



PRINCIPLES OF INTERNATIONAL CRIMINAL LAW IN THE STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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Abstract

This article is intended to verify the principles of International Criminal Law adopted by the ICTR (International Criminal Tribunal for Rwanda), using primary sources such as its Statute and rules of procedures and evidence. Our point of departure is the reflection of Luciana Boiteux on these principles in the Rome Statute (of the permanent International Criminal Court), mainly based on the principles of the Brazilian criminal law, but adding two principles that are unique to international criminal law: complementarity and individual international responsibility. The methodology employed was research on primary sources, in addition to literature review on the subject.

Keywords: International Criminal Law, International Criminal Tribunal for Rwanda; principles.

PRINCÍPIOS DE DIREITO PENAL INTERNACIONAL NO ESTATUTO DO TRIBUNAL PENAL INTERNACIONAL PARA RUANDA

Resumo

Este artigo tem como objetivo verificar quais são os princípios de Direito Penal Internacional adotados pelo TPIR (Tribunal Penal Internacional para Ruanda), utilizando como fontes primárias o seu Estatuto e suas Regras de Procedimentos e Provas. Parte-se aqui principalmente da reflexão que Luciana Boiteux faz sobre esses princípios no Estatuto de Roma (sobre o Tribunal Penal Internacional de caráter permanente), principalmente com base nos princípios do Direito Penal brasileiro, mas adicionando dois princípios que são exclusivos do Direito Penal Internacional:

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complementaridade e responsabilidade internacional individual. A metodologia empregada foi pesquisa documental, além de revisão bibliográfica sobre a temática.

Palavras-chave: Direito Penal Internacional; Tribunal Penal Internacional para Ruanda; princípios.

Introduction

The objective of this article is to determine the international criminal law principles adopted by the ICTR (International Criminal Tribunal for Rwanda), which a court created by the Security Council of the United Nations (UN), the main body of the UN, as a subsidiary body of that Council.

The *rationæ personæ*, *rationæ temporis* and the *rationæ loci* competences of this Court are stated in articles 1 and 7 of the Statute. Article 5 of that instrument provides for *rationæ personæ* jurisdiction. In relation to this, the ICTR can only judge natural persons who must be Rwandan citizens because, as according to articles 1 and 7 of the Statute, only persons responsible for serious violations of humanitarian law committed by Rwandan citizens can be judged by the Court.

The *rationæ temporis* jurisdiction the ICTR only applies to crimes committed in 1994, the year in which the Court was established and when the great genocide in Rwanda took place (although there have been reports that some crimes against humanity had been committed in previous years, which is why the Rwandan government wanted that competence to be retroactive to 1990). Violations of humanitarian law committed after this year cannot be punished, although there are reports that they still occur (albeit not characterizing genocides).

But the *rationæ loci* competence of the Court applies not only to crimes committed in the territory of Rwanda (in both its land surface and in its airspace), but also in the territory of neighboring States. The *rationæ materiæ* jurisdiction applies to the crimes of genocide, war crimes and crimes against humanity.



Our point of departure is Luciana Boiteux's reflection about these principles in the Rome Statute (of the permanent International Criminal Court), mainly based on the principles of the Brazilian criminal law (legality, harmfulness, minimal human intervention and humanity), but adding two principles that are unique to international criminal law: complementarity (which the author claims to be unprecedented in the Rome Statute –a point of view that we disagree with) and individual international responsibility. Thus, Boiteux establishes a typology of principles of international criminal law, upon which this article is based.

The methodology was documentary research, and as primary sources, more specifically, the Statute of the International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence (a sort of Code of Criminal Procedure of the ICTR) were used. In addition, a literature review was undertaken on the subject.

