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THE ICC'S JURIDICAL CONTINUUM: A STUDY IN LEGAL EVOLUTION

AUTHORED BY - UTKARSH PANDEY & SNEH PANDEY

LIST OF CASES

1. Kupreskic ICT T. Ch. II 14.1.2000
2. Prosecutor v. Vasiljevic´ (Case No. IT-98-32)
3. Prosecutor v. Milošević, ICTY, T. Ch., 8 November 2001
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6. Prosecutor v. Blé Goudé, PT. Ch. I, ICC-02/11-02/11), 31 December 2014
7. Prosecutor v. Katanga et al., ICC PT. Ch. I, Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008).
8. Prosecutor v. Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009
9. Krsˇtic´ ICTY A. Ch. 19.4.2004
10. Prosecutor v. Katanga & Ngudjolo Chui, Case No. ICC-01/04-1/07, Decision on the Confirmation of Charges, ¶¶ 506–08 (Sept. 30, 2008).

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ABSTRACT

Until the Rome Statute came into force, international treaties were of lesser importance for international criminal law. Today, as it is the case, the ICC Statute is the main source of international criminal law. International criminal law owes its origin to various sources. Crimes such as war crimes have their source in laws and customs of war through which individuals are accorded protection during conflict. Crimes against humanity and most importantly, genocide, are a product of barbaric actions even of one's own government., so as to protect persons from gross violations of human rights. This study explores the sources of international criminal law that have helped evolve the International Criminal Court. The International Court of Justice exists that can prosecute individuals, but post the establishment of International Criminal Court, new concept of 'individual criminal responsibility' have been coined in such manner that individuals alone can be prosecuted no matter the place of committing of war crime. The Rome Statute under Article 24(2) takes note of position of change in law beforehand and at such times it is the applicable law found in treaties and customary international law as well as general principles that determine whether change in customary law can be considered sufficient to consider it as change in international law so as to give protection under Article 24(2). Generally, the sources of law are considered to be treaties, customary international law, general principles and previous decisions of the Courts. The ICJ Statute provides sources of law that are applicable in no order of merit on which nearly all international tribunals including ICTY and ICTR have relied. However, this study also brings out the position as it stands due to the hierarchy of sources of law that find place under Article 21. The study also studies the source of origins of well-established principles such as that of the principle of legality (nullum crimen and nullum peona). The study also focusses on caveat that needs to be maintained while different sources of law are being used for interpretation.

RESEARCH QUESTIONS

1. Are the sources of international criminal law analogous to the International Criminal Court?
2. What have been the reasons for the ICC to rely on sources other than the Statute itself?
3. What is the irreconcilable contradiction test to understand the precedence of one source of applicable law over the other in the light of Al Bashir case?
4. How has the source of law international criminal law evolved with specific reference to the ICC?

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RESEARCH METHODOLOGY

The project followed empirical method and the researcher went through various commentaries of the Rome Statute,2000, journals, articles and books.

HYPOTHESIS

The study begins with the presumptions that the sources of international criminal law are nearly same for all kinds of tribunals, be it the predecessor tribunals, Ad Hoc Tribunals or the permanent international criminal court of that of International Criminal Court and all apply law in a similar manner.

RESEARCH DESIGN

The study has been divided into 4 different chapters. The first chapter deals with the Introduction with insights as to the setting up of the ICC, and its history with specific reference to the Rome Conference, 1998. The second chapter deals with the sources of law, covering treaties, customary international law, general principles of law, and limited recourse to judicial decisions. The sources have been explained with the help of relevant case laws as to know to what extent the Courts consider the binding sources of different sources of law and to ascertain the source of law of well-established principle of legality. The role of ad hoc courts and tribunals, the predecessors to the ICC that provided significant development to the ICC have also been discussed. It further discusses the evolution of ICC as had been after the spurt in need of a permanent international court by studying in brief the Nuremberg and Tokyo Tribunal and the ICTY and ICTR by acknowledging the origin of modern concepts of law dated back to these tribunals. The Third Chapter explains the evolution of ICC in context of applicable law which studies the hierarchy of sources and the extent to which the source of elements of crime shall apply. The same is understood in the light of the Al Bashir case. Lastly, the fourth chapter concludes the study.

