

Chapter 1

Introduction

For the last two decades, a fairly young discipline of international criminal law has been experiencing a dramatic development triggered and sustained by the establishment and work of international criminal courts and tribunals.¹ Although international criminal law remains to some extent a conflicting and fragmented field of law, this fairly new discipline is in a way a product of convergence and cooperation of the world's major legal systems in combating core international crimes such as genocide, war crimes and crimes against humanity. In practical terms, the result of such cooperation is an interfusion of criminal laws originating from various legal systems into the jurisprudence of international criminal courts and tribunals. The existing jurisprudence demonstrates that the incorporation by the ad hoc tribunals and the International Criminal Court² of national approaches to international criminal law appears to be more of a technical transposition of concepts rather than the result of a meticulous comparative analysis. Consequently, the jurisprudence is replete with internal inconsistencies and lacunae as to the construal of the fundamental concept of a crime in international criminal law that this book endeavours to address.

¹ This book mostly deals with the practices and jurisprudence of the the International Criminal Tribunal for the Former Yugoslavia (hereinafter—ICTY), the International Criminal Tribunal for Rwanda (hereinafter—ICTR) and the International Criminal Court (hereinafter—ICC). In some parts, references are made to the jurisprudence of the Special Court for Sierra Leone (hereinafter—SCSL).

² The Rome Statute of the ICC encompasses a set of Articles (Articles 22–33) that lay down a firm foundation for “general principles” in international criminal law.

1.1 Relevance and Significance of Comparative Method

The academic literature notes the increasing significance of comparative criminal law in furnishing international law through “general principles of law” identified in domestic criminal law.³ The benefit of comparative law is enhanced through the implementation of the complementarity principle by States Parties to the Rome Statute which are tasked with a daunting task of harmonising their national laws and bringing them in conformity with internationally recognised standards. As it is rightly penned by *Bassiouni*, “such degree of cross-fertilisation between international and national criminal law contributes to the harmonisation of substantive and procedural laws both at the national and international levels”.⁴

This book is concerned with the influence of comparative law on shaping the substantive part of international criminal law. The major finding of this study is that only careful incorporation of general principles originated from *many* world legal systems may compellingly demonstrate that international criminal law is rooted in “generally accepted standards rather than national idiosyncrasies or aberrations”.⁵ Despite all positive influences of comparative studies on the advancement of international criminal law, the most challenging exercise in the application of the comparative method is “attempting to reconcile, let alone combine, legal concepts pertinent to different legal systems under the umbrella of international criminal law”.⁶ The use of comparative law is not about “transplantation of one dominant model” into international criminal law, rather it is “hybridisation inspired by pluralism”.⁷ It is clear that during the drafting process of major international criminal law instruments the statutory language is influenced by the geographical representation of delegates that settle on the most suitable formulation of legal provisions. The judges of international criminal courts have a tendency to reinforce their national perceptions of criminal law, which is clearly visible in a number of the ICTY judgements. However, instead of attempting to bring along legal traditions from own national jurisdictions into international criminal law, it is advisable to resort to a comprehensive comparative analysis that will underline the existence of commonly shared “universal values” across many legal jurisdictions.⁸

Being a field in its own right, international criminal law is a fascinating amalgam of international law, customary law, and general principles derivative from

³ For the support of this position, see: Werle (2005), p. 91; Ambos (2006), pp. 660–673, at 661–662.

⁴ Bassiouni (2008a), p. 6.

⁵ Cryer (2005), p. 173.

⁶ Bassiouni (2005a), p. 158.

⁷ Delmas-Marty in Cassese (2009a), p. 99.

⁸ Fletcher (2007), pp. 4–5.

domestic criminal law.⁹ Given its unique nature, it is quintessential to lay down a solid theoretical framework of the fundamental concept of a crime as understood in domestic jurisdictions prior to distilling and channelling the substantive law doctrines (*actus reus*, *mens rea*, modes of liability, defences) through “general principles” to the field of international criminal law. As it is observed by *Delmas-Marty*, the use of comparative law should promote “progressive reconciliation between international and domestic law”.¹⁰

