Science Arena Publications
Specialty Journal of Politics and Law
Available online at www.sciarena.com
2017, Vol, 2 (3): 23-31

Status of the Principles of Criminal Law in the Statute of the International Criminal Court

Milad taherinezhad Ladari[1] , Mehdi Esmaelii[2*]
[1]MA of Criminal and Criminology, Islamic Azad university
The Ayatollah Amoli Branch, Iran.
[2] Assistant Professor Criminal and Criminology, Islamic Azad university, Vice City Branch, Iran*
***Coresponding Author** : Taherinezhad.milad@yahoo.com*

Abstract: *The international criminal court needs to follow legal principles in order to reach its goals and perform its duties. These legal principles might be resulted from the international law and some of them might have been explicitly mentioned in different treaties and some of them might have turn into an international custom and might be observed internationally because they have been implemented by countries in their national laws as well as international ones. These principles might have been accepted in the national laws of the countries by being mentioned in international treaties or they might have been resulted from national criminal laws. The one of the basic and significant principles that the international criminal court requires in the beginning of its work is the principle that any court needs the Code of Criminal Procedure given the laws of its establishment. At the start of the matter and at the beginning of any kind of investigation and performance, the jurisdiction of the criminal, the jurisdiction associated with the crime scene and the jurisdiction associated with the crime must be taken into consideration. The range of jurisdiction of the international criminal court is, on one hand, international or global. On the other hand, given the territorial or material scope or what is called local jurisdiction or to put it more accurately, territorial jurisdiction in criminal law, it can be national and finally, from the aspect of attention and jurisdiction, this court is associated with specific individuals given their situations and personalities. This research aims to review the status of principles and rules of criminal law in the Statute of the International Criminal Law.*

Keywords: *Legal Principles, Global Jurisdiction, Personal Jurisdiction, Territorial Jurisdiction, International Criminal Law*

INTRODUCTION

Previous legal systems did not have the criminal law context in the current and particular sense. The human society has gone through many ups and downs in order to reach the principles governing legal punishments and have tolerated murders, tortures and many other oppressions by governors and oppressors and have revolted in order for the administration of justice. Occurrence of common crimes in an international scene has always been an issue and it has evoked different reactions. Vengeance has always been one of the most natural reactions to these crimes which has not been considered as a proper solution, but making the international criminals pay for what they have done in judicial or quasi-judicial courts has always been necessary. In the respect of this matter, there have always been cross-border encounters with international crimes in different ways and their horizon has broadened as time went by. Up until the first World War, the governments believed that they had the jurisdiction to address a limited number of crimes without taking the crime scene or nationality of the criminal and the victim into consideration. Some of these crimes were

piracy, slavery and international postal charges. After the ends of WWI, a commission was formed by the Paris Peace Conference in 1919 to determine the responsibility of those who started the war and to set punishment for those who violated the laws and customs of war. This commission proposed the establishment of an ad hoc tribunal for prosecuting the criminals violating the laws of war and violating humanitarian laws was prosecuted only because of the Treaty of Versailles in 1919. After Kaiser escaped to Netherlands, the Dutch government did not extradite him to the allied nations because he was considered to be a political refugee and because the Dutch government believed that the criminals must be extradited by a government with sovereignty rights and not by a set of governments and therefore, instituted international prosecution was not successful. After WWII, two international prosecutions, Nuremberg and Tokyo, were instituted for prosecuting war criminals. The Nuremberg prosecution prosecuted the main criminals in the Europe and had eight members which means that any of the four countries (America, England, France and the Soviet Union) had introduced a substitute member for the prosecution. As a result of the struggles with the tyranny of the judges and oppressive governors, the governors tried to explain the crimes and punishments which has been manifested in the presumption of innocence, the principle of legality of crimes and punishments, the principle of personalization of the punishments, the principle of equality of punishments and the principle of individualization of the punishments.

