International Criminal Justice Series

Volume 28

Series Editors

Gerhard Werle, Berlin, Germany Moritz Vormbaum, Münster, Germany

Series Information

The *International Criminal Justice Series* aims to create a platform for publications covering the entire field of international criminal justice. It, therefore, deals with issues relating, among others, to:

- the work of international criminal courts and tribunals;
- transitional justice approaches in different countries;
- international anti-corruption and anti-money laundering initiatives;
- the history of international criminal law.

It is peer-reviewed and seeks to publish high-quality works emanating from excellent scholars.

Editorial Office

Prof. Dr. Gerhard Werle Humboldt-Universität zu Berlin Faculty of Law Unter den Linden 6, 10099 Berlin, Germany gerhard.werle@rewi.hu-berlin.de vormbaum@uni-muenster.de

More information about this series at http://www.springer.com/series/13470

Gillian MacNeil

Legality Matters

Crimes Against Humanity and the Problems and Promise of the Prohibition on Other Inhumane Acts





Gillian MacNeil Faculty of Law University of Manitoba Winnipeg, MB, Canada

ISSN 2352-6718 ISSN 2352-6726 (electronic) International Criminal Justice Series ISBN 978-94-6265-442-6 ISBN 978-94-6265-443-3 (eBook) https://doi.org/10.1007/978-94-6265-443-3

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

© T.M.C. ASSER PRESS and the author 2021

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work. The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

This T.M.C. ASSER PRESS imprint is published by the registered company Springer-Verlag GmbH, DE part of Springer Nature

The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

Acknowledgements

It is a bit curious, but the most difficult element of this book to write may be this acknowledgment. Not because I have so few to thank, but because I have so many. The number of family, friends, mentors and colleagues who have unselfishly shared their wit and wisdom with me over many years is humbling. I have been, and remain, the grateful beneficiary of their grace, good humour and professionalism.

There are a few whom I wish to single out for particular thanks. First and foremost, my family who have always been available to listen and to help me put challenges in perspective. They have been unstinting in their encouragement. I am also grateful to Prof. Hugh Kindred (Emeritus) and Prof. Robert J. Currie for their early guidance, continued mentorship and unwavering friendship. A special thank you as well to Dr. Ksenia Polonskaya, Dr. Debra Haak, Dr. Lucie Guibault and Basil Alexander. Their support and willingness to share their time whenever I needed to discuss an issue or wanted a second pair of eyes to look over a draft have been invaluable.

This book began as a Ph.D. thesis. Neither would have been possible without the wisdom, expertise and encouragement of my supervisor Dr. Darryl Robinson. I am indebted to my Examining Committee members, Dr. Lisa Kerr, Dr. Noah Weisbord, Dr. J. Andrew Grant and Dr. Valerie Oosterveld, for their collegiality and insights. The questions and comments I received during my defence opened new intellectual doors: I simply could not have wished for a more helpful discussion or encouraging response.

I would also like to extend my gratitude to the anonymous reviewer whose comments assisted me in clarifying my thinking and, I hope, my expression of those ideas.

All errors remain my own.

Contents

1	Intro	oduction	
	1.1	Introdu	ction
	1.2	Expand	ling on the Elements
		1.2.1	CAH: Not for the ICC Alone
		1.2.2	The Broader Questions: Rethinking Retroactive
			Criminal Law and the Role of Courts
	1.3	Lookin	g Ahead: The Structure of My Argument
	1.4	Conclu	sion
	Refe	rences	
2	Theo	retical U	Inderpinnings: Understanding the Prohibition
_			ve Criminal Law
	2.1	Introdu	ction and Overview
	2.2	Prelimi	nary Matters
		2.2.1	Fuller: A Theory for All Systems
		2.2.2	Legitimacy and Legality
	2.3	Fuller's	s Account: The Process of Law and the Legitimacy
			_aw
		2.3.1	Legitimate Law-Making is Reciprocal
		2.3.2	Legal Subject as Law-Making Agent
		2.3.3	A Duty to Obey Arises from Reciprocity
		2.3.4	Reciprocity and Legitimacy; Focus on Process, Not
			Results
		2.3.5	The Elements that Reciprocity Demands
		2.3.6	When Process Fails
		2.3.7	Implications: A Closer Look at the Details
			of Law-Making
		2.3.8	The Place of Retroactive Laws in a Legitimate
			Legal System
		2.3.9	Clarifying Fuller's Theory: Retroactive Criminal
			Laws May Be Permissible
		2.3.10	What Remains?

