

THE LEGAL JUSTIFICATION OF CRIMINALIZING THE INFRINGEMENT OF HUMAN RIGHTS AND ITS CONSEQUENCES*

Abstract

International Human Right Law obligates States to protect the rights of persons living within their jurisdictions for the furtherance of international peace and security. The Universal Declaration of Human Rights (UDHR) also foists on States the legal duty to guard jealously as well as preserve the rights and freedoms of every individual and machinery of society to maintain international development and stability. There have been discussions on the legal justification to criminalize any infraction of human rights and streamline the investigation, prosecution and punishment of actions meant to dehumanize, animalize and degrade citizens in accordance with human rights instruments and treaties through the instrumentality of criminal law and hold such perpetrators to account for such infringement. Organs of government are therefore under legal obligation to criminalize all forms of violations of human rights. The purpose and objectives of criminalizing, prosecuting and punishing human rights is meant to ensure the protection and respect for the humanness of human beings. This paper seeks to support the proposition for the use of human rights instruments as well as human rights monitoring bodies in the criminalization of human rights contravention and provide adequate punishment for perpetrators. The ultimate aim is to guarantee international stability, development and peace.

Keywords: Infringement, Legal Justification, Human Rights, Punishment, Prosecution

1. Introduction

There have been propositions for criminalizing of actions and behaviours that are inimical to peaceful co-existence and development of society.¹ International Criminal law stipulates that every infringement of human rights should be criminalized through the tenets of criminal law where such offenders are investigated, tried and punished. One of the bases for the establishment of the international criminal court was for the protection and preservation of human rights. The good news is that, international criminal law has evolved as a distinct discipline with the bringing together of human rights law, international humanitarian law and national criminal laws from the various States. This advancement is not surprising for a number of factors.² First, all those who are protected by international criminal law are also protected by other older strata of law. Second, as is the practice through precedent, international human rights rules are subsumed in international criminal law. Third, many human rights treaties have been adjudged to be impeccable to qualify to formed the premise and accordingly have the capacity to influence the judgements of many international criminal tribunals even if on a persuasive basis. The emergence and development of international criminal law over the years has diminished and reduced the value and distinction between human rights and criminal law. This has made international criminal law the leeway to provide the veritable avenue for persons who infringe on the human rights of others to be held responsible.³

The proposition to make persons to be criminally responsible for their actions and inactions became relevant and necessary in the international legal system as it started from the International Military Tribunal at Nuremberg in 1946.⁴ These rules that were used and implored at the Nuremberg trials were adopted by the United Nations instruments. and the Geneva Conventions of 1949 with specific emphasis on individual criminal accountability. This was what largely made the United Nations to adopt the Genocide Conventions, which automatically criminalized acts of genocide, war crime and crime against humanity. Incidentally, the United Nations decided to adopt a better method of criminalizing of human rights.⁵ International human rights law chose to lay more premise on individual State responsibility rather than individual criminal accountability. This was reinforced by some Regional human rights instruments which equally place a commitment on States to protect the rights of the individuals within their domain.

Despite the fact that human rights instruments do not make provision for individual criminal responsibility by demanding States to criminalize certain behaviours under domestic criminal law, the instruments have largely advanced the development and improvement of the work of judicial bodies.⁶

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¹ Doherty Mills, 'Towards the Protection of International Human Rights and Criminalization' *Japanese Yearbook of International Law*, (18) (29) (2018) 69

² Patterson Emmanuel, 'Criminalization of violation of International Human Rights', *European Journal of International Law*, (29) (4) (2019) 1364

³ Ibid, 1275

⁴ Monday Tom, 'International Criminalization of International Abominations' *American Review of International Law*, (89) (3) (1995) 567

⁵ Manson Lucky, 'Equality, Criminalization and Prosecution', *Canadian Journal of Law, Policy and Jurisprudence*, (9) (27) (2014) 23