Over the past centuries, criminal law has been affected by numerous issues of philosophy, law, criminology and individual law and it has attained mutual and general principles which have been the infrastructure for criminal justice and their essential philosophy is based on supporting individual and social laws and to establish order. Nowadays, the strategic principles are taken into consideration when criminal rules and regulations are developed; in such a way that they have been explicitly and clearly mentioned in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Laws, the International Covenant on Civil and Political Laws and the Statute of the International Criminal Law and numerous International and Regional Conventions and Documents, Constitution and Criminal Laws of most countries. In a national scene, criminal law is liable for establishing order in a society and to bring security to that society. Prevention is one of the function of the criminal law. Thus, as long as individuals know that if they do something specific, they will be punished, this would be a type of prevention. The next important point about the importance of the criminal laws is that these laws are tools for obligation and for people to observe the rules and legal positions. The criminal laws are the simplest, and at the same time the most severe means for obligating individuals to observe the rules.

Each government is responsible to enforce its own criminal jurisdiction to those who are held accountable for the commitment of international crimes and to confirm the fact that peace, security and safety is threatened by terrible crimes and that the most disastrous crimes that cause anxiety in the international society must not go unpunished and effective prosecution of those who have committed these crimes is guaranteed by adopting national strategies and also reinforcing international cooperation so that the criminals wouldn't exploit their immunity, wouldn't be able to run from their crimes and so that they government would be able to take part in the prevention [of the occurrence] of such crimes. In this regard, no member state is allowed to interfere in the armed conflicts and national affairs of other states. The countries have decided to establish a permanent independent International Criminal Court associated with the system o the United Nations so that the goals of the current generation and the future generations would be fulfilled. The International Criminal Court addresses all of the disastrous crimes that threaten the international society. The decisions of such a court significantly affects the International Criminal Law. By taking the aforementioned points into consideration, in our study, we have aimed to review the status of principles and regulations of the criminal law in the Statute of the International Criminal Court and the necessary conclusions will be provided in the final sections of the article.

The International Criminal Court

The bitter experience of the World Wars led the international society to think of a solution for maintaining international safety and peace. With the establishment of the United Nations, the jurisdiction of the International Court of Justice was confirmed so that it would address the cross-border disputes and resolve the disagreements and disputes between the governments based on the international law and to put an end to the bloodshed and war or even prevent it. Thus, in the past few years, many countries and international organizations, with political nature, became quite determined to establish an independent international criminal center in order to address the international crimes. The first move in the respect of forming the International Criminal Court can be traced back to the year 1474. In 1474, a court was established in a city (Breisach) in Germany consisting of 27 judge for the prosecution of the German Emperor. This procedure remained silent until 450 years later. It was in the WWI that due to articles in the Treaty of Versailles (1919), a criminal court was established so that Wilhelm I, the Emperor of Germany would be prosecuted because of violating the international ethics and treaties which was then practically cancelled when he ran to Netherlands and because of lack of extradition. In practice, the authorities did not show any interest in prosecuting the perpetrators. The first steps towards the establishment of the international criminal court as we know today was taken by the League of Nations in 1937 along with efforts that were made for the passage of a treaty with the same name; however, this treaty was not accepted by any government. According to the agreement signed in August 8, 1945 between England, United States of America, France and Soviet Union, the Nuremberg trials were established for the Nazi court. With the establishment of the United Nations, a new horizon was opened to the international community. In the early years of the founding of the organization (1948), the United Nations General Assembly mentioned the issue of establishment of the International Criminal Law for addressing the crime of genocide in the Resolution 260 dated in December 9, 1948 and gave the responsibility of drafting its Statute to the International Law Commission. In December 10, 1948, the United Nations General Assembly passed the Universal Declaration of Human Rights. While, the day before, i.e. December 9, 1948, through a Resolution, the Human Rights Commission of the United Nations had been granted the responsibility of preparing the draft of a Statute for the establishment of an International Criminal Law. The Statute of the International Criminal Law, consisting of 13 chapters and 128 articles, was passed. With the accession of more than 60 countries, pursuant to the article 126 of Statute, from the first of July of 2002, which is the first day of the month after exactly 60 days from the date of the sixtieth instrument of accession, it became enforceable. And about a year later, this court practically began its work with the election of judges, prosecutors and other court officials. This court is also located in Hague just like the International Court of Justice (Poor Baferani,2003).