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I. INTRODUCTION: HISTORY OF SETTING UP OF THE ICC

Gustav Monere, who was one of the founders of the international committee of the Red Cross is considered to be the first one who mooted for the establishment of an international court in the year 1872. He was concerned over the fact that the domestic judges would not be able to act fairly and charge offenses committed during wars in which their countries were involved. After that the Nuremberg trial and even the Second World war came to be of no credit as the objective sort to be achieved fell short. It was at the time of negotiations during the 1948 Genocide Convention that the proposal to set up a permanent national Criminal Court was made, that too was left to be set up in the future. Relevant provision was the 1948 genocide convention Article 6 which provided for holding persons accountable and charging them in the territory where they committed genocide or alternatively by such international penal tribunal that may have jurisdiction once the contracting parties have accepted its jurisdiction. Finally, in the year 1950 a Special Committee was appointed that drafted a draft statute. However, it again could not be culminated into setting up of a permanent international court as no consensus could be sought as to the definition of aggression. Also, the idea of the concept of a permanent international criminal court was not well conceived obviously due during the Cold War allegations and it was viewed skeptically especially by the superpower countries from the lens of a propaganda. Due to the illegal drug trade and drug trafficking menace the Prime Minister of Trinidad and Tobago revived the demand for setting up of a permanent International Criminal Court and urged the General Assembly after which the latter passed resolution to once again task the international Law Commission with the aim of drafting the statute. In the meantime, 2 Ad hoc tribunals the ICTY and the ICTR were also established which again boosted momentum for the need of a permanent International Criminal Court.

Initially States were skeptical about setting up an international common criminal Court. However, a group of like-minded states emerged During the Preparatory Committee meetings, a 'Like-Minded Group' of States supportive of a new court emerged, and agreement was reached to hold a conference in Rome in the summer of 1998 to finalize and conclude the treaty. The draft statute which had emerged from the Preparatory Committee, with its numerous alternative texts, served as the basis for negotiation at the Rome Conference.

I.I. The Rome Conference 1998

The Rome conference was convened in 1998 by the General Assembly so as to complete the finalization of the statute. There were different issues ranging from the duration of the new court

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as to how broad it will be to some countries putting forward the conflicting interest as they were not prepared to accept but without an amendment to the vote. Even Indian delegation asked for a vote on its proposal to include a crime related to use of weapons of mass destruction and urged to exclude any role for the Security Council. The Rome Statute was ratified by 60 countries and it came into force on first July 2002 thereby establishing the International Criminal Court.

II. SOURCES OF INTERNATIONAL CRIMINAL LAW

It can be said that as the International Criminal law is a subset of the international law its sources are similar. As regards the International Criminal law, the statute of the International Court of Justice prescribes 4 clauses that are treaty, customary law, general principles of law which are considered as subsidiary means of determining the law and also judicial decisions including the writings of most qualified publicists. Even the Ad Hoc tribunals rely on these sources being part of the International Criminal law. However, if we talk about the ICC statute it has its own regime of sources to apply. On the face of it they appear to be analogous to the ICJ sources, and are in part can even be said to be so however the main difference lies in the interpretation as the former creates a hierarchy of sources. In other words, article 21 of the Rome Statute 2002 is the most important provision. While it can be said that International Criminal law is an all pervasive law through which all the codes and tribunals derive its sources, yet the ICC ranks the sources of law in order of applicability. In which the Rome Statute read along with the rules of procedure and evidence and the elements of crime are to be considered the primary source of law. Also, Article 9 and 51 of the Rome Statute makes it specifically clear that the statute shall have an overriding effect over the rules of procedure and elements of crime in case there is a conflict. As will be seen later in this study, since the ICC makes a departure from other kinds of tribunal by making it explicit the primary source of law there have been cases in which the ICC was caught up in giving precedence to one type of source over the other despite the expressly clear reading of the statute as well as the International Criminal norms.

