

Jurisprudence of International Criminal Justice

Jurisprudence of International
Criminal Justice

Farhad Malekian

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By Farhad Malekian

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To my wife the basic chamber of my heart and brainpower
– Kerstin Nordlöf

The only woman I will ever love

The first thing we do, let's kill all the lawyers.

Henry the Sixth, Part II, IV, ii
Shakespeare from the law of the land

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ABSTRACT

This challenging volume examines the jurisprudence and the essence of international criminal justice from various points of view. The philosophy of justice may vary from time to time and from nation to nation, depending on prevailing attitudes towards the substantive rules which deal, in one way or another, with cultural norms. In the national and international area, the principles of criminal justice have a key role in the abolition, elimination, prohibition, prevention, extradition, prosecution, jurisdiction, judgment or punishment of international crimes. In particular, the principles are effective in examining the scope of the most serious violations of international criminal law. It is on the basis of appropriate judgment that these principles may be accumulated and achieved for the future conduct of man. This volume, therefore, examines the principles and dimensions of the constitutions of various international criminal tribunals such as Nuremberg, the ICTY, the ICTR, the Sierra Leone Court, non-trial justice, with particular focus on the Statute of the International Criminal Court (ICC). As such, the volume offers a comprehensive evaluation of the rule of law and criminal justice and their legal tasks within the complementarity system of international criminal jurisprudence. This includes such as *de lege lata*, *nullum crimen sine lege*, *nulla poena sine lege*, non-retroactivity *ratione personae*, jurisdiction *ratione temporis* or *materiae*, criminal responsibility and *ne bis in idem*. The volume emphasises the prosecution and punishment of all those who may successfully escape from the proceedings of national and international criminal courts because of their juridical, political, religious, economic or military power. It also demands the implementation of international law of *jus cogens*. The provisions of the Statute should not be deduced in contradiction to the norms from which no derogation is possible, such as prohibitions governing crimes against humanity, torture, apartheid, rape, war crimes, genocide and aggression. This means that all international relations between international legal persons including states or entities and even groups or individuals are subject to the realm of peremptory norms and they should not violate the fundamental principles of justice. If the value of the task of the Court is to be realised by the majority of states in the international community, the cycle of impunity has to be abolished in the case of all states including the five permanent members of the Security Council of the United Nations.

Key words: international, law, crime, equality, justice

INTRODUCTION

Farhad Malekian, a distinguished scholar of international law has now authored a comprehensive work on *Jurisprudence of International Criminal Justice*. The absence of agreement among leading decision makers for maintaining peace has led to endless suffering and destruction of humankind; and the absence of a permanent international criminal court to deter aggression, genocide, crimes against humanity and massive war crimes has been a missing link in the world legal order.

In his scholarly chapter-by-chapter analysis, Malekian notes the cultural, economic and legal diversities that need to be harmonized in order to protect universal human rights. Although punishment will not prevent all international crimes, it will help to deter some of them if perpetrators know they will be brought to justice. He calls for a global vision that will recognize the legal and moral obligations of states as well as individuals and the rights of victims.

The author traces the development of international criminal law from the Nuremberg and Tokyo trials through to the existing ad hoc tribunals created by the United Nations to deal with the massive human rights violations in the former Yugoslavia, Rwanda, and other areas.

He notes the importance of respect for established principles of fair trial, non-retroactivity and the avoidance of double jeopardy. He welcomes the growth of national jurisdictions to cope with international crimes. He recognizes that in certain situations it may be necessary in the interests of peace to forego legal prosecutions in favor of non-legal solutions by reconciliation commissions.

In his historical analysis, the author sketches the evolutionary movement from the early United Nations General Assembly Resolutions in 1946 to the culmination in Rome in 1998 when the idea of a permanent international criminal tribunal was resoundingly endorsed by most nations. A Review Conference that took place in Kampala, Uganda in June 2010, agreed on a new definition of the crime of aggression but was unable to agree that it should be punishable by the ICC. As was done in Rome, the problem has been deferred for further consideration until sometime after 2017. Malekian's books, which analyze the Rome Statute and the activities of the International Criminal Court, offer very timely reference points. The author wisely expresses the hope that the Court will end the existing impunity of those leaders who are responsible for the supreme

international crime of aggression. He looks forward to the implementation of criminal justice

The new legal body is in its infancy. That is why the Assembly of States Parties is continuously taking those important problems of the Court into consideration. However, one cannot deny that the text on the Elements of Crimes greatly aids understanding of the Statute and its main functions. Nevertheless, the Statute presents a mixture of adversary-accusatorial and inquisitorial methods including criminal procedures which may, in particular situations, prevent access to peace and justice relatively slow because of differences between those methods. The Court hopefully prevents impunity of those who are personally responsible for transgressions, in particular, those who are responsible for grave violations of international humanitarian law of armed conflicts or genocide. This is the minimum hope for the implementation of criminal justice and the prevention of grave violations of international legal and moral law.

