Nullum Crimen sine Lege in the International Criminal Court

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Abstract: The Principles of legality in crimes and punishments refer to the fact that an act is not considered a crime and deserves no punishment, until the legislator determines and announces the criminal title and its penalty. In Iranian legal system, before the Islamic Revolution and also after it, the Constitution and ordinary laws have explicitly emphasized the observance of the mentioned principle. When there is no text or in the case of the silence or lack of law, the criminal judge is bound to issue the verdict of innocence. According to the Rome statute the court shall exercise jurisdiction over the crime of aggressions once a provision is adopted. And, according to the article 121 and 123 defending the crime and setting out, the condition under which the Court shall exercise jurisdiction with respect to crimes such as provision shall be consisted of the head of the general principle the relevant provision of the charter of the United Nations. The principle of legality is set out in article 22 to 24 of the ICC statute. These norms are derived from the customary law and the national law. Article 15, *International Covenant on Civil and Political* rights, states that no one shall be found guilty of any criminal offence based on an act or omission which did not constitute a criminal offence under national or international laws at the time when it was committed. Yet, in the context of prosecuting mass atrocities, genocide, crimes against humanity, and war crimes, international criminal law appears to be resigned to such a principle, if not openly including it. fact, that it may be considered the poor cousin of *nullum crimen sine lege* (no crime without law) which has attracted far greater consideration in scholarship and jurisprudence.

Keywords: principle of legality; ICC; codification; unwritten of customary law

Introduction

The general principle of all criminal law—*nullum crimen nulla poena sine lege*—was already mentioned. Many call it the principle of legality (in its narrow sense). The said principle is an achievement from the 1789 French Declaration of the Rights of Man and of the Citizen and is embodied in the constitutions of a great

many of States as being one of the guarantees of the rights of individuals[1] even if, strictly speaking, it is not a peremptory norm of general international law (*jus cogens*), it is better to observe it than to undermine its importance in any criminal proceedings.[2]

Nullum crimen sine lege scripta: the basis of a criminal charge should be either in the national law of a State, or in a Statute of an ICC or tribunal. In both instances, the matter should be subject to a rule of positive law in written form. This excludes incriminations based exclusively on (unwritten) customary law.

Nullum crimen sine lege certa: the elements of crimes must be precisely defined by a rule. This forbids the **criminal** judge to resort to analogy. To this end, the Assembly of States Parties to the Rome Statute of 1998 has adopted the Elements of Crimes, to be applied by the ICC.

Nullum crimen sine lege previa: a crime must be forbidden by law **a**t the time of its commission. Retrospective application of new criminal law**s** is forbidden, unless they were more favorable to the accused (*lex mitius*).

Nulla poena sine lege: the penalties for specific crimes should also be provided by a legal rule in advance. It is hard to strictly respect this requirement in international criminal proceedings. The scale of prison sentences for the crimes within the competence of international criminal tribunals have so far not been provided in their Statutes.

The constructional foundations of the crime, including the *actus reus*, *mens rea* and legal base are discussed in the criminal law. In this discussion, the necessity of approving laws related to the criminal titles is emphasized, and this notion is introduced in the legality principle of crimes and punishments in the Criminal Law. This principle is obtained from Latin phrase "*nullum crimen, nullum crimen, nulla poena sine lege*". Legality is derived from the rules of law and has several conditions.[3]

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[1] Lamb, Susan – "Nullum Crimen, Nulla Poena Sine Lege" *in International Criminal Law*, *in* The Rome statute of the International Criminal Court: A commentary 773, 773-74756 (Antonio Cassese, Paola Gaeta & John R. W. D. Jones eds., 2002); Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 Harv. J. on Legis. 393, 396-97 (1988); William A. Schabas, "Nulla Poena Sine Lege", *in* Commentary on the Rome statute of the International Criminal Court: observers' notes, article by article 463, 463 (Otto Triffterer ed., 1999).

[2] As the historical development of *nulla poena sine lege* has been covered by other authors, it will not be further revisited here. *See* Bassiouni, *supra* note 1, at 127-35. See generally Carl Ludwig von Bar (1916). *The History of Continental Criminal Law* (Thomas S. Bell trans., Rothman Reprints 1968) Pomorski, *supra* note 1; Jerome Hall, *Nulla Poena Sine Lege*, 47 Yale L.J. 165 (1937); Aly Mokhtar, *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, 26 Statute L. Rev. 41 (2005).

