匡扶正义 共享和平

国际刑法新发展论文集

MAKING PEACE THROUGH JUSTICE

Essays on the New Development of International Criminal Law

凌岩 / 主编 Edited by LING Yan



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前言

中国政法大学国际刑法和国际人道法研究中心在麦克阿瑟基金会的赞助下,于2009年4月25日至26日在北京成功举办了"匡扶正义共享和平——国际刑法新发展国际学术研讨会"。这是我校国际刑法和国际人道法研究中心举办的第一次学术盛会,受到了中国政法大学校领导、外交部条法司和中国国际法学会领导、国内外专家学者的重视、关注和大力、热情的支持。参加会议的代表有从国外远道而来的8位外国专家学者,来自全国各地20所大学,其中包括北京的7所大学、外地的10所大学和军队的3所大学,以及外交部、中央军委、总参谋部、法院等单位的共40多位国内专家学者,对国际刑法感兴趣的很多老师和学生也参加了旁听。

国际刑法横跨国际法和刑法等多个传统的法律学科,是法律的一个相对较新并具有丰富理论和实践意义的法律分支。上个世纪90年代,联合国安理会先后设立了前南斯拉夫和卢旺达国际刑事法庭,重新表活了国际刑法并推动其蓬勃发展起来。现在国际上已有常设的、特设的、国际的和国际化的各种刑事法庭,通过国际刑事审判追究那些严重违反国际人道法和危害国际社会根本利益的责任者,改变有罪不罚的文化,促进民族和解,维护和共享世界和平。

为了促进在中国政法大学和中国开展国际刑法和国际人道法的教学,培养国际刑法专门人才,推动国际刑法的理论研究,为政府决策部门献计献策,以及与国际和国内国际刑法和国际人道法学术界和实务界进行广泛的交流和合作,2007年中国政法大学成立了国际刑法和国际人道法研究中心。研究中心在成立的短短一年半中,已取得丰硕的成果。中心的研究人员已为中国政法大学的硕士研究生开设了国际刑法课程,为本科生开设了国际人道法课程,组织和指导学生参加了国内外举行的国际刑事法院模拟审判竞赛,中国赛区、亚太赛区和皮克泰的国际人道法模拟法庭竞赛,并取得了好成绩。通过准备比赛和参加比赛,学生们不仅比较深入地学习了国际刑法和国际人道法的知识,还对国际刑法和国际人道法产生了浓厚的兴趣,他们已自发成立了国际刑法学习小组,以便进一步扩大校内外和国内外的联系与交流,参加各种国际刑法和国际人道法的学习和研究活动。研

究中心的研究人员也已出版和发表了不少国际刑法和国际人道法方面的专著和论文,其中一些专著和论文获得了国际或国内的奖项。中心还建立了中英文网站,加强与校内外和国内外的学术联系。

在国际研讨会举行期间,来自海内外的专家、学者和实务部门的工作者汇聚一堂,交流、研究和探讨国际刑法新发展的问题,会议组委会收到了会议代表提交的中、英文论文30篇。会议代表就会议议题和专题发言,对国际刑事审判面临的新挑战、国际刑事法院和法庭对国际刑法和程序法的贡献、补充性原则和优先管辖原则在国际刑事审判中的运用、国际刑法对国内立法的影响以及与国际刑事审判相关的其他问题各抒己见,进行了热烈和卓有成效的讨论。

现将精选的十数篇中英文论文集成本书正式出版,编者诚挚地期望,本论文集的出版和问世将推动对国际刑法更加深入和广泛的学术研究。

凌 岩 2009年5月1日

代序

在"和平与发展"时代主题下促进国际刑法的新发展

段洁龙*

女士们, 先生们:

很高兴能够参加中国政法大学国际刑法和国际人道法研究中心举办的"国际 刑法的新发展"学术研讨会,感谢会议主办方的邀请。相信这次研讨会将增进中 外学者之间的沟通和理解,促进对国际刑法的深入研究,并且取得丰硕成果。

