REVIEWING THE PUNISHMENT FOR CRIMES AGAINST HUMANITY AND WAR CRIMES

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Abstract

The punishments for crime against humanity and war crime differ from jurisdiction to jurisdiction. The reasons for this phenomenal legal system also differ from jurisdiction to jurisdiction. This paper seeks to analyze the issue of this kind of structured penalties for crimes against humanity and war crimes and advance the argument that penalties for crimes against humanity should be more grave and drastic than war crimes. This is in contradistinction to the present position where the penalties meted out for crime against humanity and war crimes are the same. One reason why the present approach is being used is that there seems to be no generally accepted blueprint and guideline to determine different levels of sentencing for war crimes and crimes against humanity. Even though the contextual elements of the war crimes and crimes against humanity are largely interwoven and analogous, crimes against humanity and war crime are not the same and should not carry the same minimum or maximum penalties. This paper seeks to recommend that the international community needs to adopt an index to increase the punishment for crimes against humanity more than war crimes. Crime against humanity has a motivation with a heinous mind to commit homicide. This is usually followed by loss of lives, massive injury, or property being destroyed. It is not in doubt that crime against humanity is committed both during war and peace times.

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1. Introduction

This paper calls for a review in the quantum of punishment meted out for the perpetration of crime against humanity and war crime.[1]The penalties meted out to persons who commit offences such as murder, rape, torture etc. when they are committed as a crime against humanity should not be same when identical offences like murder, rape, torture etc, are committed as a war crime.[2] This proposition is based on some form of discriminatory and non-discriminatory sentencing index as well as the concomitant correlative and comparative weight attached to the two set of crimes.[3]

At the moment the seeming way penalties are imposed based on the relative and subjective consequence of the sets of crimes is prickly and problematical.[4] Some people question the rationale why crimes against humanity and war crimes are being penalized differently with varied categories and measure.[5]The expected response is that these crimes depict and reflect the most serious infringement of the rights of man known to humanity.[6]

This paper submits that crimes against humanity and war crimes are not the same in their ability to destroy or even in their contextual

[1]Churson Bomson, 'Crime and Punishment' *Gimson International Criminal Law Journal*, (2014) (4) (6) 25

[2]WaysaTony, 'Fighting Unjustied Wars'. *Climky International Law Journal*, (2008) (29) (8) 67

[3]Bush Clinton, 'War Crimes in International Law' *International Criminal Justice Journal*, (2011) (5) (3) 66

[4] Williams Strawson, 'Prevention of Crimes Against Humanity', *Journal of International Criminal Law and Policy*, (2013) (8) (6) 28

[5]Thompson Wilson, 'Substituting Crimes Against Humanity with War Crimes' *Columbia International Law Journal*, (2011) (8) (6) 29

[6] Michael Dickson,The Law of Wars' *Collins International Law Review*, (2015) (8) (5) 23

gravity and should not carry the same penalties.[7] The fact is that both categories of international crimes reflect and characterize contrasting standardization and pennon. This can be seen in their different historical originations.[8] In other words, as expected, war crimes are historically based upon the way combatants conduct themselves in times of war. One way to determine culpability, therefore, has to do with an evaluation as to whether or not acts done by warriors or fighters during the period of war, were in line with such principles like appropriateness, essentiality, self-defence, etc. In contradistinction, crimes against humanity are clearly more drastic and demeaning crimes than war crimes. One case that readily comes to mind is that of Hitler's persecution of some Jews before and during the Second World War.[9]The seemingly difficult thing has been how to translate the aforementioned differences in value and context between the two sets of crimes into a sentencing framework which is outside the scope of this paper. [10]However, suffice it to say that the solution to this difficulty is not far-fetched.