Principle of legality

According to Nilo Batista, the principle of legality is the basis of the *rule of law* and also of any criminal law that aspires to ensure legal certainty. This principle ensures that citizens will not be subjected to criminal coercion other than that provided by law, this being inscribed in the Universal Declaration of Human Rights (Article XI, paragraph 2) and the Pact of San José, Costa Rica (art. 9) (BATISTA, 2007, p. 67). In Brazilian Penal Law, this principle has the following functions: prohibition of retroactivity in criminal law, except in favor of the defendant; prohibition of custom as a source of criminal law (except in favor of the defendant), prohibition of analogy against the defendant, and prohibition of non-determinate criminal laws (Boiteux, 2007, p. 95).

While in the domestic sphere this principle was accepted and incorporated into the vast majority of jurisdictions until the Rome Statute was approved, there were disagreements as to its scope and grounds in international criminal law, mainly due to the *ad hoc* tribunals, some of which claim that it sets standards for retroactive



international criminal law. Japiassú distinguishes three strains that address the appropriateness of this principle in the international sphere (Japiassu, 2009, p. 19).

There is a strain of thought according to which this principle does not apply to international criminal law, for it is largely customary law, widely influenced by common law systems, while the principle of legal reserve presupposes a law that is supported by legislation (Japiassu, 2009 p. 20).

According to another strain, the principle of legality is not internationally applicable. This is because the rules of international criminal law (at least in international criminal courts) are intended to judge the very people who used their positions of state leaders to commit certain crimes under planned and systematic policies. Therefore, according to this view, the international application of the principle of legal reserve would protect the state. Since this principle precisely serves to protect the individual from the state, and not the contrary, it would then not be appropriate (Japiassu, 2009, p. 20).

As for the last strain, the principle of legality does apply, because the law ensured by the *ad hoc* tribunals already existed. War crimes and crimes against humanity, according to this view, would have been previously typified internationally and in various domestic legal systems and also by the Hague and Geneva Conventions. The crime of genocide, in turn, had already been contemplated in the 1948 Convention (Japiassu, 2009, p. 19-20).

This last strain is our point of departure. This guarantee must be ensured to an individual, whether he or she is a head of state who used this position to commit crimes or not. Here, the argument that the principle of legality, as applied internationally, would result in the protection of the State is refuted. Normally, when a defendant goes to trial at the international sphere, he or she is deprived of his or her powers and status as a leader. Thus there can be the passage of the discretion of the arbitration of the State to the arbitration of international society, which is, ultimately, a society in which the main actors are States. This way, the most powerful states become the arbitrators, a situation that should be avoided.



Regarding the legality of punitive measures, it is a bit more complicated to state that the ICTR incorporates this principle. Article 23, paragraph 1,² was added to the Statute of the Court as an attempt to incorporate the principle of *nulumpoena sine lege* into this legal document. This is a copy of article 24, paragraph 1, of the Statute of the ICTY (International Criminal Tribunal for former Yugoslavia). The idea is that, in doubt as to the standard to be applied, the Court could base its judgment on the country's domestic law. However, prior to 1994, when the ICTR was created, there was no classification of crimes against humanity, war crimes and genocide in Rwanda. The country had already ratified and published major treaties on the subject in its Official Gazette, but these crimes were only characterized after the genocide, and retroactively (after all, the idea was to create such legislation in Rwanda as to punish the genocide of 1994). As a consequence, when applying article 23, paragraph 1, the ICTR ultimately applied retroactive criminal laws, infringing the principle of legality and interpreting article 23 differently from what it was designed to provide for (SCHABAS, 2000, p. 534).

Principle of individual international responsibility

The principle of international responsibility emerged in Nuremberg. This principle represents the overcoming of "classical notions of international law, which required only the international responsibility of the State" (BOITEAUX, 2007, p. 103). This does not mean, however, that the state is no longer responsible internationally³.

² "The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda".

³ In this sense, see the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, International Court of Justice, in which the Court said that a state can be held accountable internationally for genocide.



In the Statute of the ICTR, this principle is embodied by articles 5 and 6. Article 5, as mentioned above, provides that the jurisdiction of the Court is only to judge natural persons. Article 6 establishes that criminal responsibility is individual, as indicated in its title, and states the hypotheses of the participation of people⁴.