上个世纪,两次世界大战留下了沉痛的烙印。遭受战争创伤的各国人民强烈希望对二次世界大战期间犯下的严重国际罪行予以惩治。但是,直到冷战结束后,和平与发展成为时代主题,这种愿望才有了实现的可能。在新的历史背景下,联合国系统通过了多项涉及国际刑法的公约,一些临时性或常设性的国际刑事司法机构也应运而生。1998年罗马外交大会通过《国际刑事法院罗马规约》,并在随后建立国际刑事法院,体现了国际社会对国际刑法作用的认知达到了一个新的层面。国际刑法的理论和实践,包括刑事定罪、确立管辖、司法协助和引渡方面的国家合作等方面也有了更为具体的进展。然而,如何使国际刑法有效地促进国际与地区的和平与发展,仍是国际社会需要认真思考的问题。

下面谈几点个人看法。

^{*} 中国外交部条法司司长。本文为在"匡扶正义共享和平——国际刑法新发展国际研讨会"开幕式上的发言。

一、维护国际和平与安全,推动实现持久和平与共同繁荣,应是 国际刑法追求的终极目标

在中华民族的近代历史上,我们的人民多次经历外国侵略,饱受战争罪、反 人类罪等最严重国际罪行之戕害。中国人民深知国际和地区的和平与安全在很 大程度上有赖于国际司法正义的支撑。多年来,中国政府始终高度重视并积极参 与国际社会促进国际刑法发展的种种尝试,并与许多国家一道做出了不懈的努 力。我们支持建立适当和可行的国际刑法制度,期望它可以作为国家法律体系的 补充,在预防、威慑、制止、惩罚严重国际罪行、实现司法正义方面发挥积极 作用。

同时,我们也一贯认为,建立和健全国际刑法体系或制度,应当将尊重《联合国宪章》的宗旨和原则置于首要地位,而《宪章》的核心价值在于维护世界和平与安宁。任何一种国际刑法制度或机制都应当有利于促进《宪章》核心价值的实现。具体而言,就是既要有利于伸张司法正义,也要有利于促进和平与稳定,既要有利于维护人类的基本权利和尊严,也要有利于维护主权国家的尊严和领土完整及统一,既要贯彻独立、公正、客观的专业操守,也要尊重历史背景和现实条件。只有这样,国际刑法体系或机制才能有真实的存在价值和广阔的发展空间。

二、国际刑事法院仍需通过自身实践赢得国际社会的普遍信任和支持

国际刑事法院的建立,是国际刑法发展过程中的一件大事。中国政府一贯理解并支持建立一个独立、公正、有效和具有普遍性的国际刑事司法机构,以惩治最严重的国际罪行,在维护国际和平、实现公平正义方面发挥作用。为此,中国政府以积极的和建设性的态度参与了《国际刑事法院罗马规约》谈判。基于《联合国宪章》所倡导的原则和理念,我们曾反复强调,《规约》必须切实体现和落实"补充性原则"价值,并真诚地提出了相应的观点和建议,尽了一个负责任的国际社会成员应尽的责任和义务。在《规约》生效及法院成立后,中国政府也一直以合作的态度关注着这一重要国际刑事司法机构的运作和发展。

众所周知,中国迄今尚未加入《罗马规约》,这主要是由于在《规约》的起草阶段,中国政府的一些重要关切未能得到适当反映。其中特别包括担心《规约》的某些规定不符合国家主权原则,也未适当体现补充性原则,可能影响主权国家司法体系对有关罪行的管辖;《规约》规定,检察官有权自行启动调查程序,

但相应的制衡机制不足以防止权力的滥用;《规约》的有些规定可能会影响安理 会职权等等。现在看来,这些关切似乎并非没有道理。国际刑事法院近期的一些 实践在国际社会,特别是在非洲和阿拉伯国家中引起了广泛争议,这从一个侧面 说明,法院要赢得国际社会的普遍信任和支持,仍是一个相当复杂的过程。

我们当然理解法院的成长和成熟需要时间,也对法院依法、客观和公正地开展工作寄以期望,愿法院以其对和平与正义的积极贡献赢得国际社会的普遍信任和支持。在这方面,值得关注的是,《规约》审查会议将于2010年召开,期待《规约》缔约国能够利用这次机会,认真回顾《规约》生效后所经历的发展历程,深入探讨有利于法院长远发展的切实步骤和改进措施,切实体现法院的存在对推动实现国际和平与安全的重要价值和作用。

