimcrt/russell.html>

Herzegovina. Its results served the basis for the UN Security Council decision to establish in 1993 a tribunal to investigate crimes committed in the former republic of Yugoslavia after 1991.³² In 1994 it was followed by the UN Tribunal for Rwanda, established as a response of the international community to an unprecedented case of genocide witnessed by UN peacekeepers.³³

The activities of Tribunals for Yugoslavia and Rwanda as well as their status, authority, legitimacy, investigation efficiency and impartiality give rise to controversial reaction in the world. The main criticism concerning the Tribunal for former Yugoslavia is that its work can be seen as anti-Serbian. To support this claim one can offer statistical data about prevalence of cases against ethnic Serbs, and a smaller number of cases against representatives of other ethnic groups. Arrest of Slobodan Milosevic in 2001 and the proceedings of the “prisoner No. 1” trial introduced even more controversy into Tribunal routine. Critics believe that the sudden death of Milosevic on March 11, 2006 completely undermined the moral grounds for further Tribunal activities. One of the points raised by critics is that the Tribunal was established by the Security Council instead of the General Assembly and thus its legitimacy is limited.

Objective problems of the Tribunal include the complexity of evidence, difficult search and protection of witnesses, and unwillingness of some people to go back to their tragedies and painful memories of the past. Location and exhumation of mass graves in the territory of former Yugoslavia are also problematic with precarious assistance from the government, police and population. The tribunal gives rise to controversial assessment even among the population of those sovereign countries, which used to form part of the Socialist Federal Republic of Yugoslavia and were belligerent parties. Extradition of persons, suspected or sentenced *in absentia* for committing war crimes, also causes resistance of some people and political leadership

³² See official site of the International Criminal Tribunal for the former Yugoslavia - <http://www.un.org/icty/>

³³ According to various data, in 1994 up to 800 thousand people died in Rwanda as a result of wide-scale elimination of one ethnic group (Tutsi) by another (Hutu) and elimination of those who opposed this mass crime. See information at official site of the International Criminal Tribunal for Rwanda - <http://69.94.11.53/>

of the Balkan countries. In order to ensure Milosevic's extradition, the Hague Tribunal had to resort to serious diplomatic efforts, i.e. the promise and payment of a 50,000,000 dollar loan by the USA to the government of Yugoslavia in March 2001. Now the main way of putting pressure upon the states of former Yugoslavia is providing an opportunity for them to join the EU versus suspending accession negotiations. So far the only country of the former SFRY to become an EU member-state is Slovenia which joined in 2004. All former SFRY republics take part in EU accession programs. Croatia and Macedonia are already registered as candidates for accession. Serbia was also required to cooperate with the Hague Tribunal on Radovan Karadzic's extradition. It was believed that he had been hiding in the territory of the country.³⁴ After the arrest and extradition of Karadzic in July 2008, negotiations on Serbian accession to the EU are expected to speed up. Local national courts function in parallel with the Tribunal and are to examine cases of war crimes, committed in the former SFRY countries.

The International Tribunal for Rwanda revealed yet other problems. Genocide turned out to be a reflection of deep divisions and cleavages in society, and reconciliation of society through condemnation of violence, and just and impartial trial proved to be impossible. Tribunal activities were accompanied by several scandals, when the judges of the Tribunal turned out to be involved in the crimes committed. All mentioned international tribunals have limited jurisdiction as they were established to investigate crimes committed at a given time in a given place (*ad hoc* tribunals).

In the second half of the XX century the idea about establishing a permanent international tribunal that could examine all cases of war crimes, committed or ignored by national governments gained significant popularity. It was particularly popular among the representatives of developing countries, who accused the developed world of violating international humanitarian law during armed conflicts in the third world. Most criticisms and claims were voiced against the USA and Israel. Over the last decade we have seen active formation of an institutional mechanism for IHL norm

³⁴ See European Partnership with Serbia, including Kosovo as defined by United Nations Security Council Resolution 1244. Available at :

support at the international level. One can argue that the international community strives to develop a comprehensive mechanism of control over IHL norms observance and prosecution for their violation.

The July 1998 international conference in Rome adopted a statute aimed at establishing a permanent International Criminal Court (ICC) to examine war crimes, cases of genocide and crime against humanity. Rome Statute was signed by 120 countries. However, its ratification met with significant difficulties. Only in April 2002 the Rome Statute was ratified by 60 states necessary for the Court formation. The ICC started its work in early 2003, and 3 cases are investigated at the ICC now: Congo, Uganda and Sudan (Darfur).³⁵

Major criticisms concerning ICC, the possibility of its formation and functioning came from the USA and Israel. Both countries did not ratify the Rome Statute, and the USA took active steps towards bilateral agreements with individual countries on non-extradition of US citizens, in case of them being brought to criminal liability at ICC.³⁶ Such counteraction to ICC is due to numerous factors, but primarily to the fact that after the end of the Cold War the U.S. has been actively using its military power to solve problems around the world, and those military operations have been received with heavy criticism. Refusal to ratify the Rome Statute was also caused by the fact that the Tribunal for former Yugoslavia examined consequences of the NATO military operations in spring 1999 during the Kosovo Crisis. Cases when NATO bombs hit the Yugoslavian television building, the Chinese embassy in Belgrade, and the refugee train could be qualified as war crimes. The very fact of such investigation stimulated opponents of ICC establishment in the US governmental circles even further.