Malekian concludes that the principles of international criminal justice in the Court are, sooner or later, an integral part of international law of *jus cogens*. He bases this on the fact that war crimes, crimes against humanity, genocide and aggression are not only contrary to the basic elements of international human rights law, but also violations of those norms which infringe human civilization as a whole. These are accepted by the international community of states as peremptory or *jus cogens* norms from which no derogation is permitted under international law and are to be respected by all states irrespective of whether they have signed or ratified: a state is not permitted to make a reservation to those crimes which are against humankind. According to him, those norms encourage the international legal community to pay special attention to certain civilized values: these are the safeguarding and maintenance of security and peace, as well as the respect of certain fundamental common human values.

Prof. Farhad Malekian has produced a much needed comprehensive survey showing the evolution of international criminal law and international courts from the Nuremberg Tribunals following World War Two to the most recent problems confronting the International Criminal Court in The Hague. The prolific author takes the reader through the maze of new international courts that are still in formative stages.

His clear and scholarly analysis depicts the problems and gradual movement towards the criminalization of human rights violations still taking place throughout the world. The slow process toward a more rational and humane world under the rule of law binding all states, groups and individuals is a work still in progress.

Prof. Malekian's important contribution offers new insights into a rapidly expanding field of law that hopefully points the way toward a more humane and peaceful future.

The book constitutes a prized addition to the literature of international criminal justice. It presents an unbiased and significant facet of international jurisprudence. It should be read eagerly by those who are searching for a new analysis of the rule of law.

New Rochelle, New York
Professor Benjamin B Ferencz¹

¹ Professor Benjamin B Ferencz, J.D. Harvard 1943, a former Nuremberg war crimes prosecutor who has written extensively on the subject.<http://www.benferencz.org>. He was awarded Erasmus Prize together with Antonio Cassese in 2009.

FOREWORD

The body of international criminal law is growing rapidly and has become one of the most important parts of international legislation. This is especially apparent in the case of the jurisprudence of international criminal justice, which has a long history of legislative development. In fact, international criminal law cannot function properly without an effective understanding of its norms and rules, as well as the philosophy behind the implementation of its theory. A body of law may not be taken seriously if its provisions or norms are not protected by a system of jurisdiction that executes justice based on genuine adherence to the principle of equal treatment. Moreover, at the national and international levels, the principles of justice play the most significant role governing the abolition, elimination, prohibition, prevention, extradition, prosecution, jurisdiction, judgment and punishment of international crimes. Whilst the principles of justice may never convince the victims of crime, they represent to the people of the world the message of peace, security, humanity, common understanding of international problems and respect for the rule of law. If such principles could be successfully upheld, atrocities and antagonisms between the nations of the world might be reduced and harmonious relations between nations developed and strengthened.

In recognition of the growing number of international conventions which recognize and analyse international crimes, the focal point in the development of the system of international criminal law in recent decades has been the establishment of international criminal courts. Nevertheless, what the philosophy of justice is, and what its functions, aims, purposes and, principles are, continue to constitute some of the most important elementary questions of international criminal jurisprudence. The tradition of criminal law provides for four discrete authorities for the implementation of the philosophy and principles of criminal justice, namely, national, regional, hybrid and international criminal courts. These authorities have been exercised and consolidated within the civilizations of different states and constitute today integral parts of the legislative framework of human rights law. The constitutions of the *ad hoc* tribunals, including those of Nuremberg, Yugoslavia and Rwanda, as well as the Sierra Leone Court, and even the procedures of non-trial justice, imply the chronological improvement of the jurisprudence of criminal justice. The provisions of the 1998 Statute of the International Criminal Court (ICC)

also empower the jurisprudence of justice. A milestone of the Statute is the creation of a framework for a code of international crimes recognising the concept of the international criminal responsibility of individuals. The crimes identified in the code are genocide, crimes against humanity, war crimes and aggression.