三、国际刑事司法合作是国际刑法制度重要而不可或缺的组成 部分

国际刑法的发展离不开国际刑事司法合作。无论是国际刑事司法机构还是国内司法机构,无论是对最严重的国际罪行还是普通的跨国犯罪,无论是确立管辖、进行审判还是执行判决,都会涉及国家间的相互合作。长期以来,中国积极开展国际刑事司法合作,以自己的实际行动促进国际刑法的发展与完善。经过二十多年的实践,我们在这一领域已积累了丰富的经验,树立了良好的国际声誉。

自1987年缔结第一项司法协助条约以来,中国一直积极推动与各国的司法合作缔约工作。截至目前,中国已与50多个国家缔结了各类双边司法协助条约共104项。其中,引渡条约31项,刑事司法协助条约27项,移管被判刑人条约6项。根据这些双边司法协助条约,我们已先后办理了6000余起刑事司法协助案件。例如,自《中美刑事司法协助协定》于2001年3月生效以来,中美两国每年相互请求送达司法文书的案件就达150多起。此外,为有效打击跨国犯罪,中国还积极倡导建立双边执法合作机制。1998年中美正式成立了执法合作联合联络小组(JLG)。自这一机制建立以来,双方合作力度不断加大。迄今双方已经举办了七次全体会议,成立了刑事司法协助、反腐败、计算机犯罪、知识产权刑事执法、追逃、非法移民与遣返、打击偷渡等七个工作组。双方的执法合作层次也由最初的个案发展到统筹两国司法、执法等多个方位、多个领域。

在多边国际公约方面,中国迄今已经参加了包括《联合国打击跨国有组织犯罪公约》、《联合国反腐败公约》在内的20余项含有刑事司法协助内容的国际公

约。在这些公约机制下,我们与许多国家开展了良好的沟通与合作。同时,我们 还希望与更多的国家在这一领域开展更为广泛和深入的合作。

国际刑法的发展,牵系整个国际社会对和平与正义的渴望,道路虽长,却充满希望。我与在座各位一样,对国际社会的和平与正义事业充满信心。愿我们协力合作,共同为这项事业的发展贡献力量。最后,衷心祝愿本次研讨会圆满成功。

Foreword

Repression of War Crimes

International humanitarian law is certainly one of the most densely regulated areas of international law. The ICRC's database of treaties related to that law lists around one hundred multilateral instruments through which the States have undertaken to limit the effects of armed conflict. Those treaties are widely accepted and in the case of the 1949 Geneva Conventions, they have been ratified by all States. And yet, compliance with international humanitarian law seems to be a different matter. Violations of IHL are all too frequent and constantly a matter of serious concern to conclude otherwise. It is those violations that cause so much suffering for millions and, as the UN Security Council has repeatedly stated, may threaten international peace and security.

Armed conflicts are closely linked to the crimes under the jurisdiction of the International Criminal Court. The existence of an armed conflict is a precondition for the commission of war crimes. But also crimes against humanity and genocide have more often than not been committed in situations that qualified as armed conflict.

Under international humanitarian law, the States have an obligation to prevent such crimes and when they occur to prosecute and punish the authors of the crimes. In 1949 already, the four Geneva Conventions formally provided for the obligation of the States to enact legislation allowing them to punish grave breaches of international humanitarian law. The Conventions further specified that on the basis of such legislation each State searches for persons allegedly responsible for the breaches, and either prosecutes them itself or hands them over for trial to another interested State.

These provisions seem fairly straight forward. They are universally binding. Nevertheless, they have not been systematically implemented. Relatively little legislation have been adopted to give effect to the obligation to punish violations of international humanitarian law and in particular war crimes. Compared to the number of such violations, few cases have actually been tried. As a consequence, many of the war crimes committed since the adoption of the Geneva Conventions have never been punished.