Article 6, paragraph 3, which deals with the liability of those hierarchically superior, deserves special mention. This is the hypothesis in which those committing criminal acts are subordinates, but the hierarchically superior person is liable for such conduct for knowing (or at least having the duty to know) that the subordinate was about to commit such acts or was committing them and not taking the necessary measures to prevent or punish the subordinate.

Thus, according to Boiteux, the responsibility of the superior constitutes a form of improper omissive crime with eventual intent, where this superior is assigned the role of guarantor agent. A legal obligation to prevent the outcome is thus imposed onto the superior and activities to prevent the result are required of him or her (provided that such action is possible) (BOITEAUX, 2007, p. 105).

Principle of complementarity

According to Cassese, there is no general rule determining how crimes that are under the competence of both international and domestic courts are to be judged.

⁴ **"Article 6: Individual Criminal Responsibility.** 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime. 2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment. 3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. 4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires".



This conflict has been resolved by treaties (TPI) or binding resolutions (ICTY and ICTR)(CASSESE, 2003, p. 348).

According to Boiteux, the principle of complementarity is opened by the Rome Statute,

“[...] referred to in § 10 of the preamble, expressly provided for in Article 1st, and further detailed in Article 17th. Unlike the *ad hoc* tribunals, in which universal jurisdiction takes precedence over the national jurisdiction, the jurisdiction of the ICC is complementary to national jurisdictions” (Boiteux, 2007, p. 101).

The author continues to define this principle, according to which universal jurisdiction is triggered only if the national court is unable to act in the case (Boiteux, 2007, p. 101).

Article 8, paragraph 1, of the Statute of the ICTR, following the precedent of former Yugoslavia, states that its jurisdiction is concurrent with that of the national courts, with primacy of international jurisdiction, pursuant to article 8, paragraph 2. Also according to this latter provision, the ICTR may at any time require a national court to submit a given case to its jurisdiction⁵.

The preference for the primacy of international jurisdiction, in the case of the ICTY, was based on the fact that with the continued conflict that arose between the States that appeared after the fragmentation of former Yugoslavia, and the animosity between the various ethnic and religious groups, it became unlikely that national courts would conduct fair trials. It was considered unlikely that the authorities would bring their own people to trial and the general belief was that, if that happened, the trial would be beset with prejudice. Therefore, the need was felt to

⁵“**Article 8: Concurrent Jurisdiction.**1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighboring States, between 1 January 1994 and 31 December 1994. 2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda”.



assert the authority of international jurisdiction. Similar considerations, based on the precedent of the ICTY, were made in relation to Rwanda, where in addition to problems in common with the former Yugoslavia, the national judicial system had collapsed (CASSESE, 2003, p. 349).

However, the Statutes of both Tribunals do not specify under what conditions and how the primacy is to be exercised, leaving the task to be regulated by the Rules of Procedure and Evidence of the Court. The judges of the ICTY established their rules, which were soon copied by the ICTR. These rules (Rules 8-13) do not establish the absolute primacy of the courts; they even state that competing jurisdiction can lead to the prevalence of national jurisdiction, and that even the International Court can refuse to admit a case where it considers that it would be more appropriate for an international court to judge it. Thus, judges have established a mechanism through which cases can be referred to the domestic jurisdiction if considered necessary, as set out in Rule 11A of the Rules of Procedure and Evidence (CASSESE, 2003, p. 349; HERIK, 2005, p. 54.). The Rules also provide that, at the request of the Prosecutor, the Court may assert its primacy in three cases. In the first case, a national prosecutor investigates an international crime, or a national court conducts criminal proceedings without considering this crime as an international crime, but as a common crime. In this case, the classification of the offense as a common crime presupposes a bias, either deliberate or unintentional, to misrepresent the nature of the crime and thus underestimate the seriousness of international crimes. In the second case, if a national court is found not to be reliable, i.e. when it is proven that there is little independence or impartiality in investigations and procedures or that they have been designed to serve as a shield towards the defendant, or that the latter has not been diligently prosecuted either to protect him or to impute improper criminal liability. Finally, if, even though a court appears to be reliable and able to conduct a fair trial, the case is closely related or may be relevant to the resolution of other cases being prosecuted by the international court, the ICTR can assert its primacy of jurisdiction (CASSESE, 2003, p. 349).



