The Sources of International Criminal Law with Reference to the Human Rights Principles of Domestic Criminal Law

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1 Introduction

The relationship between public international law and domestic criminal law has greatly contributed to the development of international criminal law, not only in a historical context, but also in the present situation of turmoil and conflicting ideologies. The sources of international criminal law originally derived from public international law, and though they have passed through a development of their own, they still, of necessity, depend on this traditional field of law. Therefore, it will be a starting-point in this article to establish what these sources are.

2 Sources of International Law

By consulting the 1945 Statute of the International Court of Justice (located in the Hague, Netherlands), annexed to the United Nations Charter, it can be easily ascertained from Article 38 what sources of law the International Court is expected to apply. The International Court is one of the six principal organs of the United Nations. Its function is to decide in accordance with international law such civil disputes between States as are submitted to it. The Court does not deal with and decide criminal cases. In spite of this fact there is a good deal of reason to assume that the sources purporting to constitute international law according to the introductory provision of Article 38 also do apply, though not directly, to criminal cases as minimum standards required for international criminal liability. This is true, irrespective of the enforcement model applied, whether the case is tried by a national court, an international court or the U.N. International Court itself, if it were given the authority and competence to do so.

The sources listed in Article 38 are the following:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[1]

It is not clear whether Article 38 was, at the time of its formulation, designed to provide an exhaustive list of sources to be applied by the Court, but today it is hardly considered a complete statement of the sources of international law.[2] There may, however, be a question as to what is meant by *sources*, a term not included in the Article itself. The essential thing is that Article 38 is of vital importance because it provides a reasonably clear and precise statement of the most significant sources to be applied, directly by the International Court of Justice and indirectly by other organs that may decide international disputes. Article 38 has therefore been accepted as authoritative by the Court and by the States themselves.

There is no indication of any priority or hierarchy of the sources listed in Article 38, except for the single reference to subsidiary means in item (d). There is, in fact, no difficulty if the content of the rules derived from the various sources is complementary, which will usually be the case. However, in cases of conflict it must be determined which source shall prevail. Which does prevail, a later treaty or earlier customary law? And will subsequent customary law prevail over an earlier but explicit treaty obligation? The interaction between conventional and customary international law will be considered below with reference to international criminal law rules and human rights principles. The fundamental *rules of jus cogens* are of crucial importance to the determination of priority. The general superiority of a later convention to earlier customary law is displaced by the rules of jus cogens. These are rules of customary international law that are so fundamental that they cannot be modified by treaty.[3] As regards international criminal law, specifically, the priority of sources will tend to follow the order of Article 38, that is from 1 (a) to 1 (d).

3 The Sources of International Criminal Law as Compared with the Sources of Domestic Law

International conventions and international custom are the most important sources of public international law, and even more so where international criminal law is concerned. There is a great need to ensure that individuals

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1 A second paragraph, which is of little importance here, states that this provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

2 Martin Dixon: *Textbook on International Law* (1993), pp. 19–20.

3 Martin Dixon: *Textbook on International Law* (1993), pp. 31–32.

prosecuted and tried for international crimes enjoy a fair degree of fundamental human rights guarantees. There is a great difference, however, between domestic criminal law and international criminal law. In the domestic criminal law of any advanced modern society *written sources of law* in the form of statutes enacted by the legislature (statute law) have practically assumed a monopoly status as the basis for criminal liability and punishment. Although not true in theory, it is in fact also true for the Common Law countries, which have already codified most of their judge-made criminal law.

International criminal law presents a quite different picture. *Firstly,* a great deal of international conventions now in force can be traced to earlier customary law, for example a substantial part of the 1949 Geneva Conventions on war crimes and humanitarian law principles. *Secondly,* international criminal liability can be based on customary law as such, provided the custom applied fulfils the requirements of "a general practice accepted as law", as laid down in Article 38 of the Statute of the International Court of Justice, cf. also Article 3 of the Statute of the Hague International Criminal Tribunal, which grants equal standing to the laws and customs of war as a basis for trial and conviction. *Thirdly,* but somewhat reluctantly, it appears that even today criminal liability for international crimes can be based on the *unwritten general principles of law* recognized by civilized nations (cf. also the formulation of Article 7.2. of the European Convention on Human Rights) or by the community of nations (cf. the formulation of Article 15.2. of the United Nations International Covenant on Civil and Political Rights).

Already in the Judgment of the Nuremberg International Tribunal September 30, 1946, the application of the general principles of law proved to be a difficult issue, particularly with relation to crimes against humanity and crimes against peace, which were based on rather poor sources of law until the creation of the Charter of the International Military Tribunal, signed as an annex to the London Agreement of August 8, 1945, that is *after the war.* It was argued on behalf of the defendants that it is a fundamental principle of all law – international and domestic – that there can be no conviction or punishment for crime without a preexistent law (nullum crimen sine lege, nulla poena sine lege). It was submitted that ex post facto (retroactive) punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time when the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders. The Tribunal responded to these arguments, stating:

> "In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."

The ensuing reasons of the Tribunal are concerned with the culpability or subjective guilt (mens rea) of the defendants, including a presumption of their knowledge of the wrongful and unlawful conduct, considering the positions they had occupied in the German Government (res ipsa loquitur reasoning). We note the heavy emphasis on the key argument of a *principle of justice*, which here relates to morality and natural law rather than to modern human rights guarantees for the defendants. But it would, even by these standards, hardly have fulfilled the requirements of morality and justice if mens rea had not been established. The Tribunal continued by defining the nature of the general principles of law:

> "In interpreting the words of the pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."

