Prescription of Criminal Liability in International Law

Dumitrița FLOREA¹,
Narcisa GALES²

¹ Lecturer PhD, "Stefan cel Mare"
University of Suceava, Romania,
dumitrita.florea@fdsa.usv.ro

² Lecturer PhD, "Stefan cel Mare"
University of Suceava, Romania,
narcisa.gales@fdsa.usv.ro

Abstract: The particular extent of the phenomenon of crime in modern society, the increasingly frequent violations of values that interest the international community as a whole or target the interests of a large number of states, as well as the emergence of organised crime which transcends national borders through criminal networks operating in the territory of several states, are the basis for the establishment and development of international criminal law as an expression of the coordination of efforts to ban and repress antisocial acts detrimental to the legality and progress of the entire contemporary human society. Attempts to define international criminal law have been made over the years, but it should be pointed out that international criminal law is a relatively new branch of law and is still in the process of being codified, i.e. through international agreements in the form of conventions or treaties establishing general rules with binding legal force. Its content is developing day by day, and is becoming more and more deeply embedded in the legal consciousness of nations, which is only to be expected if we consider the dynamics of international society in recent times. Its importance is constantly growing as the development of military technology, the use of chemical and bacteriological weapons and the threat of the use of atomic weapons require the legal protection of international security and peace.

Keywords: *prescription of criminal penalty, criminal liability, international law.*

How to cite: Florea, D., & Gales, N. (2020). Prescription of Criminal Liability in International Law. *Journal of Mediation & Social Welfare*, 2(1), 12-21.
<https://doi.org/10.18662/jmsw/2.1/9>

1. Introduction

It is undeniable that it was only after the Second World War that international criminal law became a reality. The unimaginable atrocities committed by fascist aggressors on racial, ethnic and political grounds led to the establishment of individual criminal liability and its effective enforcement for criminal violations of international law. The mission of international criminal law is immeasurable, to protect the peace and security of humanity by preventing and repressing crimes condemned by international morality and justice. We believe that the definition of international criminal law should not be complicated by overelaborated formulations that could give rise to confusion or misinterpretation, so we say that international criminal law contains all the legal rules, customary or conventional, established in relations between states concerning the repression of crimes committed in violation of public international law.

The legal literature (Păvăleanu, 2019) is divided on the denomination of this exact criminal science between international criminal law or criminal international law. The two names cover different concepts.

Therefore, the international criminal law, in the sense of the classical doctrine, contains in essence provisions of domestic international law aiming at fixing the repressive competence of the state in the field of the fight against crime. We are discussing here about the competence of the state to punish offences committed outside its territory, or committed by its nationals in the territories of other states, or those committed to the detriment of the state or its nationals abroad. In reality there is no international law, as it contains provisions of domestic national law which unilaterally delimit, in each country, the field of application of its criminal law in space. The concept of international criminal law therefore encompasses provisions of domestic law which, derogating from the dominant principle of the territoriality of criminal law, provide for its application to crimes committed by its nationals abroad as well as crimes committed abroad by foreigners which are prejudicial both to that state and to its citizens.

2. Foundations of international state responsibility and forms of liability

Like any legal system, international law also faces the question of international liability. International liability is the legal institution by virtue of which a state that has committed illegal act, according to international law,

owes reparations to the state injured by that act. The rules of international law, like any binding legal norm, observed without reservation by all states, as well as, under certain conditions, by individuals, as we shall see in this paper. Violation of these rules necessarily attracts international liability, all the more so as we relate to their legally binding nature.

International liability thus arises from "the commission of an unlawful antisocial act, i.e. the violation of a rule of conduct between states, established by a treaty or other conventional legal instrument, or by custom, and necessarily entails a sanction. International liability is a state-to-state relationship and exists in principle only in favour of one state and against another' (Rousseau, 1983, p. 9). In the old doctrine of international law, it was argued that states are in principle responsible only to themselves and that the idea of mutual responsibility between states would be contrary to the idea of sovereignty. Such a concept no longer has a place in international law, as it is likely to introduce arbitrariness, anarchy and abuse in relations between states.

Every state is sovereign, but "sovereignty and international personality, each in its own right, cannot be a ground for the violation of both the principles and the rules of international law" (Miga Beșteliu, 2010, p. 10). The institution of liability and the legal norms, which compose it, are seen as ways of achieving legal order, both within the state and within society (Scăunaș, 2007, p. 25). The society is becoming increasingly complex and imperative in relation to the need for legal order, but legal liability is also an institution that represents a guarantee, both in domestic and international society. Wherever and whenever it is needed, it provides a suitable framework for the development of society; disorder, chaos, inter-state misunderstandings at international level would lead to serious politico-military dissension, which would give rise to large-scale conflicts. We believe that the assumption that 'international responsibility contributes to the achievement of international legality' and '... to the guarantee of the international legal order' (Mazilu, 2010, p. 16) is verified in all situations concerning international relations.

