INTERNATIONAL JUSTICE SYSTEM: ANALYSING GENERAL PRINCIPLES OF CRIMINAL PROSECUTIONS

Dr. M. Kalimullah* & Afreen Rizvi**

Abstract

The criminal justice system in a democratic society, adhering to the rule of law, has to carefully balance different and sometimes conflicting interests. The clear merits of individual criminal prosecution by international tribunals cannot simply override the very real problems and obstacles they face. A number of principles have been invoked as the basis for extraterritorial jurisdiction. Individual criminal responsibility International criminal law allows for individuals to be held criminally responsible not only for committing war crimes, crimes against humanity and genocide, but also for attempting, assisting in, facilitating or aiding and abetting the commission of such crimes. Nullumcrimen, nullapoena sine lege also known as the principle of legality which is enshrined in Article 15 of the International Covenant on Civil and Political Rights, states that no one may be convicted or punished for an act or omission that did not violate a penal law in existence at the time it was committed. Ne bis in idem enunciates the principle that "no person should be tried or punished more than once for the same crime". It ensures fairness for defendants since they can be sure that the judgment will be final and protects against arbitrary or malicious prosecution at both domestic and international level. Therefore, the existence of a particular crime depends on the existence of legislation stating that the particular act is an offence, and for a specific penalty to be imposed for that offence, the legislation in force at the time of its commission must include that particular penalty as one of the possible sanctions for that crime. There is need to balance State power and individual liberty, and sets out the minimum guarantees that States must observe throughout their criminal justice process.

Keywords: *Criminal Justice System; International tribunal, Courts of Crimes; Customary Law; Courts of First Instance.*

INTRODUCTION

* *Asst. Professor* @ Faculty of Law, Aligarh Muslim University, Aligarh (U.P.)

** *Research Scholar* @ Faculty of Law, Aligarh Muslim University, Aligarh (U.P.); Email: afreenrizvi15@gmail.com; Mobile: +91- 9520317586; 9412517625

International crime has been broadly defined as *"an act universally recognized as criminal, which is considered as a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances"*. Today, international criminal liability exists at least in respect of war crimes, crimes against humanity, genocide and torture. Other crimes such as terrorism- related crimes, enforced disappearances and extrajudicial killings can arguably also be considered international crimes.

International criminal law is a "hybrid branch of law", as it is the child of a tripartite marriage between international human rights law, international humanitarian law and domestic criminal law[1]. Whereas the fundamental principles underpinning a liberal criminal justice system are those of personal culpability, legality and fair labelling, international human rights law is focused on state responsibility and harm to the victim.

General principles of law, which derive from domestic legal jurisdictions, have greatly shaped the substantive part of international criminal law. These principles have played a varying role as a source of law in the jurisprudence of international criminal courts and tribunals, which may be explained by the different legal and political settings in which these judicial bodies were established and have functioned. The statutes of the ad hoc tribunals encompass only a few substantive law provisions and do not provide for a hierarchy of sources of law. This is not particularly surprising given that the statutes were hastily drafted by mostly diplomats, who were not necessarily criminal law experts, in an atmosphere of disbelief that the grand project of international criminal justice would take off the ground. The establishment of international criminal courts was not a routine measure employed by the UN Security Council to restore peace and security in troubled regions of the world, which to some extent expounds the imperfect nature of legal instruments that laid down the jurisdictional basis for the ICTY and ICTR. As a result, the judges of the ad hoc tribunals had to work with the poorly articulated statutes in terms of substantive law. The recourse to customary law and general principles was inevitable, since it was the only way to render legitimacy to the judgments.

The criminal justice system in a democratic society, adhering to the rule of law, has to carefully balance different and sometimes conflicting interests. The clear merits of individual criminal prosecution by international tribunals cannot simply override the very real problems

[1] P Clark & N Waddell, 'Dilemmas of justice', *Prospect Magazine*, 134, 2007

and obstacles they face. A number of principles have been invoked as the basis for extraterritorial jurisdiction. There is truth in the assertion that international tribunals are better enabled to deliver justice in the fairest and most efficient manner possible with tailored institutional frameworks and procedures. On the other hand, the existence in the law of international criminal procedure of multiple legislative solutions that address the same procedural issues somewhat differently might call in question the coherence and authority of that body of law. In particular, in their quest for the highest standards of international procedural justice and the best trial practices in cases of international crimes, national criminal justice systems have increasingly turned, and may be expected to continue doing so in the future, to the seminal experience of international courts. However, for now, it is our view that the guidance they could draw from the latter is on many essential matters too contradictory, unprincipled or inconclusive to be useful.

