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DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW AND
THE INTERNATIONAL CRIMINAL COURT

- By Ahan Gadkari

ABSTRACT

International Law has developed over time to include certain rules that have become customary in nature. Some of these have been codified into treaties. The customary nature of others can be observed via state practice.

This paper provides an insight into the development of customary international law and its relation to various crimes codified within the Rome Statute. The paper looks into the history of the Rome Statute and the formation of the International Criminal Court. The paper examines the principle behind the laws that have been weaved into the fabric of custom. This paper uses decisions by various tribunals established around the world to depict the development of customary international law.

This paper will then delve into the development of various crimes within the Rome Statute and look into their development and their relation to customary international law.
A. CUSTOMARY INTERNATIONAL LAW:

Customary International law is one of the two primary sources of international law alongside treaties. It can be defined as a "general and consistent practise of states followed by them from a sense of legal obligation."\(^1\) Most international norms have been codified under treaties, but some rules of law are followed by states even when no treaty binds them. These are norms that have become sources of law and are thus binding in nature; this has been mentioned in the Statue of the I.C.J.\(^2\)

Does the question arise as to why states that act in self-interest follow a set of customary laws that have not been codified into a treaty? The answer to that is that these norms act in the states' joint interests, but only as long as all follow them.\(^3\) For example, the principle of ambassadorial immunity exists so that both states can be sure that their ambassadors are safe in the other state. It also ensures that the states can use their ambassadors to negotiate with the other state. In this manner, the states involved can jointly benefit from cooperation. Another example that can be considered is the Paqueta Habana case,\(^4\) Which was decided in the wake of the Spanish-American war, by the U.S. Supreme Court. In this case, it was decided that coastal fishing vessels would remain an exception to the prize system and its further inclusion in treaties proves that states believe “they gain more from the exception (their citizens are protected from the depredations of the enemy) than they lose (their sailors will not have access to this type of plunder).”\(^5\) In the case, as mentioned earlier, the U.S. Supreme Court took note of the fact that the British Navy had refrained from seizing coastal fishing vessels in certain conflicts. This brings about another important factor in customary international law, i.e., a requirement that the general norm is something states have consented to.

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\(^1\)Restatement of the Law (Third), the Foreign Relations of the United States, s. 102(2).
\(^2\)Statute of the International Court of Justice, Art. 38 1 (b).
\(^3\)Eric A. Posner and Alan O. Sykes, Economic Foundations of International Law (2013), pg. 52.
\(^4\)175 U.S. 677 (1900).
\(^5\)Supra Note 3, pg. 55.
B. HISTORY OF THE INTERNATIONAL CRIMINAL COURT

The first well-acknowledged military tribunal was created after the first world war. The Allies set up a commission that decided that all the defeated powers had violated international law and held accountable for it. They stated that all the officials in high positions must be punished for command superiority.\textsuperscript{6} Article 228 of the Treaty of Versailles noted that the German government acknowledged the allied powers' right to bring individuals accused of violating international humanitarian law to be presented before military tribunals. The Nuremberg trials were the real starting point for international criminal law. The trials were based on Control Council Law No. 10.\textsuperscript{7} It was based on the principle that international law gives certain obligations and responsibilities upon the individuals who must maintain it. Individuals and not "abstract entities perpetrate violations of international law."\textsuperscript{8} The Military Tribunal for the Far East reconfirmed the legal findings of the Nuremberg trials. It crystallized the position of the criminality of crimes of aggression and the rejection of the absolute defense of superior orders in international law. The test set out was that the individual has an obligation to prevent the commission of an act that violated international law's peremptory norms.\textsuperscript{9}

The next development in international criminal law was when the International Law Commission adopted a Draft Code of Crimes against the Peace and Security of Mankind.\textsuperscript{10} The United Nations Security Council also affirmed holding individuals responsible for their resolutions upon Darfur's situation.\textsuperscript{11} While dealing with Iraq's situation in 1990, the council adopted a resolution\textsuperscript{12} that reaffirmed Iraq's liability under the Fourth Geneva Convention, 1949 as well as individual responsibility for those liable in committing those crimes.\textsuperscript{13}

The next major leap in international criminal law was when the International Tribunal for the Former Yugoslavia was set up. The UNSC had many resolutions about expressing grave concern about the human right violations in Yugoslavia.\textsuperscript{14} It was finally in Resolution 780 (1992) that the UNSC asked for a Commission of Experts to report on the human rights violations in Yugoslavia. The UNSC decided to establish an international tribunal to hold the