The first step towards the prosecution of international criminals was taken in the Treaty of Versailles in 1919. According to this treaty, Wilhelm II, the ruler of Germany, must have been prosecuted because of the crimes he had committed. In December 9, 1948, the General Assembly of the International Law Commission and a Special Committee composed of representatives of governments asked the authorities to see if such a court could be established. Despite the fact that both of the aforementioned references had put emphasis on the pleasant outcomes of the establishment of the court, this was not practically realized. The jurisdictions considered in this court were as follows:

At the time of the establishment of the International Criminal Court, the issue of the relationship between this court and national courts of the countries and jurisdictional conflicts. In other words, this question rises that how can jurisdictional conflict of the International Criminal Court and National Courts can be resolved? In the history of the International Criminal Courts, this issue was also taken into consideration. In the current of drafting the Statute of the primary International Criminal Court, the concurrent jurisdiction of the court was accepted. This principle was not much clear in the current of the preliminary negotiations. Nonetheless, ultimately, it was passed in the Diplomatic Conference by an absolute majority. According to this principle, national courts have the main responsibility of realizing and prosecuting international crimes

subjected to the jurisdiction of the court. And in case of lack of interest, inability or absence of an independent and efficient judiciary, the International Criminal Court would be held accountable (Poor Baferani, 2003). Jurisdiction of the court is limited to the most serious crimes of concern to the international community. Due to this Statute, this court is held accountable for the following crimes:

1- The crimes of genocide;
2- The crimes against humanity;
3- War crimes;
4- Assault … (Shari'at Bagheri, 2007).

The reasons for establishing the International Criminal Court from the perspective of proponent and opponents

1. Presence of an International Criminal Court in an international community can have a positive impact on the reduction of the rate of international crimes as well as the effective punishment of international criminals and the individual who is prosecute in front of multiple judges is more fearful than one who is prosecuted in a national court of law.
2. Proponents of this issue believe that the crime that threatens the interests of a specific country must be differentiated from the crimes that threaten the interests of the international community and a specific criminal system shall be internationally created for these second-degree crimes.
3. Establishment of an International Criminal Law has become necessary for maintaining human security and peace and for creating cooperation between countries.
4. Nowadays, the concept of the principle of governance is associated with the maintenance of the interests of a specific country and with supporting the people of that country and the principle of independent governance of countries over national affairs, which is one of the reasons why some people are opponents of the establishment of the International Criminal Law, is no longer acceptable (Kristin, 2004).

Opponents' reasons:

The opponents were clearly felt at the time of the passage of the Statute of the International Criminal Court in July of 1998; in such a way that some countries, including Qatar, America, China and Turkey, did not sign it and others abstained.

1- Opponents believed that countries and international organizations cannot determine the fate of people who have the right to determine their own faith in order to fulfill the ideal interests of an international community; because their rights would be violated.
2- In all countries, it is impossible for the authorities to neglect their independent governance or political authority and hand their people over to the International Criminal Law to be punished and prosecuted or to pass up the prosecution of the crime that a criminal in their land has committed in the favor of the interests of the international community.
3- The concern is that if a country accepts the Statute of the court and act according to it. For example, that country might be forced to sit and watch a citizen get prosecuted when a crime is committed and might not be able to compensate for a right that has been violated and in such cases, it is more likely that the person would be forgiven by the court.
4- Opponents believed that improper function of the international assemblies, including the United Nations and the International Court of Justice, indicates that international organizations don't perform their duties well which would then lead to pessimism regarding the competence of the international court in the administration of justice.

Goals of establishing the International Criminal Court

1- Putting an end to the violation of humanitarian laws

The International Criminal Court attempts to administer justice so that humanitarian laws wouldn't be violated and to support the rights of orphaned children and women who were abused in the war.

2- Helping international peace and security

The International Criminal Court is an independent institution which has been created in the framework of the United Nations System and is based on the purposes and principles of the Charter of the United Nations. Thus, one of the most important goals of it is to try to realize international peace, security and justice. With the establishment of an International Criminal Court, it is hoped that if disastrous crimes occur in any country, even if the government of that country has not joined the Statute of the court, the global community could fight such crimes through this court and brings peace and security in these countries and the international community (Bahmani, 1995).