1.2 Shaping International Criminal Law Through General Principles of Law Derivative from National Jurisdictions

General principles of law, which derive from domestic legal jurisdictions, have greatly shaped the substantive part of international criminal law. These principles have played a varying role as a source of law in the jurisprudence of international criminal courts and tribunals, which may be explained by the different legal and political settings in which these judicial bodies were established and have functioned. The statutes of the ad hoc tribunals encompass only a few substantive law provisions and do not provide for a hierarchy of sources of law. This is not particularly surprising given that the statutes were hastily drafted by mostly diplomats, who were not necessarily criminal law experts, in an atmosphere of disbelief that the grand project of international criminal justice would take off the ground. The establishment of international criminal courts was not a routine measure employed by the UN Security Council to restore peace and security in troubled regions of the world, which to some extent expounds the imperfect nature of legal instruments that laid down the jurisdictional basis for the ICTY and ICTR. As a result, the judges of the ad hoc tribunals had to work with the poorly articulated statutes in terms of substantive law. The recourse to customary law and general principles was inevitable, since it was the only way to render legitimacy to the judgments.¹¹

While providing for a hierarchy of sources of law, the Rome Statute of the International Criminal Court (hereinafter—ICC) gives utmost importance to the Statute itself, which is a refined codification of substantive and procedural rules of

⁹ In the words of *Judge Cassese*, international criminal proceedings “combine and fuse” the adversarial system with a number of significant features of the inquisitorial approach. See also: *Erdemović Trial Judgement*, Dissenting Opinion, Judge Cassese, para. 4.

¹⁰ Delmas-Marty in Cassese (2009a), p. 103.

¹¹ UN Secretary-General insisted on the preferred application of customary law in the ad hoc tribunals, given the very ad-hocness of the tribunals that put them at a considerable disadvantage in relation to sources of law. For more on the “battle” of sources of law in the ad hoc tribunals, consult: Zahar and Sluiter (2008), pp. 79–105.

international criminal law. Customary law and general principles of law are only consulted if the overarching sources do not address the issue at dispute. It should be noted that many legal provisions of the Rome Statute are indicative of *opinio juris* of States on various matters, although they do not replicate *all* rules of customary law.¹²

The wording of Article 21 of the Rome Statute clearly postulates “general principles derivative from national law” as a source of last resort. The application of “general principles” is conditioned by the consistency of such principles with the Rome Statute, international law, and internationally recognised norms and standards. Cassese observed that the hierarchy of sources in the Rome Statute reflects the legal logic that an international tribunal should first look for the existence of a principle belonging to either treaty or custom before turning to general principles of criminal law recognised by the community of nations.¹³ The latest Commentary of the Rome Statute treats Article 21 (1) (c) as an “invitation to consult comparative criminal law as a subsidiary source of norms”.¹⁴

The thorny issue on the relevance of national law for the ICC was discussed in greater detail at the negotiations in Rome. The reached compromise was that national law is considered as a source under “general principles of law”. It was further clarified that the Court “ought to derive its principles from a general survey of legal systems and national laws”.¹⁵ As it is clear from *travaux préparatoires* of the Rome Statute and some critical observations, the mere reliance upon certain domestic national laws and practices does not justify the transposition of said concepts to the field of international criminal law.¹⁶ Only careful employment of comparative method could fully rationalise the application of general principles of law derivative from national law if the existing lacunae are not covered in treaty and/or customary law.

The early jurisprudence of the ICC shows that the judges utilise a comparative method when interpreting the statutory language. The construal of the law of *mens rea* as well as principal liability is clearly inspired by the German legal theory. A broader reach of comparative method covering a wider range of world legal jurisdictions would clearly render more authoritative weight to the jurisprudence.

¹² Article 21, Rome Statute. For more on whether the Rome Statute’s formulations of the applicable law are accurate restatements of customary international law, see: Cryer (2005), pp. 173–176.

¹³ Cassese (2008), p. 21. See also: Werle (2005), pp. 47–48.

¹⁴ Schabas (2010), p. 393

¹⁵ Ibid., referring to fn. 3, 4 in the Report of the Working Group on Applicable Law, UN Doc. A/CONF.183/C.1/WGAL/L.2, p.2.

¹⁶ In the context of the ad hoc tribunals, Judge Cassese warned against the mechanistic import of legal constructs and terms upheld in national law into international criminal proceedings. See: *Erdemović* Trial Judgement, Dissenting Opinion, Judge Cassese, para. 2.