A. TREATIES

Under article 21 of the Rome Statute one of the sources of criminal court is the applicable treaties. Treaty such as in 1907 Hague regulations, 1948 Genocide Convention, and 1949 Geneva Conventions with the 2 Additional Protocols form the basis of many of the crimes on which the International Criminal Court and even the Ad Hoc tribunals rely. Now the question is whether

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these treaties directly apply or are simply served as an aid to the interpretation of crimes and their definitions has varied from case to case as will also be seen later in the study. As far as the ICC is concerned the states retain the primary responsibility in in the prosecution of international crimes. The ICC has jurisdiction over war crimes, crime against humanity and genocide which are mostly covered by the 1949 Geneva Convention and the two additional protocols of 1987. The ICC statute that list the definition of crimes over which the ICC has jurisdiction is a is of course a treaty itself. The Security Council resolution of 2003 and 2004 that set up the ICTY and ICTR respectively were adopted pursuant to the UN charter powers dovetailed under Chapter 7 that derives its binding force from article 25 of the UN Charter. The Conventions of 1899 and 1907 prohibits the warring parties on use of certain methods and means of war. On the other hand, the Convention of 1864 and the 1949 Geneva Conventions along with two additional protocols of 1977 protects persons that are no longer part of the hostilities. Thus, the Hague convention and the Geneva Convention helps in identification of numerous violations of norms including war crimes as well. So, there is no one document alone instead list of war crimes finds its place in international humanitarian law International Criminal law an international customary law as well.

While the Geneva Conventions of 1949 have been ratified by all Member States of the UN, the 2 Additional Protocols do not have similar acceptance. Still, most of the rules in these treaties have been considered customary law as such and are thus binding whether or not the States have actually ratified those specific treaties or not. In addition, many rules of customary international law apply in both international and non-international armed conflict, expanding in this way the protection afforded in non-international armed conflicts, which are regulated only by common article 3 of the four Geneva Conventions and Additional Protocol II.

B. CUSTOMARY INTERNATIONAL LAW

The ICTY in the case of Kupreskic[1] conceded to the view that when a matter is outside the scope of a statute, customary international law and general principles must be referred to. However, reliance on customary international law in International Criminal law has quite a few times been criticized on the grounds of being too vague to hold a person criminally liable or not liable for that matter. It is believed that no law which is not written should suffice to read down criminal liability on a person. These assertions can be studied in the light of the principle of nullum crimen sine

[1] Kupreskic ICTY T. Ch. II 14.1.2000 para. 591

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lege. In the case of Vasiljevic[2], the Trial Chamber was of the view that since the customary law did not provide a sufficient clarity with respect to definition of the offense in question which was related to the offense of 'violence to life and person' the accused was acquitted of that charge. Thus a strict standard of the nullum crimen principle was taken by holding the view that the defendant couldn't have been reasonably aware of his acts at the time at which was committed by applying the nullum crimen principle taking into account the specificity or specific demands of customary international law. The report of the Secretary General of the Security Council in its resolution 808 (though it was related to ICC) suggested only those rules should be applied by international tribunals that are beyond any doubt of customary law so that adherence to customary law by the States remains untainted even if they are not ratified parties. However, this formulation suffers from a vice as all that is important as regards the nullum crimen principle is not whether the treaty does or does not reflect the actual customary law but the only test is only whether such treaty is applicable to the relevant armed conflict.

Customary international law can be considered as the one of the main and primary sources of International Criminal law as well as they ICC statue. In the case of Prosecutor v. Milojevic[3], the ICT Clarified that article 27 that talks about relevance of official capacity at the time of committing international cime is no defense based on the principle of exception of immunity rations materiae that has been developed in the Nuremberg trial which reflects none other than customary international law. The ICC relied on this doctrine in the case of Prosecutor v. Omar al Bashir to hold that the heads of the states even of non parties to the Rome Statute do not enjoy any kind of immunity according to international law which finds is space in the declaratory nature of customary international law.

C. GENERAL PRINCIPLES OF LAW

General principles of law are to be understood in the sense that ICTY and ICTR both have resorted to laws of national jurisdiction in order to assist them while determining the relevant international law question. The Furundzija[4] case is of significance here where in it was observed that the International Criminal Court should be wary of uncritical reliance on the general principles derived from only one of the major legal systems of the world. Instead, International Criminal

[2] Prosecutor v. Vasiljevic´ (Case No. IT-98-32)
[3] [Prosecutor v. Milošević, ICTY, T. Ch., 8 November 2001, para 28]
[4] Furundžija ICTY T. Ch. II 10.12.1998 para. 178