This volume consists of twelve chapters. The first chapter deals with the philosophy of international criminal justice, the reason for its existence, and the need for the equal application of its principles. To a great extent the problems faced by the international political and legal community in applying international criminal justice are related to the distribution of unequal power in the world, as well as the fact that the implementation of many principles of criminal justice depends on a concern to uphold a proper relation between different subjects of international law. The chapter focuses on the solution of these problems at a theoretical level and calls for the equal application of the philosophy and principles of international criminal law, as well as the enforcement of justice and the elimination of impunity.

Chapters two and three focus on the formation, creation and operation of the international criminal tribunals and courts established under the authority of the victorious states of the Second World War, the United Nations and the international legal community as a whole. These are the Nuremberg Tribunal, the Tokyo Tribunal, the ICTY, the ICTR, the SCSL, and the ICC. It is impossible to understand the development of the jurisprudence of international criminal law and justice without first analysing the fundamental role played by the creation of the tribunals and courts and their operation. These chapters examine many of the key principles which have had an important function in the progressive evolution of the system of international criminal law and the establishment of a number of temporary tribunals around the world. The chapters also analyse the legal characteristics of these tribunals and the *raison d'être* of their applications.

Chapters four, five and six relate to three core principles of international criminal justice: international crimes, international legal procedures and the various concepts pertaining to the international criminal responsibility of individuals. Taken together, these three chapters prove that neither the official position of individuals who have committed crimes, nor the fact that they acted pursuant to orders from their governments or a superior can be sufficient reason to escape international prosecution and punishment.

Chapters seven to ten set out the *conditio sine qua non* or the practical value of the development of international criminal justice. They contain

detailed presentations of the Statute of the permanent International Criminal Court (ICC) and its recent development during the Review Conference on the Rome Statute of the International Criminal Court (ICC) in Kampala, Uganda from 31 May to 11 June 2010. It is worth mentioning here that the Statute of the ICC is based on substantive law and elaborates the provisions of *de lege lata*, *nullum crimen sine lege*, *nulla poena sine lege*, non-retroactivity *ratione personae*, jurisdiction *ratione temporis* or *materiae*, criminal responsibility and *ne bis in idem*.

The ICC, in fact, exercises an extraordinary function for the domestic criminal courts, as it authorizes recourse to the enforcement system of international criminal law when the courts are, for one reason or another, unable to exercise jurisdiction over accused persons. As a result, it is the legal duty of the Court to wait for a clear decision by the national authorities of a state concerning the investigation of a case. If the authorities avoid serious criminal investigation of the case, the principle of complementarity may empower the Court to evaluate and apply the provisions of the Statute. The Court may also, in certain circumstances, act in accordance with a decision of the Security Council concerning one of the major crimes. The Council can empower the Court to examine a criminal case, even where violations of the provisions of the Statute are committed by individuals of those states which have not signed or ratified the Statute of the ICC. This is based on the protection of the integrity of the international human community as a whole. However, this presents its own serious juridical and legal predicaments.

Chapters seven to ten deal with many questions relating to this dilemma of legal authority. My purpose is to offer a comprehensive evaluation of the rule of law and criminal justice and their legal operation within the complementarity system of international criminal jurisdiction. Chapter ten, in particular, examines certain cases heard by the international criminal tribunals and the courts.

Chapter eleven addresses the use of non-trial justice, including truth commissions and amnesties, to deal with serious offenders. The intention is to highlight that the strength of international criminal justice does not rest solely on the procedures of criminal courts, but also on forgiveness. The chapter aims to analyse how the integration and reconciliation of offenders and victims can be achieved.

The twelfth chapter concludes the whole volume. It underlines that the jurisprudence of international criminal law strongly condemns impunity for *jus cogens* crimes. It consequently calls upon the implementation of the *jus cogens* principles of international criminal law in the ICC and the prosecution and punishment of all those who have seriously violated the

provisions of international criminal law, humanitarian law, human rights law and criminal justice. I have therefore argued that the goals and values of international criminal jurisprudence should not be dismissed on the grounds of non-ratification of international criminal conventions.

Although each chapter of this volume has its own legal philosophy and is independent of the other chapters, the volume taken as a whole contributes to one legal discipline. Throughout the chapters of this work, we look into the principles of jurisdiction and its proceedings, which have been adopted for the protection of the rights of man, but which are violated by individuals, groups or governments. The argument of all chapters is based on the idea of individual criminal responsibility, which constitutes the principal theory within the statutes of international criminal tribunals or the ICC.