The scheme adopted by the ICTY and the ICTR seems to reconcile: 1) the need to avoid burdening international institutions with relatively minor cases, leaving them to the national courts, 2) the demands of the sovereign State, and 3) the need for international courts to “substitute” domestic courts when they are not found to be reliable and fair, and also for them to deal with the most serious crimes, relevant to the international community as a whole (CASSESE, 2003, p. 349).

Since the Rules of Procedure and Evidence ultimately lead to greater freedom of action of national jurisdictions, the term “primacy” is not the most appropriate to describe this kind of relationship of the ICTR to national jurisdictions. Primacy is what describes the relationship of the Courts of Nuremberg and Tokyo with domestic jurisdictions. Perhaps “complementarily mitigated” is the correct term to describe this type of relationship in the case of the ICTR, because its practical effects are, in fact, very similar to the principle of complementarity under the Statute of Rome. At this point, the *ad hoc* tribunals have served as an important precedent for the scheme provided for in the Statute of Rome.

Principle of Humanity

In his work “*Introdução crítica ao direito penal*,” Nilo Batista identifies humanity as one of the principles of the Brazilian legal system. This principle is characterized by rationality and proportionality of punishment, and the latter cannot bring suffering to a prisoner or ignore the defendant as a human person (BATISTA, 2007, p. 98-101).

Boiteux identifies this principle in the ICC Statute through the prohibition imposed on the Court to apply the death penalty, with life imprisonment being the severest possible penalty that the ICC can impose, and even in such cases subject to periodic review (Boiteux, 2007, p. 107). In the Statute of the ICTR, this also applies, as article 23, paragraph 1, provides that the sentence imposed by the Court shall be limited to detention, although it does not expressly provide for life



imprisonment or for minimum or maximum penalties. Moreover, article 23, paragraph 2, establishes the proportionality of the penalty, when it considers that the Trial Chamber, in applying it, must take into consideration such factors as the seriousness of the offense and the individual circumstances of the convicted person. Besides a sentence of imprisonment, the Trial Chamber can also determine the return of property acquired by criminal conduct to those legally entitled to it (article 23rd, paragraph 3 of the ICTR Statute)⁶.

However, these are not the only consequences of this principle. Various principles, which Cassese presented as autonomous principles, may be seen as sub-principles of the principle of humanity. Among these, the following ones can be mentioned: presumption of innocence (article 20, paragraph 3, of the ICTR Statute); impartiality and independence of judges⁷, the principle that the trial must be fair and expeditious (article 20, paragraph, 2 of the Statute)⁸, and the principle that an accused person must be present at his or her trial (article 20, paragraph 4, sub-paragraph d⁹ of the Statute)(CASSESE, 2003, 348-405).

The principle that a trial must be fair and expeditious has, according to the author, three elements: equality of the parties, as understood, according to Cassese,

⁶**Article 23: Penalties.** 1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda. 2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person. 3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners”.

⁷ Art. 12 of the Statute expressly states the adoption of this principle to establish the criteria for selection of judges: “The permanent and ad litem judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices”. Moreover, Rule 15 (A) of the rules of Procedure and Evidence of the ICTR states that if a judge has any interest in the case affecting his impartiality, he must withdraw it, and the President of the Court shall appoint another one to take his place in that concrete case. If this judge does not follow this rule, he may suffer the penalty of disqualification can no longer serve on the Court, according to Rule 15 (B).

⁸“In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute”.