Moreso, it needs to be noted that even in domestic law there is a problem of translating differences in value between crimes in their sentencing architecture.[11] That is why for example, the punishment for the offence of murder is more than the offence of theft since it involves taking someone's life. That is how crimes against humanity and war crimes should be considered, measured and prosecuted.
The point is that war is not just about carrying out an attack, but it usually does have a relationship with an armed conflict.[12]For instance,

[7]David Lucky, 'The tenets of War Crimes' *African Journal of International Law and Policy*, (2012) (4) (6) 34
[8] Charles Membere, 'The Components of crime against Humanity', *American International Law Journa*l, (2012) (9) (2) 12
[9]DanielDuggy'The Correlation of Human Rights and Humanitarian Law', *Hague International Law Journal*, (2015) (3) (6) 39
[10]Mccormacky, Harry,International Approach towards Law of War Crimes: *Kluwer International Law Journal* (2011) (6) (4) 44
[11] Green Timothy, 'Analyzing Group Rightsand Crimes Against Humanity', *Klivin International Law Journal* ,(2011) (5) (3) 64
[12] Davidson Mark, 'Prevention of Crimes against Humanity', *Pennsylvania Journal of International Law and Policy*, (2012) (3) (3) 70

article five of the statute of the international criminal tribunal for the former Yugoslavia identifies a direct relationship between crimes against humanity and armed conflict. However, this kind of relationship cannot be found in the provisions of Article three of the statute of the international criminal tribunal for Rwanda or Article seven of the Rome statute. The ICTY decision in the case of *The Prosecutor v Jean-Paul Akayesu*[13]specifically states that an attack may not be violent in nature. This kind of attacks which includes but not limiting putting some kind of pressure on a group of people to act in a particular way, may come under the way an attack is described, if it is done on a massive scale or in a methodical manner. This puts the way an attack is defined and talked about in a state of ambivalence and equivocation. Recall that, when the Rome Statute was being crafted, some delegates to that conference made frantic efforts to substitute the word 'attack' with the word 'widespread or systemic commission of such acts. Suffice it to say that one way an attack is discussed can be easily seen in the provisions of article 7(2)(a) of the Rome statute and is generally taken and considered to be a particular way which involves the manner such acts are committed many times.

It is still a matter of debate whether the components of an attack are necessarily violent.[14] It has been argued that crimes against humanity would be undermined if non-violent acts are incorporated.[15] This is likely to make the definition overly hazy.[16] The concept of an attack should be seen much more than just structure of subjugation or dominance.[17]

2:0 Analyzing two Methods of Sentencing

[13]The Accused, Jean-Paul Akayesu, was the mayor of Taba, Rwanda.

[14] Dicks Harrison, 'Measurements of Crimes and Punishment' *Journal of Crimes and Criminology*, (2018) (7) (9) 66

[15]Ramsome Hitler, 'The concepts of Violent and Non Violent Components of Crimes' *Higgins Journal of International Law*, (2012) (3) (2) 39

[16] Festus Goddie, 'The Modern trends about War Crimes' *Klimson Journal of International Law*, (2017) (5) (7) 26

[17] Ibid, 53

This part of the paper will in passing consider the concepts of discriminatory motive v. non-discriminatory motive method of sentencing and compare it with the widespread and systematic attacks v. isolated acts methods of sentencing.

2:1 The Partisan Motive methods

The concept of the Partisan motive method[18] is a method which draws a line between illiberal and intolerant persons who take advantage of the disorderly and topsy turvy atmosphere in armed conflict situations, to actualize their plans and objectives, by committing exceptionally atrocious and degrading inhuman acts. The other group includes persons whose offences were merely a byproduct of their being infected bythe violence around them. It is this core distinction that underscores the argument in this paper that persons who commit offences that bother on crimes against humanity on the basis of a discriminatory motive should be made to face greater punishment than offences that bother on war crimes.[19]This method is also supported by the international customary law which suggests that crimes that are most destructive to public safety, public health and public happiness should be most severely punished among different kinds of crimes.[20]This was the reasoning in the U.S. court in the case of *Wisconsin v Todd Mitchel*[21], where the court justified the increase in the penalty for crimes committed with a discriminatory motive to serve as a deterrent to others.