3- Putting an end to the lack of punishment of criminals

Putting an end to any kind of immunity for international criminals is one of the most significant goals of the International Criminal Court. This goal has been cited in the Statute and it has been emphasized in the article 27 of the Statute in association with any kind of immunity before the court and if a criminal is not punished for a crime he/she has been committed in a national criminal court, the international criminal court will punish him/her (Tahmasbi, 2007).

Jurisdiction of the International Criminal Court and crimes in Iran and in Islamic laws

One of the important issues associated with the International Criminal Court is its "concurrent jurisdiction" which is not compatible with the "exclusive jurisdiction" of the courts of Islamic Republic of Iran. Especially, in cases when the jurisdictional affairs of the International Criminal Court are performed without the authorization of the legal system of Iran, this jurisdiction is considered as one of the ambiguous and complex points of the relationship between this court and the Constitution of Islamic Republic of Iran. Therefore, concurrent jurisdiction of the International Criminal Court makes lawyers of our country face problems in association with the prosecution of the high-rank officials and authorities of Islamic Republic of Iran and a basic solution must be found for these problems.

Another conflict between the Constitution and the Statute of the International Criminal Law is associated with the "non-retroactive" principle. The non-retroactive principle of law is one of the most important principles of Iran's legal system. If one is prosecuted by the International Criminal Court and is placed in the realm of the legal jurisdiction of Iran's courts and wants to defend his/her "act or omission" in accordance with this principle, the crimes that are in the jurisdiction of the International Criminal Court are not included in time lapse". Principle 110 of the Constitution of the Islamic Republic of Iran, one of the authorities of the leader is associated with the amnesty or commutation of the sentence of the convicts in accordance with the Islamic principles following the proposition made by the chairman of the judiciary. According to paragraph 11 of principle 110 of the Constitution, convicts can be granted amnesty after fulfilling certain conditions. However, the question that rises here is that if a convict is being prosecuted by the International Criminal Court and is simultaneously serving time in accordance with the laws of Iran and the judiciary grants them amnesty with the requirement of fulfilling certain conditions, would the International Criminal Court also grant them amnesty or would it withdraw the prosecution? According to principle 17 of the Statute of the International Criminal Court, this must only be granted by the government. It seems that Iran can use two solutions for resolving the aforementioned issue: not joining the Statute and prevent it from being enforceable or joining it and using its facilities. In this solution, the objective is to disaffiliate any kind of association from International Criminal Court and hereby abandoning interests, the losses will be eliminated.

Although joining this court has some negative consequences, but not joining it would also prevent Iran from exploiting the benefits of the International Criminal Court; e.g. when Iran, or any of the authorities and citizens of Iran, suffer from the negative consequences of one of the crimes cited in the Statute and due to

any reason, the convict could not be prosecuted in the country and there is no other way for the convicted criminal to be prosecuted or compensate for the damages they have cost.

The procedure of the criminal law will continue to grow regardless of Iran's membership in the International Criminal Law. This issue does not lead to any kind of negative consequence for the International Criminal Law, and Iran is the only party that has to suffer from these consequences. Due to the fact that the citizens of Iran would not be able to become a member of this court as a judge, an expert or an employee, etc. and because of the natural development of the International Criminal Law even when Iran is not granted membership, the only parties that lose their opportunities are the non-member states such as Iran and they will always remain passive.

Not joining the Statute is not practically beneficial for Iran, the causes are as followings:

