General Principles of International Criminal Law

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Abstract

The significance of the principles and rules of international law is defined in the Article 38 of the Statute of the International Court of Justice. So, the general principles of substantive criminal law can be found in conventions, in customary international law or in general principles of law recognized by all civilized nations. According this, the criminal laws of most states rely on similar concepts and rules: in this sense it can be spoken about universally recognized general concepts that the exact contents of these concepts vary widely from one country to another.

This justified observation increases the role of the general principles of criminal law derived from national laws of legal systems of the world. These general principles of criminal law have been developed since the 19\textsuperscript{th} century primarily by the doctrines and practices of national criminal laws and criminal justice systems.

Keywords: ”rules”, ”general principles”, ”international law”, ”national law

Introduction

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Before the consideration of the general principles of Rome Statute of the International Criminal Court, as defined in Part 3 of the Statute, Article 21 on the applicable law should be studied. The Court shall apply in the first place, the Statute itself, including „Elements of crime”; in the second place, applicable treaties and the principles and rules of international law; and, if these primary sources are insufficient, general principles of law deriving from national laws of legal systems of the world under prescribed restriction.

Such concepts, principles and theories have mainly been developed within two different legal cultures, either in civil law or common law countries, and have been differentiated to large
extent. Research on comparative criminal law has not been carried out enough, so as to create the basis for an adherent and principled system of international criminal law. The trend towards more harmonized criminal laws within European Union has increased the need and interest for such a comparative research and system building. The International Criminal Law Statute with its general part hopefully encourages the scientific community to new research projects, comparable to those of Max Planck Institute for Foreign and International Criminal Law.

The International Criminal Court Statute (Part 3) is the first instrument to codify generally international criminal law and specially the general principles of international criminal law. Neither the Statute of the International Criminal Tribunal for the Former Yugoslavia nor the Statute of the International Criminal Tribunal for Rwanda have such a part of general principles but they do recognize some of these principles, in particular the principle of individual criminal responsibility, including the sub-questions of command responsibility and of superior orders. The jurisprudence of the ad hoc International Criminal Tribunals, has taken up views of many of these issues, and the case-law of these Tribunals has influenced on the elaboration of the relevant provisions of the International Criminal Court Statute.

This International Criminal Court Statute is still far from a comprehensive and coherent general part, because the doctrines on it are not yet in the same developmental stage as are most of the national criminal law systems following the continental European tradition. In the 3rd part of the International Criminal Court Statute is rather an attempt to merge the world’s criminal law systems into one legal instrument that was more or less acceptable to the delegations present in Rome after the three years intensive preparatory work.

The International Criminal Court Statute issues important challenges to international criminal law theorists. For instance, it could be traced the elements of crime in the Statute which are reflecting a common law tradition only and which of them rather express same kind of convergence of the continental and common law thinking. Another task would be to reconstruct the general concept of crime for systematizing the doctrines of individual responsibility in international criminal law.

When considering the structure and contents of international criminal law a distinction between various levels, i.e., national, trans-national and supra-national ones, has proved to be useful. Certain differentiated areas of criminal law have traditionally been developed, such as military criminal law; some of them are in the phase of development, such as economic criminal law and international criminal law. These tendencies are discernible both nationally and internationally. The elaboration and application of general principles both in domestic settings and on trans and supra-national levels probably lead towards more harmonized doctrines of international criminal law.

1 Kai Ambos, General Principles of Criminal Law in the Rome Statute, 1999, p.32
3 1.2 Rechtfertigung und Entschuldigung / Justification and Excuse, Albin Eser & George P. Fletcher eds., Max-Planck-Institut für auslandisches und internationales Strafrechts, Freiburg 1987-1988
The diversification of various areas of criminal law, especially the emergence of economic and international criminal law, is reflected in the pluralism of general legal doctrines and in the need to develop a more dynamic conceptual and system thinking in order to control many parallel legal regulations and the diversity of the regulated phenomena. As for international criminal law certain general principles have their doctrinal roots in this area in particular, irrelevance of official capacity, responsibility of commanders and other superiors and superior orders.