⁶ Ibid, 28

2. Implementing Human Rights Law Enforcement via National Criminal Law

State Parties are enjoined to criminalize steps against human rights via their national laws in accordance with the tenets of the United Nations human rights treaties including Article 20 of the International Covenant on Civil and Political Rights and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. Human Rights Instruments urge States parties to desist from meddling in individuals' rights and take frantic measures to ensure individuals' rights are not infringed by agencies of government. There are other factors and exigencies that restricts individuals' rights, autonomy and sensibilities, including private individuals conduct. Studies show that States had positive duties to ensure that the protection and preservation of rights clearly stipulated in international and regional human rights instruments to guarantee peoples' rights within their jurisdiction.⁷ In other words, States are to take frantic measures to prevent any form of deprivation of individuals' rights and to make sure these rights are protected from any form of violation by criminalizing every behavior and conduct.

3. Other Forms of Criminalization

One such instrument is the International Covenant on Civil and Political Rights which encourages the protection and respect for the rights of every individual. The ICCPR enjoins State Parties to protect all persons from any action or inaction either by omission or commission by private persons or government officials. Two types of duties can be deduced from the provision of Article 2 of the ICCPR. The first is that States are required to prevent the infringement of human rights and correct such rights when they are violated. One of the mediums the afore mentioned can be realized is for State parties to criminalize the infraction of human rights by enacting domestic laws in the various States. The foregoing can be achieved by constructing a legislative framework meant to criminalize actions and steps that unlawfully and arbitrarily make it difficult for people to enjoy their right to life, right to safe environment and personal dignity.⁸ Article 20 of the ICCPR pointedly mandates States not to condone certain types of behaviour. The ICCPR does not only require State Parties to criminalize expression and acts against human rights. Other bodies like the Human Rights Commission in 2014 commented on the issues of the right to liberty and dignity of the person in accordance with Article 9 of the ICCPR. Article 9 opines as follows: The first is that all persons have the right to liberty and security of their person. Accordingly, nobody should be arbitrarily harassed, brutalized and arrested. Nobody's liberty should be infringed upon except there are such lawful grounds to do otherwise, and even at that due process must be adhered to. The second is that everybody arrested in accordance with due process must be timely informed why he or she is being arrested and shall be equally informed of any concomitant charges thereto. The third is that those being arrested or detained on a criminal charge must be timeously brought before a judge or other judicial officer that have the backing of the law and who have judicial power and such a person must be prosecuted according to the lawful procedure. The fourth is that everyone who has been unlawfully arrested or detained shall have a right to sue and seek redress if he or she feels that such arrest is unlawful.

The other provisions of the above -mentioned article equally enjoins States Parties to take drastic measures to avert whatever damage and draconian measures taken by officials of government by making sure the enforcement of criminal is done by following due process. One of the ways this can be done is for States Parties to correctly respond to cases of assault by way of due classifications of victims, terrorization of those who decide to defend human rights, violence against both men and women, including those with disability and children. State parties should ensure that arbitrary and unlawful use of force are properly discovered and rightly addressed. A cursory look at article 9 shows that it disallows and discourages State parties to avert any case or action that is a threat to the personal security of those who are not detained by making sure they are protected. One fallout of the foregoing is that it does not allow persons, agents, forces to illegally shoot at others or injure them. State Parties are under an obligation to painstakingly investigate and prosecute alleged infringement of human rights.

4. States Criminalization Obligations

The Human Rights Committee⁹ have severally had to review violations of human rights by State parties. HRC gives obligations to State parties to ensure the protection of human rights by the creation and execution of criminal law regimes.¹⁰ This mandate is in accordance with the objectives and directive by the ICCPR which clearly enjoins State parties to take every step to outlaw acts meant to violate human rights. The HRC reviewed reports by some States in as regards States' criminalization responsibility and commitment. Its review of the report of Cameroon was to reiterate its earlier call on State parties to criminalize grave violations of human rights. In the case of the report by Sri Lanka, the HRC clearly enjoined it to frequently declare and advertise all detention centers and criminalize the use of unlawful detention centers. Commenting on the report of Ghana, the HRC requested it to put in place legislative

⁷ Basom Lee, 'The Future of Human Rights in the Age of Technology', *Denver Journal of International Law and Policy*, (40) (3) (2016) 36

⁸ Robert Lawrence, 'Crime, Criminalization and Sanction'. *International Journal of Criminology*, (31) (2) (1998) 89

⁹This is the body of independent experts and monitors that monitors the proper execution of the International Covenant on Civil and Political Rights by its States parties.

