Interpreting Crimes in the Rome Statute of the International Criminal Court

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INTERPRETING CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The Rome Statute of the International Criminal Court defines more than ninety crimes that fall within the Court's jurisdiction, including genocide, other crimes against humanity, war crimes and aggression. How these crimes are interpreted contributes to findings of individual criminal liability and moreover affects the perceived legitimacy of the Court. And yet, to date, there is no agreed-upon approach to interpreting these definitions. This book offers practitioners and scholars a guiding principle, arguments and aids necessary for the interpretation of international crimes. Leena Grover surveys the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) before presenting a model of interpretive reasoning that integrates the guidance within the Rome Statute into articles 31–33 of the Vienna Convention on the Law of Treaties (1969).

LEENA GROVER is a Habilitation Candidate in the Faculty of Law at the University of Zurich. She is a member of the Law Society of Upper Canada and has worked for a number of adjudicatory bodies including the ICTY and International Criminal Court.

For all who toil to nurture the international criminal justice enterprise

> Practitioners and courts often seem not to regard it as a subject at all... Academics have not yet given sufficient attention to the doctrinal aspects.... [W]e neglect issues of interpretation at our peril.[1]

[1] A Ashworth, 'Interpreting Criminal Statutes: A Crisis of Legality?' (1991) 107 Law Quart Rev 419, 449.

FOREWORD

The Rome Statute of the International Criminal Court marks a turning point in the development of international criminal justice. That the Statute defines crimes in some detail instead of referring judges to customary international law is just one important innovation. And it gives rise to the challenge of interpreting these new treaty definitions. But is this really a challenge? In light of the well-established rules of interpretation in the *Vienna Convention on the Law of Treaties* (1969), one may wonder whether there is anything special or new about construing the relevant provisions of the Rome Statute. In Dr Leena Grover's well-considered view, the matter is not quite that simple, though. She believes that a treaty defining 'the most serious crimes of concern to the international community as a whole' does indeed pose specific questions of interpretation. She points out that the Rome Statute itself recognizes this fact by setting out several rules to assist judges with answering these questions. Her ambitious goal is to formulate a method for construing the definitions of crimes enshrined in the Rome Statute in accordance with the rules of interpretation contained therein, and to integrate this method into the general 'Vienna framework on treaty interpretation', thereby forming a coherent whole. International legal practitioners might question the usefulness of such an 'abstract' scholarly exercise, and judges perhaps even fear that an elaborate doctrine of interpretation could only unduly tighten their hands in the necessary development of the law. Dr Grover anticipates both possible concerns. To the first, she responds with the conviction that nothing is more useful for practitioners than an organized toolbox of interpretive principles, arguments and aids. Accordingly, her reflections, while certainly most inspiring from a scholarly perspective, are directly addressed to judges at the International Criminal Court, their teams and lawyers appearing before them. Dr Grover takes great pains to address the second possible objection. She does not dispute the fact that her doctrine of interpretation would restrain judicial development of the law to some degree. On the contrary, this is precisely the intended effect of her book. In Dr Grover's view, the first permanent international criminal court is exposed to a more stringent legitimacy test than its predecessors. It no longer suffices to refer to international criminal law's benign mission in order to justify the Court's decisions; in accordance with the overarching principle of legality, the latter

must also duly respect the protected liberties of the international *citoyen* and maintain a proper balance of powers on the international plane. These latter considerations, according to the author, require a methodology that enhances the foreseeability and transparency of judicial reasoning. In her search for a comprehensive doctrine of interpretation for the Court, Dr Grover covers vast ground, including some thorny territory, and many of the insights gained along the way are precious in themselves; I just mention her efforts to elucidate more precisely the Rome Statute's principle of strict construction and the significance of customary international law within the interpretive process. All of this eventually results in a thoughtfully composed and elegantly formulated interpretive doctrine. I very much hope that practitioners and scholars alike will soon subject this doctrine to close scrutiny. It would be pretentious to predict at this moment in time whether the edifice Dr Grover has erected will withstand all future objections. But it can be stated with confidence that the edifice is an impressive one, based on the courageous, rigorous and dedicated work of a very promising scholar.