At present, the USA is harshly criticized for its operation in Iraq and the way it is carried out, as well as for the occupation regime. After the victory over Iraq the coalition troops destroyed many communication lines in the country, essential for

³⁵ Information at the ICC official site - <http://www.icc-cpi.int/cases.html>

³⁶ Among the states, that signed such bilateral agreements with the USA, one can find Dominican Republic, East Timor, Israel, Marshall Islands, Romania, Tajikistan, Uzbekistan and Mauritania.

civilians. Cultural and historical sites and monuments were damaged and looted. Reconstruction of communication systems and normal life in Iraq – a goal for which US Congress allocated several dozen billion dollars - is not a charity act, but results from the obligations of an occupying power. Local government creation and power transfer are also within the responsibility of an occupying power or coalition.³⁷ Another reason for criticisms against the USA and its allies is warfare in cities and other populated areas, use of destructive weapons, and a significant number of casualties among civilians. The scandal in the Abu Ghraib prison in summer 2004 should also be examined in the context of IHL norm violation with regard to prisoners of war and their decent treatment.

Israel is often criticized for violating norms of international humanitarian law. Creation of the state of Israel led to antagonism with Arab states of the region and wars, as a result of which Israel occupied the territories of its neighboring states. Main complaints against Israel point out that it does not fulfill its obligations in the occupied Palestinian territories. Official representatives of Israel respond to these criticisms by stating that these territories are part of the country and, therefore, the occupied territory regime should not apply to them. Israel is criticized for its terrorist-fighting tactics, i.e. pinpoint strikes against military group leaders, which are qualified as “extrajudicial extermination”, as well as for its practice of destroying houses of terrorists’ families, including shahids, which is qualified as destruction of civilian targets. The problem of application of IHL norms in this conflict has caused heated debate about the status of occupied territories and warfare methods.

Russian Federation is criticized for its antiterrorist campaign in Chechnya. Main complaints are voiced against the “mop-ups” as illegal violent acts, where discrimination principle is not observed. It is also condemned for nonselective military operations in populated areas and for not giving civilians an opportunity to leave the zone of possible fighting (or violating this principle). Both the USA and Russia bring

³⁷ International Humanitarian Law Research Initiative. Monitoring IHL in Iraq. Military Occupation of Iraq: I. Application of IHL and the Maintenance of Law and Order <http://www.ihlresearch.org/iraq/feature.php?a=22>

their military staff personnel, who violate the rules of war, to criminal justice; however, the scale of such investigations and trials and their results are often limited and unconvincing.

Another level of legal proceedings is represented by activities of national tribunals and courts, supported by the active participation of international community. A vivid example of such an open trial is a trial over Saddam Hussein. This trial ended in death sentence and its swift execution on December 30, 2006. Another example is the initiative of the UN Security Council to establish international tribunal for investigating the murder of the Lebanese prime-minister Rafik Hariri. According to analysts, this will be the first judicial examination of a case of political terrorism.³⁸

Criminal prosecution at the international and national levels fulfills the function of restoring justice through imposing punishment for the gravest crimes. However, there is a number of extrajudicial ways to restore justice. One of such forms of investigating crimes committed during internal armed conflicts is the establishment of Truth Commissions or Reconciliation Commissions.³⁹ In total more than 20 such commissions were established since mid-70s. Distinctive feature of such commissions is a wider use of amnesty, as the main goal is public condemnation and not punishment. Another feature is acknowledgement of committed crimes. In legal terms there are different forms of *redress*: fact examination, complete and public truth disclosure, search for missing persons and bodies, assistance in organizing funerals in accordance with national and family traditions; official declaration or court decision about restoring dignity, reputation, legal and social rights of victims and their relatives; apologies, including public acknowledgement of the offence and the ensuing liability; commemoration and tribute to the memory of victims, etc.

Most of such commissions were established in the third world countries with an active support (financial, organizational, and ideological) from the UN, as well as

³⁸Lebanon's groundbreaking tribunal. Story from BBC NEWS. 21.04.2006 - http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/4926536.stm

³⁹ See Priscilla B. Hayner. *Unspeakable truth: facing the challenges of truth commissions*. NY, London: Routledge. 2002; W.S. Heinz. *Lessons of the "day after war": how truth commissions can help in conflict settlement //Internationale Politik*, No.3, 2005, pp.56-65; Tepperman J.D. *Truth and Consequences //Foreign Affairs*, March-April 2002, PP.128-145.

governmental and nongovernmental organizations from developed countries. Such commissions were established by the decision of parliament or president of the country during the so-called “democratic choice” period, and frequently the main function of extrajudicial proceedings is to condemn the crimes of the previous regimes and consolidate democratic forces.⁴⁰ After the end of the Cold War similar commissions were organized in Germany in 1992 and in Serbia and Montenegro in 2002. Now the establishment of such a commission for Bosnia and Herzegovina is under active discussion. Quite often the work of such commissions runs in parallel to criminal investigation of crimes of the recent past.