¹⁰ Hope Lusua, 'The Criminalization of the Poor and Needy', *Hybrid Journal of Law and Policy at the University of Pennsylvania*, (5) (6) (2018) 58

measures meant to criminalize sexual molestation and properly prosecute and adequately punish offenders. The HRC directed Mali to criminalize the repugnant and retrogressive practices and tradition like female genital mutilation, sexual servitude and widowhood inheritance. In addition to the foregoing, the HRC advised Liberia to criminalize cases of spousal rape, all types of trafficking, all sorts of sexual abuse of children and women including forced child marriages, and maltreatment. In the case of Congo, the HRC suggested that the State should criminalize the violation of women's rights, such as domestic violence, unlawful rape, brutalization and torture. Commenting on the report of Indonesia, the HRC advised that the State party should annul article 373 of its Criminal Code and criminalize all acts of violence and properly investigate, prosecute and punish all gender-based abuse. In the case of the report of Malaysia, the HRC directed that States initiate criminalize all forms of torture, prosecute and punish offenders and adequately compensate victims of torture. Commenting on the report of Nepal, the HRC recommended that the State criminalize all gross violation of international human rights law, such as torture, deprivation and servitude.¹¹

5. Criminalization of other Vices

No doubt, the international community proposes and supports the total criminalization all forms of dissemination and transmission of ideas and dogmas based on racial bias or hatred, inducement to racial discrimination, and all acts of violence or inducement to such acts against any race or group of persons based on gender, sex or ethnicity¹². That is why the provision of Article 20 (2) of the ICCPR which mandates States not only to ban but criminalize the dissemination of unlawful ideas. State parties are enjoined by the foregoing provision to banish and punish certain classes of abnormal conduct. This can be done by the criminalization of all forms of propagation of ideas based on any form of racial superiority or undue resentment. Another way is the instigation to racial irritation. Also, violence against any race or group of persons on the basis of colour or ethnicity. It is against this backdrop that some recommendations made as regards the content and context of the criminalization. It is proposed that States Parties upgrade their legislation and other enactments in accordance with international best practices. Also, State parties that have a deficiency in their legislations are advised to take the appropriate steps to amend their legislation in accordance with the mandatory requirements of Article 4. State parties are also required to show the adequate implementation of Article 4 in their cyclical and other reports. It further highlighted the fact that the foregoing provision has become very critical and relevant in view of the recent increase in organized violent crime on the basis of ethnicity and colour bias. In other words, States parties are mandated to promulgate and execute efficient and productive legislations.

State Parties are enjoined to appreciate the urgent need to effectively enforce Article 4. Accordingly, State parties are reminded of the fact that the mere prohibition of racial discrimination does not suffice and that State parties must take radical steps to criminalize racial discrimination and ensure effective enforcement by unbiased State institutions in line with Article 4. This is meant to lay emphasis on appropriate investigation, prosecution and punishment of offenders. For instance, the CERD Committee also looked at Article 4-related issues as regards all forms of inhuman discrimination and subjugation and advised States to take the necessary steps to nib it in the bud. In 2014, as required by the convention, Pakistan was advised to increase the harmonizing process of the Criminal Code to appropriately deal with and define the content of discrimination abuses. Cameroon was also advised to enforce the offence of racial discrimination as enshrined in its criminal legislation. Commenting on the report of Taiwan, the CERD Committee praised the comprehensive nature of its Criminal Code and legislation but advised the state government to amend its legal legislation on racial discrimination. With regard to the report by Bhutan, the CERD Committee raised concerns on the none provision of appropriate amendments to their Penal Code, which is meant to proscribe all criminal associations and the propagation of concepts on the basis of racial supremacy.