\textsuperscript{6}T. Meron, ‘Reflections on the Prosecution of War Crimes by International Tribunals’, 100 AJIL, 2006, p. 551.
\textsuperscript{8}I. Brownlie, International Law and the Use of Force by States, Oxford, 1963, p. 167
\textsuperscript{9}B. V. A. Röling and A. Cassese, The Tokyo Trial and Beyond, Cambridge, 1992
\textsuperscript{10}A/46/10 and 30 ILM, 1991, p. 1584.
\textsuperscript{11}Resolutions 794 (1992) and 814 (1993).
\textsuperscript{12}Resolution 674 (1990).
\textsuperscript{13}Special Section on Iraqi War Crimes, 31 Va. JIL, 1991, p. 351.
\textsuperscript{14}Resolutions 764 (1992), 771 (1992) and 820 (1993).
individuals liable for their international law violations, including ethnic cleansing.\textsuperscript{15} The appeals chamber of the ICTY went ahead to confirm that customary international law imposed individual responsibly in international conflicts and domestic conflicts in the famous \textit{Tadić} case.\textsuperscript{16}

Following the genocide in Rwanda, an International Tribunal for Rwanda was set up on the lines of the ICTY. The ICTR and the ICTY shared a joint appeals chamber.\textsuperscript{17} The ICTR set a precedent for international tribunals with the \textit{Kambanda} case and the \textit{Akayesu} case. In the \textit{Kambanda} case, for the first time, a former head of state was held liable for the crime of genocide.\textsuperscript{18} In the \textit{Akayesu} case, the ICTR was called upon to interpret the Genocide Convention and give a definition to the crime of rape concerning international law.\textsuperscript{19}

While considering the developing situation in Yugoslavia and countries like Trinidad and Trivago proposing for the set-up of a permanent international criminal court, lead to the International Law Commission adopting a Draft Statute for an International Criminal Court in 1994.\textsuperscript{20} This resulted in a Preparatory Committee\textsuperscript{21} being convened and whose work\textsuperscript{22} led to the Rome Conference in 1998, which led to the creation of the Rome Statute of the International Criminal Court.\textsuperscript{23}

\textsuperscript{15}Resolution 808 (1993).
\textsuperscript{16}IT-94-1-AR72, 2 October 1995, p. 70
\textsuperscript{17}Resolution 1329 (2000)
\textsuperscript{18}ICTR T. Ch. 4 September 1998.
\textsuperscript{19}ICTR T. Ch. 1 2 September 1998.
\textsuperscript{21}General Assembly resolution 50/46.
\textsuperscript{22}A/CONF.183/13 (III), p. 5.
\textsuperscript{23}Schabas, International Criminal Court, pp. 18 ff.
C. CRIMES THAT CAN BE TRIED BY THE INTERNATIONAL CRIMINAL COURT (ARTICLE 5)24:

i. Genocide

WHAT IS GENOCIDE?

Genocide has been mentioned in Article 6 of the Statue.25 Emerging from the end of World War II, the legal concept of Genocide became internationally recognized and codified in the Genocide Convention in 1948.26 The prohibition against Genocide and the duty to prevent and punish Genocide is, in fact, generally binding on all States, regardless of their participation in the Convention, as they have become accepted as principles of customary international law. Genocide is defined in Article 2 of the Genocide Convention as certain acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group"27 The I.C.J. has confirmed that establishing Genocide requires proof of two elements:

- Physical element: the perpetration of acts which fall within the categories in Article 2 (such as killing members of the group or causing serious bodily or mental harm to such members);
- Mental element: the intent to destroy the group, in whole or in part.

Genocide is challenging to prove in a court of law. According to Article 209 of Bosnia and Herzegovina v. Serbia and Montenegro, “The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. Corfu Channel (United Kingdom v. Albania), Judgment, I.C.J. Reports 1949, p. 17)”28 The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of Genocide or the other acts enumerated in Article III have been committed, have been established. The same standard applies to the proof of attribution for such acts. Application of the Convention on the Prevention and Punishment of the Crime of Genocide.29