[3] Bassiouni, *supra* note 1, at 123-26; Hall, *supra* note 6, at 165; Roelof Haveman, *The Principle of Legality*, *in* International Criminal Law: a System Sui-Generis 39, 40 (Roelof Haveman, Olga Kavran & Julian Nicholls eds., 2003); Lamb, *supra* note 2, at 733-66; *see also,* Boot, *supra* note 2, at 94-102.

A) Laws must be adapted and enforced in accordance with established procedural steps that are referred to as due process. In constitutional theory, decision about what conducts should be taken criminal should be considered by the legislature and these decisions should be implemented by the executive and applied by the Court. Where statutory penalty laws must create a guarantee to the individual, considered as a fundamental right, that he would not be prosecuted for an action or omission that was not considered a crime according to the statutes passed by the legislators in force at the time of the action or omission, and that only those penalties that were in place when the infringement took place would be applied. Also, even if one considers that certain actions are prohibited under general principles of international law, critics point out that a prohibition in a general principle does not amount for the establishment of a crime, and that the rules of international law also do not stipulate specific penalties for the violations. (Beccaria, 1989, p. 41)

The other arguments, the judge will be able to give a clear decision on the law to make the jury's job easier and lessen the need for appeal to the Court. In this appeal "a" is the direction by judges and another advantage proponent to a code argue that in drafting it the contradiction and ambiguities in the law can be removed. (Herring, 2006, p. 11)

B) The principle requires that criminal behavior be laid down as clearly as possible in definition of the crime. But this standard is less rigid than is usually required in continental European law and statue of Rome.

C) The law must be readily available to the public if all the laws were kept secret even if they were written in the clearest language.

1. Consequences of Nullum Crimen sine Lege

Exposit Facto Law or Retroactive Law

1. According to article 15 International Convent on Civil and Political Rights international law. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If subsequently to the omission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

In commentaries on the principle of legality, these four attributes have been discussed as they relate to the *nullum crimen* principle. They are also useful in analyzing the substance of the *nulla poena* principle. As applied to *nullumcrimen*, these attributes address the punishability of a particular conduct. Applied to *nulla poena*, they place limits and set standards for the punishment it self.

According to the mentioned rule and also the religious rule if an apostate converts to Islam and becomes a Muslim, he won't be punished or chastised for his irreligious acts, which were committed when he had been a pagan. In other words, the newly announced law is not related to the past, since it hasn't been expressed before. Generally, the rational rule of the doctrine of retroactive and the religious rule (that Islam ignores the individual's past sins) indicate that the legislator should explain the verdict prior to punishment. The legal and juridical justice also suggests that prohibitions should be declared to the individuals. Otherwise the punishment of those who are not informed of the verdict is not only against reason and religion, but also it is an intolerable duty.

Article 24 regulates the temporal limits of criminal responsibility for prosecution of an offence by international criminal court, the relevant point in time is normally 1st July 2002 under article 24 (2). If the applicable law changes meanwhile the crime is committed, the law shall be more favorable to the person being investigated, prosecuted or convicted. In accordance with constitutional law in Iran 'no act or omission may be crime with retrospective effect on the basis of a law framed subsequently (article 169).

Ignorance of the Law is not Excuse

Ignorance of the law is not excuse. It is a legal principle holding that a person who is unaware of a law may not escape liability for violating that law merely because he or she was unaware of its content. The doctrine assumes that the law in question has been properly published in distribution by being printed in a government gazette, made available through internet, or printed in volumes available for sale to public at affordable price.

According to the elements of the crimes in ICC, this doesn't require that the perpetrator had knowledge about all characteristics of the attack or the precise details of the plan or policy of the state or organization. So, the punishment of an individual who is ignorant of the verdict or subject, except the forgetful ignorant who is aware of the crime is against justice and it is considered indecent. In accordance with article 23 of Statue, a mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the court shall not be a ground for excluding criminal responsibility except it negates the mental element.

