Revista ARACÊ
ISSN: 2358-2472

THE PRINCIPLE OF LEGAL RESERVE IN INTERNATIONAL CRIMINAL LAW

https://doi.org/10.56238/arev6n3-262

Submitted on: 10/20/2024 **Publication date:** 11/20/2024

Ailton Henrique Dias and Maria de Betânia Sousa Brito[1].

ABSTRACT

By the Principle of Legal Reserve, no fact can be considered a crime if there is no law that fits it in the adjective criminal. And no penalty can be applied if there is no pre-existing sanction corresponding to the fact. The Legal Reserve allows individuals the freedom to act and all limitations, positive or negative, must be expressed in laws. However, to public agents, the same principle becomes adverse. The State, in the absence of legal provisions for its acts, is obligatorily paralyzed and unable to act. In this sense, it is necessary to carry out a study on the application of the principle of legal reserve in International Criminal Law, as it is also the basis of the International Criminal Court's action, by demonstrating its historical evolution and constant concern with human rights.

Keywords: Legal Reserve, International Criminal Law, Principles.

[1] UAA Academic Institution
E-mail: mariabetaniasousa@gmail.com

Revista ARACÊ
ISSN: 2358-2472

INTRODUCTION

International Criminal Law is the branch of law that defines international crimes (proper and improper) and imposes respective penalties. International Criminal Law also establishes the rules regarding: the extraterritorial application of domestic Criminal Law; the immunity of internationally protected persons; international criminal cooperation at all levels; the international transfers of cases and persons arrested or convicted; extradition; the determination of the form and limits of enforcement of foreign criminal judgments; the existence and functioning of international or regional criminal courts; to any other criminal problem linked to the individual, which may arise at the international level. (ACCIOLY, CASELLA, 2010)

According to the Doctrinaire Donnedieu de Vabres (1929), he defines International Criminal Law as the science that determines the competence of the State's criminal jurisdictions in comparison with foreign jurisdictions, the application of its criminal laws and the effects of foreign criminal trials, subordinating it exclusively to domestic criminal law.

In Brazil, René Ariel Dotti (1998), who adopts the expressions International Criminal Law and International Criminal Law, defines the first as "the set of criminal provisions of interest of two or more countries in their respective territories" and the second as "the complex of criminal norms aimed at the repression of offenses that constitute violations of international law".

In this sense, it is then necessary to study the principles that govern the application of international criminal law, especially with regard to the principle of legal reserve, placed in international law as *nullum crimen sine lege* and *nulla poena sine lege*. In addition, it is also necessary to carry out a thorough analysis of the historical evolution of the International Criminal Court, as an organ where the principles that govern International Criminal Law are directly and continuously applied.

HISTORICAL EVOLUTION OF THE INTERNATIONAL CRIMINAL COURT

ORIGIN OF THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court represents, in fact, a great achievement for all of us because it is a guarantee that the great crimes committed against humanity will not go unpunished, regardless of the political strength of the country involved. This is a topic that has been increasingly in evidence, due to the growing number of international conflicts,

Revista ARACÊ
ISSN: 2358-2472

which have intensified in recent years, notably the so-called Arab Spring, and, more recently, with the conflicts that broke out in Ukraine and Syria. (BRANDÃO, 2006)

In order to understand its emergence, it is important to refer to its historical origin, from the Nuremberg and Tokyo Tribunals, followed by the *ad hoc* tribunals of the UN, to the effective creation of the International Criminal Court. In 1872, the idea of international criminal jurisdiction emerged, launched by Gustavo Moynier, when he presented at a Red Cross Conference, the first proposal for the formation of a Tribunal with jurisdiction to judge War Crimes, also called the "Convention for the Creation of an International Judicial Body for the Prevention and Punishment of Violations of the Geneva Convention". (BERNADES, 2008)

Nevertheless, it was in the twentieth century that the most important steps towards the development of International Criminal Law were taken. Thus, it is agreed that it was the First World War that gave rise to the initiative to bring individuals to justice, including senior officials of states allegedly responsible for serious international crimes. (BERNARDES, 2008)

Unlike Public International Law, in International Criminal Law international criminal responsibility falls on individuals, even if acting in the name, on behalf of and in the interest of a State. Thus, International Law ceases to be a law of States alone, and starts to take into account the human being, structuring international criminal jurisdiction in an impartial and non-military way.