GENOCIDAL INTENT

Genocide not only consists of genocidal acts, but these acts must be committed with genocidal intent. The ICTR described the genocidal intent as the 'key element' of an intentional offense, which is "characterized by a psychological relationship between the physical result and the mental state of the perpetrator." The subsequent case-law of the International Criminal Tribunal for Rwanda (ICTR) followed the Akayesu findings, requiring, also the aim to destroy one of the protected groups. This means there needs to be evidence that the acts were committed with the specific “intent to destroy” the targeted group in whole or in part. For example, in Bosnia v. Serbia, the Court found that many of the 'ethnic cleansing' operations, which took place in Bosnia and Herzegovina in late 1992, consisted of potentially genocidal acts, as Bosnian Serb forces had committed numerous atrocities. Where genocidal intent is premised on a pattern of conduct, it must be the only inference that could reasonably be drawn from the acts in question. However, it did not conclude that it could be proven that these acts had been committed with genocidal intent, as no clear evidence had been presented to the Court that there was a plan to destroy these groups as such. The genocidal intent is often described with the term “specific intent” or dolus specialis.

HISTORY OF GENOCIDE IN INTERNATIONAL LAW

Genocide as a violation of international law was first legislated in The Convention on the Prevention and Punishment of the Crime of Genocide (1948). Predating this, Genocide was considered an individual crime in the Nuremberg trials but it fell under the provisions of crimes against humanity as "conducted deliberate and systematic genocide—namely, the extermination of racial and national groups—against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles, Gypsies and others." (Count 3 of the charges of the Nuremberg tribunals). Post the genocide convention, the Rome Statute establishing the International Criminal Court acquired the power to try the crime of Genocide against individuals with the same definition like the one in the Genocide Convention.

31 Ibid, para. 518
32 Supra Note 9, para. 209.
33 Ibid.
34 (1946) 41 AJIL 172.
the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda, both of which had the mandate to prosecute Genocide.

ii. **Crimes against Humanity:**

Crimes against humanity have been mentioned in Article 7 of the statute.\(^{35}\) In order to constitute a crime against humanity, it must qualify two conditions. The first is that it must come under the purview of the unusually severe crimes mentioned in the Rome Statute, like murder, enslavement, torture, rape, and enforced prostitution. The second is that they are “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”\(^{36}\) Hence, the act must not only come under the crimes mentioned in the statute but also be directed towards a specific group as part of a more extensive attack.\(^{37}\) Crimes against humanity can be committed against individuals as well, but only if the group that the individual belongs to is also being attacked.\(^{38}\)

‘Crimes Against Humanity’ was included Article 6 (c) of the Nuremberg charter. It included murder, enslavement, torture extermination, deportation or any other inhumane acts committed against any civilian populace, be it before or during the conflict.\(^{39}\) The jurisdiction for the ICTY was laid down by article 5 of the statute of the ICTY, for crimes committed within armed conflict, whether internal or international in nature. The crime needed to be directed against a civilian populace. Article 3 of the ICTR is similar in nature, other than the fact that attack must have been committed as a part of a widespread or systematic attack against a civilian populace. Article 7 of the Statute of the ICC notes that the attacks in question must have taken place as a part of a widespread or systematic attack with knowledge of the same.

Notwithstanding the fact that Article 5 of the Statute of the ICTY did not specify a widespread or systematic attack, it was incorporated into the jurisprudence of the court in the *Tadić* trial decision. This laid down that the attack must be committed on a widespread or systematic basis as interpretation of the phrase ‘directed against any civilian populace.’ The requirement of ‘widespread and systematic’ was examined in *Akayesu* case, wherein the definition for the same was laid down by the Trial Chamber of the court. The Appeals

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\(^{35}\) Supra Note 6, Art. 7.

\(^{36}\) Ibid, Art. 7 (1).

\(^{37}\) Article 5 of the Statute of the *International Criminal Tribunal for the Former Yugoslavia* and Article 3 of the Statute of the *International Criminal Tribunal for Rwanda* have a similar structure.

\(^{38}\) Larry May, *Crimes against Humanity: A Normative Account*, (2005), pp. 84-90.

