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The Principle of Legality in International Criminal Law

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Abstract

The Latin formulation "nullum crimen, nulla poena sine lege" is a principle in criminal law. This generally accepted principle of legality means that no one can be punished for a conduct without it being provided by law as a punishable offense. This principle has a guaranteeing function in the protection of the rights and freedoms of citizens and the realization of the rule of law. The dominant worldview is that now in international criminal law, instead of the principle "nullum crimen sine lege", it is enough to respect the principle "nullum crimen sine iure". This is based on the fact that international criminal law will not be directly applied, but must first be included in domestic criminal law. The newest doctrine starts from the fact that we should not insist literally on the law, but on some adequate international legal act (nullum crimen sine actu). In fact, this would imply the need to adopt an international criminal code (despite its name), which in reality cannot be expected to be adopted in the near future. The adoption of the Statute of the International Criminal Court is a step in this direction. In the continuation of this paper, we will examine the main conditions that must be met by future international legislation dedicated to the effective implementation of the principle of legality in international criminal law.

Keywords: *International criminal law, principle of legality, rule of law.*

Introduction

The discussions regarding the spatial or territorial validity of a country's criminal law are long-standing. Most authors are of the opinion that international criminal law is only a part of domestic criminal law, which contains legal provisions that determine how the criminal law of a given country will be applied, taking into account the circumstances of the commission of the criminal offense, the place and the attributes of the perpetrator. In addition to this narrow understanding of the concept of international criminal law, two other notions deserve special attention.

The second and until recently the most common notion of this term is that the meaning of international criminal law also implies a series of international acts which, for the states that have accepted them, contain the obligation to provide for certain legal norms in their criminal legislation that foresee criminal offenses. This means that these acts exclusively regulate the issue of a particular part of criminal law, i.e. matters where certain actions, omissions or conduct are foreseen, which are considered a criminal offense. Now we can say that the concept of defining international crime has been created, which is important for defining the notion of international criminal law. The notion of international crime can be understood in a narrower and broader sense.[3]

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[3] This division was also adopted at the XIV Congress of the International Criminal Law Association, which was held in 1989 in Vienna and which dealt with the issue of international criminal offences under Section IV. Schiff, XIV International Congress on Criminal Law, Proceedings of the Congress, Vienna,

In a broader sense, these are all those actions, omissions or conduct for which the international community is interested in punishing due to their international character. A necessary prerequisite for their prevention and punishment is that they are also foreseen as criminal offenses by national criminal legislation. This category includes various crimes such as trafficking in human beings, apartheid, piracy, international terrorism, kidnapping, illegal drug trafficking, etc. International crimes in the narrowest sense include those that were tried after World War II by the International Military Tribunals in Nuremberg (1946) and Tokyo (1948), and which were confirmed, mainly by the adoption of the four Geneva Conventions on the Law of War (1948). These provide for three categories of crimes: 1) war crimes, 2) crimes against peace and 3) crimes against humanity.[4]

International crimes in the narrowest sense, in addition to the above-mentioned crimes, include the crime of genocide, which was introduced by the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. These are crimes that attack the most important interests of the international community and humanity in general.

In addition to defining the aforementioned criminal offenses, the Statute of the International Military Tribunal also contained some rudimentary provisions on the essence of the general act, which were later confirmed by the UN organization and became known as the so-called Nuremberg Principles, which will certainly be discussed in more detail when the more considered development of international criminal law is presented.

Finally, the third meaning of the notion of international criminal law is the one that is being talked about more and more, especially in recent times. Now more and more people are talking about international criminal law as a supranational (supranational) criminal law that should be applied by the international criminal court in certain cases. It is not difficult to say that such a law does not yet exist and that it is still in its infancy. True supranational criminal law would require a world criminal code that would apply to all citizens of the world, which again presupposes the existence of a world parliament that would approve such a code. Discussions that in the absence of such international law it is possible to apply as a part of public international law called international humanitarian law are now quite widespread.

However, if we analyze the existing international humanitarian law carefully and in detail, we come to the conclusion that this is not a law that can be an immediate basis for determining individual responsibility for criminal acts and applying punishment, that is, criminal sanctions. This area does not contain general elementary conditions for determining criminal responsibility and applying criminal sanctions, nor does it foresee those sanctions. In theory, it is said, in a rather uncertain field, the initial steps towards the creation and elaboration of the institute of the general part of international criminal law seem to be taking place.

