



Universiteit
Leiden
The Netherlands

The Rome Statute as Evidence of Customary International Law

Tan, Y.

Citation

Tan, Y. (2019, April 9). *The Rome Statute as Evidence of Customary International Law*. *Meijers-reeks*. Retrieved from <https://hdl.handle.net/1887/71143>

Version: Not Applicable (or Unknown)

License: [Leiden University Non-exclusive license](#)

Downloaded from: <https://hdl.handle.net/1887/71143>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/71143> holds various files of this Leiden University dissertation.

Author: Tan, Y.

Title: The Rome Statute as Evidence of Customary International Law

Issue Date: 2019-04-09

Treaty and custom are the two main sources of international (criminal) law. As has been noted at the beginning of this study the relationship between treaty and custom remains a controversial topic. This study aimed to analyse the nature of the 1998 Rome Statute as evidence of customary law. This study examined whether a provision of the Rome Statute was or is declaratory of customary law. For this purpose, this study first set out the methodology for the identification of customary law and clarified the term 'declaratory' that defines the relations between treaty and custom (Chapter 2). This study then focused on four provisions of the Rome Statute that are representative of crimes, modes of liability and defences. First of all, this study analysed the relationship between article 8 of the Rome Statute and customary law concerning war crimes in non-international armed conflict (Chapter 3). Second, it examined article 7 of the Rome Statute and customary law concerning crimes against humanity (Chapter 4). Third, this study looked at article 25(3)(a) of the Rome Statute and customary law for indirect co-perpetration (Chapter 5). Last, it surveyed the interplay between article 27(2) of the Rome Statute and customary law about non-availability of personal immunity for committing international crimes (Chapter 6).

Based on the methodology and terms described in Chapter 2, Chapter 7 highlights the conclusions that can be drawn from this study. Section 7.1 briefly summarises and analyses the conclusions of this study with regard to the three sub-questions formulated in Chapter 1. These sub-questions are:

1. whether a provision of the Rome Statute reflected a pre-existing customary rule at the adoption of the Rome Statute or crystallised itself into custom upon its inclusion in the Statute in 1998?
2. whether a provision of the Statute that was of a declaratory nature continues to be declaratory of a customary rule on the same subject matter?
3. whether a provision of the Statute that was not of a declaratory nature has subsequently become declaratory?

Finally, section 7.2 discusses the findings of this study.

7.1 SYNTHESIS

There have been only few international armed conflicts¹ and few prosecutions for war crimes committed in such conflicts since World War II. It has been said that

As at 2015, there seem to have been only 17 reported cases over the previous 60 years where domestic courts or tribunals have exercised universal jurisdiction over perpetrators of war crimes. Interestingly, the vast majority of these cases arose in the last 20 years and concerned events which took place in non-international armed conflicts.²

The current armed conflicts around the world, for instance, conflicts in South Sudan and Syria, are conflicts not of an international character. At the international level, the ICTR, the SCSL, and the ECCC were established for the prosecution of crimes during civil wars. Most Situations that are presented before the ICC for consideration today occurred in non-international armed conflict, for example, Burundi, Central African Republic (CAR), Côte d'Ivoire, Democratic Republic of Congo (DRC), Darfur, Kenya, Libya, Mali and Uganda Situations.³

Chapter 3 examined the relationship between article 8 of the Rome Statute and customary law concerning war crimes in non-international armed conflict. Chapter 3 briefly revisited the historical development of war crimes and analysed the negotiations of article 8 of the Rome Statute, and then moved on to examine the practice of prosecuting war crimes in non-international armed conflict after the adoption of the Rome Statute. The extensive research about debates, signing, ratification, amendments, national implementation legislation, international and national prosecutions as well as other specified tribunal instruments either echoed the view that article 8 is declaratory of custom with respect to war crimes in non-international armed conflict or evidenced that this rule is recognised as a part of the corpus of customary law now. The main conclusion of Chapter 3 is that war crimes for violations of Common Article 3 in non-international armed conflict were codified in article 8(2)(c) of the Rome Statute, whereas war crimes for other serious violations in non-international armed conflict were crystallised in article 8(2)(e) at the Rome Conference. Articles 8(2)(c) and (e) of the Rome

1 The UCDP/PRIO Armed Conflict Dataset, available at: <https://www.prio.org/Data/Armed-Conflict/UCDP-PRIO/> [accessed 12 October 2016].