\(^{39}\) Cryer et al., *Introduction to International Criminal Law*, pp. 188 ff.
Chamber held in the *Kunarac* case that while the proof that the attack was directed against a civilian population and proof that it was widespread or systematic were legal elements of the crime, it was not necessary to show that they were the result of the existence of a policy or plan.\(^{40}\)

Many acts that constitute war crimes and crimes against humanity overlap, the main difference being that war crimes take place during an armed conflict. Crimes against humanity can take place in the absence of an armed conflict as well. However, it is important to keep in mind the difference between ‘civilian’ and ‘non-civilian’ as highlighted by the trial chamber in the *Matrić* case. It is also essential for the perpetrator to be aware that his attack was part of a systematic and widespread attack. It has to be proved that the crimes against the civilian populace were related and the accused knew that they were related.\(^{41}\)

### iii. War Crimes:

War Crimes have been mentioned in Article 8 of the statute.\(^{42}\) These are certain norms to be followed during armed conflict. War crimes are two types, one which is to be followed when the conflict is international and the other when the conflict is not international.

War crimes\(^{43}\) are crimes that violated customary international law and treaty law concerning international humanitarian law.\(^{44}\) Article 2 and 3 of the ICTY provides jurisdiction for violations of laws or customs of war. International Law applies to states while war crimes law applies to individuals. There is a long-standing history of the presence of individual responsibility for war crimes like the US Army Lieber Code (April 1864) and Article 6(b) of the Nuremberg Charter. Since the ICTR Statue provided for individual responsibility concerning non-international armed conflict; in effect recognizing that common article 3 and Additional Protocol II formed the basis of criminal liability.

International humanitarian law is applied from the moment that an armed conflict has been initiated. The definition for this has been laid down in the *Tadić* case before the ICTY. The appeals chamber noted that an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between groups of such a nature within a state. Until the cessation of hostilities, international humanitarian law will continue to apply in the entirety of the territory

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\(^{40}\)IT-96-23&23/1, 2002, para. 98.
\(^{42}\)Supra Note 6, Art. 8.
\(^{44}\)Cryer et al., *Introduction to International Criminal Law*, Chapter 12.
of the warring states or the whole territory under the control of the party; regardless whether actual combat takes place there.\textsuperscript{45} Further, it was held that irrespective of whether the conflict was an international or an internal one; individual criminal responsibility existed in regard to violations of customary international law.

This \textit{Tadić} judgement can now be taken as a reflection of international law and has been codified within the Statue of the International Criminal Court.

\textbf{iv. Crimes of Aggression:}

Crimes of aggression have been mentioned in Article 8, \textit{bis} of the statue.\textsuperscript{46} The crime of aggression was first introduced in the Nuremberg Trials and applied as \textit{ex post facto} law.\textsuperscript{47} This crime targets the leaders of the states and applies to individuals. The crime of aggression means “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”\textsuperscript{48}

Customary international law recognizes aggression as a crime.\textsuperscript{49} The term was first laid down in Article 6 of the Nuremberg Charter, whose principles were affirmed by General Assembly Resolution 95(1). One of the judgements termed aggression as the ‘supreme international crime.’\textsuperscript{50} The crime of aggression has been mentioned in the Tokyo Charter as well as Control Council Law No. 10. It was defined by General Assembly Resolution 3314 (XXIX). Article 5 of the Statute of the ICC also mentions the crime of aggression. Article 5 (2) states that the court can only exercise jurisdiction over the crime of aggression after a provision has been adopted which would set out the conditions under which the court can exercise its jurisdiction.

The crime of aggression is different from other crimes as it is a crime of ‘leadership.’ This makes it necessary to assume that the ‘leader’ is held accountable in some capacity, as they have been deemed to commit the aggression.

\begin{footnotesize}
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\item[\textsuperscript{45}]105 ILR, pp. 453, 486.
\item[\textsuperscript{46}]Ibid, Art. 8 \textit{bis}.
\item[\textsuperscript{47}]Supra Note 16.
\item[\textsuperscript{48}]Supra Note 22.
\item[\textsuperscript{49}]Y. Dinstein, \textit{War, Agression and Self-Defense}, 4\textsuperscript{th} edn, Cambridge, 2005.
\item[\textsuperscript{50}]Judgement 186, 41 AJIL, 1947, p. 172.
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CONCLUSION:

The crimes mentioned within the Rome Statute have a direct connection with customary international law. Through laws that have been enshrined within custom, state obligation for these crimes has been developed. It has been established that customary international law is a tool that can be used in the interpretation of international criminal law and a nexus that can be said to exist between the two. Through various tribunals’ decisions, the precedent for the crimes mentioned within the Rome Statute has developed.

An essential factor is to look into the direction that the International Criminal Court’s jurisdiction has been taking. If the court decides to interpret customary international law with complete consistency to the Rome Statute, it might lead to further development and modification of it that reflected the Statute.