COLLECTIVE ACTION AND INDIVIDUAL RESPONSIBILITY

The imminent prosecution of suspected authors of international crimes before the ICC represents a fundamental shift from international law to criminal law. Although these concepts have been blurred together through the formation of international criminal law, it is important to remember that the source of this nascent enterprise is two disciplines with distinct goals. Historically, international law aimed its direction at the collective level, i.e. at the actions of nations and states, their interactions and their peaceful coexistence. When there was adjudication, it was directed at the collective level, where states were criticized for their collective illegal conduct under international norms, either through treaty or custom. Punishments for collective crimes included sanctions, reparations and loss of international comity. Criminal law, however, aimed its gaze at the individual, attributing legal responsibility for individual culpability and punishing offenders on that basis. Historically, criminal law was pursued by domestic officials only under domestic statutes. The emergence of modern international criminal law culminating in the creation of the ICC brings these two historical strains of legality together[2]. While this convergence seems natural and desirable, a failure to appreciate these distinctions has produced a conceptual muddle.

The allegations presented in the Report of the UN Commission of Inquiry on Darfur enumerate several instances where militia groups were said to act in conjunction with

[2] Cryer, R., Friman, H., Robinson, D., and Wilmshurst, E., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (2d ed.) (Cambridge University Press, 2010)

military officers exercising official state discretion. In such a case, there may be liability at both the individual and state levels. If the state itself is involved in the criminality, it may face the appropriate consequences under international law. But it is crucial to remember that during an ICC criminal prosecution; only the individual will be punished. The defendant alone will serve the jail time. It is for this reason that we urge fidelity to basic principles of criminal law that ensure that defendants are punished only for crimes that they are personally responsible for, as opposed to crimes of state. For these crimes, the state as a whole bears ultimate responsibility. Article 7 of the Statute defines crimes against humanity with sufficient clarity and precision, including murder, extermination, enslavement, torture, rape, etc., and there is no need to appeal to human rights law to unpack these relatively straightforward criminal concepts. Indeed, if there is any place to look for relevant illumination, it is domestic criminal legal systems all of which make use of these primary concepts. Furthermore, appealing to international human rights law for interpretation only increases the possibility that criminal defendants will be subject to greater personal liability than envisioned by the Rome Statute. This is explicitly prohibited by Article 22(2)[3].

PRINCIPLES OF LEGALITY

The principles of legality are the new shape of the international criminal justice system emerging from the practice of the international tribunals. The principles deal with the justifications for criminalizing conduct of an individual. It recognizes specific inculpatory doctrines relating to conduct, rather than position, or general matters underlying a rule of law criminal justice system. The principle of legality makes prosecution compulsory and discretion in charging impermissible unless specifically authorized by statute. The legality principle played a major role at the Nuremberg trials[4]. The Nuremberg International Military Tribunal took the defences of ex post facto argument as an opportunity to examine and affirm the criminal nature of crimes against peace at the time the acts were committed by the defendants[5]. The validity of the principle frequently affirmed by the Yugoslavia and the Rwanda tribunals. The principle consists of the norms that must have existed at the time the crime had been committed upon which the criminality of certain conduct is based. The ICTY

[3] According to Art 22(2) Rome Statute, *'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted'.*

[4] Werle, G., PRINCIPLES OF INTERNATIONAL CRIMINAL LAW (T.M.C. Asser Press, 2005).

[5] Antony Duff and R. A. Duff, (2007), *Answering for Crime: Responsibility and Liability in The Criminal Law*, Hart Publishing Ltd.

states that the principle of legality aims at preventing the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission.

Principle of ne bis in idem Article 20 of the Rome Statute curves out the principle of ne bis in idem, which states that same person cannot be tried and punished more than once for the same act or crime that forms the basis of crimes within the jurisdiction of the ICC. The principle is recognized in the law of most national criminal justice systems and it has also been incorporated in various international convention, like the **International Covenant on Civil and Political (ICCPR) Rights (Article 14 (7)) and the European Convention on Human Rights (Article 4 Protocol 7),** as well as the conventions dealing with cooperation in criminal matters, such as extradition conventions and conventions on mutual assistance. Consequently, the principle is considered as a generally accepted principle of fairness of criminal justice system and even as a principle of customary international law. Since the principle in national legislation widely differs from international instruments, that could not define the rule in such a way that it would reflect the positive law of most nations or of conventional international law. While most states entrusted many qualifications and restrictions to the principle that it is difficult to describe its states in international law or in comparative criminal law. Here, it is impossible to analyse as aspects of the principle systematically, for the present purpose, the chapter limits itself to the most important aspects of the rule together with its applicability in the statutes of ad hoc international criminal tribunals in general, and of Article 20 of the Rome Statute in particular. Ne bis in idem is an internationally protected human rights principle. *Article 14 (7) of the International Covenant on Civil and Political, Rights (ICCPR), states that 'no one shall be liable to be tired or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.* In a national contest, the principle operates within single jurisdictional unit. In an international context, ne bis in idem problems may arise from situations where there is concurrent jurisdiction of more than one state over the same person. In some situations, it has been argued that criminal proceedings in one state should not be hampered by the law or proceedings undertaken in another state. By refusing to exercise criminal proceeding because another state has already adjudicated it, may even amount to giving up of sovereign power of a state. All the instruments mentioned above limit themselves to the national level. It means that the *ne bis in idem*[6] protection is only

