

THE DUTY TO PROSECUTE CRIMES AGAINST HUMANITY UNDER UNIVERSAL JURISDICTION, CUSTOMARY INTERNATIONAL LAW, AND CONVENTIONAL INTERNATIONAL LAW

Roza Memari¹

Department of Law, Panjab University

Abstract: International law provides protections for values and interests which are common to mankind. These values which are observed in different international law instruments are being protected by international community. Among these values, certain basic interests require essential protection in order to punish persons who tread them underfoot. Crimes against humanity are certain crimes under customary international law which are concerned as *Delicti Jus Gentium* and also they have reached the status of *Jus Cogens* which necessities imperative obligations upon each State and international community as a whole. These peremptory norms regarded as international law rules or principles have been accepted and considered binding by the international community.

In this paper Crimes against humanity are regarded as part of *Delicti Jus Gentium* and as *Jus Cogens* which give the courts competence to prosecute them based on the principle of universal jurisdiction and constitute a limitation for states to grant amnesty based on the recent developments in international law and practice. Furthermore, conventional and customary international law entitles States to prosecute perpetrators of crimes against humanity, making amnesty laws covering such atrocities of questionable legality.

KeyWords: crimes against humanity, universal jurisdiction, customary international law, conventional international law, amnesty, states obligation.

1. Introduction

The concept of *Delicti Jus Gentium* allows States to protect interests of mankind which are threatened by rigorous crimes.¹ This principle involves certain interests protected by customary international law, conventional international law, and other norms of international law such as universal jurisdiction. *Delicti Jus Gentium*, as a whole, refers to offences against the law of nations, crimes against the law of mankind, or simply international crimes.²

As opposed to the obligation of states to prosecute perpetrators of crimes against humanity, many countries grant amnesty to perpetrators thereof. In this respect, the limitation of states under universal jurisdiction, the conventional international law, and customary international law is taken into account.

2. The Duty to Prosecute Crimes against Humanity under Universal Jurisdiction

The adoption of the principle of universality gives the court competence over international offences committed whole over the world. This principle is established by customary international law and by conventions.³ The principle of universality is clearly seen in the four Geneva Conventions of 1949 and Additional Protocol I of 1977. In these instruments, mandatory universal jurisdiction is provided for grave breaches of international law.

¹ rzmemari401@gmail.com

The nature of universal jurisdiction is mandatory in serious crimes which imposes on States a duty to prosecute perpetrators thereof. “Nevertheless, regardless of universal jurisdiction, the reach of this duty depends on domestic laws.⁴ However, given the nature of the crimes over which universal jurisdiction is exercised, the state may be under an obligation to prevent impunity even if it cannot prosecute indeed, that failure may leave it liable in international law.”⁵ It is also notable that “the lack of state practice seems to preclude a general duty to prosecute international crimes”⁶ as a custom requiring prosecution of international crimes is emerging but it has not been established yet. As a consequence, it is not easy to believe that there is a customary obligation to prosecute all international crimes, nevertheless, there may be an emerging norm requiring prosecution of genocide, war crimes and crimes against humanity.⁷

3. The Duty to Prosecute Crimes against Humanity under Conventional International Law

Since violations against humanity endanger values of global community, drawing on international conventions outlaws these crimes and allows any nation to prosecute those charged with them. There are various conventions which fight against crimes against humanity. Among them are: the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

These treaties are classified in two categories: international criminal law conventions which expressly obligate states to prosecute or extradite criminals who commit human rights violations defined therein⁸ and general human rights conventions which do not expressly impose obligation to prosecute violations of human rights, however, they require states to respect and ensure the fundamental rights and provide effective remedies for such rights which are violated. Although there is no explicit expression on amnesty in these conventions, the emphasis on the obligation of states to prosecute crimes against humanity limit states to grant amnesty broadly.

4. The Duty to Prosecute Crimes against Humanity under Customary International Law

Customary international law is that aspect of international law which is taken from custom Along with general principles of law and treaties. It can be a source for the recognition of universal jurisdiction regarding international crimes,⁹ however, it just provides for the principle itself without giving the manner of the implementation of universal jurisdiction.¹⁰

Custom has two essential elements, namely uniform state practice (evidence of a general practice) and *opinio juris* (practice generally accepted as law). “State practice refers to a general and consistent practice, while *opinio juris* indicates that a practice is adhered by states out of a sense of legal obligation to follow that practice.”¹¹

Regarding the decision of many states, it is asserted that, as a matter of fact, there is no consistent practice and general customary rule for an obligation to prosecute crimes against humanity.¹² Having looked at a number of historical scopes of amnesties granted by the states, the tendency of governments to employ amnesty as a tool for peace and reconciliation is revealed. This idea is developing in states practice as Louise Mallinder notes in the most comprehensive study till date of state practice on amnesties: “Perhaps the most significant period in the relationship between international crimes and amnesties is after the UN changed its approach to amnesty laws with the signing of the Lome Accord on 7 July 1999. Between this date and December 2007, roughly 34 amnesty laws have excluded some form of international crimes, which has inspired human rights activities to point to a growing trend to prohibit impunity for these crimes.”¹³