THE TREATY OF VERSAILLES

The Treaty of Versailles was a peace treaty drawn up in 1907, based on the principles of the 2nd Hague Peace Convention, which aimed to end World War I. As a result of the heavy civilian losses, it was urgent to investigate and punish those responsible for the atrocities committed during the conflict.

The idea of punishing aggressors under humanitarian law originated among the allied countries (USA, France, England, Italy and Japan) on January 25, 1919, and was innovative in the concept of individual criminal responsibility within the scope of international law. At the Paris Peace Conference in 1919, the Allies were already discussing the possibility of holding trials for crimes against humanity, provided for in the Geneva Convention of 1864, with the aim of punishing, notably, the figure considered to be the initiator of this war, the German Kaiser Wilhelm II. (LEWANDOWSKI, 2006)

Revista ARACÊ
ISSN: 2358-2472

This was followed by the signing of the Peace Treaty of Versailles, on June 28, 1919, between the Allies, the Associated Powers, and Germany. Article 227 of this treaty provided for the creation of an ad hoc international criminal court to try Kaiser Wilhelm II for having started the war, and Articles 228 and 229 for the trial of German military personnel accused of violating the laws and customs of war by military tribunals of the Allies, or military courts of any of the Allies. . (ACCIOLY, CASELLA, 2010)

To make these trials possible, Germany enacted a law giving the German Supreme Court in Leipzig jurisdiction to prosecute the accused. This event, which became known as the Leipzig Trial, represented, despite its limited scope, a breakthrough for international criminal justice. The Leipzig Trial contributed to initiating the relaxation of the principle of the absolute sovereignty of each State when dealing with crimes committed in its territory, and exposed the need to have an international criminal jurisdiction body. (BRANDÃO, 2006)

NUREMBERG AND TOKYO TRIBUNALS

After the end of World War II in 1945, public opinion, motivated by the atrocities committed during the conflict both by Japan in China and by Germany against Jews, Gypsies and other minorities, led the rulers of the victorious powers to establish, for the first time in history, international criminal tribunals. Thus, the international military tribunals of Nuremberg and Tokyo were established to judge and punish the crimes committed in World War II, and represented the basis for current international criminal law. (HIZUME, 2007)

The Moscow Declaration on November 1, 1943, adopted by Roosevelt, Stalin and Churchill on behalf of their countries, which established principles for prosecuting Axis criminals after the end of the conflicts, is seen as the starting point for the creation of the Nuremberg Tribunal.

Germany surrendered unconditionally on May 8, 1945, submitting to the Potsdam Agreement, which provided that war criminals should be tried, without, however, establishing how to hold them accountable in international criminal courts. Subsequently, the creation of the Nuremberg Criminal Tribunal was regulated by the London Accords, signed by the major world powers and 19 other states. (HIZUME, 2007)

The Charter of the International Military Tribunal for the Trial of the Major War Criminals was passed on 6 August 1945, containing 30 articles, as well as establishing that it would be a quadripartite court, to which each Allied country should send a full judge and an alternate, with the Presidency being held on a rotating basis. (MAZZUOLI, 2006)

Revista ARACÊ
ISSN: 2358-2472

It was defined that the court could try people who had committed crimes against peace, war crimes and crimes against humanity, and the responsibility of the accused should be ascertained both as individuals and as members of organizations. It thus established, for the first time, that the position of the accused, whether head of state or official heads of government departments, should not exempt them from responsibility, or act as a mitigating factor for the crimes committed.

Crimes against peace refer to the prohibition of initiating an unjust war. Planning, preparing, inciting, or contributing to war, or participating in a common plan or conspiracy for war. Crimes against humanity refer to genocide, murder, rape, slavery, among others, committed against civilians and/or military personnel. War crimes, on the other hand, refer to crimes committed during the war by the use of techniques such as gas or bombing directed at civilians.