1.3 Structure

Chapter 2 investigates the fundamental concept of a crime in selected common law jurisdictions such as the UK and USA. The chapter deconstructs the concept of a crime into *actus reus* and *mens rea*. Given the significant influence of the common law theory on the interpretation of the substantive part of international criminal law, such an overview of domestic practices is a solid foundation for a more sound understanding of the concept of a crime and critical assessment of the jurisprudence of international criminal courts.

Chapter 3 examines the concept of a crime in selected continental law jurisdictions, in particular Germany, France, Denmark and the Russian Federation. The chapter scrutinises a number of existing legal instruments and academic writing on the substantive part of criminal law in these jurisdictions, and gives a valuable insight into the construal of the constitutive legal elements of a crime. International criminal courts and tribunals have already substantiated some of their major legal findings with references to national criminal law.¹⁷ However, a broader application of comparative method will furnish and enhance the existing theoretical framework of the substantive part of international criminal law.

Chapter 4 provides brief accompanying historical notes on the legal development of genocide, war crimes and crimes against humanity, and scrupulously analyses contextual elements of international crimes. The chapter touches upon a number of important problematic issues that have been raised in the jurisprudence of the ad hoc tribunals and the ICC on the construal of core international crimes, among others, the much debated contextual element adjacent to the crime of genocide; the meaning of a State or organisational policy within the context of crimes against humanity; the scope of *mens rea* covering contextual elements of international crimes etc.

Chapter 5 explores the complexity of the law on *mens rea* in the jurisprudence of international criminal courts and tribunals. At the backdrop of the inconsistent employment of various *mens rea* in the ad hoc tribunals, the chapter focuses on the latest discussion surrounding the interpretation of Article 30 of the Rome Statute in the jurisprudence of the ICC and offers critical analysis on the evolution of the *mens rea* doctrine through the lens of comparative law.¹⁸

¹⁷ *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras 326–341; *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 357; *Stakić* Trial Judgement, paras 438–440.

¹⁸ *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 357. Pre-Trial Chamber attempted to reconcile the continental law and common law theory under the umbrella of international criminal law by conducting a comparative analysis of the gradations of intent in various legal jurisdictions. In regards to *dolus directus* in the second degree, which is a continental law notion, the Chamber found the counterpart of “oblique intention” in English law and cited the following academic works in support: Ormerod and Hooper (2009), p. 19; Kugler (2004), p. 79; Williams (1987), at 422. The notion of *dolus eventualis* was erroneously equated to the concept of subjective or advertent recklessness as known in common

Chapter 6 provides a comprehensive dissection of principal and accessory (derivative) modalities of criminal liability available in international criminal courts and tribunals. The chapter observes the evolution of the controversial concept of Joint Criminal Enterprise (JCE), which was specifically devised to capture “masterminds” (top political and military leadership) who do not necessarily have their hands drenched in blood but direct the commission of international crimes from behind the scenes.¹⁹ On the face of the fading enthusiasm for the applicability of JCE, the chapter investigates the aptness of the newly introduced modes of indirect (co)-perpetration and co-perpetration based on the joint control over the crime in the ICC jurisprudence.²⁰ The chapter summarises pro- and contra arguments as to the employment of certain principal and accessory modes of criminal responsibility in international criminal law through the comparative analysis of similar notions in selected common law and continental law jurisdictions.

Chapter 7 explores the relevance of grounds excluding criminal responsibility (defences) to core international crimes within the jurisdiction of international criminal courts and tribunals. While the ad hoc tribunals paid little attention to the construal of exculpatory grounds with the exception of the extensive discussion on the duress defence in the *Erdemović* case, the Rome Statute provides a comprehensive overview of defences that could be invoked by the suspect/accused. With the scarce jurisprudence on exculpatory grounds in international law, the chapter examines best domestic practices and compares them to the legal provisions of the Rome Statute.

law. The finding was supported by the ICTY jurisprudence: *Stakić* Trial Judgment, para. 587; *Stakić* Appeal Judgment, para. 101; *Brđanin* Trial Judgment, para. 265 n. 702; *Blagojević* et al., Case No. IT-02-60-T, Judgment on Motions for Acquittal Pursuant to Rule 98Bis, 5 April 2004, para. 50; *Tadić* Appeal Judgment, para. 220.

¹⁹ *Tadić* Appeal Judgement, para. 220.

²⁰ *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras 326–341; *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, paras 480–486; *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad *Al Bashir*, 4 March 2009, para. 210; *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, paras 346–348.

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