One can come across different points of view on the role which is and can be played by international humanitarian law in constraining violence. There are different ideas on whether IHL and its international institutions possess effective power for implementing impartial justice in case of war crimes. J. Snyder and L. Vinjamuri argue that the strategy of obligatory punishment of war criminals as a precondition for peace can turn out to be counterproductive in real life. Its dubious power to constrain cruelty aside, it may in fact have an adverse effect and lead to a more severe struggle and further social division. These authors believe that the problem of norms and their observance in international relations, as well as that of punishing the violators, should not be subject to “rigid logic”. Sometimes, as the empirical research shows not punishment, but amnesty turns out to be a more productive way of reconciling society. The precondition of the long and lasting peace is stability of political institutions and removal of individuals who had been involved in criminal activities, from power, even without their formal prosecution. At the same time, justice should not be selective, as it is likely to create double standards, when only those are brought to trial who can be. As a rule those are political leaders who lost power. The authors come to the conclusion that law observation is not a basis for peace, but is in fact a result of peace and stability in society.⁴¹

⁴⁰See database and information about similar commissions at the website of the US Federal Institute of Peace.- <http://www.usip.org/library/truth.html#tc>

⁴¹ See Snyder J., Vinjamuri L. Trials and errors. Principles and pragmatism in strategies of international justice *International Security*, Vol. 28, No. 3, winter 2003-2004. PP.5-44.

Adoption and ratification of documents, regulating humane conduct of armed conflicts, represent only the first step on the way towards justice in this field of international interaction. A more important and complicated stage is actual application of the norms and suppression of violations, both at the international and national levels. As the specialists in this field note, the present system of prosecution for war crimes is compound: “partially international, partially domestic”.⁴² This peculiarity of international humanitarian law is characteristic of international law in general and consists in an unavoidable mixture of public and private law, and national and international law. Researchers confess that the system turns out to be completely heterogeneous and “only creates an illusion of being an international system of suppressing the violations”, which it claims to be.⁴³

No doubt, the problems of international justice are also due to the dual nature of sources of international law legitimacy. N.A. Kosolapov, in his classification of sources of legitimacy in international relations, identifies three elements: “force-faith-power”.⁴⁴ In case of international humanitarian law, we can argue that this is an example, when politics preceded law only partially, and, occupying initially a limited space in the Western world, gradually spread far and wide over the international field. However, in the process of adoption and implementation of norms there was a constant expansion of its application sphere (both in terms of subject matter and geographic location), which was not always accompanied by the necessary

⁴² H.L.F. Flores. Prevention of violations of the warfare law, committed by individual persons // Prevention of International Humanitarian Law Violations, PP.14-15.

⁴³ “Each country has its own norms and applies international law provisions in its own way. As a result the same act may be classified as delinquency, crime or misdemeanor in some national legislations or may be completely ignored in others. Therefore, some countries apply harsher criminal sanctions and some use soft penalties, while others do not do anything at all, and defendant’s fate will depend on where the crime was committed and on the country, where he or she will undergo trial. This person can even choose to undergo trial in a different country, other than his or her own”. // Prevention of International Humanitarian Law Violations, P. 15.

⁴⁴ N.A. Kosolapov. Legitimacy in International Relations // World Economy and International Relations, No.2, 2005. P.8.

legitimate norm creation at the national level under the existing international legal status.

This area of international regulation still to a large extent relies on “faith”, i.e. ideology of humanity as the basis of restoring and reconciling people after wars. “Force” and “power” for bringing to international legal responsibility are applied depending on the situation, which is a source of debate and criticisms. However, the fact that many nations resort to national truth commissions may indicate a new trend in achieving justice and redress on the basis of extrajudicial justice, which also promotes further consolidation of the legitimacy of these norms. However, the opposing trend is also apparent: 1) international investigation of cases where strict norm observation is unlikely at the national level while execution of justice is critical from the viewpoint of “observing the truth” and 2) at the national level as a result of activities of national criminal courts and truth commissions rendering pressure “from above” for the sake of restoring justice after societal split and prolonged conflict.

The problem of establishing and following the norms of humanity in wars and internal conflicts cannot help but invoke constant debates about violence in general being a more important component of this problem and about the notion of “just warfare” being an awkward oxymoron. However, the experience of IHL development demonstrates that the strife for justice restoration in a judicial or extrajudicial way – through courts or without courts – is still one of the most important trends in international interaction.