2 Cameron *et al*, 'Article 3', para 880. 'Table of National Case Law on International Crimes and Universal Jurisdiction', in *Report of the Third Universal Meeting of National Committees on International Humanitarian Law*, 'Preventing and Repressing International Crimes: Towards an "Integrated" Approach Based on Domestic Practice', Vol II, Annexes, prepared by Anne-Marie La Rosa (ICRC 2014) 123-31.

3 Cameron *et al*, 'Article 3', para 530; 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (13 August 2014), UN Doc A/HRC/27/60; *Bemba Trial Judgment*; *The Prosecutor v Al Mahdi* (Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, PTC I) ICC-01/12-01/15 (24 March 2016).

Statute in general were and are declaratory of custom concerning war crimes in non-international armed conflict.

This conclusion, however, does not extend to all underlying acts of war crimes in non-international armed conflict. As commentators mentioned, article 8(2)(e) is both a step back and a step forward with respect to customary international law. Issues of sexual crimes, recruiting child soldiers and the use of chemical weapons were highly debated during the 1998 Rome Conference.⁴ Further studies should keep an eye on developing customary rules about specific offences of war crimes in non-international armed conflict.

Chapter 4 focused on the relationship between article 7 of the Rome Statute and customary law concerning crimes against humanity. Crimes against humanity was a new type of international crime in the Nuremberg Charter. However, before the adoption of the Rome Statute, which provides for crimes against humanity in article 7, this crime, in general, had already been recognised as a crime under customary law. Since World War II, there are several formulations of crimes against humanity in international instruments. Divergent formulations do not affect the customary state of crimes against humanity in general but indicate different understandings of elements of the crimes.

Chapter 4 critically analyses two contextual requirements: the absence of a nexus with an armed conflict and 'policy'. Research shows that the armed conflict nexus requirement was a substantive element for the notion of crimes against humanity in the Nuremberg Charter. Later on, the link with an armed conflict disassociated itself from the notion of crimes against humanity. It remains unclear when this nexus disappeared under customary law before 1998. By excluding the armed conflict nexus, article 7 codified or, at the very least, crystallised crimes against humanity under customary law. Chapter 4 concludes that article 7(1) was and is declaratory of custom on the absence of a nexus with an armed conflict.

In addition, 'policy' is considered as a legal requirement at the ICC in accordance with article 7(2)(a). The Appeals Chamber of the ICTY in *Kunarac et al* held that policy was deemed an evidentiary factor to establish an attack. *Kunarac et al*, however, is not persuasive. An analysis of case law and definitions of crimes against humanity indicated that policy was a required legal element. Article 7(2)(a) of the Rome Statute on the issue of policy is declaratory of the pre-existing customary rule. Alternatively, even if the *Kunarac et al* Appeals Chamber's view of no policy element for crimes against humanity is valid, this judgment is not conclusive evidence for the status of customary law on the policy issue now. Sufficient evidence suggests that policy is a requirement of crimes against humanity under customary law. In conclusion, article 7(2)(a) was and is declaratory of custom with regard to the policy requirement.

4 UN Doc A/CONF.183/2/Add.1 and Corr.1.

At the Rome Conference, States were reluctant to recognise serious violations of laws and customs in non-international armed conflict as war crimes for several reasons.⁵ Michael Bothe noted:

The government side will claim that acts of repression performed during that conflict are nothing more than the maintenance of law and order as required by the legal system of that State. Thus, it will be argued, those acts were required under the law and consequently cannot be punished.⁶

Indeed, it is generally supposed that behaviour as a method to maintain the law and order is required by the national system. Some acts of repression performed during non-international armed conflicts would be at the risk of prosecution if other violations in non-international armed conflicts were included as war crimes. For instance, the use of expanding bullets is lawful in law enforcement at the national level in order, for example, to avoid unnecessary harm to citizens surrounding the scene of a bank robbery or in the course of a hostage-taking.⁷ However, the Rome Statute considered the use of expanding bullets as a war crime in non-international armed conflict.⁸ In connection with the ambiguous definition of non-international armed conflict, States may object to criminalising some punishable acts as war crimes in non-international armed conflict because these acts are legitimate maintenance methods in national law.⁹ At the Conference, diplomats as representative of States were not willing to restrain the enforcement powers or measures of their States. These considerations explain why the threshold of non-international armed conflict was added, and why the list of punishable acts of war crimes in non-international armed conflict is somewhat shorter than that in international armed conflict under article 8.