Claus Kreß
Director of the Institute of International Peace and Security Law,
University of Cologne

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am forever grateful for this exhilarating once-in-a-lifetime opportunity to experience how, through multilateral negotiations, international crimes are defined. I am also deeply indebted to Benjamin and Don Ferencz for so generously supporting this work.

It is with immense gratitude that I acknowledge the Canadian Council on International Law for funding my research, as well as Professor Peter Hogg and Dean Mayo Moran in Canada for their academic support and encouragement. To Elizabeth Spicer, Cassie Tuttle and the entire Cambridge University Press team, I wish to express my sincere appreciation for your belief in and work on this project. For their most constructive comments and time, I kindly thank the manuscript's blind reviewers. This book was initially completed in March 2011. I am therefore indebted to Professor Christian Walter and members of his chair at Ludwig Maximilian University in Munich for providing me with an ideal environment in which to update it.

Finally, a book is not written in a bubble – life intervenes. I therefore wish to acknowledge the wonderful support of friends and family near and far, especially Susan, Kelly, Gerli, Wolfgang, Sasha and mom. Christian, my greatest blessing, words fail me; you make all dreams possible and I can never thank you adequately. Julian, our lives know no greater love or joy than you.

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1

Introduction

1.1 Introduction

Interpretation is central to the practice of law. Sometimes a legal victory or defeat turns on the meaning a judge attributes to a single word in a legal text. The stakes may be low or incredibly high. For example, the International Court of Justice (ICJ) in its *Genocide Decision* (2007) held that the killing of approximately 7,000 Muslim men in Srebrenica between 13 and 15 July 1995 was an act of genocide and that Serbia was responsible for failing to prevent and punish the individuals involved.[1] For conduct to qualify as genocide in a legal sense, the victim group must be protected by the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) (*Genocide Convention*).[2] Accordingly, the judges had to satisfy themselves that the victims formed whole or 'part' of a national, ethnical, racial or religious 'group'.

The parties disputed inter alia whether the death of 7,000 Muslim men satisfied this element of the crime. Given the gravity of genocide, does the killing of 7,000 men result in the destruction of 'part' of a group? If the argument is that the number of people forming 'part' of the group is substantial in a quantitative sense, should this be assessed in absolute terms or relative to the size of the whole group? On this point, can 'group' be defined in geographically limited terms even if large diasporas of persons exist who share the same nationality, ethnicity, race or religion as the victim group? Ultimately, one important justification for the ICJ's finding that genocide occurred in Srebrenica was its interpretation of the words 'part' and 'group'.

Judges deciding cases at the International Criminal Court (Court) will be forced to engage in similar interpretive exercises. The difference is that their decisions will be used to justify findings of individual culpability for the most serious crimes of concern to the international community as a whole. Indeed, one judge of the International Criminal Tribunal for the former Yugoslavia

[1] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina* v. *Serbia and Montenegro)* Judgment (26 February 2007).

[2] 78 UNTS 277 (adopted 9 December 1948, entered into force 12 January 1951).

(ICTY) described the task of interpreting the law as 'both the most challenging and the most anxiety-ridden part of the job'.[3] These decisions could lead to the imprisonment of individuals and the compensation of victims, contribute to or disturb transitional justice efforts in situation countries, influence the development of customary international law, encourage or dissuade Non-States Parties to join the Court and help to strengthen or undermine the Court's legitimacy as an independent and impartial international judicial organ.