viii Contents

	2.4	Summ	ary	22
	2.5	Implic	eations for the Process of Law-Making	23
	2.6	Applic	cation to International Criminal Law	25
	Refer	ences .		25
3	The l	Prohibit	tion on Retroactive Criminal Law in International	
			IW	27
	3.1		uction	28
	3.2		ninary Matters	29
		3.2.1	My Sources Explained	29
		3.2.2	The Prohibition on Retroactive Criminal Law:	
			A Variable Concept	31
	3.3	Prolog	gue: The Principle Prior to Nuremberg	33
		3.3.1	Overview	33
		3.3.2	The Prohibition Was Not a Treaty Norm	34
		3.3.3	The Prohibition Was Not a Norm of Customary	
			International Law	36
		3.3.4	The Prohibition Was Not a General Principle of Law	38
		3.3.5	A Brief Overview of Divergent Conceptions	
			and Practice	39
		3.3.6	Summary	45
	3.4	The O	pening Movement: The Acceptance of the Prohibition	
		in Inte	rnational Criminal Law	45
		3.4.1	Role of the International Military Tribunal	45
	3.5	The In	ternational Courts Were Sources of Law	48
	3.6	Subsec	quent Clarifications	49
		3.6.1	The Nuremberg Military Tribunals Have a Say	49
		3.6.2	Summary	51
	3.7		Developments: The Contribution of Human Rights	
			the Prohibition on Retroactive Criminal Law	51
	3.8		t ICL Developments: Clarifying the Prohibition	
		in Cus	stomary and Conventional International Criminal Law	54
		3.8.1	Overview	54
		3.8.2	Customary Law Developments: The Contributions	
			of the Ad Hoc Tribunals	55
		3.8.3	The Special Court for Sierra Leone: Agreement	
			with the ICTY	59
		3.8.4	Summarizing the Tribunals' Position	59
		3.8.5	The International Criminal Court: Rome Provides	
			a Different View	60
		3.8.6	The Conventional Approach and Customary Law	60
	3.9		ustomary Prohibition Unpacked	61
		3.9.1	The Outlines of the Prohibition: The Content	
			Clarified	61

Contents ix

	3.10	The De	epartures: The Permissible Categories of Retroactive	
		Crimin	al Law	63
		3.10.1	Clarifications of General Prohibitions	63
		3.10.2	The ECtHR in Support: The Case of <i>CR v. UK</i>	64
		3.10.3	The <i>CR</i> Case in Domestic Courts: Background	64
		3.10.4	The <i>CR</i> Case in Domestic Courts: The Trial	65
		3.10.5	The <i>CR</i> Case in Domestic Courts: The First Appeal	66
		3.10.6	The <i>CR</i> Case in Domestic Courts: A Second Appeal	67
		3.10.7	The CR Case: An Analysis of the Decisions	67
	3.11	The Im	plications of the CR Decisions	69
		3.11.1	Looking at CR Through a Fullerian Lens	69
		3.11.2	The Clarification Exception: Further Support	70
		3.11.3	Elaborations of the Law: Another Acceptable	
			Exception to the Prohibition	71
		3.11.4	Acceptable (Accepted) Elaborations in Early ICL	
			Developments	72
		3.11.5	Recently Accepted Elaborations: Confirmation	
			of the Acceptability of the Practice	73
		3.11.6	An Explanation of Why Elaborations Are	
			Acceptable	74
	3.12	Critiqu	ing the Tribunals Approach: Lessons from Fuller	74
	Refer	ences .		77
4	Crim	es Agair	nst Humanity: Introduction, Development	
•			ace	81
	4.1	_	iction	82
	4.2		volution of Crimes Against Humanity	84
		4.2.1	Overview	84
		4.2.2	The IHL origins of Crimes Against Humanity:	
			Pre-World War II Developments	85
		4.2.3	World War II and Post-War Developments	87
			International and National Advance	
		4.2.4	HILCHIALIONAL AND NALIONAL MUVAILLE	
		4.2.4		97
	4.3		and Harmonization	97 102
	4.3		and Harmonization	97 102
	4.3	Explair	and Harmonization	102
	4.3	Explair 4.3.1	and Harmonization	
	4.3	Explair	and Harmonization	102
	4.3	Explair 4.3.1	and Harmonization ning the Adherence Crimes Against Humanity: Retroactive Criminal Laws The Acceptance, and Acceptability of Crimes Against Humanity: A Look Through a Fullerian	102
	4.3	Explair 4.3.1	and Harmonization ning the Adherence Crimes Against Humanity: Retroactive Criminal Laws The Acceptance, and Acceptability of Crimes Against Humanity: A Look Through a Fullerian Lens	102 102 105
	4.3	Explair 4.3.1 4.3.2	and Harmonization ning the Adherence Crimes Against Humanity: Retroactive Criminal Laws The Acceptance, and Acceptability of Crimes Against Humanity: A Look Through a Fullerian Lens The Problem of Opposite Notice	102 102 105 109
	4.3	Explair 4.3.1 4.3.2 4.3.3 4.3.4	and Harmonization ning the Adherence Crimes Against Humanity: Retroactive Criminal Laws The Acceptance, and Acceptability of Crimes Against Humanity: A Look Through a Fullerian Lens	102 102 105