Opinio Juris as the second element of customary international law denotes a subjective obligation, a sense on behalf of a state that is bound to the law. It, as a matter of fact, derives from believes of states not their real action in this sense that the practice of a state is due to a belief which is obliged to do a particular act; accordingly, treaties and declarations are the statements of what states believe apart from what they do. An *Opinio Juris* might be understood in certain circumstances from state practice but it is complicated to ascertain what the states believe and what they say. Some jurists argue that reliance to custom is not

acceptable because some states rely on their custom when it is not in contrast to their interests. “Given this difficulty, a number of writers have suggested that instead of focusing on a consistent pattern of state practice, supported by evidence that states regard such a practice as a legal requirement, it is better to focus on statement of governments, resolutions of international organizations, pattern of ratification of international treaties and commentaries including travaux preparatoires”¹⁴ but the significant problem is that there is no strong explicit words in resolutions to interpret prosecution and punishment as a mandatory duty, therefore this obligation is not supported enough by resolutions.

5. Conclusion

Crimes against humanity are regarded as Jus Cogens which oblige states to prosecute perpetrators thereof. The adoption of the principle of universality gives all states criminal jurisdiction over persons whose alleged crimes were committed outside the boundaries of the prosecuting state and constitute a limitation for states to grant amnesty based on conventional international law and the recent developments in international law and practice. Nevertheless, the reach of this duty depends on domestic laws. Having looked at a number of historical scopes of amnesties granted by the states, the tendency of governments to grant amnesty as a tool for peace and reconciliation is revealed. Accordingly, there is no unique procedure in the practice of states under customary international law.

6. References

- [1] Bassiouni Cherif M., *International Extradition and World Public Order*, A.W. Sijthoff-Leyden, Oceana Publications Inc, 1974, p. 262-263, noted in Konstantinos Karountzo, *Universality principle, an Orientation for International Criminal Law*, Griffin’s View on International and Comparative Law, vol. 5, no. 1, 2004, p. 131.
- [2] J.M.C. Divino, *Delicti Jus Gentium: A Limitation on the State’s Power to Grant amnesty*, 40 *Ateneo Law Journal*, 1995, p. 202-250.
- [3] Geoff, Gilbert, *Responding to International Crime*, Martinus Nijhoff Publishers, 2006, p.91.
- [4] *Ibid*, p. 93.
- [5] *Ibid*.
- [6] Linda M. Keller, *The False Dichotomy of Peace versus Justice and the International Criminal Court*, *Hague Justice journal Judiciaire de la Haye*, Vol. 31, No. 1, 2008, p.18-19.
- [7] Thomas Hethe Clark, *the Prosecutor of the International Criminal Court, Amnesties, and the “Interests of Justice”*, 4 *WASH. U. GLOBAL STUD. L. REV.*389, (2005), p.400.
- [8] More than twenty four international offences in several international conventions impose the duty to prosecute or extradite on states including: aggression, crimes against humanity, genocide, war crimes, unlawful of weapons, racial discrimination and apartheid, slavery and related crimes, torture, piracy, crimes against the safety of international maritime navigation, aircraft hijacking and related offences, unlawful human experimentation, use of force against internationally protected persons, taking of civilian hostages, drug offences, protecting of national and archeological treasures, international traffic in obscene publications, environmental protection, theft of nuclear materials, unlawful use of the mails, interference with submarine cables, counterfeiting, corrupt practices in international commercial transactions, and mercenarism, stated in M. C. Bassiouni and E. M. Wise, “ *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*”, 1995, p. 73-283.
- [9] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law. Vol. 1: Rules*, Cambridge University Press, Cambridge, 2005, p. 604.
- [10] Xavier Philipp, *The principles of universal jurisdiction and complementarity: how do the two principles intermesh?*, Volume 88, Number 862, June 2006. p.386.
- [11] PTD Rakate, *The duty to prosecute and the status of amnesties granted for gross and systematic human rights violations in international law: towards a balanced approach model*, LLD thesis, University of South Africa, 2004, p. 198. Also the ICJ in the *North Sea Continental Shelf Cases* [1969] ICJ Rep.3 at 44 has described these two main sources of customary international law as follows: ... not only most the acts concerned amount to a settled practice,

but they must also be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.

[12] Amnesties in International law and Practice, CTJ Short Paper on Amnesties, 9 Oct, 2008.

[13] See notably Diano orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," Yale Law Journal 100, no. 8 (1991): 2537-2618; and "settling Accounts Revisited", International Journal of Transitional Justice, Vol. 1, 2007, 10– 22, at p. 13; or Antonio Cassese, International Criminal Law, Oxford University Press, 2003, at p. 313. Cassese cites notably the revision of the French Constitution to implement the ICC Statute, in particular of the principle that laws on amnesty may not be relied upon for crimes falling within the ICC mandate (International Criminal Law, at 314-315).

[14] PTD Rakate, supra note 11, at p. 202.