Similarly, a structure of the enhancement of the varied gravity of penalty for crimes committed on the basis of a partisan motive method is recognized and applied under international criminal legal system which generally made a number of propositions as follows[22]. First,

[18]Olaoluwa Olusanya, 'Do crimes against humanity deserve a higher sentence', Hopkins International Criminal Law Journal, (2004) (5) (3) 31

[19]Loannis Kelmos, 'Penal Crimes against Humanity', *Mellowe Journal of International Law*, (2015) (12)(1)17

[20] Bing Jian, 'The Incongruous concepts of War Crimes and other Related Crimes in International Criminal Law' *Bedford International Law Journal*, (2011)(6) (2) 34

[21]08 U.S. 476 (1993)

[22] Clarkson Brisk, 'Appraisal of Crimes and Punishments' *Icomy International Criminal Law Journal*, (2017) (2) (3) 89

assuming the matter being talked about has to do with a crime that is based on some kind of hatred or about a situation where the victim is seen as vulnerable and defenceless, the court in passing its sentence can determine or consider whether it will look at the issue of intentionally selecting any victim or any property as the object or basis of the offence in its analysis of conviction. And when the court now decides the issues on the basis of real situations or on extraneous factors like blood ties, colour, religious beliefs, gender, disability, or sexual orientation of any person, such punishment may be increased by four levels. Second, assuming the person being accused is taken to have known that a victim of the offence was a vulnerable person, such punishment may be increased by three levels. There are some criminal law jurisdictions that have equally adopted this method that use evidence of a structure of penalty-enhancement for crimes committed on the basis of a partisan motive method.

The United Kingdom is a good example of where the country's crime and disorder act impose more drastic penalties for offences committed with a partisan motive and intent. One way to showcase how these methods work is with the aid of the offence of assault and such related offences. The Understanding is that, the offence of assault is divided into many forms and dimensions with racial induced tendencies. The latter is prosecuted and ultimately punished more severely than the former because of its perceived greater individual and societal harm such perpetration can cause to the society. This example is simply meant to show here that the punishments for certain types of crimes should carry more weight than others. This is not to say that the other crimes that carry less punishment are less detrimental to the peace and development of such a society.[23]

Countries like Portugal and Norway also recognize penalty enhancements for crimes committed on the basis of a partisan motive method. In the case of Portugal, section 132 of its criminal code provides that the gravity and intensity of the punishment shall be increased if the motivation and intention is the killing of a person on the basis of where he comes from, colour, national or religious

[23]Shaner Darcy, 'Prosecuting the war crime of collective punishment', *International Criminal Journal*, (2011)(8) (1) 36

inclination, the offender shall be sentenced to imprisonment from 17 to 27years as punishment. In the case of Norway, its penal code was restructured and modified to ensure that the courts should take into consideration of cases of racial discrimination as they set up higher sentences of imprisonment for crimes of coercion,[24] threats or intimidation[25] including other offences that bother on a person's life, body and health[26] and acts of unlawful destruction or damage of public or private property. It needs to be noted that the higher sentences for the above crimes are meant to bring about a crime-free society and promote its peace and development. This is in line with best global practices.

There is also an exhibit and proof of identification and realization of penalty enhancements for crimes which are committed based on a partisan motive method at the regional levels. For instance, article eight of the European Union proposal for a council framework stipulates that article eight bothers on racist and xenophobic motivation and enjoins member states to ensure that racist stimulation and inclination may be considered as circumstances that may aggravate in the determination of the penalty for offences other than those referred to in articles four and five.

It is noteworthy to mention here that, for instance, several scholars have accepted the argument that when people are prosecuted on the basis of crime against humanity is more drastic than war crimes based on the compulsory requirement of intent. It is however problematic and hazy on how to structure the postulated nuances as regards the varied classifications of international crimes into the context of international criminal law. For example, this proposition is evident in the landmark set of celebrated statements made by the ICTY in the *Blaskic*[27] case where the trial court takes note of the ethnic and religious coloration that were imputed to the victims which was inimical to their disposition and wellbeing. In consequence, the

[24]Aina Bottom, 'Analyzing Crime and Punishment,' *Klimo Journal of International Criminal Law*, (2011) (7) (5) 34
[25]*Ibid*, 41
[26]*Ibid*, 45
[27] supra, paragraph 6

violations are to be analyzed as persecution which, in itself, suggests a greater penalty which equally justifies the higher punishment.