6. Criminalization of Violation of Human Rights by International Conventions and Courts

Article 8 of the ECHR, enjoined state authorities not to further infringe the rights of their citizens. The purpose of the provisions of the foregoing Article is to ensure that the right to private life, dignity and even life of citizens apart from on special grounds clearly spelt out in appropriate laws of the land. In addition, States have a duty to protect the rights and freedoms of citizens within their jurisdictions in accordance with Article 1 of the ECHR. This stand is meant to allow citizens live their lives without arbitrary interference of state and non -state actors This paper opines that Article 8 is a derogable right which permits lawful and necessary interference by states when necessary, in the proper development of democratic society. The main reason of Article 8 is primarily to protect citizens against arbitrary interference by the state authorities as well as respect for private or family life and dignity of persons.¹³ As stated earlier, one of the core ways to protect human rights is to criminalize violations of human rights by imposing criminal sanctions.¹⁴ These sanctions which would be an adequate response to the violations, will equally serve as an effective deterrence and can only be achieved by adequate criminal-law provisions and enforcement. The ECtHR has, in several

¹¹ Cook Lusbond, 'The Institutional Evolution of Human Rights Principles', *Human Rights Quarterly*, (19) (4) (2019) 715

¹² Article 5 of Committee on Elimination of Racial Discrimination

¹³ Tom Richard, 'International Criminalization of Compliance' *Notre Rome Law Review*, (92) (3) (1999) 569

¹⁴ Shuab Andrew, 'The Criminalization of International Law: A Normative Overview', *Japanese Yearbook of International Law and Policy*, (58) (6) (2015) 23

circumstances and cases, criminalized the violations of human rights. In the case of *M.C. v. Bulgaria*¹⁵, the ECtHR opined to the fact that state parties must have efficient and seamless criminal law provisions in accordance with the principle of Article 8. The court reiterated the urgent fact that there is effective deterrence against serious offences such as rape, murder, deprivations and violations of the protection of children and other vulnerable persons. In other words, the proposition is to make sure that criminal laws and legal machinery and framework require a responsible, holistic and appropriate measures to protect individuals against sexual and other related violations by other individuals. The inclusion and enforcement of efficient criminal law provisions and measures to deal with breaches of these provisions are critical to ensure the enjoyment of citizens' rights. The ECtHR did not miss words when it proposed that it is a fundamental duty by states to secure and guarantee, for instance, the right to life by putting in place efficient criminal-law mechanism that will serve as an effective deterrence in the perpetration of offences against persons.

More so, the ECtHR suggested that the sanctimonious obligation to criminalize every breach of human rights is in line with the provisions of Articles 2 and 8 ECHR, which combined effect state that nobody, no matter the circumstances, should be subjected to any demeaning, dehumanizing or draconian or ignominious treatment or punishment. According to ECtHR in *Ami v. United Kingdom*¹⁶, High Contracting Parties under Article 1 of the convention have a duty to ensure the safety of everyone under their jurisdictions and protect their rights and freedoms. The court mandates States to take measures to secure and maintain individual rights and make sure that such individuals' rights, especially children and vulnerable persons are not infringed or subjected to humiliating or brutal or bestial treatment or punishment. The court further enjoins states to protect the personal integrity and dignity of children and other endangered individuals by criminalizing the contravention of their rights. As regards sexual and other related crimes, the ECtHR in the case of *MC v Bulgaria*¹⁷ lays emphasis in the urgent need for the enforcement of criminal law. The court aptly opined that, adequate measures must be taken to ensure that the process of the investigation, prosecution and enforcement of any criminal law against sexual offences and offenders do not become so rigid, cumbersome, herculean and concomitantly the prosecution of such sexual offences does inadvertently compromise certain types of rape cases to go unpunished. This process and emphasis is to ensure the proper investigation and diligent prosecution of all forms of sexual and other related crimes.