The second reason is that the recognition of war crimes in non-international armed conflict does not seem to be in the interest of States. States were uneasy that their recognition would be deemed a recognition of belligerents' status for anti-government forces, and would justify rebels' killings of their soldiers. Without a rule of war crimes in non-international armed conflict, the State can prosecute alleged individuals of an organised armed group for

5 Djamchid Momtaz, 'War Crimes in Non-International Armed Conflicts under the Statute of the International Criminal Court' (1999) 2 *YIHL* 177.

6 Michael Bothe, 'War Crimes in Non-International Armed Conflicts' in Y. Dinstein and M. Tabory (eds), *War Crimes in International Law* (The Hague: Martinus Nijhoff Publishers 1996) 295.

7 The Declaration of Czech Republic said: 'The prohibition to employ gases, and all analogous liquids, materials or devices, set out in article 8, paragraph 2(e)(xiv), is interpreted in line with the obligations arising from the Convention on the Prohibition of the Development, Production, stockpiling and Use of Chemical Weapons and on Their Destruction of 1993'.

8 1998 Rome Statute, art 8(2)(e)(xv) reads: '[e]mploying bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.'

9 Bothe, 'War Crimes in Non-International Armed Conflicts', 295-96.

joining rebels or killing soldiers of government armed forces at the national level, regardless of whether perpetrators/rebels respected international humanitarian law applicable in non-international armed conflict. The existence of war crimes in non-international armed conflict indicates that it is less legitimate for States to prosecute individuals who behave in compliance with rules applicable in non-international armed conflict. A rule of criminalising serious violations in non-international armed conflict as war crimes leads to less control over prosecution of rebels by national authorities. However, 'if the distinction is not made between behaviour in conformity with international humanitarian law and behaviour which is not, the value of criminal law in the repression of breaches of international humanitarian law is greatly reduced'.¹⁰

All these concerns show a struggle between State sovereignty and the aim to end impunity. This finding is also true for debates about the elements of crimes against humanity. Aside from the two crimes, selected provisions concerning participation in crimes and defences were also examined in this study. Government or State leaders comprise most of the cases before international criminal tribunals, in which the attribution of crimes is somewhat complicated. Meanwhile, for alleged international crimes, questions become controversial concerning the scope and the applicability of absolute personal immunity of senior State officials.

In contrast to other provisions or drafts of individual liability for international crimes,¹¹ article 25 of the Rome Statute provides many explicit rules of individual criminal responsibility. International criminal tribunals also used different labels, the complicity liability for participation in a common plan/conspiracy, joint criminal enterprise and indirect co-perpetration. Chapter 5 delved into the relationship between article 25(3)(a) of the Rome Statute and customary law concerning indirect co-perpetration. Three forms of perpetration are embedded in article 25(3)(a). An examination of the text and the drafting history of article 25(3)(a) indicates that this provision does not contain indirect co-perpetration as a fourth form of perpetration or a form of co-perpetration. Therefore, it is not a real issue concerning the relationship between article 25(3)(a) and custom with regard to indirect co-perpetration because a treaty provision dealing with a specific subject matter is a starting point for this research. Assuming the idea is well accepted that indirect co-perpetration as a mode of liability is embedded in article 25(3)(a), it is required to examine its customary status to date. After analysing post-World

¹⁰ *ibid*, 295.

¹¹ Nuremberg Charter, art 6(2); Control Council Law No. 10, art 2(2); 1950 ILC Nuremberg Principles, Principles I, VI (a)(ii), and VII; 1948 Genocide Convention, art III; 1949 Geneva Conventions (GC: art 49 of GC I; art 50 of GC II; art 129 of GC III; and art 146 of GC IV); the 1977 Additional Protocol I, art 86; 1991 Draft Code of Crimes, arts 3(1)-(2); 1996 Draft Code of Crimes, art 2(3); 1993 ICTY Statute, art 7(1); 1994 ICTR Statute, art 6(1); Statute of the SCSL, art 6(1); Law on the Establishment of the ECCC, art 29(1); and Statute of the African Court of Justice and Human and People's Rights (not entered into force), art 28N.