The above only goes to show that neither the statute nor the rules lay down expressly a scale of punishment applicable to the crimes which comes under the jurisdiction of the court. Article twenty four sub section two of the statute draws no distinction between the gravity of crimes when determining the appropriate punishments. The Trial court gives different types of punishments depending on the gravity of the offence, the maximum being life imprisonment. This is in line with sub-rule 101(A) of the Rules. The understanding is that the provision of section 10 of the aforementioned law does not preclude the passing of a single punishment for several crimes. As regards the foregoing, the Trial chamber takes note that despite the fact the ICTY trial chambers before now have rendered decisions imposing varied punishments, other Chambers of the ICTR imposed single dimension punishments in other cases it previously dealt with.

The foregoing clearly throws up the problem of how to streamline the varied postulations as regards the gravity and magnitude that exist between any form of prosecution as a crime against humanity and war crimes in line with the tenets of international criminal law. Finally, it is the resolution of this problem that the later part of this paper focuses on.

3. A Systematic wide spread attacks v. Isolated acts method

A brief mention of the above method even in passing is instructive and necessary. The issue of a systematic wide spread attacks v. isolated acts method is not the focal point of this paper and that is why it will attract only a brief comment. This method's emphasis is based on attempts to characterize crimes against humanity as crimes that involve or hover around premeditated attacks on a higher proportion. While war crimes are scaled as crimes that entail isolated attacks based on smaller proportion. The general conclusion, therefore, is that the former category of international crimes should attract a higher punishment.[28]

[28] Pearl Johnson, 'The Nuances of War Crime and Crime against humanity' Malian International Criminal Law Journal, (2018) (5) (3) 48

Suffice it to say that this method failed to attract common support amongst the scholars. This is in addition to the fact that this method has also been criticized as being too artificial and hazy. This criticism is based on the fact that the elements used to distinguish between crimes against humanity and war crimes for purposes of imposing punishments are questionable and problematic.[29] The point is that it is more problematical and complex to award punishments for crimes against humanity and war crimes based on penalties awarded for similar offences under other international penal codes rather than to invent a new penalty index that does not explain but rather serves a thorny notation.[30]

4. The Same Interest Method

The same interest method is also not the focal point of this paper therefore will only attract brief mention here. This method is premised on the presupposition that offenses like murder, torture, sexual assault, etc, under national laws are on the same pedestal with their international criminal law counterparts.[31] This method draws strength from international criminal law and other criminal legal instruments which in their appropriate provisions stipulate punishments for different categories of offences. Some legal instruments stipulate that punishments for some offences shall be limited to imprisonment only. In determining the terms of imprisonment, the gravity of the offence is usually considered. When higher sentences are to be imposed, the relevant legal provisions should take into consideration and apply such factors and elements as the gravity of the offence and the personal circumstances of the person so convicted. In addition to imprisonment, the laws may order that any property taken be returned and proceeds acquired unlawfully by criminal conduct, including by means of duress be given back to those who legally own them.

[29] Jonathan Clement, 'Dissecting War Crimes' Falem Journal of Law, (2015) (6) (3) 69
[30] Ibid, 29
[31] Godson Stawson, 'The Purposes of Criminal Punishments' *Markson Journal of Criminal Law*, (2017) (6) (4) 83

The foregoing discourse has been interpreted as creating the way for extending punishments to offences such as murder, rape, torture, under our various criminal laws. There are usually mitigating and aggravating circumstances within such laws. For instance, a person who is convicted may be sentenced to term of imprisonment which may include the remainder of the convicted person's life span. In other to determine the sentence appropriately, it is important to take into consideration the factors and ingredients such as any specific aggravating circumstances contained therein. It is also important to consider other extraneous mitigating circumstances including the substantial cooperation by the person so convicted before or after such conviction.[32] Furthermore, the general practice regarding prison sentences needs to be taken seriously. All these circumstances are to ensure that the extent to which any punishment imposed by a court of competent jurisdiction in any State on the convicted person for the one and the same act has already been served. Some criminal law instruments stipulate that concession shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his capitulation or arrest. This practice has been accepted as global best practices.[33] The critical point being made is that the punishments for offences such as murder, rape, torture, etc. under our national laws, should be awarded the same punishments as murder, rape, torture, etc. under international criminal laws. The foregoing propositions are generally problematic because of their complexity and retrogression.