⁹“In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: [...] (d) To be tried in his or her presence [...]”.



not in the way it is traditionally understood in accusatory systems, i.e. that the prosecution and defense must have the same advantages, but rather according to the concept of international human rights, in the light of which a defendant cannot be put at a disadvantage in relation to the charge, the publicity of proceedings (article 20, paragraph 2, of the Statute of the ICTR)¹⁰, in connection with which article 20, paragraph 2, of the Statute provides for an exception, making reference to article 21¹¹ of the same document, in relation to the protection of victims and witnesses, which must include, without being limited to, procedures behind closed doors for this purpose, in addition to measures for protecting the identity of witnesses; celerity of proceedings (CASSESE, 2003, 395-398).

The principle of humanity is not only a principle of international criminal law, but one that must guide the actions of the United Nations itself according to the treaty that established it, as set out in a provision included in the preamble¹² and article 1, paragraph 3¹³, of its Charter (Schweigman, 2001, p. 168). Therefore, this principle serves to limit the establishment of subsidiary bodies, including *ad hoc* tribunals that violate these same rights, and constitutes the basis of the principle of humanity.

Principle of harmfulness and of minimum intervention

The principle of minimum intervention (which prescribes that criminal law should only be used as a last resort) is set out in articles 1 and 7 of the Statute of the ICTR, according to which only serious violations of humanitarian law fall under

¹⁰“In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute”.

¹¹“The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity”.

¹²“WE THE PEOPLES OF THE UNITED NATIONS DETERMINED [...] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person[...]

¹³ARTICLE 1 - The Purposes of the United Nations are: [...] To achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion



the jurisdiction of the Court. This is not due, in International Criminal Law, to the belief of Criminal Law as *ultima ratio*, but to the principle of sovereignty, which should only be mitigated in cases of serious violations of human rights and humanitarian law. The way to punish is internally decided by the sovereign state (in the case in Rwanda, this has been reflected in a crowded prison system, in a country where the judicial system is already weakened by genocide, and in the application of death penalties).

Furthermore, the principle of harmfulness forbids prosecution of an inner attitude or of a conduct that does not exceed the scope of the author, and requires disregard for a legal provision for imposing a penalty (Boiteux, 2007, p. 106). Reading the Statute of the ICTR, one can see that in crimes against humanity and in violations of article 3 of the Geneva Conventions and of the Additional Protocol II thereto, this principle is incorporated. However, it seems that it was not incorporated into the definition of the crime of genocide, as what is punished is the conspiracy to commit genocide¹⁴.

Conclusion

Based on the typology of International Criminal Law principles established by Boiteux, it is clear that some of these principles are included in the Statute of the International Criminal Tribunal for Rwanda, such as the principle of humanity, the principle of minimal intervention, and the principle of individual international responsibility.

As for other principles, their inclusion in the Statute of the International Criminal Tribunal for Rwanda is under discussion. Regarding the principle of legality of retroactive penalties, the conclusion is that it has not been included in the Statute.

¹⁴A conspiracy is a combination of two or more persons for the purpose of harming another one in the future, but the conduct does not exceed the scope of the author. As provided in Art. 3 of the Statute, which deals with the crime of genocide, particularly in its § 3: "The following acts shall be punishable : [...] (b) Conspiracy to commit genocide [...]".



However, it appears that the other dimensions of this principle have been incorporated into that Statute. Likewise, the principle of harmfulness has not been fully incorporated into the Statute, since the criminalization of conspiracy to commit genocide leads to the criminalization a conduct that did not produce a result.

Discussions are also being held on the implementation of the principle of complementarity in the Statute of the International Criminal Tribunal for Rwanda, because, unlike the Statute of the International Criminal Tribunal, which provides for complementary jurisdiction, the ICTR Statute does not provide for complementary jurisdiction. However, throughout the study, it is clear that, in fact, the Rules and Procedures of Proof confer a more significant role to national jurisdictions, with the ICTR acting only in specific cases. Thus, there is no actual precedence, but rather a “mitigated complementarity.”

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