One of the main criticisms leveled at the court was the fact that it was adopted after the incriminating conducts had been committed, which would constitute exfacto criminalization. A kind of Court of Exception, made by the victors to condemn the losers. In order to refute this argument, the court referred to the Hague Conventions for war crimes and the Treaty of Renunciation of War (Paris Pact or Briand-Kellogg, 1928). Flávia Piovesan (2007) explains this theme as follows:

> (...) much controversy arose around the allegation of affront to the principle of anteriority of criminal law, under the argument that the acts punished by the Nuremberg Tribunal were not considered crimes at the time they were committed. To this criticism others were added, such as those related to the high degree of politicity of the Nuremberg Tribunal (in which "winners" would be judging "losers"); the fact that it is a precarious and exceptional Court (created post facto to judge specific crimes); and the sanctions imposed by it (such as the death penalty).

Even so, the Nuremberg Tribunal contributed to the strengthening of international criminal jurisdiction, promoting the universalization of the principle of international responsibility for those who violate human rights. As for the grounds of the Tokyo Tribunal, they are to be found in the Cairo Declaration of December 1, 1943, which was signed by representatives of the United States, Great Britain and China. The punishment of Japanese war criminals, especially those who committed cruelty against prisoners, was announced, as well as at the Nuremberg Tribunal, during the Potsdam Conference in July 1945. (MAZZUOLI, 2006)

Japan's surrender took place on September 2, 1945, and the procedures and conditions regarding detention and treatment of those suspected of having committed war

Revista ARACÊ
ISSN: 2358-2472

crimes were stipulated. At the same time, the United Nations Crimes Commission approved a recommendation to establish an international military tribunal to try war criminals in the Far East, addressing it to eight countries directly concerned to follow the recommendation.

The Tokyo Court in the Far East was established on January 19, 1946. Its creation was announced by General Douglas MacArthur, commander-in-chief of the allied forces in the region. The Statute containing 17 articles was drafted similarly to the Statute of the Nuremberg Tribunal. The Tokyo Trial began on May 3, 1946 and lasted approximately 3 1/2 years, and this trial was the subject of criticism both during and after the event. It was claimed that this was a way for the United States to avenge the treacherous attack on Pearl Harbor, or a means of alleviating national guilt over Japan's use of atomic bombs. (HUZEK, 2012)

Even criticized, the Nuremberg and Tokyo Tribunals undoubtedly represented a milestone, where judges abandoned both the doctrine of immunity from acts of state, and that of the answer to the superior, which considers blind obedience to superior orders an automatic and complete defense against criminal prosecution. In this way, the long era of impunity of criminal rulers, who shielded themselves in the cloaks of immunity from the State and superior orders to commit atrocities in times of war and in times of peace, ended for the reader. (HUZEK, 2012)

THE CREATION OF THE PERMANENT INTERNATIONAL CRIMINAL COURT

In 1948, the idea of establishing a permanent International Criminal Court had already been considered, when the United Nations General Assembly asked the International Court of Justice to examine the possibility of creating a tribunal to judge cases similar to those that had been submitted to the Nuremberg and Tokyo Tribunals. (HUZEK, 2012)

Between 1951 and 1953, draft statutes for the future court were presented through two committees constituted by the UN General Assembly, however, due to the so-called Cold War, the work of creating the court was suspended until 1989, when at the request of the UN General Assembly, the International Law Commission returned to work on the subject. (HUZEK, 2012)

Between 1995 and 1998, the United Nations General Assembly convened two committees to prepare the Draft Statute for the creation of a permanent International

Revista ARACÊ
ISSN: 2358-2472

Criminal Court. The first ad hoc committee began discussions in 1995, and the second committee, which in 1996 replaced the first ad hoc committee, submitted a Draft Statute and a final Draft Law to the Diplomatic Conference in Rome.