According to Article 30 (1) of the Rome Statute, unless otherwise provided, a person shall be criminally responsible "*only if the material elements were committed with intent and knowledge*". The intent and knowledge of the accused

cover *dolus directus* in the first and in the second degree[1] However, the so-called *dolus eventualis* is not provided by the Statute. Conscious negligence or recklessness is provided only in Article 28 concerning the responsibility of commanders and other superiors. But unconscious negligence, or disregard of the obligation of due diligence, is not provided in the Rome Statute expressly, even as a ground of criminal responsibility for military superiors. It is close to the notion of "strict liability" which, in criminal law of civilized nations, is excluded as a general principle

Presumption of Innocent

According to Article 40 of the International Convention of Child, due process rights are to be observed including the presumption of innocence, the right to silence and access to justice options other than judicial reseedings and institutional care The presumption of innocence when charged with criminal offence Article 14 (2); Article 14 (2) of the ICCPR provides the right to be presumed innocent to "*everyone charged with a criminal offence*". It has been generally accepted that the presumption, as well as most of the other rights in Article 14, applies both to the defendant in a criminal case and an accused person prior to the filing of a criminal charge. A person has this right until a conviction is recorded. The presumption of innocence is an extremely important aspect of the criminal trial itself, in that the prosecutor must prove the defendant's guilt. The Human Rights Committee has emphasized that the resumption of innocence is fundamental to the protection of doubt, but the Human Rights Committee has established that is the acceptable standard of proof. Furthermore, the presumption of innocence implies a right to be treated in accordance with the standard, judge also has the duty to conduct the trial without previously having formed an opinion on the guilt or innocence of the accused. This duty applies to all public authorities too. It has been argued that in the case of excessive "media justice" or the danger of impermissible influence on lay or professional judges by powerful social groups, one has to assume that the state is under a corresponding positive duty to ensure the presumption of innocence. Violation of the right to be presumed innocent is extremely difficult to prove. The Human Rights Committee, which has dealt with a vast number of cases, has only held article 14 (2) to be violated in two communications against Uruguay.

[1] *Dolus directus* in the first degree is provided in Art. 30 (2): "... a person has intent where: (a) in relation to conduct it means to engage in the conduct; and (b) in relation to a consequence, it means to cause it." *Dolus directus* in the second degree is covered by Art. 30 (2) under (b): "... a person is aware that a consequence will occur in the ordinary course of events"; and in Art. 30 (3): "... the 'knowledge' means awareness of the person that a circumstance exists or a consequence will occur in the ordinary course of events.

The doctrine of permission in doubtful prohibitions, when there is no reason for the prohibition of an act, it is permissible. On the other hand, the criminal responsibility of the individuals is secondary to the expression of the regulations. In cases that no verdict is stated or when the verdict is unavailable, one is not responsible for his acts which may actually be against religious law, if proved guilty before the court. In accordance with article 66, Statue of Rome "*everyone shall be presumed innocent pored guilty before the court in accordance with the applicable law*".

Limitation of Interpretation

One of the general principles that are applied in criminal law is limitations in the interpretation that refer to penal code that should be held by the interpretation favorer of accuse. There will be those who argue that, as a source of criminal law, the Rome statue should be subject to the rule of strict construction or that in the event of ambiguity or uncertainly, the results are more favorable to the accused that should be endorsed. It is confirmed, at least with respect to the definition of crimes in article 21 (2) the definition of a crime shall be strictly constructed and shall be extended by analogs.

2. *Nullum Crimen sine Lege* in Article 21 of Statute

The statute proposes a three-tiered hierarchy. At the top is the statue it self, accompanied by the element of crimes and the rules procedure and the evidence system but in fact Statute of Rome is a statute of no code so it is incomplete. According to the Statue of Rome article 20 except that which is provided in this state, no person shall be tired before the court with respect to conduct which formed the basis of crime for which the person has been convicted or acquitted by the court. According to the article 21 Statue of Rome there are three tier sources that are different from the source of law International Court of Justice because of its dealing with civil responsibilities of state but ICC is a criminal institution[1]. The statute is the core document of international criminal law. Today it's set out the legal bases of the international criminal court and developed it is new brand of procedure.[2] The Rome statute creates a special regime as far as the source of the

[1] See Statue of Rome, art. 21.