We emphasize that the violation of the norms of international law, and thus of the rights and interests of other states, cannot be justified by invoking sovereignty, since such actions do not constitute manifestations of sovereignty, but its abusive use, given that today state sovereignty is no longer conceived as an absolute power, but is closely linked to the observance of the norms of international law and the obligations assumed, as well as the rights of other states. Moreover, "such theories are today clearly contrary to the conventional and customary rules of international law,

which enshrine the international responsibility of states. On the other hand, the basis for the international liability of states should be sought in the existence of an international legal order superior to the internal legal order of states, which imposes obligations on members of the international community. The nature of interstate relations, which are relations based on the principles of sovereignty and equality in rights of states and not of subordination of supranational entities, structures or institutions or institutions of law, emphasizes that international liability also originates in the cooperation between states as sovereign and equal entities' (Constantin, 2010, p. 324) which obliges them to respect the norms and principles of international relations and, ipso facto, to be liable for their violation. We therefore conclude that the violation by a state of an international norm has the consequence of establishing a legal relationship between the injured state and the state responsible, the institution of liability contributing to guaranteeing the legality of the international order. On closer examination, international liability cannot be conceived without being based on certain illicit facts which, at international level, are the subject of lively discussion and sometimes fierce disputes. International liability can be conceived as liability between states, even when the interests of private individuals have been harmed. Each state must necessarily protect its compatriots from any harmful acts caused by another state.

3. Prescription of criminal liability in international law

From a substantive point of view, prescription is the acquisitive or extinctive effect that the passage of time can have on certain rights such as, for example, the property right. From a procedural point of view, the prescription is a non-exculpatory defence which blocks the otherwise legitimate possibility of prosecuting a civil action, enforcing a judgment or prosecuting and convicting an offender after a certain period of time has elapsed from the date on which the event in question occurred (the date on which damage occurred or was discovered or the date on which a crime was committed). In domestic legal systems, the regulation of prescription is generally justified by the requirement of a diligent attitude towards one's own rights, by considerations of stability and predictability of legal relations and by the need to resolve disputes before the passage of time affects the existence or physical integrity of the relevant evidence.

The legal regime of prescription is inseparable related to the existence of objective prescription terms, and these terms are specified in legal norms. In the absence of such rules or, at least, of a general rule establishing an objective formula for calculating limitation periods,

prescription is in itself non-existent. It cannot be presumed. Domestic law systems are *centralised legislative systems; states have criminal codes that establish the prescription of criminal liability, as a rule or exception*, and which provide limitation periods for different categories of crimes. In the anarchic system of public international law there is no legislator, there is no international criminal code, and for a long time (until the second half of the 20th century) there were no multilateral treaties containing a conventional inventory of international crimes. In civil law systems, the rule is the prescription of criminal liability, even in the case of serious crimes. Common law systems accept the prescription of criminal liability only as an exception, in the case of less serious crimes. In general, it is common to both types of systems that the right to seek compensation for pecuniary or non-pecuniary damage caused by the commission of a crime expires after a certain period of time, regardless of the nature of the criminal act that caused the damage.

The Hague Conventions (1907) or the Geneva Conventions (1949) do not contain an actual list of international crimes, but condemn certain acts in the context of international law applicable to armed conflicts. However, neither these Conventions, nor the Charter of the Nürnberg or Tokyo Tribunal, nor the *Convention on the Prevention and Punishment of the Crime of Genocide* have addressed the issue of prescription and, by implication, have established limitation periods for criminal liability corresponding to the acts they have incriminated. Consequently, there was no concept of prescription of criminal liability in international law, and thus no distinction between prescriptibility and imprescriptibility. It should be pointed out that the debate on the issue of prescription of criminal liability in international law has been generated mainly by the fact that some national courts have applied the prescription regime in cases of conviction or extradition of persons prosecuted for crimes committed both domestically and internationally, in particular war crimes or crimes against humanity. For example, in 1985, the criminal division of the Lyon Court of Appeal refused to try and convict the Nazi murderer Klaus Barbie on the grounds of *prescription of criminal liability*.