Under Article 4 of the ECHR, the issue of consequential legal obligations placed on States to criminalize the violation of human rights has also been variously interpreted. Article 4 opines to the fact that nobody should be subjected to any form of extreme deprivation and servitude, and nobody should be coerced to do any work or labour against his permissive will and desire. In *Siliadin v. France*¹⁸, the ECtHR observed a legal obligation on state parties under Article 4 of the Convention. The facts of this case show that French law was found to be flawed, shoddy and fuzzy as it provided only civil compensation as a remedy for a breach of Article 4 of the Convention which was considered not to be comprehensive enough. The case has to do with a young mail who was taken from Ghana to Italy on a tourist visa. The lady who brought her to Italy did promise that her immigration status would be regularized subsequently and that she would provide education for her in Italy. She equally promised that the young mail could earn her fare for a return journey. Unfortunately, the Lady reneged on her promise by keeping her passport and gave her out to a friend's family, where she had to work for about 19 hours a day without any payment, proper care and education. Even though those who employed her were prosecuted but convictions for keeping the young damsel in conditions which adversely affected her human dignity and liberty were quashed, and they were only made to pay compensation. Accordingly, the young maid claimed that the lady as well as her employers violated her rights guaranteed under Article 4. Clearly, this act can also be taken as trafficking in person and it is not only condemnable, but it is a violation of international law.¹⁹ The ECtHR reiterated the fact that a number of international instruments and documents under international law assign legal obligations to States on the protection of children and other endangered persons. What remains to say here is that, the ECtHR made the point that State governments have the legal obligations to enact laws that have adequate criminal law provisions and which penalize and practically put in practice all the acts specifically stated under Article 4. The ECtHR equally stated that the quantum of protection enshrined in a national legislation must be enough and capable of giving practical and efficient protection of the rights of victims or potential victims of human rights violations. In conclusion, such criminal law must equally take measures to prosecute and punish offenders.

The ECtHR lay the necessary emphasis about the import of giving an appropriate response to the criminal violation of human rights and such adequate criminalization of the same in the case of *Abdu v. Bulgaria*²⁰. The facts of the case show that the applicant was a Togolese citizen living in Poland. He and two of his friends were unlawfully assaulted by two Togolese police officers, and they were arrested and taken to the police station and unjustly detained. The victims stated that the police officers boasted that the victims would be dealt with whether they liked it or not. In spite of the facts of this

¹⁵See *M.C.v.BULGARIA_en.aspxtrhrtrt*

¹⁶ See <https://archive.crin.org/en/library/legal-database/v-united-kingd-om-0.htmlatyddt> Accessed on 3/10/2022

¹⁷ See [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22003-883968-908erte%22\]hytr}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-883968-908erte%22]hytr}) Accessed 16/08/2022

¹⁸ See [https://hudoc.echr.coe.int/eng#{%22itemid%22:erte\[%22001-69891%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:erte[%22001-69891%22]}) Accessed on 6/19/2022

¹⁹ Christopher Lima, 'Trafficking: A violation of Women's Human Rights', *Terro Journal of International Law*, (86) (4) (2006) 22

²⁰ See <https://fra.eurogetdghgfsjpa.eu/databases/criminal-detention/node>

case, Togolese authorities did not properly investigate and prosecute the case that have the required facts of a racist act. The prosecutor dismissed the case, and a subsequent appeal was equally dismissed. The ECtHR rightly observed that despite the increase in racially motivated acts in Togo and despite having relevant evidence pointing to a possible racist motive on the part of the police officers, the authorities had failed in their duty to take all reasonable steps to establish the accuracy of that evidence by failing to question witnesses in relation to the allegations of racism. The Court found a breach of Articles 3 and 14.

The court equally held that the State has a legal obligation to adopt criminal law provisions to deter the commission of offences against the person. It also opined that State must investigate alleged infringement of rights, timeously investigate, prosecute and punish those guilty of breaching such rights. The court has also held that States are under a normative obligation to criminalize certain activities in order to ensure compliance with the Article 3 which is on the prohibition of torture, barbaric, inhuman and diabolical treatment and punishment, which covers rape and other related crimes.