[2] However, the genuine nature of these general principles of law is most transparent in the so-called "transnational law", which is extremely poor in substantial legal rules. When arbitrators decide disputes about contracts concluded between States and foreign corporations or private banking institutions, there are almost no other sources of applicable law except the contract itself. Then the arbitrators largely apply "general principles of law recognized by civilized nations", because the text

law concerned. The rules of international criminal law in ICC have been set out with a clarity approaching that of the civil laws system (the privation of the statue and the element of crime and procedure) but some sources in the ICC for example general principles of law not codified. So in this case ICC approaches that of the common law system. Because the general principle of law derived by the court from the national laws of legal systems of the world

Although analogy is forbidden to any criminal judge in respect of incrimination of human behaviour, there is still some place for general principles of law in this narrow sense as a subsidiary source of international criminal law, in particular if it is so provided in advance. That is the case with Article 21 (1) (c) of the Rome Statute, to which Article 31 (3) of the Statute refers concerning the grounds for excluding criminal responsibility. Nevertheless, the scope of application of these principles in this narrow sense is rather exceptional in this disciplines8

Paragraph (1) (c) provides that the Court shall apply furthermore:

Failing that, general principles of law derived by the Court from national laws and legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards

Paragraph (1) (c) stresses on the fact that all these derived general principles of law must be consistent with the Statute and with international law, “internationally recognized norms and standards”, human rights and fundamental freedoms. The emphasis is, here, once again, on the rules of positive international law and not of *lex ferenda* by judges. The drafters of the Rome Statute were awarded that by Articles 32 and 33 did not codify all the possible general principles of law in this respect. For that reason, it is provided in Article 31 (3).

At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article. Finally, Article 21 (3) states the following:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

The ICC concerns that the statute’s definition of crime was assigned to customary law. Article 10 of statute states: Nothing in this part shall be interpreted and

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of the contract would, in their absence, be almost meaningless. See details on that practice, Degan, V. D. (1997). *Sources of International Law*, Hague: Martinus Nijhoff Publishers.

defined about crimes in the ICC statute that exists in certain conduct and involves direct individual responsibility under customary international law. For example for the criminality under customary limiting or prejudicing in any way develops rules of international law with purposes other than this statue. According to the article 10, the customary goes beyond the statute.

However the statute of the Rome doesn't have mentioned to the customary law as a source of law exactly and specifically. In the other hand, the ICC was indicated to the general principle as the applicable law. But the imposition of penalties for offences is illegal under the international law or the criminal law. But "the general principles of law in nations" as applicable law are not clear and contrary with the criminal justice.

The other applicable law in the ICC is that the international treaty couldn't be a fit source of the international criminal law, because the treaty creates obligations for the party state. Thereby a treaty is formed by the express consent of the parties only duly authorized. Agents of states have the power to enter a treaty in each state that has to follow its own constitutional procedure before it's bound by the term of treaty under Iranian law, the international treaty need to the approval of parliament in accordance with constitutional law in Iran. All of the law must be consisted of Islamic criteria.

There is another substantial difference in this regard. When two or more States agree on the jurisdiction of the ICC, or on international arbitration, they expect to obtain in these procedures the final judgment of their case. To this end, in order to avoid *non liquet*, the judges resort to all sources of law provided in Article20, they must find applicable legal rules to any dispute which States can refer to them.

Certainly, definitions of all crimes against humanity as set forth in Article 7 of the Rome Statute seem to be more appropriate and more complete. But it is not a job of judges in deciding on past crimes to create perfect definitions of crimes which fall into their jurisdiction. It is better for them to stick to the *nullum crimen sine lege* principle.

Conclusion

Legality in the ICC is combined as common law and civil law but the English and welsh criminal law failure in no codification of criminal law Legality in common law has codified but not always on complexity is the law marking power of judge under common law Hence, in criminal law**,** either municipal or international, written sources have the preference over unwritten ones. This means that in international criminal law, customary rules cannot have the same importance as in the international legal order of sovereign States in which a near totality of rules of general international law is of customary character. The rules of the Rome Statute,,

will not permit judges of the ICC to improvise with the general principles of criminal law, with applicable law on international crimes within its jurisdiction. It seems highly desirable that the statutes of criminal tribunals provide, in advance, all the crimes within their jurisdiction, exactly as was done in the Rome Statute. Amendments like that are not in accordance with the principle *nullum crimen sine lege.*

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