

SYMPOSIUM ON THE ROME STATUTE AT TWENTY

TRANSFORMATION OF CUSTOMARY LAW THROUGH ICC PRACTICE

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Article 21 of the Rome Statute, in defining the applicable sources of law for the International Criminal Court (ICC), breaks with the practice of the ad hoc tribunals by treating customary international law as only a secondary authority. Nonetheless, customary international law still has an acknowledged role in ICC jurisprudence in filling lacunae in the Rome Statute and aiding in its interpretation. One can also predict other instances in which the application of customary international law will be required. It remains to be seen, however, whether the ICC's use of customary law will lead to that law's further fragmentation or whether that use will instead modify customary law to reflect the ICC Statute.

A Break with the Past

Under the heading "Applicable law," Article 21(1) of the ICC's Rome Statute provides:

[T]he Court shall apply: (a) In the first place, the Statute, Elements of Crime and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflicts; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

Furthermore, under Article 21(3), "the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on [various protected] grounds."

These provisions appear to introduce a noteworthy change in the practice followed so far by international courts and tribunals established before the Rome Statute.¹ Indeed, in the absence of any specific provision in the statutes of previous tribunals, those tribunals have relied on customary international law to reach their decisions.² This approach was also recommended by the UN Secretary-General in his report accompanying the draft statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), and endorsed, or at least taken note of, by the Security Council.³

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¹ Only ad hoc international courts and tribunals are referred to here. Hybrid and mixed courts with international participation will not be considered, as they are normally also entitled to apply, to a certain extent, the domestic law of the states concerned with their jurisdiction.

² See, e.g., Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AJIL 817 (2005).

³ Secretary-General, *Report Pursuant to Paragraph 2 of Security Council Resolution 808*, UN Doc. No. S/25704, para. 34 (May 3, 1993).

By contrast, the Rome Statute's detailed description of the applicable law expressly declares the priority of the Statute and its related binding legal instruments (referred to collectively as "the Statute") over customary law, clearly encompassed by the expression "principles and rules of international law."⁴ While the structure of Article 21 is to some extent inspired by Article 38 of the Statute of the ICJ, even a plain reading reveals substantial differences. Unlike Article 38, Article 21 appears to institute a formal hierarchy among the mentioned sources of law by establishing the priority of the ICC Statute over any other source of law (i.e., other applicable treaties, customary law, and principles of international law). However, the scope of the said priority is somewhat uncertain, and the relationship between the two expressions employed in letter (b)—"in the second place" and "where appropriate"—is far from clear, as they may look mutually exclusive. Furthermore, under Paragraph 3, treaty and customary international human rights law would seem to enjoy absolute priority over general provisions derived from national laws, a hierarchy that may have far reaching consequences given the close connection between human rights and international criminal law.

Limited Application of Customary Law

In light of these considerations, what then is the role of customary international law in the ICC jurisdictional system? Is the break with the past in Article 21 intended to displace customary law entirely, and to foster a jurisprudence that reflects a closed treaty legal system in opposition to customary law? Or is such a break aimed at modifying existing customary law, transforming it into a new customary law whose rules would be identical to the Rome Statute?

There is something of each of these issues in the provision of Article 21, and an answer cannot be final, at least so far, because the case law of the Court is not sufficient to identify a precise trend. One point is clear and cannot be denied: the Statute itself expressly recognizes that customary international law has a role to play, albeit an ancillary one. How ancillary, however, may be a matter of debate.

On one hand, Article 21 indicates that customary law shall be applied "in the second place," thus giving priority to the Statute. In its first decisions, the Court has consistently respected this priority and referred only to the Statute rather than looking at customary law as applied by other courts and tribunals. In the *Katanga* case, it further emphasized that the Statute establishes a hierarchy of the sources of applicable law, and that a chamber "shall apply the subsidiary sources . . . only where it identifies a lacuna in the provisions of the Statute, the Elements of Crimes and the Rules."⁵ This seems a rigid approach, and it has been sometimes criticized as implying disregard for precedents in international case law, but it in fact leaves the door open for further developments.