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CHAPTER ONE

THE ORIGIN OF INTERNATIONAL CRIMINAL JUSTICE

1. Introduction

International criminal justice is the fruit of transcultural morality, cooperation, assistance, reciprocity, mutual and multilateral tolerances, and a combination of different political necessities. It is, moreover, inspired by ideals of fairness, reparation and rehabilitation. When we talk about the principles of international criminal justice, we do not necessarily mean only the judgments that may be delivered by international criminal courts, but also the living structure of international criminal law as it exists in the international relations of states. International criminal justice is therefore not just a matter of criminal jurisdiction. The term has its own framework of recognition of what is right and what is wrong between different nations. That is why we talk about the general principles of law and their effects in the system of international criminal law. The rights secured by the principles of criminal law obviously should not be subject to political interference by any state or authority. As a recognised principle of justice, criminal rules should be applied equally to all individuals, whether they are weak or powerful. The rationale behind these principles is to provide effective measures against violators of international law and to consolidate the principle of non-impunity. This philosophy should be followed within national or international criminal jurisdictions.

2. The Philosophy of Law

2.1. Spirit

A law is the command of social order.¹ By “order” we mean the rules of relationships which have been agreed upon. The members of a community may expect that the law, *inter alia*, creates freedom, equality, assistance,

¹ Lord Lloyd of Hampstead, Introduction To Jurisprudence (4th ed. 1979).

justice and peace. When theorising law and order we are looking to find the most practical and convincing way of regulating the relations between the members of one society, and also of those members with members of other societies.² This is the simple aspect of the law and the normal expectation behind the creation and establishment of new norms of legislation. As society continues to evolve, it also develops the scope and the perspective of the law. In other words, a law is the language of the development of relations between its members. One of the final stages of these developments is the creation and evolution of the system of customary and conventional international criminal law in order to protect the purposes of societies, including their legal as well as moral aspirations. However, what the command of social order is, or who or what the principal inspiration of this order is, varies from one legal system to another and from one society to another. This is because a law lacks the obvious biological systems of the human body consisting of different organs such as the heart or brain. In other words, a law is not a material or tangible product of our social environment, like, for instance, a package wrapped up in Christmas paper. Rather, a law is the consequence of the circumstances of a given social order, whether derived from monarchy, dictatorship, religion, democracy or other such social phenomena.³

Although most of the subjects of most social sciences may be observed and recorded by one means or another, this is not possible in the case of law or the social legal order. In another sense, a law does not exist as do other material objects until it has been created by human agents through their attention in terms of political science. Thus, a law is tied into human thoughts, human understanding and misunderstanding; human interpretation, inspiration, instigation; human will and resistance; human tolerance and intolerance; and also, human physical and moral capability.⁴ In the final stages of its creation, the law is bound by material—i.e., visible—subjects of our social environment, transferred from a piece of paper to physical violence.

² Brian Tamanaha, *A General Jurisprudence Of Law And Society* (2001).

³ For a discussion on what the nature of law is, See Cairns Huntington, *Plato's Theory of Law*, 56 *Harvard Law Review* 359-387 (1942).

⁴ See also M.J. Detmold, *The Unity of Law And Morality: A Refutation Of Legal Positivism* (1984); *Natural Law* (John Finnis, Ed., 1991); Lon Luvios Fuller, *The Morality Of Law* (2 Ed., 1969); *The Autonomy Of Law: Essays On Legal Positivism* (Robert P. George, Ed., 1995); Robert P. George, *Natural Law Theory: Contemporary Essays* (1994); *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (P.M.S. Hacker And J. Raz, Eds., 1977); John Finnis, *Natural Law and Natural Rights* (1980); John Finnis, *Fundamentals of Ethics*, (1983); John Finnis, *Aquinas: Moral, Political and Legal Theory* (1998).

Consequently, talking about a law is similar to talking about the nature of a human being, his or her habits and the borderline of his or her understanding of the surrounding environment. For example, a person who lives in a rainforest, and is free to feed himself/herself by whatever is available, has quite a different understanding of the law compared with a person who lives inside a zone of armed conflict. Similarly, a person who has grown up in a rich family has quite a different understanding of the law compared with someone from a poor family. They see the law from different aspects and different angles. They may reach similar conclusions, but with different perceptions, views and frameworks. There are further factors that also affect our personal understanding of the law. These may be religions, politics, theories, philosophies, ideologies, cultural flexibilities, economic variations or the historical description of the development of social expectations of sadness and happiness. In other words, a law may be defined in terms of individual tolerance. This means the tolerance to accept a different understanding of the law and its interpretation from one's own.⁵ Thus, a law is a form of integration and disintegration of the will of a human being regarding what is recognised by him or her to be reasonable and not reasonable.⁶ The law should therefore represent the principle of give and take and, more obviously, the framework of duties and responsibilities of persons to recognise the existence of other theories.⁷

2.2. Respect

In one word, the basic philosophy of the law is “respect”. What is meant by “respect” is securing the will of human beings in their social interactions.⁸ The framework of an accurate and equal law is thus the

⁵ According to J. Shklar the law “relies on what appears already to have been established and accepted.” J. Shklar, *Legalism*, in Lord Lioyd of Hampstead note 11, at 24.