Regarding Brazil's participation, Mazzuoli (2008) explains that:

> The Brazilian diplomatic corps, which already participated even before the 1998 Rome Conference, in a Preparatory Commission for the establishment of an International Criminal Court, played an outstanding role in the entire process of creating this Court. And this was due, in large part, to the commandment of article 7 of the Act of Transitory Constitutional Provisions, of the Brazilian Constitution of 1988, which states: "Brazil shall advocate for the formation of an international court of human rights."

On July 17, 1998, the creation of the International Criminal Court was approved, and the Statute entered into force on July 1, 2002 in The Hague, Netherlands, where its current seat is located. Data from 2012 indicate 120 States parties to the Rome Statute, but the United States, China and Russia have not yet signed and/or ratified the treaty.

The entry of the 120 countries, with the ratification of the Statute of the International Criminal Court, can be considered the most important step of international society in the battle against impunity and in favor of greater respect for Human Rights.

Thus, by virtue of the aforementioned article, the Rome Statute of the International Criminal Court was integrated into Brazilian Law with the status of a constitutional norm, and there can be no abolition of any of the rights and guarantees, contained therein, by any means in Brazil, including by constitutional amendment.

It should be noted that the Rome Statute has adopted a very rigid mechanism, where reservations are not allowed. Thus, the signatory State must accept the treaty in its entirety, committing itself to each of its articles, without being able to impose a reservation on a particular article of the document, which would have delayed the ratification process by each signatory State.

The creation of a permanent criminal jurisdiction meant a great advance, bringing important advantages compared to ad hoc jurisdiction, such as savings in installation costs, institutional stability and, above all, the increased legitimacy that results from a greater guarantee of impartiality, equality and uniformity in the application of the Law.

Revista ARACÊ
ISSN: 2358-2472

THE INTERNATIONAL CRIMINAL COURT AND INTERNATIONAL SOCIETY

It is a permanent and independent court, which tries people accused of crimes of the most serious international interest, such as murder, crimes against humanity and war crimes. It is based on a statute to which 106 countries are part.

The International Criminal Court is a court of last resort. He will not act if a case has been or is being investigated or tried by a national legal system, unless the proceedings of that country are not genuine, such as if they are merely formal in character, in order to protect the accused from possible legal liability. In addition, the International Criminal Court only judges cases that it considers to be extremely serious. In all its activities, the International Criminal Court observes the highest standards of fair trial, and its activities are established by the Rome statute.

FUNDAMENTAL PRINCIPLES OF THE INTERNATIONAL CRIMINAL COURT AND THE LEGAL RESERVE

Principles are basic sources of an entire national legal system, and of great importance in the application of law. Following this line of reasoning, Humberto Ávila (2012) cites in his work Theory of Principles that:

> [...] Karl Larenz defines principles as norms of great relevance to the legal system, insofar as they establish normative foundations for the interpretation and application of the Law, resulting from them, directly or indirectly, norms of behavior. In other words, principles give the necessary direction for the application of the law, so that it can be said that principle and norms go together, because the application of a norm must be guided by a fundamental principle for that.

Thus, in order to make it possible to impute crimes to persons in the criminal sphere under the jurisdiction of the International Criminal Court, the Rome Statute brought in its text principles and foundations that guide such application, namely: *nullum crime sine lege; nulla poena sine lege*; non-retroactivity ratione personae; individual criminal responsibility; exclusion from jurisdiction in relation to minors under 18 years of age; irrelevance of official quality; liability of the military chiefs and other hierarchical superiors; imprescriptibility; psychological elements; causes for exclusion of criminal liability; error of fact or error of law; hierarchical decision; complementarity and natural judge.

Nevertheless, it must also be said that the principle of the Dignity of the Human Person applies, as it is what brings the unification of the fundamental rights of the individual, and has been considered by doctrinaires as being a major principle. The

Revista ARACÊ
ISSN: 2358-2472

doctrinaire Rizzatto Nunes (2012) prescribes that: "Human dignity is intangible. Respecting it, and protecting it is the obligation of all public power" In other words, human dignity is the principle that guides the other principles, without it there is no talk of personal freedom or social justice.