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Courts must derive such concepts and apply them only if they are common to all the major legal systems of the world. Also, it is believed that since the principles of criminal law being general in nature are not ideal and that should be used only as a last resort. In fact, in the case of Erdemovic[5], Justices McDonald and Vohrah opined the fact that criminal law is not really the ideal law where general principles can be found and applied as times there exists simply no principle general enough to apply. So, it can be safely said that the general principles of law are a weaker source when it comes to International Criminal Law. With specific reference to the ICC statute, as discussed earlier, if we go by the hierarchy of sources it is only when the first 2 categories or clauses of sources or law do not provide enough guidance on the question of interpretation of criminal law it is only then that the general principles of law that have been derived from national Courts of different jurisdictions can be relied on by the court as deemed appropriate Which is also qualified by the provisio that such principle should not be inconsistent with the statute itself and also with international law and it's recognize norms and standards. It was held in the Loongah case that the though the general principles are at maintaining uniformity by adopting a comparative approach to criminal law yet the readily inference cannot be resorted to because the precedents of the Ad Hoc tribunals are in no way binding and that procedural rules and jurisprudence of the ad hoc tribunals cannot be made applicable without careful and due analysis. However, in the case of *Prosecutor v. Blé Goudé*[6], the Chamber specifically gave the reason for holding the perpetrator of a perpetrator responsible under article 25 (3)(a) for the offense of indirect perpetration. Out of the 3 reasons that the chamber gave one of the reasons was that holding a person responsible on the notion that he was accused who committed the crime or the incriminatory conduct through another person has been increasingly used in national jurisdictions. It also observed that the notion of control over crime has been constantly addressed in the evolving jurisprudence of international tribunals such as in the case of Katanga[7]. Thus, in this case it was recognized that the approach of or the concept of perpetrator behind the perpetrator is widely accepted as the legal doctrine in various domestic jurisdictions and is therefore an established legal doctrine to be relied on even by the International Criminal Court.

[5] Erdemovic´, ICTY A. Ch. 7.10.1997 Opinion of Judges McDonald and Vohrah, paras. 56–72.
[6] Prosecutor v. Blé Goudé, PT. Ch. I, ICC-02/11-02/11), 31 December 2014, paragraph 134.
[7] (Prosecutor v. Katanga et al., ICC PT. Ch. I, Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008).

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D. THOUGH NOT BOUND BY STARE DECISIS, YET RECOURSE TO OWN JUDICIAL DECISIONS IS NO BAR

The ICC is not bound by the common law principle of the stare decisis. The ICC, however may regard such principles and rules of law as evolved by it in its previous decisions if need be if the other sources of international criminal law are found to be inadequate. The ICTY and ICTR, however, had frequent recourse to judicial decisions for determining points of law and revisited such precedents thereby evolving its own jurisprudence. Finally, although the writings of scholars are not, in themselves, sources of international criminal law, it is widely known and accepted that a reasonable inference is possible. However, wherever statement of an author is being used as a source to aid international criminal law, caveat exists so that only account of law as it exists is taken into consideration than author's subjective opinion of how law should ideally be, most importantly to preserve nullum crimen sine lege principle.

One unique feature in the Rome Statute is the principle of legality. Need for incorporating Articles 22 and 23 were vivid as soon as 1996 when the Preparatory Commission acknowledged that the definition of crimes should be clear, precise and the specificity required for criminal law should be according to the principle of legality. These principles, i.e, nullum crimen and nulla poena are well established principles whose drafting in the Rome Statute stood effortless to be already well-established in customary international law.[8]

In the Katanga(supra) case the Pre-Trial Chamber defined the term 'other inhumane acts' as serious violations of international customary law'. It added that they are basic human rights that are derived from international human law.

E. AD HOC COURTS AND TRIBUNALS: PREDECESSORS TO THE ICC THAT PROVIDED SIGNIFICANT DEVELOPMENT TO THE ICC

The Nuremberg tribunal and the Tokyo tribunal are considered to be the starting point for International Criminal prosecutions. They were established to make criminals responsible for the worst of the crimes inter alia, genocide, mass execution of political opponents, ethnic cleansing and systematic rape of a particular ethnic group however due to the unwillingness or inability of these Tribunals they went unpunished. There was felt a need for a reliable system as these national

[8] Lamb in Cassese, 2002, p. 734-735 [Broomhall in Triffterer, 2008, p. 715].