From 1942 onwards, Klaus Barbie was the regional commander of the Gestapo in Lyon in occupied France; he was also called the 'Butcher of Lyon' because of the notorious cruelty with which he interrogated his victims. After the war he took refuge in Bolivia, and in 1957 managed to obtain Bolivian citizenship under the pseudonym Klaus Altman. In 1983, Barbie was extradited at the request of France. The Court of Cassation set aside the judgment of the Court of Appeal, and Klaus Barbie was tried and sentenced to life imprisonment for crimes against humanity; died in prison on 25 September 1991.

The same argument complicated or delayed (Cryer, 2010, p. 78) the extradition of Pieter Menten by the Swiss authorities, at the request of the Netherlands, or the extradition of Erich Priebke by the Argentinian authorities, at the request of Italy.

In 1941, as a Nazi officer, Pieter Menten was complicit in the murder of several thousand Jews and Poles. After the war he became a multimillionaire, mainly due to his real estate holdings and his impressive collections of works of art (many of which were confiscated during the war from the homes of his victims). He was exposed during an auction where he was trying to sell paintings by a Jewish journalist of Dutch origin, Hans Kroop, on the basis of information he had obtained from Israeli sources (victims of Pieter Menten who survived the war). Menten was arrested on 6 December 1976 in Zurich, Switzerland; he opposed the extradition request made by the Netherlands, *inter alia*, on the grounds that Swiss law provided for a limitation period of 20 years for war crimes, so that his criminal liability was time-barred. Finally, the Swiss authorities agreed to send Menten to the Netherlands, where he was tried and, in 1980, sentenced to 10 years in prison. He died on November 15, 1987, in a nursing home in the Netherlands.

In March 1944, a group of Italian Communist partisans killed 33 Germans; in response, Hitler ordered that within 24 hours ten Italians be executed for every German killed. Erich Priebke drew up a list of the victims, who were taken to a cave (Adreatine) in groups of five and executed. He supervised the entire operation and personally machine-gunned two men. He also participated in the deportation of several thousand people to Auschwitz concentration camp and tortured political prisoners. After the war, Priebke fled to Argentina. In 1994, 50 years after the Adreatine massacre, feeling safe, he agreed to talk about the incident and was interviewed by an ABC News reporter. Italy requested his extradition and, after 17 months of hesitation, Argentina's Supreme Court granted Italy's request. Erich Priebke was sentenced to 15 years in prison.

Such hesitations on the part of national courts have been caused by some concrete problems relating to the relationship between national law and international law. More specifically, when receiving international conventions containing rules of incrimination, the states Parties transposed into their criminal codes substantial rules of incrimination under international law, which have been integrated into the domestic procedural regime; as such, some national courts referred to these rules strictly substantially and did not take into account their inherent characteristic, *the*

genetic imprint of imprescriptibility, determined by the specific system from which they originate.

We believe that the application of the domestic statute of limitations for internationally criminalised acts has sometimes created the possibility of "escape from criminal liability, through technical arguments, even in the case of persons who have participated in crimes against humanity, genocide or war crimes. To avoid this, the United Nations supported the adoption of *the International Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*. This Convention was adopted on November 26, 1968 and opened for signature in New York on December 16, 1968; it entered into force on 11 November 1970 and has 54 contracting parties. Subsequently, on 25 January 1974, the Council of Europe adopted a similar convention, the *International Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes*; it was opened for signature in Strasbourg, has seven contracting parties and entered into force on 27 June 2003 (Council of Europe, 2021).

The New York Convention expressly provides for the non-prescription of war crimes and serious crimes listed in the 1949 Geneva Conventions; also, crimes against humanity, eviction by armed attack or occupation, inhumane acts arising from the policy of apartheid and the crime of genocide are also not subject to prescription, even if, at the time of their commission, these acts did not constitute a violation of the domestic law of the state in which they were committed. According to the Convention, States Parties are required to take all necessary domestic measures, whether legislative or otherwise, to establish the imprescriptible nature of these acts and to ensure the possibility of extradition of persons who participated in any capacity in their commission.

The 1974 Council of Europe Convention enshrines the imprescriptibility of the following facts: crimes against humanity covered by the 1948 New York Convention; certain offences covered by the Geneva Conventions; serious violations of the laws of war existing at the time of entry into force of the Convention; other similar violations of international law. Article 2 of the Convention limits the retroactive application of its provisions to acts committed before the date of its entry into force for which the limitation period had not yet expired at that date.