War II practice, the jurisprudence of other international criminal tribunals as well as the implementation legislation, Chapter 5 concludes that evidence showing the acceptance of indirect co-perpetration liability is rare. Indirect co-perpetration serves a similar function to the ICTY's *Brđanin* JCE liability with respect to high-level leaders. Trial Chambers and the Appeals Chamber of the ICC, however, tend to assign liability to the accused under the label of indirect co-perpetration. Chapter 5 shows that indirect co-perpetration has not been sufficiently supported to qualify as a customary rule to date. Accordingly, article 25(3)(a) neither was nor is declaratory of a customary rule with respect to indirect co-perpetration.

The different applications of liability to solve the scenario like that in the ICC indicate that the law is developing in this regard. If States tend to follow the ICC's approach in dealing with international crimes, a consensus on how to attribute liability to government or State leaders might be reached in international criminal tribunals, as a *sui generis* system of this regime. However, if States adopt different ways of attributing liability to the accused based on national laws, it would be difficult for States to reach a consensus on this unique mode of liability because of different criminal justice systems. The division of criminal law systems between common law and civil law would further enhance this difficulty. The issue of whether this liability might be a customary rule depends on the approach States will adopt, the ICC-oriented approach or the national-oriented one.

Chapter 6 discussed the relationship between article 27(2) of the Rome Statute and customary law about an exception to personal immunity. Article 27(2) of the Rome Statute provides that international immunities and special procedural rules cannot bar the exercise of jurisdiction by the ICC. This study found that article 27(2) with a derogation does not indicate the refusal to respect personal immunity of senior officials of non-party States in custom, but confirms the pre-existing customary law respecting personal immunity in international law at the time when the Rome Statute was adopted. An observation of the post-World War II instruments and case law has demonstrated that traditional customary law also applies in prosecuting these international crimes. No rule existed with an exception to absolute personal immunity before the adoption of the Rome Statute. Finally, an examination of international jurisprudence, national cases as well as the attitude of the UN Security Council and the ILC shows whether an exception to absolute personal immunity for the commission of international crimes has been well recognised under customary law to date. This research concluded that there is not sufficient evidence to demonstrate a trend of an exception to personal immunity for the commission of international crimes. Thus, contemporary customary law still provides that incumbent senior officials are inviolable in international and national criminal proceedings. Chapter 6 concludes that article 27(2) neither was of a declaratory nature nor is declaratory of a customary rule respecting personal immunity. Under current international law, it seems to be unjust to retain personal immunity of senior officials, whereas it is also unjustified to invalidate it on the basis

of custom because the evidence is not sufficient to modify the pre-existing traditional customary rule.

If accountability and non-impunity mean prosecution of a person in the highest rank or on the top of the planning chain, then the introduction of indirect co-perpetration might be desirable, and personal immunity for international crimes would seem to be a barrier to achieving that goal. However, indirect co-perpetration has not been sufficiently supported to constitute a customary rule to date. In addition, the challenge to the regime of personal immunity should not be exaggerated.¹² As the ICJ suggested, even if senior officials have committed international crimes, their personal immunities remain intact under customary law. There are alternatives to prosecute sitting senior State officials in the future. A specific exception to the customary rule of personal immunity for international crimes through a treaty is acceptable.¹³ If a person is deprived of personal immunity by a UN Security Council resolution, the person can no longer invoke personal immunity to challenge the jurisdiction of a UN-based tribunal.¹⁴ State authorities concerned can waive personal immunity before national or international criminal tribunals. Another way to invalidate personal immunity is by pushing non-party States to join the Rome Statute, which requires a waiver of immunity before the ICC. It seems less necessary to retain it when all States are consistent in depriving personal immunity.