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Courts in the form of Ad Hoc Tribunals proved to be biased therefore hardly willing to hold criminals responsible. As highlighted their establishment of ignited a hope that a permanent institution might soon be created but the Cold War allegation stalled the efforts which were only elevated after the Berlin Wall fall. It is no doubt that the ICTY and the ICTR which were set up by the Security Council in the year 1993 and 1994 respectively were a step in the direction of setting up a permanent International Criminal Court, however they had their own pitfalls. The ICTY and ICTR provided alternatives for trying perpetrators that have been accused of gross crimes against humanity in national Courts that provided impetus to the proposal of a common International Criminal Court. Many jurists consider it to be the missing link in the international legal system. The Ad Hoc Tribunals were also tainted of being accused of political bias them being established by the decision of the UN Security Council instead of a result of a treaty. Also, the jurisdiction of the Ad Hoc Tribunals is limited in scope both of territory and subject matter of war crimes. So, the atrocities specific to the situations was the reason for bringing ICTY and ICTR for other matter any other tribunal into place which could never substitute the need for a permanent international court. The statement given by Jose Lassow, the former United Nations High Commissioner for human rights also highlighted the fact that there is a need to end impunity despite the significance of the Nuremberg and Tokyo and also the 2 ad hoc tribunals just is not really served as most perpetrators went unpunished for the reasons highlighted above. Despite being called out for being tainted by Victor's justice, the Nuremberg tribunal was successful in establishing 3 significant precedents which were holding individual responsible for war crimes instead of the state, second, the recognition of crimes against humanity and lastly, the universal jurisdiction concept which passes on the jurisdiction to the ICC no matter where the crime has been committed and thus the power to prosecute individuals has been exemplified on any willing country in case of most of the serious international crimes. Like the Nuremberg The Geneva Convention of 1949 also strengthened the position of holding criminal responsible or in other words individual criminal liability for grave breaches. The International Criminal law also finds its prevalence in the 1985 convention against torture and other cruel, inhuman or degrading treatment all punishment where in both the concepts of universal jurisdiction and crimes against humanity have also been recognized.

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III. EVOLUTION OF ICC IN CONTEXT OF APPLICABLE LAW: STUDY ON HIERARCHY OF SOURCES

The Statute has created a hierarchy of sources. The ICC differs from ICJ to the extent that it has under article 21 of the statute given ranks to different sources of international Criminal law in mandatory terms. The said article is titled as the applicable law. The Statute itself is followed by elements of crime and its rule and procedure is first as the primary source in interpretation. Next, it is followed by 'where appropriate, applicable treaties, principles and rules of international law'. Lastly the general principles of law that are derived from Courts of national jurisdiction. The second clause also provides liberty and does not bind the ICC to rely on its own previous decisions. Thus, the ICC statute provides precedence of one source of law to the other. The treaties are given the highest rank in contradistinction to customs and general principles evolved by domestic jurisdiction. However, it is not as harmonious as it is believed to be. This is because it is fairly believed that some of the crimes and also their definitions have been accepted as jus cogens norms. The ICC has used the irreconcilable difference theory to determine the precedence of customary statement of element of crimes despite the fact that the definition of crimes that exists in treaties (Geneva Convention) was succinctly determinative.

The Al Bashir[9] arrest case suffice the fact that interpretation of the hierarchy of sources is not that simple. The prosecutor approached the Pre trial chamber to issue a arrest warrant on the grounds of three war crimes. The warrant was, however issued for war crimes and crime against humanity but not on account for genocide. The next segment of the study examines the same.

III.I. THE QUESTION: TO WHAT EXTENT THE SOURCE OF ELEMENTS OF CRIME SHALL APPLY

Elements of crime was the demand of the United States and it was already observed in the Preparatory Committee which was submitted by it to the United Nations. It was of the view that it was consistent with the need to define crimes with clarity that many jurisdictions follow[10]. Along with the US, Japan also stressed the need of incorporating the source of elements of crime during Rome Conference.