⁶ Brian Barry, *Justice as Reciprocity* in JUSTICE (Eugene Kamenka and Alice Erh-Soon Tay, eds., 1979), at 58, 73, 76.

⁷ Eugene Kamenka, *What is Justice?* in JUSTICE (Eugene Kamenka and Alice Erh-Soon Tay, eds., 1979), at 4-5.

⁸ But see also Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart (Ruth Gavison, ed., 1987); Heidi Hurd, *Challenging Authority*, 100 Yale Law Journal 1611 (1991); G. Hughes, *Validity and the Basic Norm*, 59 California Law Review 695 (1971); H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983); Joseph Raz, *The Morality of Freedom* (1986); J.W. Harris, *Legal Philosophies*, 2nd edn. (1997); John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (1954); Postema, Gerald J, Bentham and the

framework of an individual mechanism, which should normally be respected by all individuals. By the term “individual” we mean not only the individual who has taken part in the formulation of the law, but also the individual who has not, for one reason or another, been able to take part in its drafting. Although the basic construction of a law may be re-examined by a new generation for various necessary modifications and alterations, its essence is generally the same.⁹ This is because, as long as modifications of the law are not dictatorial or fanatical, they may simply polish its legal effect and modify it according to the new requirements of the time.¹⁰ This is what we have become used to through the adoption of a number of international conventions within the system of international law and international criminal law.¹¹ But certain modifications or

Common Law Tradition (1986); Julie Dickson, *Evaluation and Legal Theory* (2001); H.L.A. Hart, *The Concept of Law* (1961); H.L.A. Hart, *The Concept of Law*, 2ndedn., (P.A. Bulloch and J. Raz eds., 1994).

⁹ See Joseph Raz, *The Authority of Law* (1979); Joseph Raz, *Practical Reason and Norms* (1999); Paul Phillips, *Marx and Engels on Law and Laws* (1980); M.J. Detmold, *The Unity of Law and Morality: A Refutation of Legal Positivism* (1984); J. Rawls, *A Theory of Justice* (1971); G. MacCormack, *Scandinavian Realism* *Juridical Review* 33 (1970); G. MacCormack, *Hägerström on Rights and Duties*, 59 *Juridical Review* (1970); Karl Olivecrona, *Law as Fact*, 2ndedn. (1971); W.J. Waluchow, *Inclusive Legal Positivism* (1994); Karl Olivecrona, *Law as Fact* (1939); Donald Black, *The Behavior of Law* (1976); Roscoe Pound, *Jurisprudence* (1959); Karl Olivecrona, *The Imperative Element in Law*, 18 *Rutgers Law Review* 794 (1964); Perry Anderson, *Arguments within English Marxism* (1980).

¹⁰ But read also Ian Ward, *An Introduction to Critical Legal Theory* (1998); Richard Rorty, *Philosophy and the Mirror of Nature* (1990); Mark Kelman, *A Guide to Critical Legal Studies* (1987); Anne Barron, *(Legal) Reason and its “Others”*: *Recent Development in Legal Theory*, in *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* (Schiff Penner, and Nobles, eds., 2002), 1038-63; Peter Goodrich, *Reading the Law: A Critical Introduction to legal Method and Techniques* (1986); *Legal Coherence*, 103 *Yale Law Journal* 105 (1993); F. Ewald, *Unger’s Philosophy: A Critical Legal Study* 5 *Yale Law Journal* 665 (1988); *The Politics of Law: A Progressive Critique* (David Kairys, ed., 1982).

¹¹ The development of international criminal law has been so great and effective that it has come to occupy an important place in the literature of international law. For an analysis of this law and its scope On international criminal law see Georg Schwarzenberger, ‘The Problem of an International Criminal Law,’ 3 *Current Legal Problems* (1950) 263; Edward M. Wise, ‘Prolegomenon to the Principles of International Criminal Law,’ 16 *New York University Law Review* (1970) 562; Farhad Malekian, *International Criminal Law: The Legal and Critical Analysis of International Crimes* (2 vols. 1991); Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (2011); Farhad Malekian, *The*