1. Not joining the International Criminal Court with regard to the state of Iran, is a proper excuse to propagandize against it. This act is to maintain Iran's interests, while Iran puts itself under the propagandistic and negative pressure, and will be withdrawn, which jeopardizes Iran's interests.
2. Since the crime of genocide, crimes against humanity, war crimes and assaults have been included in this Statute, due to numerous international documents, Iran has already committed to avoid these types of crimes and the punishment of those who commit this kinds of crimes. In this regard, it can be clearly stated that Iran is the member of the Convention on the Prevention and Punishment of Genocide, the Declaration and the International Covenant on Civil and Political rights, the Geneva Conventions on the Law of War and is a member of the United Nations and accordingly, regardless of the existence of the Statute of the International Criminal Court, Iran has already committed to many of the acts cited in the Statute.
3. If we assume that Iran has not joined the court in order to avoid taking on any kind of criminal responsibility and to prevent the jurisdiction of the International Criminal Court, this activity cannot be a barrier, because due to the authority granted by the Charter of the United Nations to the Security Council in association with the possibility of the formation of secondary institutions for maintaining international peace and security. This Council can attempt to form exclusive criminal courts in order to address the probable committed crimes by Iranian citizens.
4. The predetermined attorney general of the International Criminal Court can directly investigate the case based on the information he/she obtains and attempt to do researches and in order to get permission for the research, he/she must submit a request to the primary branch and ask to start his/her researches.
5. The Security Council also has the authority to refer a situation in which one or multiple crimes might be committed to the attorney general and this can be basis for the investigation of the court, just like Darfur's situation is under investigation in the court despite the membership of Sudan (Doclange, 1975).

Future problems of the International Criminal Court

The International Criminal Court will surely face enormous challenges which are as follows:

Globalization: efficiency of the future court in fact depends on the support of the global community in general and the flexibility of the positions of the United States of America. America's doubts about the concurrent jurisdiction of the court, balance in the elements of the court and procedures of cooperation with the court. The other two permanent members of the Security Council, i.e. China and Russian Federation, have not signed the court Statute and other important governments, such as India, Mexico and Egypt, have withdrawn themselves from the Council for now without actively doing anything against the Statute. It is in no way possible to predict the behavior of Arabic countries. They have passively negotiated and succeeded in entering the issue of the consideration of the public order in the national armed conflicts into the Statute.

Suppression of the most serious crimes: the significant issue here is the creation of a compatibility between the independence of the International Criminal Court on the one hand, and a criminal policy that is aware of

the issues of peace and the reconciliation process and establishment of a law-oriented government on the other one.

Prevention of conflicts: for France, the important issue is entering this legal mechanism in a multidimensional process in favor of peace. The challenge here is the risk of loss of unity of the procedures of the International Legal Institutions. In fact, a branch of the International Criminal Law might consider a matter as the crime associated with national armed conflicts for the former Yugoslavia, while another branch might state that that same crime is associated with international armed conflicts. Moreover, increased international tribunals, from International Court of Justice to the International Criminal Court, the risk of development of incoordination in the response to similar questions would be increased, especially the fact that it is likely for the special courts to be established (Robertson, 2005).

Conclusion and recommendations:

The International Criminal Court is one of the important international criminal courts and tribunals that is an independent legal organization and unavailable to superpower countries including having the right of Veto, in order to prevent the violation of rights, has the power to challenge individuals who commit one of these four types of crimes. Regardless of the political issues and threats between the member countries and those who have the right of Veto, independent from the United Nations, this court has the ability to act independently and without any kind of political and legal partiality in association with punishing convicted criminals.

The decisions made by the court in association with various cases which have been assigned to the court by the Security Council and from countries (e.g. the case of Omar Al-Bashir) have almost always convicted all of the alleged criminals and that human rights activists have become quite hopeful.

It is hoped that as experts in international relations and laws believe, our country Iran must sign the accession to the court and in the next stage, lead the court towards issues that seem to be oppressive by supporting that opinion. The Statute of the international court expresses that this court has a concurrent jurisdiction and it doesn't aim to weaken the jurisdiction of national courts; but beyond this legal claim, the issue of "national governance" of the countries is also an important one.

By signing this Statute, the countries have assigned some of their authorities in the pursuit of criminals to the International Criminal Court. On the other hand, by accepting the Statute of this court, the jurisdiction of criminal prosecution of political and military officials of the countries have also been assigned to this court. On the other hand, in the Statute of this court, it has been expressed that governments must cooperate with this court in order to implement the principles of this Statute. In cases when the court calls the nationals of a government for interrogation, investigation and research, the governments must deliver the criminal to the International Criminal Court without any presumptions. This not only contradicts with the legal system and the jurisdiction of national courts in terms of prosecution of criminals, it politically weakens the "national governance" of the governments. In terms of legal content and legal references cited by the national courts, that have been determined based on the Constitution of each country, numerous oppositions and alternations are seen with the Statute of the international criminal court. In addition to the issue of jurisdictions and conflict of jurisdictions in addressing numerous crimes, "the nature and type of the crime" are also different from the perspective of these two legal systems. The Constitution and ordinary laws of Iran have matured based on jurisprudence, reason and vote of the people; while the legal system of the International Criminal Law is administered based on the benefits of international rights and this in turn has been the origin of many alternations and differences between the Constitution and the Statute of the International Criminal Law.