[9] Prosecutor v. Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009

[10] [Schabas, 2010, p. 407, citing the Proposal submitted by the United States of America, Elements of offences of the International Criminal Court, UN Doc, A/AC.249/1998/DP.11]. [Schabas 2010, p. 407]

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Coming back to the Al Bashir Case (supra), the Rome Statute or the ICC defines genocide under Article 6. It has been derived from Article II of Genocide Convention on the Prevention and Punishment of Crime 1948. So, in essence since the Statute itself restricts itself to the definition of genocide to what is provided therein, the ICC must have bound itself to the definition alone. However, the court took the additional requirement that found place in the Elements of Crime under article 21(1)(a) to include the requirement of such an act being taking place in context of a manifest pattern of a conduct that is against such particular group. Or that such conduct itself produced such destruction. Thus the ICC went a step further to warrant conviction only if there is no threat short of concrete one. The reasons, as I understand have been more of political. The ICC was wary in invoking jurisdiction in every such case of genocide and thus turned away from being involved every time there are 'random racist killings. It is of the view that such matters are best left to the discretion of national jurisdiction. Consequentially, despite the controversial nature of Element of Crimes as a customary status, the Pre Trial Chamber applied it. The Pre-trial chamber even though concurred to the decision of ICTY and ICTR maintaining that there was no such analogous provision in the 1948 Genocide Convention. In its decision the Pre-Trial Chamber accepted that there is only one requirement of constituting genocide which is existence of such an intent to destroy whole or in part the targeted group. As soon as this is established there is no further need of proving latent threat of having been converted into a concrete one. It still decided to use the element despite its incompatibility with the customary law. However, it failed to take into consideration that in previous decisions it was also held by the Appeals Chamber the attempt to use this particular element had already been expressly rejected in the case of Krstic[11].

It is not that the elements of crime are not to be considered while interpreting, but they are in the nature of non-binding and have to be in consonance with the statute as such they are limited to be used for the purposes of guidance rather than authoritative text.

International Criminal law draws is its source from the statute, treaties, customary international law the latter being converted in the just cogens norms. The ICC is not aloof do this standard. Yet limiting the scope of the definition of genocide in the case of genocide mentioned above, despite it falling squarely under the ambit of the Rome Statute stands counter to both the hierarchy of sources as enshrined under article 21 as well as the customary international law supra case.

[11] Krsˇtic´ ICTY A. Ch. 19.4.2004 paras. 24–38

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There have been cases such as those of Katanga and Njudjolo(supra)[12] where the ICC applied the determinative text of the statute and the statutory definitions rejecting the applicability of custom. Although it is unnecessary to question its decision in this piece but the fact is that the ICC departed from the International Criminal law and ignored the intention of the drafter by giving considering elements of crime as binding source of law contrary to what had been the intention of the framers (Al Bashir case). The majority, thus applied the irreconcilable contradiction test by weighing elements of crime as against the Statue and held former as binding so to acquit the accused by applying this test thereby limitng the definition of genocide and giving mandatory precedence to the source of Elements of Crime over and above the statutory definition. The best that the court could do specially in the Al Bashir case was to use elements of crime only to the extent of assisting the ICC in interpretation of the crimes, the crime of genocide, rather than to reconcile and apply the texts per se.

IV. CONCLUSION

On the face of it, apparently the applicable law of all tribunals and courts are the sources of international criminal law that are common to all. However, with specific reference to the International Criminal Court, as also made amply clear through the cases, there have been reasons where Court went beyond the simple and plain text of the Statute. While it is permissible, to go beyond to understand the intention of the framer as well as to provide better of the applicable laws to the accused, but when there exists no inconsistency resort to international customary laws can prove to be dreadful that might as well lead to loss in faith in its very existence. The crime of genocide and its definition is wide enough to cover all possible aspects as it is highly doubtful, in my perspective, to look beyond the Statute that eventually led to the acquittal of the perpetrator by relying on customary laws. What is a customary law, may again even lead to more ambiguous acquittals which were the very biggest drawbacks of Nuremberg and Tokyo Tribunals and even the two Ad Hoc ones. It is not that customary laws or elements of crime cannot be resorted to, but to what extent namely only to aid or apply them per se is a matter that is best left to the discretion of the Court. In conclusion, the best at hand is to understand the intention of the drafters behind the simplistic hierarchy of sources and construe them harmoniously so that the perpetrators of war crimes do not go unpunished due to unscrupulous and unwarranted reference of one source over the other.

[12] Prosecutor v. Katanga & Ngudjolo Chui, Case No. ICC-01/04-1/07, Decision on the Confirmation of Charges, ¶¶ 506–08 (Sept. 30, 2008).

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