Such a narrow understanding of the concept of international criminal law is represented by the author Gerhard Werle, who, as one of the constituent elements of the concept of international criminal law, considers that the incrimination of a certain action, omission or conduct should exist independently of the transformation and definition of the essence of the crime in state laws.[5]

Even if one day truly supranational international criminal law is realized, it is difficult to imagine

1989, pp. 329-333.

[4] In detail, see M.Bilalli, Public International Law, AAB College, 2019, Prishtina, pp. 250-251.

[5] [5] G. Werle, Völkerstrafrecht, Tübingen, 2003, f.30.

its existence and functioning completely independent of the will of states. Today, it is undoubtedly unthinkable for domestic criminal law without that part of international criminal law, which is an integral part of the international order. There is a relationship of interconnection and a very pronounced mutual influence between these two parts of criminal law.

There is a different view of the concept, possibilities and future of international criminal law depending on whether it is viewed from the aspect of international law, or from the aspect of criminal law. While criminal law theorists are skeptical about whether there is any international criminal law that contains anything more than the obligation of states to include certain provisions of international criminal law in their legislation,[6] international law theorists are more optimistic in this regard.[7]

The Principle of Legality in International Criminal Law

The Universal Declaration of Human Rights, adopted and proclaimed by the resolution of the UN General Assembly of 10 December 1948, in Article 11, paragraph 2, contains provisions relating to the principle of legality. Here too it stipulates that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. The Declaration, as can be seen, expressly requires that the principle of legality be respected in international criminal law as well. The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 also contains an almost identical provision (Article 7, paragraph 1).

However, due to the non-existence of the International Criminal Code, as well as the underdevelopment of international criminal law, the principle of legality, until recently, has been reduced to the rank of a second-class principle in international criminal law (a contradiction to national criminal law). This is because these international legal acts were more a will and an obligation of the domestic legislator, than influenced by the need to adopt appropriate standards in international criminal law regarding the guaranteeing function of the principle of legality. Despite the certain specifics of international criminal law, this position is today hardly accepted by various states. The principle of legality serves to prevent arbitrary punishment that is not provided for by law, or on the basis of unspecified law or law with retroactive effect. The guarantee function in a sense represents a counterbalance, limitation and correction of the protective function of criminal law. A sense of security must be created in the sense that no one will be prosecuted or punished arbitrarily, that is, he can only be prosecuted for what is previously described as a criminal offense and for which a criminal sanction is provided.

It is common for the principle of legality to be expressed in the Latin formula nullum crimen sine lege. This principle, which is now generally accepted, means that a subject cannot be punished for any behavior that is expressly not punishable. This means that a criminal sanction cannot be applied to him if, before he committed a certain action, that action was not provided for by law as a criminal offense. By adopting and implementing the principle of legality, criminal law primarily performs its guaranteeing function, which is extremely important from the point of view of the rights and freedoms of citizens and the implementation of the principle of the rule of law. Today, in many countries, the prevailing view is that instead of the principle of nullum

[6] H. H Jascheck, T. Weigend, Lehrbuchdes Strafrechts, AT 5. Auflage, 1996, f. 123.
[7] A. Cassese, International Criminal Law, Oxford, 2003, f. 17.

crimen sine lege[8], the principle of nullum crimen sine iure should be respected or is sufficient.[9]

However, it should be emphasized that many modern authors believe that it is no longer acceptable to understand the principle of legality as more flexible in international criminal law with the maxim nullum crimen sine iure. That is, if there is a fundamental assumption that the norms of international criminal law must first be incorporated into the domestic criminal law of the state, then this implies direct application of international criminal law. The principle of legality in international criminal law must be subject to the same strict standards that are common in domestic criminal law. Of course, this is about the essence and quality of this principle, not the form. This does not mean that we should insist word for word that this should be in the law, but in an adequate international legal act nullum crimen sine actu. In fact, this would imply the need to adopt an international criminal code (whatever it was called) which is not realistically expected to be adopted by states in the near future.

The Statute of the International Criminal Court, apart from representing a certain shift towards the codification of international criminal law, does not meet the strict standards of criminal law established above all in relation to the principle of legality. However, it is very important that the Statute declaratively adopts the principle of legality, in a formulation that could hardly be contested.[10] Moreover, the provisions of the Statute expressly prohibit

analogy, and also foresee that in cases of ambiguity, unclear provisions should be clarified in an interpretation that is more favorable to the perpetrator of the criminal offense.[11]