In the preamble to the Pact of San José, Costa Rica, adopted in this American international contract a regime of personal liberty and social justice, based on respect for essential human rights, based on the human person, the following excerpt:

> "Reaffirming its intention to consolidate in this Hemisphere, within the framework of democratic institutions, a regime of personal freedom and social justice, based on respect for essential human rights; Recognizing that the essential rights of the human person do not derive from the fact that he or she is a national of a given State, but rather from the fact that they are based on the attributes of the human person, which is why they justify international protection, of a conventional, supporting or complementary nature to that offered by the domestic law of the American States;" (IACHR, 1969)

The right to life is the greatest legal good to be protected, there is no way to speak of freedom, for example, without respect and protection of the human person. In the Brazilian Constitution, for example, it brings in its article 1, the dignity of the human person, as being more than just a guiding principle, but as being one of the foundations of the Democratic Rule of Law.

Still, with regard to this line of principles, in the sphere of International Law, there is the Theory of Penal Guaranteeism, idealized by Luigi Ferrajoli, in which the guarantee designates a normative model of law, in which it guarantees rights, privileges and exemptions constitutionally conferred to the citizens of a State, maximizing the freedom of individuals and minimizing the arbitrariness of the State Power, with regard to the restriction of individual and collective rights. (TRINDADE, 2013)

PRINCIPLE OF NULLUM CRIMEN SINE LEGE

There is no crime without Law. The prediction of a crime must be established precisely, so that if there is no prior typification prior to the legal fact, it will not be a crime, because for an action to be considered a crime it is necessary to have a typification of a human behavior in the criminal law, prior to the fact.

Professor Rogério Greco (2008) when conceptualizing criminal type points out:

> By imposition of the principle of *nullum crime sine lege*, the legislator, when it wants to impose or prohibit conduct under the threat of sanction, must necessarily make use of a law. When the law in the strict sense describes the conduct (commissive or

Revista ARACÊ
ISSN: 2358-2472

omissive) with the purpose of protecting a certain asset whose protection has been shown to be insufficient by the other branches of law, the so-called criminal type arises.

Now, it is known that criminal law is the last *ratio*, thus, it punishes the individual offender of a conduct typified as criminal, restricting him from his freedom or limiting it. In Article 5 of the Rome Statute, there is an exhaustive list of crimes under the jurisdiction of the Criminal Court, that is, no person will be considered responsible for a crime in the international sphere, if at the time of the act, it was not a typified crime.

In this principle, it does not admit the use of analogy, where in cases of ambiguity, it will be interpreted in favor of the person under investigation, accused or convicted, for this reason the prediction of a crime must be precise in its typification.

PRINCIPLE OF *NULLA POENA SINE LEGE*

There is no penalty without law. No one can be punished if, prior to the fact committed, there is no law that considers it a crime, even if the fact is immoral, antisocial or harmful. (MIRABETE, FABRINI, 2011) It is necessary to typify the conduct as well as the application of its punishment.

In the classic work Penal on Crimes and Penalties, Cesare Beccaria (2001) says that: "The first consequence of these principles is that only laws can set the penalties for each offense and that the right to make penal laws can only reside in the person of the legislator, who represents the whole of society united by a social contract." Within the scope of the International Criminal Court, any individual may only be punished in accordance with the provisions of the Rome Statute, as provided for in Article 23 thereof.

FINAL CONSIDERATIONS

The Principle of Legal Reserve in International Criminal Law arises together with the guarantor idea that involves most international legal systems. The principle of legality was born from the desire to establish permanent and valid rules in human society, which were works of reason, and could shelter individuals from arbitrary and unpredictable conduct on the part of rulers. The aim was to achieve a general state of trust and certainty in the action of the holders of power, thus avoiding doubt, uneasiness, distrust and suspicion, so common where power is absolute, where the government is endowed with a sovereign

Revista ARACÊ
ISSN: 2358-2472

personal will or is considered *legibus solutus* and where, finally, the rules of coexistence have not been previously elaborated or recognized.