It is interesting to look at the developments of these doctrines; already the comparison between the Statutes of ad hoc Tribunals ICTY and ICTR, on one hand, and the ICC Statute, on the other, indicates substantial changes in the provision concerning superior responsibility and superior orders. More attention should be paid those general principles which are for the first time regulated in the ICC Statute, such as the provisions on individual criminal responsibility in the Article 27, as well as on mental element – Art. 3a and on Mistake of fact and mistake of law (art. 32).

The significance of the legality principle in international criminal law has been essentially strengthened in the ICC Statute. The different rules of this fundamental principle have been defined in Articles 22-24: *Nullum crimen sine lege, Nulla poena sine lege* and Non-retroactivity *ratione personae*. The rule of strict construction and the “more favorable” clause in Article 22, paragraph 2, should be especially mentioned, because such provisions are seldom in national criminal laws. The legality principle and the just-mentioned paragraph would also be applied towards the general principles of criminal law (Part 3 of the ICC Statute). Cogent reasons are in favour of this interpretation. It can also be argued for a smoother application of the legality principle when taking into account the role of the general part which in certain respects differs from that of the special part.

The International Criminal Court Statute as reflecting the latest developments of the general principles.

Individual criminal responsibility as such is a generally recognized principle of international criminal law since the judgments of the International Military Tribunal. Articles 25 (3) and 28 of the International Criminal Court Statute define the scope of individual criminal responsibility, covering the basic rules and rules expanding attribution. An important question is how the characteristic of international criminal law to create liability for acts committed in a collective context and systematic manner can be adjusted to the principles of individual responsibility and culpability. So, criminal attribution for such international crimes as defined in the Article 5-8 of the International Criminal Court Statute (“macro-delinquency”) has distinguishing features in comparison with the individual criminal liability for ordinary offences according to domestic criminal laws: “the individual’s own contribution to the harmful results is not always readily apparent.”

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10 Anthony Duff ed. 1998, Cf.generally Philosophy and the Criminal Law
Subparagraph (d) of Article 25(3) extends the liability for contributions to a collective crime or its attempt in such a way which deviates from the criminal law (Romano-Germanic) tradition when criminalizing participation in ordinary offences. It is noteworthy that this liability from is not fully in line with the common law concept of “conspiracy” but presents a compromise formulation, which also included in a similar provision of the antiterrorism convention.12

A general regulation on the criminal responsibility for omission – commission by omission – was not adopted in the International Criminal Court Statute, although it was proposed during the preparatory work. In this respect the International Criminal Court Statute is not following a legislative trend of the recent reforms of Continental criminal laws such in the Finnish Penal Code.

The criminal liability for the omission is recognized in Article 28 concerning superior responsibility. The responsibility of the commanders and other superiors is based on customary international law, but the broad concept as adopted in this provision can be criticized. For instance, it is questionable to draw a parallel between the cases of knowledge and negligent ignorance of impending offences.13 The solution of the German Code of Crimes against International Law – 2002 – to regulate the superior responsibility in three separate provisions might serve as a model how to clarify and differentiate the contents of this general principle.14

The subjective requirements of individual responsibility according to the International Criminal Court Statute, in particular, the definitions on mental element in Article 30 and on the mistakes of fact and law in Article 32, mean a remarkable progress towards having the culpability principle as an essential independent element of crime in addition to the objective wrong doing.15

Conclusions

The recognition of mistake of law and duress as grounds for excluding criminal responsibility indicates a somewhat larger conception of culpability than to regard it as a psychological concept of mens rea (“guilty mind”) only, when it would be synonymous with intent and knowledge.

The provision on the mistakes of fact and law is unsatisfactory. Article 32 is based on the traditional common law doctrine that a mistake shall be a defense only if it negates the guilty mind. The doctrine implies that mistake as to the wrongfulness of the act cannot in any case exclude criminal liability (error iuris nocet). In this strict form the doctrine disregards the culpability principle as it has been adopted in recent Continental criminal laws. Mistake as to circumstances affording a ground excluding liability should also be recognized.

13 Kai Ambos, Superior Responsibility in 2 Commentary, p. 823-872
15 Albin Eser, Mental Elements - Mistake of Fact and Mistake of Law in First Commentary, p. 890-891
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