Neither the New York Convention nor the Council of Europe Convention creates a legal regime or the imprescriptibility of certain criminal acts incriminated by international law, "but confirms the imprescriptibility of these facts. The enumerative formulation in the text of Article 1 of each Convention does not *distinguish, at the level of international law*, between the

imprescriptible facts, expressly provided, from the prescriptive facts outside the enumeration, since there is prescription in international law and all criminal acts are imprescriptible; the option of expressly enumerating a core of imprescriptible facts creates a domestic distinction between the facts incriminated in the penal codes of the states-parties. The two Conventions therefore prohibit States Parties from taking advantage of the effect of the passage of time in order to evade their obligation to prosecute and punish persons who have participated, in any capacity, in any of the crimes listed in the text of the Conventions" (Botau, 2013, pp. 300-302).

The 1968 Convention has not succeeded in definitively eliminating the errors made by national courts in referring to the imprescriptibility of the acts criminalised by international law, "either because of the relativity of its effects or because of the reservations expressed by some States Parties regarding the retroactive application of the Convention. For example, Mexico ratified the New York Convention in 2002, subject to the non-retroactivity of its provisions, so that domestic courts have held that the imprescriptibility of criminal liability only applies to acts covered by the Convention that were committed after the date of ratification; as such, in 2004, national courts applied the regime of prescription and invalidated a warrant for the arrest of former Mexican President Luis Echeverria and 11 other participants in the Corpus Christi Massacre of 10 June 1971, when paramilitary forces opened fire against 10,000 students demonstrators and killed over a hundred of them" (Hessbruegge, 2012, p. 349).

The Council of Europe Convention has tried to the problem of retroactive application of imprescriptibility, but the low number of ratifications undermines its effectiveness. Many states which are not party to these conventions do not consider themselves bound by their provisions and continue to apply the domestic legal regime of prescription, including to the acts expressly listed in Article 1 of each convention. However, domestic legislation does not affect the regulation of criminal liability under international law, which do not apply to the statute of prescriptions. Moreover, states cannot rely on domestic legislation to evade the enforcement of international obligations.

4. Conclusions

The international liability of states, a vast and particularly important area of contemporary international law, has split into two main divisions: liability for acts prohibited by international law, that constitute a development of classical liability of states, and liability for harmful consequences arising from activities which do not violate international law

but cause significant damage in the territory of other states, as a new form of liability. In analysing some aspects of the liability of states for illicit acts, it is necessary to outline the current evolution in an important field of international law, which was addressed by the international law classics Grotius and Gentilius and continues to evolve, the issue of international liability of states for illicit acts acquiring a complex and vast character, illustrated by the continuous evolution of state practice, jurisprudence and doctrine and, last but not least, by the codification work being carried out within the International Law Commission since 1953, without yet having been completed by the presentation of a draft convention.

Most of the authors who have defined international crime have included it in the category of illicit acts committed by states through their authorised representatives or by private persons in their own name, but imputable in all situations, under the aspect of criminal sanction, to individuals. An international crime may be defined as an act or omission committed culpably by a person acting as an agent of the state or in his own name and interest, which violates the rights and interests protected by international law and which is punishable under international law. Starting from the classical theory of crime, as well as the provisions of the Rome Statute and the Elements of Crimes adopted by the Assembly of States Parties to the Rome Statute, it is possible to identify a legal content of international crimes falling under international criminal jurisdiction.

References

- Rousseau, C. (1983). *Droit international public* [Public international law] (5th vol.), *Les rapports conflictuels* [Conflicting reports]. Sirey.
- Botau, D. (2013). *Aplicarea dreptului internațional în subsistemul Convenției europene a drepturilor omului* [Application of international law in the subsystem of the European Convention on Human Rights]. Hamangiu.
- Mazilu, D. (2010). *Drept international public* [Public international law] (5th ed.). Lumina Lex.
- Hessbruegge, J. A. (2012). Justice delayed, not denied: Statutory limitations and human rights crimes. *Georgetown Journal of International Law*, 43(2), 335-386. <https://articleworks.cadmus.com/geolaw/zsx00212.html>
- Cryer, R., Friman, H., Robinson, D., & Wilmshurst, E. (2010). *An introduction to international criminal law and procedure* (2nd ed.). Cambridge University Press.
- Miga-Beșteliu, R. (2010). *Drept international public* [Public international law]. C.H. Beck.
- Scăunaș, S. (2007). *Drept internațional public* [Public international law]. C.H. Beck.

- Constantin, V. (2010). *Drept internațional* [International law]. Universul Juridic.
- Păvăleanu, V. (2019). *Parchetul European* [The European Public Prosecutor's Office]. Lumen.
- Supreme Court of France, Criminal Law Chamber. (1983). The Prosecutor v. Klaus Barbie, Decision of 1983, October 06.
<http://www.internationalcrimesdatabase.org/Case/183>
- Council of Europe. (2021, May 11). Chart of signatures and ratifications of Treaty 082 - European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes.
<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=082&>