[6] Lackner and Ku¨hl (2004), p. 104; Tro¨ndle and Fischer (2006), p. 106

guaranteed within one and the same state. No international ne bis in idem protection exists under the international human rights instruments. Consequently, the international human rights protection is limited in scope and does not guarantee a transitional ne bis in idem protection.

NullumCrimen sine lege

The maxim nullumcrimen sine lege prescribes that an individual shall not be considered criminally responsible unless the conduct in question was unambiguously criminal at the time of its commission within the jurisdiction of the court. The principle is explicitly laid down in Article 20 of the Rome Statute, which states that a person can only be punished for an act which was codified in the statute at the time of its commission that was defined with sufficient clarity and was not extended by analogy. The principle of nullumcrimen is explicitly laid down in it four different forms: *a) a person can only be punished for an act which was codified in the statute at the time of its commission, that is, a written law; b) the act in question was defined with sufficient clarity, that is the value of legal certainty; c) it was not extended by analogy, that is, the prohibition on analogy; and d) the criminal act was committed after the law entry into force, that is, non-retroactivity.*

Although the purpose of Article 22 (3) of the Rome Statute is similar to that underlying Article 10, the two provisions are clearly distinct in their scope and effect. Article 22 (3) applies to limit any perceptions as to the impact of Article 22 alone, while Article 10 does not so with respect to all of Part 2 of the ICC Statute with regard to jurisdiction admissibility and applicable law. Article 22 (3) applied only to the characterization of conduct as criminal under international law; where Article 10 applies to all existing and developing rules of international law in so far as the statute might be required to impact on them.[7]

Principle of Non-Retroactivity

One of the elements of the principle of legality and the corollary of the *nullumcrimen sine lege* principle is the rule of non-retroactivity. According to the rule, no person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charge as an offence within the jurisdiction of the ICC. It means conduct may be punished only on the basis of a norm that came into force prior to when the conduct occurred.

[7] Heller, Kevin. 2012. *A Sentence-Based Theory of Complementarity*, Harvard International Law Journal 53:202-249.

Under **Article 24** the long-standing legal principle of non-retroactivity is included. **Article 24 (1)** ofthe ICC statute states that the court cannot exercise its jurisdiction to the individuals criminally responsible for the conduct that occurred prior to the entry into force ofthe statute[8]. It reads as follows:

1. No person shall be criminally responsible under this statute for conduct prior to the entry into force of the statute.

2. In the event of a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply. The article spells out that with regard to the states that become parties to the statute subsequent to its entry into force, the ICC has jurisdiction over crimes committed after the Rome Statute entry into force with respect to such states. Article 24 regulates the temporal limits of criminal responsibility.

NullaPoena Sine Lege

Article 23 of the Rome Statute recognizes nullapoena sine lege principle declaring that a person convicted by the court may only be punished with penalties laid down in the statute. The article sets out that there is no punishment except in accordance with the law, with regard to the jurisdiction of the ICC. The principle requires that there are defined penalties attached to criminal prohibitions. Various international human rights instruments have incorporated the nullapoena principle, and prohibit the imposition of a punishment that is heavier than the one applicable at the offence was committed. For example, Article 15 (1) of the ICCPR incorporates the nullapoena principle, in the form of a non-derogable provision, which forms part of the core human rights protection[9].

Merits of Regionalization of International Criminal Law Enforcement

Enforcement mechanism at the regional level has proven to be effective for various international legal regime which can be seen in the case of regional enforcement for money laundering, protection of human rights, pollution, piracy etc. The most effective enforcement system at the regional level has been the maintenance of international security and peace by various international and regional organizations working together. The effective enforcement

[8] G.P. Fletcher, *Liberals and Romantics at War: The Problem of Collective Guilt*, 111 Yale Law Journal (2002), at 1526^1527.
[9] Gerhard Werle, *Principles of International Criminal Law*, (2005), p. 90.

