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International Human Rights Law and 'Criminalization'

Japanese Yearbook of International Law Vol 58 (2015), 45-70
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International human rights law places obligations on States to protect the rights of the individuals within their jurisdiction. The Universal Declaration of Human Rights (UDHR) states that it is 'a common standard of achievement for all peoples and all nations', and places an obligation on every individual and societal organ 'to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their individual and effective recognition and observance.' Over the last number of years, human rights monitoring bodies have been increasingly placing positive obligations on States to ensure compliance with human rights instruments by utilising domestic criminal law to criminalise certain types of behaviour, to investigate criminal behaviour and to prosecute and punish private individuals' conduct which is not in line with the rights set out in the human rights instruments. The use of domestic criminal law to help in the enforcement of international human rights obligations is an interesting one because, as Bantekas states: '[c]riminalization (and punishment) is not an aim within itself, but is a necessary ingredient for the primary aim, which is the protection of human beings.'

This article analyses how human rights treaties and human rights monitoring bodies have progressively embraced a criminal law approach with regard to ensuring the protection of international human rights norms. After a brief discussion of the historic relationship of international human rights law and international criminal law the piece focuses on provisions of human rights treaties which contain an obligation to criminalise, in particular Articles 9 and 20 of the International Covenant on Civil and Political Rights (ICCPR) and Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD). This section also addresses how UN human rights monitoring bodies have interpreted these provisions and how UN treaty bodies have encouraged States to adopt criminal sanctions in order to protect human rights. The article also reviews developments within the Council of Europe system, examining the provisions of the European Convention of Human Rights (ECHR) which require States Parties to prohibit certain types of behaviour in order to protect human rights as well as the expansive approach to a criminalization requirement taken by the European Court of Human Rights (ECtHR).

Positive Obligations Doctrine

This doctrine dictates that States have positive obligations to ensure the enjoyment of rights enshrined in international and regional human rights treaties for people within their jurisdiction. Shue argued in 1980 that every basic right has three corollary duties: to avoid depriving, to protect from deprivation and to aid the deprived. This thinking was further developed and conceived by Eide as the duties to respect, to protect and fulfil. This tripartite categorisation has now been accepted widely by human rights bodies and domestic law regimes and the positive obligations principle is echoed in regional human rights treaties. This doctrine, in some instances, requires States to prohibit, and indeed to criminalise, certain behaviours within their jurisdiction in order to respect, protect and fulfil human rights.

Provisions and Jurisprudence Analysed

ICCPR

Provisions: Article 9, Article 20,

Jurisprudence: *Chongwe v Zambia*, Communication No 821/1998, 25 October 2000, *Sundara Arachchige Lalith Rajapakse v Sri Lanka*, Communication No 1250/2004, 4 September 2006

CERD

Provisions: Article 4

Jurisprudence: *Gelle v Denmark,* Communication No 34/2004, 6 March 2006, *Dawas v Shava v Denmark*, Communication No 46/2009, 6 March 2012

ECHR

Provisions: Article 2, Article3, Article 4, Article 8

Jurisprudence: *X and Y v The Netherlands* (1986) 8 EHRR 235, *MC v Bulgaria* (2005) 40 EHRR 459, *Osman v United Kingdom* (2000) 29 EHRR 245, *Siliadin v France* (2006) 43 EHRR 16, *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, *Nachova and Others v Bulgaria*, (2006) 42 EHRR 43, *Šečić v Croatia*, Application No 40116/2002, judgment 31 May 2007, *Abdu v Bulgaria*, Application No 26827/08, judgment 11 March 2014

Conclusion

Increasingly, public international law has focused on victims and numerous attempts have been made to address the previously pervasive culture of impunity whereby there was a lack of accountability for violations of international law. The establishment of the *ad hoc* criminal tribunals in the 1990s and the creation of the ICC have engendered the development of criminal law principles to address serious violations of international law. This emphasis on criminal law has now been furthered by human rights monitoring bodies and courts. While not established for the purpose of implementing criminal law, these bodies and courts, especially the ECtHR, have carved out a significant criminal law mandate, requiring States to adopt criminal law legislation and to prosecute alleged wrongdoers. However, this development is not unproblematic as it is propelling a movement from 'human rights by persuasion' to 'human rights by coercion'.

About the Authors

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Japanese Yearbook of International Law

The Japanese Yearbook of International Law is published by the Japanese Branch of the International Law Association (http://www.ila-hq.org/), which was established in 1920. This volume of the Yearbook focused on "Criminalization" of International Law'.

References

TextPreamble, Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A (III).

Ilias Bantekas, "Individual Responsibility and the Evolving Status of the Physical Person in International Human Rights Law" in Mashood A Baderin and Manisuli Ssenyonjo eds., *International Human Rights Law: Six Decades after the Universal Declaration of Human Rights and Beyond* (2010), pp. 431-443, p. 438.

Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 U.N.T.S. 222.

Henry Shue, *Subsistence, Affluence, and US Foreign Policy* (1980), p. 52.

Asbjørn Eide, "Final Report on the Right to Adequate Food as a Human Right", UN Doc E/CN.4/Sub.2/1987/23 and Martin Scheinin, "Economic, Social and Cultural Rights as Legal Rights", in Asbjørn Eide *et al* eds., *Economic, Social, Cultural Rights: A Textbook* (1995), pp. 41-62.

Article 1(1) European Convention on Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5; Article 1(1) American Convention on Human Rights, 22 November 1969. See also *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, Communication No. 74/92 (1995) (2000) AHRLR 66 (ACHPR 1995).

Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, (2012), pp. 117-122.

Ramesh Thakur and Peter Malcontent eds. *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (2004).

Alexandra Huneeus, "International Criminal Law by other means: The Quasi-Criminal Jurisdiction of the Human Rights Courts", *American Journal of International Law*, Vol. 107 (2013), pp. 1-44.

John Tobin, "Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation", *Harvard Human Rights Journal*, Vol. 23