Finally, it should be noted that the principle of legality in international criminal law has four segments. The first segment, nulla poena sine lege scripta, excludes the application of unwritten customary law. Therefore, it should be expected that written acts will replace customary law in the field of international criminal law as well, as has happened in the development of criminal law itself. The second segment, nulla poena sine lege praevia, contains a prohibition on the retroactive application of criminal norms. This means that there is no criminal offense and no criminal sanction if it is not provided for in criminal law before its commission. The third, nulla poena sine lege certa, is a principle of legal certainty, which requires that the norms of criminal law be defined and specified as much as possible. And the fourth, zero poena sine lege stricta, contains a prohibition on creating criminal law norms by analogy. This means that criminal law covers only what it refers to, and not a similar situation.[12]

Conclusions

As an international community, we are still at the beginning of the construction and general international codification of the branch of international criminal law, because this matter still largely consists of domestic law;

[8] S.Glaser, La méthode d`interpretation en Droit international penal, Rivista italiana di dirittoe procedura penale, 1966, f. 762/764, 766.
[9] M.Ch.Bassiouni, Crimes Against Humanity in International Criminal Law, 1992, f. 112.
[10] In the provision of Article 22, paragraphs 1 and 2 of the Statute, the principle nullum crimen sine lege is formulated.
[11] Article 23 of the Statute specifically provides for the principle of nulla poena sine lege.
[12] This is explicitly defined by the provision of Article 22, paragraph 2 of the Statute of the International Criminal Court.

Today, in many states, the prevailing position is that instead of the principle nullum crimen sine lege, priority should be given to the principle nullum crimen sine iure, because many states continue to apply international agreements directly, without including them in domestic laws.

The adoption of an international criminal code is an extremely slow process, but in any case, in the future, certainly not so near, the international community will also achieve this reality. The incrimination and treatment as a criminal offense of some political actions or of some issues related to fundamental human freedoms such as freedom of free thought and free expression, are still obstacles to the codification of a general international criminal law.

References

Gerhard Werle, Völkerstrafrecht, Tübingen, 2003,
Lauterpacht Hersch, The function of Law in the International Community, Oxford, Clarendon Press, 1933.
Hans Henrich Jescheck, T. Weigend, Lehrbuchdes Strafrechts, AT 5. Auflage, 1996.
-Stefan Glasner, La méthode d`interpretation en Droit international penal, Rivista italiana di dirittoe procedura penale, 1966.
-M.Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, 1992.
Mersel Bilalli, E Drejta Ndërkombëtare Publike, Kolegji AAB, 2019, Prishtine.
Geert-Jan Knoops, Defenses in Contemporary International Criminal Law, Transnational Publishers, Inc., Oxford, 2001.
Geoffrey de Q. Walker, The Rule of Law: Foundation of Constitutional Democracy, Melbourne University Press, Melbourne, 1988.
George P. Fletcher, The Grammar of Criminal Law: American, Comparative, and International (Foundations), Volume 1, Oxford University Press, Oxford, 2007.
Gu Minkang, "Criminal Law," Chinese Law, Kluwer Law International, London, 1999.
-Guénaël Mettraux, International Crimes and the ad hoc Tribunals, Oxford University Press, Oxford, 2005.
Harold J. Berman, Soviet Criminal Law and Procedure: The RSFSR Codes, Harvard University Press, 1966.
Henri Felix August Donnedieu de Vabres, "Le jugement de Nuremberg et le principe de légalité des délits et des peines", Revue de droit pénal et de criminology, Volume 2, Bruxelles, Palais de Justice, 1947.
Henri Felix August Donnedieu de Vabres, Les principes modernes de droit pénal international, Panthéon-Assas, Paris, 2004.
Herbert Lionel Adolphus Hart, The Concept of Law, Clarendon Press, Oxford, 1994.
Howard Ball, Prosecuting War Crimes and Genocide: The Twentieth-Century Experience, University Press of Kansas, Kansas, 1999.
Hubert Rottleuthner and Matthias Mahlmann, "Models of Transition: Old Theories and Recent Developments", Rethinking the Rule of Law after Communism, Central European University Press, Budapest, 2005.
Iain Cameron, "Jurisdiction and Admissibility Issues under the ICC Statute", The Permanent International Criminal Court: Legal and Policy Issues (Dominic McGoldrick, Peter Rowe and Eric Donnelly, redaktorë), Hart Publishing, Oxford, 2004.
Ilias Bantekas and Susan Nash, International Criminal Law, Cavendish Publishing Limited, New York, 2003.
-Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International

Other materials

Statute of the International Criminal Court, 1998.

XIV International Congress on Criminal Law, Proceedings of the Congress, Vienna, 1989

A. Cassese, International Criminal Law, Oxford, 2003.

UN Security Council Resolutions No. 808, 827/ 1993, on the establishment of the Hague Tribunal for the former Yugoslavia.