CHAPTER FOUR

PRINCIPLES OF CRIMINAL RESPONSIBILITY: THE GENERAL PART¹

SECTION 1. INTRODUCTION

Generally speaking, the general part in most national criminal codifications is based on a theoretical scheme from which certain legal consequences follow. Even when such a scheme does not exist, a certain method is followed which determines the order and sequence of the legal provisions contained in the general part. The general part of national criminal law usually reflects certain values and policies that determine the requirements for criminal responsibility and the factors or conditions that exonerate a person from such responsibility. This is particularly evident with respect to vicarious criminal responsibility, responsibility for the conduct of another, group criminal responsibility, command responsibility, state responsibility, joint criminal enterprise, statute of limitations, as well as certain defenses and certain immunities.² The same is true with respect to the various types of mens rea required for different crimes of ICL.

Almost everything in the general part reflects legal policies and value-choices. However, these policies and choices are not evident with respect to ICL. The general part of ICL developed haphazardly, first in the context of the IMT and IMTFE, and later in the ICTY and ICTR statutes and their respective case law. The statutes of these four tribunals provide very little of a general part other than the elimination of immunities, the defense of obedience to superior orders, and the reaffirmation of the principle of command responsibility. It was left to the jurisprudence of these tribunals to provide, ex post facto, the elements of criminal responsibility and conditions of exoneration. Thus, everything from defining the required mental state to whether mistake of law or fact can be a defense was left to judicial determination after individuals had been indicted and prosecuted. By the standards of many legal systems, this violates the principle of nullum crimen sine lege.³

A particularity of ICL is its general lack of specificity when compared to domestic criminal provisions, whether, the definition of international crimes, the contents of a general part, the obligations to prosecute or extradite, and other aspects of international cooperation. For example, the connection in ICL

¹ This chapter is based in part on M. Cherif Bassiouni, Crimes Against Humanity: Historical Evolution and Contemporary Application (2011).
² See supra Chapter I.
³ See supra Chapter III, section 9.
between the accused and the applicable principles of criminal responsibility, which by Civilist-Germanic methodological standards should be part of the general part, is nonetheless dealt with as part of the overall *ratione personae* because ICL is not codified. These principles of criminal responsibility derive either from international treaties or from the jurisprudence of international criminal tribunals. The reason why there are so few provisions in ICL conventions relative to the general part is due to the flawed assumption that the general part of the domestic criminal law of each State Party will control once the convention is incorporated into the laws of the State Parties. This assumption was based on the idea that the general part of only the developed countries would apply—a number much smaller during early multi-national treaty negotiations. Among common law or Civilist systems there are differences that are overlooked by this assumption. Even within a domestic system ideas of the general part can differ. In the United States, for example, not all state courts uniformly apply the idea of general or specific intent.

The judicial process in the cases of the IMT, IMTFE, ICTY and ICTR was, for all practical purposes, an inductive judicial method of ascertaining and applying what they believe to be part of “general principles of law.” The term “intuitive” means that the judges in a given case, acting on the basis of their knowledge and individual research, reach a conclusion without following a method recognized in comparative criminal law technique. The haphazard nature of the process, however, did not necessarily exclude the reaching of correct outcomes consonant with what a proper methodology would have reached. But that also meant that the process was unpredictable and the outcomes not always consistent with a given theory of law. Each judge was made to rely on precedent and concepts native to their national systems and, in many cases, the information available in their native languages. The absence of pre-existing norms of the general part also meant that the prosecution was frequently uncertain as to what it had to prove, and the defense was equally uncertain as to its ability to challenge it, or to advance arguments for exoneration.

The Rome Statute sought to remedy this situation by providing articles on the general part in Part 3 of the Statute. Presumably, that codification represented general principles of criminal law, but the negotiating history of the Statute reveals that this was not the case, as it was in fact the outcome of political negotiations. Thus, many of the principles of criminal responsibility contained

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