The lack of national measures allowing States to punish war crimes received renewed attention in the 1990's after the end of the Cold War. In fact, the whole issue of national implementation measures began being more systematically assessed in the context of the International Conference for the Protection of War Victims held in Geneva in 1993, where governments and experts came together to look for solutions to increase respect for the law in armed conflict. In many ways, that conference became the starting point for heightened awareness of the problem and led to considerable activity in the area of national implementation. The United Nations acknowledged the results of the conference in its General Assembly resolution 49/48 of December 9, 1994. And so did the 26th International Conference of the Red Cross and the Red Crescent in 1995, which endorsed them together with the recommendations of the Intergovernmental Group of Experts who met in Geneva in January 1995 as a follow-up of the 1993 conference.

But it was the horrendous events in the former Yugoslavia and in Rwanda that have accelerated developments in the law with the Security Council adopting resolutions 808 (1993) and 955 (1994) establishing two ad hoc international criminal tribunals, and later in 1998 the States adopting the Rome Statute which created a permanent international criminal court. Now, although these tribunals have jurisdiction over war crimes, they do not pretend to substitute themselves to the States' own judiciary. Rather, the international tribunals act in parallel to the national tribunals of the States. The latter maintain, indeed, jurisdiction that can be subsidiary, as in relation to the ad hoc tribunals for ex-Yugoslavia and Rwanda, or complementary as is the case with respect to the International Criminal Court. Whatever the case may be, the States

remain bound by their commitments to prosecute and punish themselves perpetrators of war crimes and other violations of international humanitarian law. Indeed, the Rome Statute explicitly recalls in its preamble "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

The efforts undertaken by the States to adjust domestic criminal legislation to their treaty obligations require an assessment of the crimes already contemplated by that legislation and the crimes provided for in the treaties, and in particular those specified in articles 50, 51, 130 and 147 of the four Geneva Conventions of 1949 and those defined in articles 11 and 85 of Additional Protocol I of 1977. In practice, many States extend this analysis to comprise crimes defined by other treaty provisions as well. Among them range most prominently article 8 of the Rome Statute. That article specifies numerous war crimes, including the grave breaches of the Geneva Conventions and most, but not all, of the grave breaches of Additional Protocol I, besides defining war crimes that neither the Conventions nor the Protocols consider, for example those committed in non-international armed conflicts.

Regardless of whether a State is a party to the Rome Statute or not, it may still seek to ensure punishment through domestic legislation of the war crimes specified under the Rome Statute. To a large extend this will allow meeting obligations arising under international customary law. Whatever the case, the fact that there are differences in the definition of war crimes in the Rome Statute and in Additional Protocol I should not detract from the obligation to give full effect to the latter. For that purpose it will be crucial to give due attention to the crimes not listed by the Rome Statute, namely those concerning attacks against installations containing dangerous forces, attacks against non-defended localities and demilitarized zones and the delay in the repatriation of prisoners of war, as provided under articles 85(3)(c), 85(3)(d) and 85(4) (b) of Additional Protocol I, respectively. Likewise, Additional Protocol I obligations will not be satisfied by solely relying on the definitions contained in the Rome Statute when those definitions are narrower than those of the Protocol for similar crimes. The problem arises, for example, in the definition of article 8(2)(b)(iv) Rome Statute of the crime of intentionally "launching an attack in the knowledge that such attack will

cause incidental loss of life or injury to civilians [...] which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated". For the same crime article 85(3)(b) of Additional Protocol I does not require that the civilian loss be "clearly" excessive, nor does it require that the "overall" military advantage be evaluated. In other words, absent these conditions the crime cannot be punished despite the obligation to do so stemming from Protocol I.

The Symposium on the New Developments of International Criminal Law which was held in Beijing from April 25 – 26, 2009, allowed to address these and wide range other challenges in quite some detail. The ICRC is honoured to have been able to contribute to the important work accomplished and grateful to the Research Centre for International Criminal Law and International Humanitarian Law at China University of Political Science and Law (CUPL) for having provided such a productive platform for discussions and a meaningful exchange with experts.

Anton Camen

V. James

Deputy Head of Delegation

Regional Delegation for East Asia

International Committee of the Red Cross

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