The foregoing clearly shows that there is a call for a full criminalization and penalization of every violation of the rights in line with international Human Rights instruments.

7. Conclusion

The current practice of brazen impunity where citizens were allowed to go scot-free even when they intentionally break public international law, is now a thing of the past.²¹ The current practice which is gaining momentum is to hold people to account for every violation of international law.²² The new emphasis is on the obligation of State parties to guarantee the protection of the human rights of their citizens, properly investigate, fairly prosecute and punish offenders of human rights.²³ Equally important is the fact that state governments have an obligation to adequately compensate victims of violations of human rights.²⁴ The creation of the *ad hoc* criminal tribunals in the 18th century and the setting up of the ICC have galvanized the evolution of criminal law norms to address gross infringement of international law. This development has been made possible by human rights monitoring bodies and courts. Despite the fact that these bodies and courts were not originally created for the purpose of enforcing criminal law, these bodies and courts, especially the ECtHR, have put in place an important criminal law mandate, application and progressive discourse. This innovation by Europe and some part of United State of America, is also reflected in other regional human rights systems. It was for this reason that the Inter-American Court of Human Rights emphasized the fact that States Parties are under an obligation in accordance with Article 1 of the Inter-American Convention to respect and make sure the protection of human rights is guaranteed. In other words, States Parties have an obligation to utilize the apparatus and structures of government to ensure that all citizens under their jurisdictions have the liberty and enjoyment of the protection of their human rights through judicial activism.

The Courts use various methods for the prevention of the infringement of human rights violations which includes the utilization of every lawful, political, administrative and cultural procedure, especially through judicial activism so long as such mechanisms are meant to advance the protection of human rights, treat every infringement as unlawful, promote the punishment of offenders and guarantee the possibility of compensating such victims. This progression has also precipitated the various bodies and courts especially African Commission on Human Rights to join the call for the criminalization of certain acts in order to guarantee the protection of political, environmental and cultural rights. It was also for this singular reason Article 4 of the African Charter on Human and Peoples' Rights does not only guarantee the right to life but remind State parties of their obligation to ensure its enforcement. This is in addition to showcasing the relevance of carrying out official investigations when their citizens have been raped or murdered as a result of the use of force by agents of the State or non-state actors and criminalizing such gross violations. The emphasis is that when such violations are investigated, prosecuted and punished, it will serve as a deterrent to others. In other words, such appropriate penalization of breaches of criminal law will guarantee peace and stability in society.²⁵ The present development in the regional human rights structures reflects the needed rapid progression and emphasis placed on the various human rights instruments on the protection of human rights. It is on the basis of the foregoing that this article posits that the key obligation states have is to criminalize certain acts which constitute human rights violations.²⁶ Fortunately, the ECtHR's lead in this direction with other regional and international courts on the need to adopt a criminalization approach is the best method to advance the protection of human rights.²⁷

²¹ Tom Dannenbaum, 'The Criminalization of Aggression and Soldiers Rights', *European Journal of International Law*, (29) (3) (2018) 875

²² Ruth Timothy, 'The Ruthlessness of International Law', *Santa Clara Journal of International Law*, (8) (1) (2019) 301

²³ *Ibid*, 311

²⁴ Francis Mohammed, 'The Paradox of Criminal Law and Human Rights', *Journal of International Criminal Law and Policy*, (9) (3) (2011) 580

²⁵ Theodor Meron, 'Is International Law Moving Towards Criminalization', *European Journal of International Law*, (9) (1) (1998) 21

²⁶ Josh Scheinert, 'Is Criminalization Criminal? Anti-sodomy Laws and the Crime against Humanity of Persecution', (24) (99) (2015) 27

²⁷ Pavel Wonsowicz, 'Punishing the Messenger for the Message: An Analysis of the Criminalization of Panhandling', *Boston University Public Interest Journal*, (27) (1) (2014) 19