x Contents

5	Oth	er Inhumane Acts: Development and Critique 1	19
	5.1		20
	5.2	Terminology	22
	5.3	Contrasting the Articulations	22
	5.4	Interpreting the Instruments: From Characterization	
			23
		5.4.1 Introduction	23
		5.4.2 The Early Characterizations	24
		5.4.3 Evolving Analyses	25
	5.5	Comparing and Critiquing the Interpretation	31
		5.5.1 Methodological Flaws	31
		5.5.2 Identifying Some Deeper Problems	38
		5.5.3 Possible Alternatives to the Current Approach 1	44
	5.6	Re-thinking the Residual Clause: The Problem of Its Nature 1	45
		5.6.1 Introduction	45
		5.6.2 The Gravity Requirement: An Opening to Uncertain	
		Applications of the Law	46
		5.6.3 Arguing for a New Understanding	47
		5.6.4 Re-reading the Clause: An Invitation,	
		not a Prohibition	48
		5.6.5 The Vienna Convention on the Law of Treaties:	
		Why More Is Needed	5 0
	5.7	A Look Through a Fullerian Lens	51
	Refe	erences	5 3
6	ΔN	ew Way Forward: Advocating a Fullerian Approach	
Ů			55
	6.1		56
	6.2		57
	6.3		59
	6.4		62
	0.4	$oldsymbol{arepsilon}$	62
		• •	63
	6.5	· · · · · · · · · · · · · · · · · · ·	72
	0.5	· · · · · · · · · · · · · · · · · · ·	72
			73
			74
			79
	6.6		80
	0.0		80
			80
		·	81
			82
	6.7		84
	6.8	· · · · · · · · · · · · · · · · · · ·	84 84
	0.0	Justinying the New Approach 1	04

Contents xi

6.9	Identifying the Elements	
	6.9.1 Introduction	
	6.9.2 Identifying the Elements: Essential on Any	
	Approach	
6.10	The Evidence and Process	
6.11	Conclusion	
6.12	Some Final Thoughts	
Refer	ences	

Abbreviations

ACHR American Convention on Human Rights AFRC Armed Forces Revolutionary Council

CAH Crimes against humanity CDF Civil Defence Forces

ECCC Extraordinary Chambers of the Courts of Cambodia

ECHR Convention for the Protection of Human Rights and Fundamental

Freedoms

ECOSOC Economic and Social Council
ECtHR European Court of Human Rights
ICC International Criminal Court

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

ICJ International Court of Justice ICL International criminal law

ICTR International Criminal Tribunal for Rwanda

ICTY International Criminal Tribunal for the Former Yugoslavia

IMT International Military Tribunal

IMTFE International Military Tribunal for the Far East PCIJ Permanent Court of International Justice

PIL Public international law

PoWs Prisoners of war PTC Pre-Trial Chamber

RUF Revolutionary United Front SCSL Special Court for Sierra Leone

UDHR Universal Declaration of Human Rights

UK United Kingdom of Great Britain and Northern Ireland

US United States of America

USSR Union of Soviet Socialist Republics