The major flaw and enfeeblement of this approach is that it weakens the contrast that exists between the respective criminal intention for war crimes and crimes against humanity. It is trite that criminal intention as well as a motive in criminal law is compulsory in prosecuting offenders in all states' jurisdictions.[34]This was also the thinking of many scholars who allude to the fact that the dividing line

[32] Kennedy Luke, 'Advancing the Concepts of Criminal Law and Punishments' *Hopps Journal of Criminal Law,* (2012) (3) (7) 27

[33] *Ibid*, 57

[34] Cameroon Lymani, 'The Legal consequences of Crimes against Humanity', *Canadian International Criminal Law Journal*, (2013)(8)(1) 54

between many warring parties in the international community was race related, especially when the armed forces of countries are involved. Such armed conflict which is so permeated with race related nuances and antagonism that all offences thus committed might be taken as crimes against humanity. It is not possible to really argue convincingly that some members of the opposing military might or even the local populations might not know the race related nature of the armed conflict. It is equally difficult to argue that if such persons are charged with breaching international humanitarian law, their intent would only be that required for war crimes[35]

Studies show that one more credible way to access and determine the basis on which crimes against humanity constitute more drastic offences than war crimes is by examining the penalties imposed in respect of these crimes by the courts which were set up immediately after the Second World War. Such analysis will show that the tribunals and courts did treat crimes against humanity as being more grievous offences and should be given greater punishments than war crimes.

5. Penalties for other crimes

This part of the paper discusses punishments for numerous offences such as compromised offences, convicted as persecution as a crime against humanity and war crimes.[36] The aim is to find out restraints and handicaps to the relative penalties for persecution as a crime against humanity vis-a-vis war crimes. Further analysis will be explored on the question of the relative gravity of crimes against humanity and war crimes and the varying magnitude of punishments.

This goal will be achieved as we consider some cases[37]that involve and deal with some compromised convictions for multiple offences under persecution as a crime against humanity as well as x-ray cases that have to do with many convictions as crimes against humanity and war crimes based on the same set of acts but have different

[35] Green Titus, 'The Legal effect of International Law on Crimes against humanity', *Glassy Journal of International Law*, (2011)(26) 19

[36]Renner Markson, 'The nature and character of Crimes against Humanity in Criminal Law, *Komas Criminal Law Review*, (2005) (6)(1) (2002)23

[37] Mercy Angelo, 'The Seriousness of Crimes against Humanity in International Law' *Malian Journal of International Law*, (2006) (6) 28

aggravating circumstances. In such instances, the overall punishment will be attributed to the persecution as a crime against humanity conviction. That is, cases that involve compromised convictions for numerous war crimes.

The paper considers *Furundzia's case* which involves the defilement and brutalization of a disabled lady, by the accused who was an Italian. The facts show that apart from his role in the said most brutal atrocities, the accused was convicted of war crimes. The major statement indicates the basis for his conviction which is to the effect that the accused allegedly continued to probe her about her private life in such annoying manners that got her so irritated. The witness told the court that the accused also issued vulgar and threats against the victim.[38]

From the foregoing case, it is crystal clear that there was a direct nexus between the victim's unintentional inability to provide satisfactory answers to the accused while she was being interrogated and the way and manner she was maltreated and the draconian torture she was subjected to. It is therefore this factor which contributed to grounds on which the accused was convicted for crimes against humanity instead of war crimes.