Indeed, the case law offers no indication so far as to the exact meaning of the word "lacuna" in this context. For instance, when dealing with the crime of genocide, Article 6 of the Statute reproduces Article II of the 1948 Convention on the Prevention and Repression of the Crime of Genocide ("Genocide Convention"). In contrast, the Statute does not mention the acts contained in Article III of the Genocide Convention as crimes, but takes them up in Article 25 as modes of individual criminal responsibility for committing genocide. Irrespective of whether this division is correct—an issue which need not be discussed here⁶—Article 25 omits "conspiracy to commit genocide," which is listed in Article III as a punishable act. Such an omission implies that conspiracy,

⁴ This new approach is due to the consideration that the ICC's jurisdiction extends only to crimes committed after the entry into force of the Statute, to ensure that the application of the Statute does not raise, unlike with previous ad hoc tribunals, issues with respect to the principle of legality.

⁵ *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, para. 39 (Mar. 7, 2014).

⁶ See Fausto Pocar, *Genocide (répression)*, in *Dictionnaire Encyclopédique de la Justice Pénale Internationale* 482 (Olivier Beauvallet ed., 2017).

which has been regarded as an independent crime in the case law of the ad hoc tribunals, would not be punishable as such by the ICC, but only if genocide occurs (as a form of complicity). Is this a lacuna that will allow the ICC to look to customary international law to decide a case of conspiracy to commit genocide? Or will the Court express the view that the case should be dismissed as the conduct is not punishable under the Statute, in contrast with customary law? If the former, will the principle of legality be invoked as not allowing the Court to fill in the lacuna?

On the other hand, Article 21 allows the Court to refer to customary law “when appropriate,” and it is not entirely clear what exactly this expression means. The Court appears to have interpreted it narrowly, considering it appropriate to refer to customary law, besides when filling a lacuna, only for purposes of interpretation of the Statute. This conclusion was reached not by directly applying Article 21, but through a reference to the Vienna Convention on the Law of Treaties, which governs the interpretation of the Statute under international law and provides for the taking “into account, together with the context, . . . any relevant rules of international law applicable in the relations between the parties.”⁷ In that respect, the *Katanga* court affirmed that “where the founding texts do not specifically resolve a particular issue, the chamber must refer to treaty or customary international law and the general principles of law,” and it may be required to refer “to the jurisprudence of the ad hoc tribunals and other courts on the matter.”⁸ However, the *Lubanga* court maintained that “whilst relevant jurisprudence from the ad hoc tribunals may assist the chamber in its interpretation of the Statute, the chamber is bound, in the first place, to apply the Statute, the Elements of Crime and the Rules of Procedure and Evidence.”⁹

In conclusion, the ICC has taken a prudent approach in interpreting Article 21 of the Statute by allowing for reference to other sources of law only to fill in a lacuna in the applicable law or for purposes of interpreting the Statute. The Court itself has recognized that the boundaries between the two approaches may be fluid, that both usages are possible, and that the approach to be followed needs to be determined on a case-by-case basis depending on the circumstances, but it has also stressed that “it must not use the concept of treaty interpretation to replace the applicable law.”¹⁰ Referring to the role of human rights law in Article 21(3) and to the principle of legality enshrined in Article 22, the Court has added that it cannot adopt an interpretation that would broaden the definition of crimes contained in the Statute, and that it is bound to adhere to the letter of the provisions in the Statute.¹¹

Additional Relevance of Customary Law

Notwithstanding this prudent approach, the margin for the application of customary international law remains wide. The Statute contains a number of concepts that are not specifically defined in the Statute but are defined in customary law as assessed by the ad hoc tribunals, or for which the Statute specifically refers to international law for their definition. The Court itself has highlighted the fact that the Statute does not define “international armed conflict” or “armed conflict not of an international character.”¹² This is one context in which customary law does and could provide a definition for these terms. Even more pertinently, Articles 8(2)(a) and 8(2)(b), respectively, refer specifically to the Geneva Conventions and to “the established framework of international law” for the definition of war crimes.¹³

⁷ [Vienna Convention on the Law of Treaties](#) art. 31(3)(c), May 23, 1969, 1155 UNTS 331 [hereinafter VCLT].

⁸ [Prosecutor v. Katanga](#), *supra* note 5, at para. 47.

⁹ [Prosecutor v. Lubanga](#), ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, para. 54 (Mar. 14, 2012).

¹⁰ [Prosecutor v. Bemba Gombo](#), ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, para. 79 (Mar. 21, 2016).

¹¹ *Id.* at para. 83.

¹² *Id.* at para. 85.

¹³ [Prosecutor v. Katanga](#), *supra* note 5, at para. 39.