Today, countries that have a rigid Constitution, that is, those whose modification of its text can only be carried out by means of a procedure qualified as amendments, which obeys not only the form constitutionally provided for this purpose, as well as the matters that may be subject to this modification, adopt a true Constitutional State of Law, in which the Constitution, As a source of validity of all norms, it cannot be contradicted by legislation that is inferior to it. As an instrument for defending the constitutional hierarchy, there is the control of the constitutionality of laws.

Now, all States subject to International Criminal Law and to the judgment of the International Criminal Court will also be subject to the application of the principle of Legality and its logical connectives, so that individuals in the trial process are protected from the abuses that may arise from the Sovereignty of the judging States, aiming at the protection and perpetual maintenance of the dignity of the human person and human rights, basis of International Public Law.

Revista ARACÊ
ISSN: 2358-2472

REFERENCES

1. Accioly, H., & Casella, P. (2010). Manual de direito internacional público (18th ed.). São Paulo: Saraiva.

2. Beccaria, C. (2001). Dos delitos e das penas (6th reprint). São Paulo: Edipro.

3. Bernardes, M. di R. (2011). A importância para a humanidade do Tribunal Penal Internacional. Revista Intellector, 7(14). Available at: http://www.revistaintellector.cenegri.org.br Retrieved on September 5, 2019.

4. Brandão, R. C. S. (2006). Tribunal Penal Internacional: Uma nova realidade do Direito Penal Internacional para a garantia da segurança dos Direitos Humanos [Master's dissertation, Universidade Gama Filho]. Rio de Janeiro. Available at: http://www.dhnet.org.br Retrieved on August 28, 2019.

5. Convenção Americana sobre Direitos Humanos – CIDH. (1969). Pacto de São José da Costa Rica. Assinada na Conferência Especializada Interamericana sobre Direitos Humanos, San José, Costa Rica, em 22 de novembro de 1969.

6. Donnedieu de Vabres, H. F. A. (1929). La justice pénale d'aujourd'hui. [Publisher not specified].

7. Dotti, R. A. (1998). Bases e alternativas para o sistema de penas. Revista dos Tribunais.

8. Greco, R. (2008). Curso de direito penal: Parte geral, volume I, artigos 1º a 120 do Código Penal (10th ed., revised and updated). Niterói, RJ: Impetrus.

9. Hizume, G. C. (2007). Breves reflexões acerca da questão da cooperação jurídica no Tribunal Penal Internacional. In W. Menezes (Coord.), Estudos de direito internacional: Anais do 5º Congresso Brasileiro de Direito Internacional (Vol. X, pp. XX–XX). Curitiba: Juruá.

10. Husek, C. R. (2012). Curso de direito internacional público (11th ed.). São Paulo: LTr.

11. Larenz, K. (as cited in Ávila, H.). (2012). Teoria dos princípios (13th ed., revised and expanded). São Paulo: Malheiros.

12. Lewandowski, E. R. (2002). O Tribunal Penal Internacional: De uma cultura de impunidade para uma cultura de responsabilidade. Estudos Avançados, 16(45), 1–15.

13. Mazzuoli, V. de O. (2006). Coletânea de direito internacional (4th ed., expanded). São Paulo: RT.

14. Mazzuoli, V. de O. (2008). Curso de direito internacional público (3rd ed., revised, updated, and expanded). São Paulo: Revista dos Tribunais.

Revista ARACÊ
ISSN: 2358-2472

15. Mirabete, J. F., & Fabrini, R. (2011). Manual de direito penal: Parte geral, artigos 1º a 120 do Código Penal (27th ed., revised and updated). São Paulo: Atlas.

16. Nunes, R. (2009). O princípio constitucional da dignidade da pessoa humana: Doutrina e jurisprudência (2nd ed., revised and expanded). São Paulo: Saraiva.

17. Piovesan, F. (2007). Direitos humanos e justiça internacional (1st ed., 2nd printing). São Paulo: Saraiva.

18. Trindade, A. K. (2013, June 8). Raízes do garantismo e o pensamento de Luigi Ferrajoli. Diário de Classe. Available at: http://www.conjur.com.br/2013-jun-08/diario-classe-raizes-garantismopensamento-luigi-ferrajoli Retrieved on August 29, 2019.