The last part of this quotation is of great importance as a response to sharp criticisms regarding the ex post facto element in the defence argumentation.

The Report of the U.N. Secretary-General 3 May 1993 (S-25704), having the function of explanatory notes to the Statute of the Hague International Tribunal, contains an implicit recognition of the Nuremberg ruling, cf. item 35:

> "The part of conventional humanitarian law which has *beyond doubt* become part of international customary law is the law applicable in armed conflict as embodied in:… and the Charter of the International Military Tribunal of 8 August 1945."

The quotation above directly relates to the interactions between the two principal sources of international law: international conventions and international custom. But, simultaneously, it reflects the recognition by the United Nations of the Charter of the Nuremberg International Military Tribunal as a fully valid legal source in international criminal law. The Charter, in turn, was inter alia based on the general principles of law, which, by the Tribunal, were regarded as already existing at the time when the alleged criminal offences were committed. Furthermore, a few other remarks in the Report indicate that the sources of law applied by the Nuremberg Tribunal are, at least by now, practically undisputed as a legal basis for its judgment. By Resolution 827 (1993), the Security Council adopted the Report of the Secretary-General and decided to establish the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

4 The Interrelationship Between Conventional and Customary International Law

Although conventional and customary international criminal law are equally binding (no formal priority rule), their legal effects are of different scope. Strictly speaking, international conventions are only binding upon those States (and their citizens) which have ratified them. From this point of view the 1949 Geneva Conventions are the most international of all conventions, having been ratified by almost every country in the world. The recurrent lack of conventional binding authority over all the States involved tends to create serious problems and prevent necessary rules from coming into force within a reasonable period of time. Customary law, on the other hand, applies to any State and to any citizen for that matter, irrespective of whatever conventions the various States may have ratified, as well as to new States that are not parties to any conventions and have not contributed to the development of customary law, either. Customary law is very useful, in case particular States or even most of them cannot agree on the issue yet to solve. In some instances, customary law may become a rule of *jus cogens*, i.e. a fundamental rule binding on everybody, irrespective of the existence of other sources of law. Customary law may derive from one or more conventions, but is also quite often an unwritten source of law from the beginning, which later on may get codified in international conventions, as have many customs of war. The conventions differ a lot from the statutes as their counterparts in domestic law in that their coming into force does not depend on the consent of the citizens, to whom they may apply.

In order that a custom may constitute a binding rule for the international community, but not necessarily a rule of jus cogens, it must fulfil the requirements embodied in "a general practice accepted as law", to quote the wording of Article 38 of the Statute of the International Court of Justice. The following requirements, known as the elements of customary law, must be established beyond a reasonable doubt:

a) The existence of State practice, as established by *evidence* of actual State activity, statements whether made in the abstract or not, diplomatic correspondence, U.N. General Assembly resolutions and so forth.
b) Consistency of practice (constant and uniform).
c) Generality of practice, common to a significant number of States.
d) Opinio juris, i.e. States must recognize the practice as binding upon them *as law*.

As secondary elements, somewhat more ambiguous, may be mentioned the duration of practice and the practicability (suitability) of a rule based on custom.[4]

The above mentioned Report of the U.N. Secretary-General contains a concise remark on the interrelationship between conventional and customary international law, in a few general comments he made on the concept of

4 For additional reading, see e.g. Martin Dixon: *Textbook on International Law* (1993), pp. 24–30; Gunnar G. Schram: Ágrip af Thjóðarétti (1986), pp. 20–22.

international humanitarian law, which is to be applied by the Hague International Tribunal (cf. item 33):

> "This body of law exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law."

In his Report prior to the establishment of the Hague International Tribunal, the U.N. Secretary-General furthermore expressed the view that the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are *beyond any doubt* part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law (cf. item 34). What exactly constitutes the international humanitarian law to be applied by the Hague International Tribunal will not be dealt with for the time being.

5 Sources of International Criminal Law Against the Background of Human Rights Conventions

A study of the human rights conventions reveals that they place *international law* in a position equal to that of *national law*, as stated in Article 7.1. of the European Convention on Human Rights and in Article 15.1. of the U.N. International Covenant on Civil and Political Rights. It can be taken for granted that international law in this context will cover international conventions as well as international customary law, whether written or unwritten. This also means, comparing paragraphs 1 and 2 of the Articles above, that the (unwritten) *general principles of law* recognized by civilized nations or by the community of nations are not included in paragraph 1. They are reduced to an inferior position in paragraph 2 of both Articles. These second paragraphs are formulated as an exception to the principle stated in paragraph 1. It runs as follows in the European Convention, Art. 7.2:

> "This Article shall not prejudice the trial and punishment of a person for any act or omission which at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations."

The formulation of Article 15.2. of the International Covenant on Civil and Political Rights is practically identical except for the final words of the text, "the community of nations" instead of "civilized nations". The first one is obviously better chosen.

Article 7, paragraphs 1 and 2, of the European Convention and the equivalent provisions of the U.N. Covenant, provide an unmistakable evidence that these international instruments apply to international criminal law as well as to national criminal law, irrespective of the enforcement model used. It is hard to say, whether this is true for these instruments in all respects. Keeping in mind

the rule of exception for the general principles of law and the risk that such rules may not fulfil the requirement of the European Court of Human Rights that penal provisions should be both accessible and foreseeable, it is certainly possible that the exception rule will disappear from both instruments in the near future. This would entail that the general principles of law would not do any more as a basis for criminal liability, even though the principle of no *ex post facto* law were recognized, as it is presently in the above mentioned international instruments.