Other situations requiring the application of customary law can also be envisaged. The question will inevitably arise when the Court is called to adjudicate a crime committed in a state that is not a party to the Statute in the case of a referral of a situation to the prosecutor by the Security Council under Article 13(b) of the Statute, whether the alleged perpetrator is a citizen of a contracting state or not. In both cases the Court would have jurisdiction, but the applicable law may differ. If the perpetrator is a citizen of a state party to the Statute, it can be easily argued that the criminal law of that state is binding on him and may have extraterritorial application; thus, the Statute will be applicable even if the crime is committed in a state that is not a party.

By contrast, if the alleged perpetrator is not a citizen of a contracting state, the Statute is *prima facie* not applicable, by virtue of the general rule that a treaty does not create either obligations or rights for a third state without its consent.¹⁴ Could it be argued that the Statute would nevertheless be applicable as the law of the court that exercises jurisdiction, the mere possibility of a referral under chapter VII of the UN Charter implying that any individual should be aware of the prospect that his conduct may be adjudicated by the Court under its Statute? The argument would look rather weak in light of the precedent of the *ad hoc* tribunals, where it was held that the attribution of jurisdiction to a court does not entail that its statute could be regarded as the applicable law, and that the law applicable in such a circumstance should be customary international law. One has to conclude that the ICC should in this case apply customary law rather than its Statute.

However, should this conclusion differ when the law applicable under Article 21 of the Statute has a more restricted scope than customary international law? In other words, would the Court be entitled to apply customary law beyond the limits provided by its Statute when describing the applicable law? To answer this question, we have to go back to the interpretation of the expression “where appropriate” in Article 21(1)(b). If the Court adheres to the interpretation it has given so far to this expression, it may limit itself to applying the Statute, after checking that it conforms to customary law, and restrict any additional reference to customary law except for filling lacunas or for purposes of interpretation.

The example of the crime of persecution may clarify the issue. Article 7 of the Rome Statute lists persecution among the crimes against humanity within the jurisdiction of the Court, and it defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”¹⁵ This definition substantially matches the definition under customary law as assessed by the ICTY since 2000.¹⁶ The Statute, however, makes more than one departure from customary law, in particular by stating that persecution is to be regarded as a crime when it is committed “in connection with any act ... or any crime within the jurisdiction of the Court,”¹⁷ thus appearing to revert to the idea, adopted in the Nuremberg Charter, that persecutory acts may only be punished if they occur “in execution of or in connection with any crime within the jurisdiction of the Tribunal.”¹⁸ When assessing individual criminal responsibility according to customary law, which lacks the requirement of a link with other crimes for persecution, will the Court nevertheless apply this requirement out of respect for its own Statute? Will it do so notwithstanding its duty to apply and interpret the law consistently with internationally recognized human rights, including, arguably, the rules aimed at protecting human rights through the repression of their violations?

¹⁴ *VCLT*, *supra* note 7, at art. 34.

¹⁵ *Rome Statute of the International Criminal Court* art. 7(2)(g), July 17, 1998, 2817 UNTS 3 [hereinafter Rome Statute].

¹⁶ See *Prosecutor v. Kupreškić*, Case No. IT-96-16-T, Judgement, para. 621 (Int'l Crim. Trib. for the Former Yugoslavia, Jan. 14, 2000).

¹⁷ *Rome Statute*, *supra* note 15, art. 7(1)(h).

¹⁸ *Charter of the International Military Tribunal* art. 6(c), Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (Aug. 8, 1945).

Conclusion

A final answer to these questions may only be given by the future jurisprudence of the Court, which might be guided by various considerations, including the concern for maintaining the unity of the legal regime in international criminal law and avoiding fragmentation, although unity might be better ensured by interpreting the Statute in accordance with customary law and not the other way round.¹⁹ The direction that the Court's jurisprudence will take might be very significant for the development of customary international law. Should the Court apply customary international law only when it is consistent with its Statute, its jurisprudence may progressively modify current customary law and transform it into a new customary law that reflects the Statute of the Court. This would be an ambitious task, which the codification proposed at the Rome Conference could not achieve and that the ICC could only try to carry out if it remains the sole international criminal jurisdiction and the entire international community accepts it as such. Should this not be the case, customary law will continue to develop separately, as it has done so far, and the case law of the ICC will continue to be just one component of international practice that will be assessed alongside other practice in ascertaining the existence and content of a customary rule.

¹⁹ On the issue of the ICC's role with respect to fragmentation of international law, in the sense that fragmentation should be avoided by interpreting the Statute in conformity with customary law, cf. Fausto Pocar, *International Criminal Justice and the Unifying Role of Customary Law*, 21 UNIFORM L. REV. 171 (2016).