Existence of an International Criminal Law is a significant achievement for the international community and plays a key role in making the world unsafe and unsecured for international criminals. Iran is not a

member of the court and it has not been pressured much to become a member and that is because, as many experts have expressed, the United States of America has not joined this court.

If the United States of America was able to obtain advantages by joining this court (according to the Resolution 1422 of the Security Council and agreements known as the agreements of article 98; a summary of them can be listed), it would definitely join this court and pressure other governments to do so as well. In association with the International Criminal Court, Iranian government cannot think that the situation will remain as it is now. It must be politically clever to know that it is necessary to develop plans for the not too distant future and to simultaneously use all of the facilities and capacities of the court and to take advantage of them in their favor.

Another reason that is probably preventing Iran from joining the court is the issue that it contradicts with Islamic jurisprudence or it might contradict with the Islamic jurisprudence. Among these contradictory issues, we can refer to Rejection of Way, gender balance, etc. however, as many experts believe, these issues can be reviewed by specialists and from a jurisprudent aspect so that there would be kind of coordination between the Islamic requirements and necessities of a country.

According to the previously presented explanations, the fact that Iran hasn't joined the Statute not only will cause the advantages and disadvantages of the International Criminal Law to be lost, but it will also lead to risks that are sometimes way more dangerous than the risks of joining the Statute. However, quite conversely, if Iran was to join the Statute, this will have many advantages regarding development and evolution of Iran's Criminal Laws and on the other hand, Iranian experts and lawyers will be able to enter the area of international normalization and to play effective roles in the international evolutions.

The Statute of the International Criminal Court in 1998 was passed following the process that was started in the years after the WWI in the respect of objectifying such a court and the government of Iran played an active role in its development and was seriously involved with all of the stages of its development. However, after the Statute was drafted, various opinions and beliefs were expressed about the efficiency or inefficiency of this court.

The International Criminal Court is like a double-edged sword which can be, at the same time, useful and valuable and harmful and dangerous. Studying the Statute of the court, preparatory documents and statements of representatives of governments confirms this claim. On the other hand, according to article 27 of the Statute and changing the concept of the governance of governments, the political and military officials or any other Iranian citizen might be prosecuted and sentenced (even with political intentions). This shows its significance when the prosecution is held by an institution with powers beyond the conventional limits of the attorney general of national courts, who also have the authority to act on the third parties, and a kind of power that is inaccessible in Iran's legal system. In addition to this reason and many others, we can also add the ambiguity of the definition of some of the crimes and claim that it is likely for parties to abuse this ambiguity.

Nonetheless, we are still dubious about the answer to the following questions: would the establishment of the International Criminal Court and its membership have any kind of advantage or disadvantage for the countries? Would the International Criminal Court turn into a means that superpowers might use to their advantage in order to survive in the political world, whether positively or negatively?

Obviously, according to the studies focused on governments' position, the answer to these questions are yes. However, another critical question that rises here is that is there a solution(s) for the government of Iran to build the proper substrate for using the advantages and disadvantages of the International Criminal Court and to prevent the interests of Iran from being put at any risk?

In the best case scenario, this court cannot be actually established any sooner than three or four years and relative to the function of the International Criminal Courts for the former Yugoslavia and Rwanda the desirableness of its function significantly depends on the Security Council of the United Nations and good intentions of the governments.

Given the aforementioned points, it is recommended to develop a proper law based on the opinions of experts in association with international crimes, to educate specialized experts in various fields before assigning them to the court. Furthermore, another necessary point is the existence of the organizational structure of the judiciary in different countries which must be in proportion with the requirements of the court.

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