7.2 DISCUSSIONS AND CONCLUDING REMARKS

Based on the methodological framework described in Chapter 2, this study of the selected provisions of the Rome Statute as evidence of customary law found that provisions of the Statute were partly declaratory of custom when adopted in 1998, and that they are also partly declaratory of custom at the present time. Provisions concerning war crimes and crimes against humanity were reflections of custom, and they continue to be declaratory of custom. Meanwhile, provisions about indirect co-perpetration liability and non-availability of personal immunity were not of a declaratory nature at the time when the Rome Statute was adopted, and they have not passed into customary law to date. This section discusses the findings as well as a combination of the findings of this research.

As shown above, provisions of the Rome Statute about substantive crimes were and are recognised as custom in general. A mode of liability, indirect co-perpetration, was not and is not considered as a customary rule. In contrast to international crimes, it is difficult but not impossible for a mode of liability without sufficient roots in national laws to pass into customary law. The main reason may be that international crimes are mainly

12 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 594.

13 UN Doc A/63/10 (2008), para 310.

14 *ibid.*

derived from international law, while many modes of liability and defences originate in national laws. This reason, however, does not apply to issues concerning *sui generis* liability and personal immunity. Traditional general international law still plays a vital role with respect to personal immunity (a procedural defence). Whether a substantive customary rule exists at the relevant time is at the crossroads for the identification of customary law and the principle of legality. We should be cautious in applying customary law either as a source or as an interpretative aid to developing the scope of crimes, to extending the mode of liability, and to narrowing the scope of defences.

It is also necessary to discuss the implication of the combination of these findings. Firstly, a combination of the finding that a treaty rule 'was and is' declaratory indicates the existence of a customary rule on the same subject matter at the material time. Such a combination is found in Chapters 3 and 4 on war crimes and crimes against humanity. In the two instances, the content of customary law in the past and at present is the same on the issues concerned. It should be noted that, as Mark Villiger wrote: 'customary law is dynamic and the customary rule underlying a treaty text may change; the treaty rule may generate new customary law and the treaty text may be influenced by different approaches of interpretation'.¹⁵ Since customary law is not static and a parallel treaty rule is not frozen, such a combination of findings generally does not demonstrate what the content of a customary rule was and is.¹⁶

Secondly, a combination of the findings that a treaty rule 'was not' and 'is not' of a declaratory nature does not inherently imply that no customary rule exists on the same subject-matter in the past or at present. For instance, the nature of article 27(2) of the Rome Statute as evidence of custom does not indicate that there was no customary rule on personal immunity in international law. Similarly, this combination of findings only implies the non-existence status of a rule 'underlying the treaty provision' at the critical time under customary law. The findings of articles 25(3)(a) and 27(2) as evidence of customary law reflect such a combination.

Thirdly, a combination of findings that a treaty rule 'was' but 'is not' declaratory of customary law indicates that a rule underlying the text was a pre-existing or emerging customary rule at the time when the treaty was adopted. This combination does not lead to conclusive findings on the status of customary law on the same subject matter at present. The treaty rule is not of a declaratory nature either for the reading of the treaty text has changed later on, or the content of the customary rule has been modified (extinguished) on the same subject at present, or both.

Lastly, the combination of the findings that a treaty rule 'was not' but 'is' declaratory of customary law does not automatically demonstrate the status of a customary rule on the same subject-matter in the past. There may

15 Villiger, *Customary International Law and Treaties: A Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* 227, 238.

16 Vienna Convention on the Law of Treaties, art 31(3).

be several reasons for concluding that a treaty rule was not declaratory of custom. One of them may be that no pre-existing customary law existed. The other reason may be that the treaty rule was of a norm-making character or stipulates an exception to a pre-existing customary rule. A good example of the latter is article 27(2) concerning an exception to personal immunity at the ICC. If a rule of non-availability of personal immunity for committing international crimes is generally accepted in the future, the conclusion in Chapter 6 would be that article 27(2) was not but 'is' at that moment declaratory of customary law. The latter two combinations of findings cannot be confirmed in this research with regard to the selected provisions under the present circumstances.

The 1998 Rome Statute exercises an essential impact on the content of international law in the field of international criminal law. Customary law also continues to play a role in and outside the ICC framework. As Rosalyn Higgins wrote: 'international custom is the most flexible, the most fluid, and as such, is exceedingly responsive to the changing needs of the international community'.¹⁷

17 Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford: OUP 1963) 1.