The Rome Statute has to date been ratified by 122 States Parties, thirteen of which have ratified the aggression amendments and sixteen the recently added crimes committed in the course of a non-international armed conflict. The Court is seized of situations in Uganda, the Democratic Republic of the Congo, Darfur (the Republic of the Sudan), the Central African Republic, Kenya, Libya and Cote d'Ivoire. It is investigating eight situations, conducting preliminary examinations of an additional eight, is considering the appeals of two cases, has acquitted one individual, has one ongoing trial, is scheduled to commence two more trials, has several cases that are at the pretrial stage and has twelve arrest warrants that remain outstanding, the oldest ones dating back to 2005 (e.g., Joseph Kony).[4]

Given that the Court is the world's first permanent international criminal court, the legitimacy factor is a serious concern. As a young judicial body that only came into existence in 2004, it does not have the luxury of being able to rest on its laurels as an established and well-respected institution. Unlike domestic criminal courts, any missteps the Court might make will occur under the watchful gaze of those who thumb their noses at the international criminal justice enterprise and would welcome the Court's failure. Unfortunately, judges do not currently have an agreed method for interpreting the more than ninety international crimes that fall within the Court's jurisdiction. One of its strongest critics suggested that 'the Court's discretion ranges far beyond normal or acceptable judicial responsibilities, giving it broad and unacceptable powers of interpretation that are essentially political and legislative in nature'.[5]

The purpose of this book is to offer judges of the Court and counsel appearing before them a tool known as a 'legal methodology' for interpreting

[3] PM Wald, Interview for The Third Branch (2002), www.uscourts.gov/News/TheThirdBranch/02-03-01/An_Interview_with_Judge_Patricia_Wald.aspx, accessed 23 April 2014.

[4] Report of the International Criminal Court to the UN General Assembly (13 August 2013), UN Doc. A/68/314, 2, 4; The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, 'Status of Ratification and Implementation', http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/, accessed 23 April 2014.

[5] JR Bolton, former Under Secretary for Arms Control and International Security, 'The United States and the International Criminal Court', Remarks to the Federalist Society in Washington, DC, 2002, www.iccnow.org/documents/USBoltonFedSociety14Nov02.pdf, accessed 2 November 2013.

the definitions of crimes that fall within the Court's jurisdiction. The Rome Statute of the International Criminal Court (Rome Statute or Statute) grants the Court jurisdiction to hear cases of genocide, other crimes against humanity, war crimes and, once States Parties activate the Court's jurisdiction for this crime not earlier than 2017, aggression.[6] These crimes are currently defined in articles 6, 7, 8 and 8 *bis* of the Rome Statute.[7] These provisions resemble a criminal code of sorts. Part III of the Statute sets out general principles of criminal law, and articles 55, 66 and 67 contain various due process guarantees for individuals. Other parts of the Rome Statute deal with diverse subject matter. For example, part IV is concerned with the composition and administration of the Court, part IX with international cooperation and judicial assistance, part X with enforcement and part XII with financing. A method of interpretation for these other parts of the Rome Statute might well differ from anything developed for crimes in the Rome Statute and be informed inter alia by international institutional law.

To understand the exact scope of this study and its import, this introductory Chapter will set out the following: (1) a working definition of interpretation; (2) sources of interpretive problems; (3) a working definition of legal methodology; (4) an explanation of the method for developing this methodology; (5) the practical benefits of this study; and (6) how to use this book.

1.2 Interpretation

In this section and the one that follows, a working definition of 'interpretation' will be introduced in three stages. First, the concept of operative interpretation will be defined. Second, this concept will be distinguished from gap filling and other judicial responsibilities. Finally, the line between operative interpretation and gap filling will be brought into sharper relief by introducing the reader to all of the interpretive problems that are covered by this study.

1.2.1 Operative interpretation

Every time a court publicly expresses its view on how a legal text should be construed, it engages in the act of interpretation.[8] Recognizing that no universally accepted legal definition of interpretation exists, the following definition of 'operative interpretation' will be adopted in this study:

[6] Article 5, Rome Statute for the Establishment of the International Criminal Court, 2187 UNTS 90 (adopted 17 July 1998, entered into force 1 July 2002).

[7] See also First Review Conference of the Rome Statute, Official Records, Resolution on the Crime of Aggression (adopted 11 June 2010) RC/Res.6, www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf, accessed 2 November 2013.

[8] Z Bankowski, DN MacCormick, RS Summers and J Wróblewski, 'On Method and Methodology' in DN MacCormick and RS Summers (eds.), *Interpreting Statutes: A Comparative Study* (Ashgate 1991) 9, 12.