mechanism by the regional organizations for maintaining international peace and security is actually derived from Article 52 of the UN Charter which states nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action[10]. Thus, these effective regional enforcement mechanisms have resulted in strengthening the International Law. In the recent times, when the international criminal justice system is an upcoming phenomenon, the status of International Law and its enforcement focused on two major and crucial points first being the delegation of authority by the States to the ICC and other international tribunals for prosecuting international crimes and second is the delegation of authority to the National Courts for the enforcement of International Criminal Law which is done through the establishment of specialized international courts under the judicial system of the state and or by exercising the universal jurisdiction. But the enforcement mechanism of the international criminal law at the international as well as the national level are often conflicting and are thus criticized for various reasons. In case of International tribunals, the costs of enforcement are very high and expensive, often unmanageable and are physically and psychologically away from the actual region of the crime whereas, in case of courts at national level, the costs are less and are situated nearer the region of the crimes which are being prosecuted but these courts lack resources to enforce and prosecute the crime[11]. They also have the risk of unfairness, prejudice and political manipulation. Hence the costs and benefits of international and national enforcement mechanisms are always in conflict with each other and this is seen when the benefits of regional or domestic adjudication are reaped while those of international adjudication is not received.

The Collective Nature of Genocidal Intent

The dialectic between individual responsibility under criminal law and collective responsibility under international law becomes most pressing when the crime in question is genocide. Indeed, the definition of the crime itself places it at the intersection of collective and individual responsibility, and we urge a careful consideration of this nexus when attempting to attribute criminal responsibility for this crime. Genocide is both collective and

[10] Bassiouni, C., *Principle of Legality in International and Comparative Criminal Law in International Criminal Law*, (Vol. 1) (Martinus Nijhoff, 2008).

[11] Wald,P. M., To Establish Incredible Events by Credible Evidence: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings, 42 HARV. INT.'L L.J. 535, 536 (2001)

individual. It is collective in the sense that both the perpetrator and the victim are groups. While scholarly attention has focused on the collective nature of the victims, and indeed catalogues the kinds of groups (including racial, ethnic and religious groups) that can be victimized by genocide, less attention has been paid to the collective nature of the perpetrators[12]. Genocide is not merely one individual seeking to annihilate an entire ethnic group. History teaches us that genocide is the attempt to wipe out an ethnic group by another ethnic group. It is for this reason that genocide brings strong collective shame and guilt to a nation that has perpetrated it. Indeed, this shame and collective guilt may very well persist even after the individuals involved have passed from the scene. Despite this collective aspect to the crime of genocide, the international law of war since Nuremberg, including Yugoslavia and Rwanda, and now Sudan as well, represents an attempt to hold individuals accountable for a collective action. But accomplishing this task has been insufficiently theorized at two levels. The first is the objective element, when it is clear that many individuals may have participated in small ways. The second is the subjective element of genocidal intent.

CONCLUSION

Consequentialist defences of international criminal law punishment focus naturally on the question of general deterrence, and here indeed there would seem to be a close match between the arguments' pros and cons on the international and domestic levels. In both contexts, the question of deterrence through punishment is empirical, and hence shares the challenges characteristics of under-supported empirical claims. After all, for the consequentialist defence of the narrow conception of impunity to succeed, one would have to show that the failure to punish is a serious disvalue in its own right, and not a mere proxy or indirect indicator of other disvalues such as a lack of legal certainty or physical security, or seriously reduced prospects of a successful democratic transition, or loss of trust in State authority. Further, one would also have to prove that the available means for reducing the disvalue of impunity to an acceptable level are themselves available, at an acceptable cost, without identifiable alternatives. International criminal law has always asserted, as a sort of promissory note never (yet) redeemed, that threatened sanctions deter would-be perpetrators of international crimes. It has not sufficiently responded to the openness of the empirical question of deterrence. We are to think with Pal about global criminal justice and also against him, renouncing his ethically troubling apologia for non-Western sovereignty and sovereign

[12] Aggarwal, H. O., *International Law and Human Rights*, Allahabad, Central Law Publications.

violence, we need to think of action which gradually uncouples global criminal justice from the force of sovereign regimes. Rather than a momentous transformation right now, we need to deliberate with others, and especially with those in subalternised locations who suffer the most from acts of sovereign violence – from brutal behaviour committed by States, big corporations exercising State-like power (and/or in connivance with States) to commit exploitation, and sectarian militants and hierarchical religion-legitimated communities which all too often assert some form of superordinate political and legal authority. We need to establish Tran's local social solidarities and simultaneously call for deeply individuated ethical transformations, while renouncing any belief in the sovereignty of our interests and dogmas. Such transformations in our individual, as well as social, selves are not only necessary for legal actors, the judges and lawyers who carry out the practical task of criminal justice, but for everyone who wishes to support the end of sovereign atrocities.