The second discussion is that of Maekan's case[39]which involves nefarious and odious activities committed against Serbiani detainees in a notorious prison detention which generally referred to as the *Celebiciena* prison detention. The story reveals that based on certain acts of the accused in the perpetration of these heinous crimes, he was convicted for crimes against humanity. The statement reveals that the basis for his conviction is tied to the fact that the criminal responsibility of Mr. Maekan is tied to his failure to exercise his superior authority in favour of the detainees in the Celebiciena prison detention. The case further reveals that Mr. Maekan, who was said to have deliberately neglected his duty to control those under him, which gave them the gods to maltreat the detainees in the Celebiciena prison. Mr. Maekan was consciously creating alibis for the possible criminal

[38]Furundžija (IT-95-17/1)
[39]Maekan et al. (IT-96-21)

acts of those under the accused. It would constitute a travesty of justice, and an abuse of the concept of command authority, to allow the calculated dereliction of an essential duty to operate as a factor in the mitigation of criminal liability. What was offensive in the present circumstance was his rationale for staying away from the prison detention camp for days without making provision for discipline and surveillance during this period under consideration. Taking that measure was supposed to save him from the superfluity and overbearing attitude of the guards and soldiers. Therefore, failure to do this only rather aggravated his liability.[40]

It is crystal clear from the above that the accused whose conviction on crime against humanity was based on the fact that he abandoned his responsibility in controlling those under him, which is why his subordinates arbitrarily maltreat the detainees. This is largely the reason which was canvassed in the way the accused was convicted for crimes against humanity.

Practically every case prosecuted before the International Tribunals and other courts of competent jurisdiction have involve an attempt at race related purge, in which particular groups have been specifically targeted for various kinds of arbitrary abuse, destruction and mistreatment by way of murder and detention. Not surprising that the international tribunals and courts see no obvious distinction between such cases and the other trials involving ethnic cleansing. The essence of the foregoing is that crimes involving race related purge must be treated with disdain which is why such crimes must fall under the crime against humanity which must carry a higher level of sentencing and punishment.[41]

6.0 Conclusion

It has been a successful examination of the issues bothering on penalties for crimes against humanity and war crimes, advancing the argument that sentencing of crimes against humanity are made more

[40] Ibid.

[41] Monday Yorks, 'An Appraisal of the Components of Crimes against Humanity, *Sanks International Law Journal*,(2004), (4) (8) 14

drastic than war crimes.[42] The paper assessed three sentencing approaches and adopted the concept of discriminatory motive v. non-discriminatory motive method. One core rationale for adopting the discriminatory motive versus nondiscriminatory motive method over the other methods is because it carries the most effective type of comparing offences that bother on crimes against humanity vis-à-vis war crimes offences. One major frailty and deficiency of the one and the same interest approach is that it weakens divergence that exists between the concomitant criminal intention for war crimes and crimes against humanity. Criminal intention, as well as motives in criminal law, is vital in attempts to prosecute offenders in all states' jurisdictions.[43] The systematic wide spread attacks v. Isolated acts method has been criticized as being too foggy and smoggy. This disapproval and critical evaluation is founded on the fact that the elements used to disconnect crimes against humanity and war crimes for purposes of sentencing are questionable and knotty.

Even though there seems to be no generally accepted blueprint and guideline to determine different levels of sentencing for war crimes and crimes against humanity, this paper recommends that the international community needs to adopt an index for imposing more drastic punishment for crimes against humanity vis-a-vis war crimes[44].This reasoning is based on the proposition that offences that bother on crimes against humanity should attract more severe punishment than identical offences when committed as war crimes because of their relative gravity and destructive character.[45]This proposition is supported by the international customary law which suggests that crimes that are most destructive to public safety, public

[42]Sylver Markson, 'Measuring Crime and Punishment, *Dunsky Law Journal*, (2007) (4) (7) 12

[43]Thomas Dookie, 'Appraisal of Terrorism and Terrorist Crimes, *Scocky Law Journal*, (2014)(3) (6) 15

[44] WilliamsonTrust, 'Modern Explication of Crimes against Humanity', (2016) (6)(4) 18

[45] Joab Martins, 'Criminology and Crime', *Caroma Law Journal*, (2018) (5) (8) 29

health and public happiness should be most severely punished compared to other kinds of crimes.[46]

[46] Mark KieIsgardy, 'Appraisal on Sentencing Insights in International Crimes Criminal Law', (2011) *Citom University Law Review*, (3)(7) 52