

Dynamic Interpretation in International Criminal Law

Striking a Balance between Stability and Change

Bearbeitet von
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Alexander Grabert

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Europäisches und Internationales Recht

herausgegeben von

Prof. Dr. Georg Nolte und Prof. Dr. Rudolf Streinz

Humboldt-Universität zu Berlin und Ludwig-Maximilians-Universität München

begründet von

Prof. Dr. Bruno Simma

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Table of Contents

Preface and Acknowledgements.....III
Table of Abbreviations.....X
Note on Citations.....XV

Introduction.....1

Part One: The Concept of 'Dynamic Interpretation'

A. Use of Terms.....4
 I. 'Interpretation'.....4
 II. 'Dynamic' or 'Evolutive' Interpretation.....4
 1. 'Dynamic' Interpretation v 'Specifying' Interpretation.....6
 2. 'Dynamic Interpretation' v 'Modification'.....7
 3. 'Dynamic Interpretation' v 'Identification' of Customary Law.....8
 III. 'International Criminal Law'.....9
B. The Role of Dynamic Interpretation in Different Legal Systems.....9
 I. Dynamic Interpretation in National Criminal Justice Systems.....9
 1. The Principle of Legality.....10
 2. Scope for Dynamic Interpretation.....13
 3. Conclusion.....15
 II. Dynamic Interpretation in the Law of Treaties.....15
 1. Treaty Interpretation in General.....15
 2. International Human Rights Law.....17
 3. International Humanitarian Law.....18
 4. Conclusion.....20
 III. Dynamic Interpretation in International Criminal Law.....20
 1. The Principle of Legality in International Criminal Law.....20
 2. Requirement for Flexibility.....22
 3. Conclusion.....26
C. Conclusion.....27

Part Two: Dynamic Interpretation of International Criminal Law in Judicial Practice

A. Introduction.....	28
B. ICTY and ICTR.....	29
I. Applicable Law.....	29
II. Specific Rules of Interpretation.....	30
III. Instances of Dynamic Interpretation in the Jurisprudence of the ICTY and ICTR.....	31
1. War Crimes.....	32
a) 'Persons [...] Protected' (Article 2 ICTY-Statute).....	33
b) Individual Criminal Responsibility for Atrocities Committed in Non-International Armed Conflicts.....	37
c) Applicability of the Grave Breaches Regime to Internal Armed Conflicts.....	41
d) Specific Offences.....	43
2. Genocide.....	44
a) Intent to 'Destroy'.....	44
b) 'a National, Ethnical, Racial or Religious Group, as such'.....	52
3. Crimes Against Humanity.....	57
a) 'Discriminatory Intent'.....	58
b) 'Enslavement'.....	61
c) 'Deportation'.....	65
d) 'Torture'.....	68
e) 'Rape'.....	74
4. General Principles of Criminal Liability.....	78
a) 'Joint Criminal Enterprise'.....	78
b) Command Responsibility in Internal Armed Conflicts.....	83
IV. Conclusions.....	87
1. Tensions between the Applicable Law in its Original Meaning and the Needs Prevailing at a later Point in Time.....	87
2. The Role of Dynamic Interpretation.....	88
a) Dynamic Interpretation of Treaties.....	89
b) Dynamic Interpretation of Customary Law?.....	89
c) Dynamic Interpretation of Treaties v Identification of Customary Law.....	90
3. Methodological Aspects.....	94
a) Purposive Approach.....	94
b) 'Substantive-Developments-Approach'.....	96

4. Dynamic Interpretation and the Principle of Legality.....	97
a) Criteria for Distinguishing between Instances of Dynamic Interpretation and Retroactive Application of the Law.....	99
b) Conformity of the Jurisprudence with the Pertinent Criteria.....	100
5. Evaluation.....	102
C. ICC.....	105
I. Applicable Law.....	105
II. Specific Rules of Interpretation.....	105
III. Instances of Dynamic Interpretation in the Emerging Practice of the International Criminal Court.....	107
1. War Crimes: The War Crime of Conscripting or Enlisting Children under the Age of Fifteen Years 'into the National Armed Forces', Article 8(2)(b)(xxvi) ICC-Statute.....	107
2. Genocide.....	110
a) 'Contextual Element', Article 6 ICC-Statute.....	110
b) 'Intent to Destroy', Article 6 ICC-Statute.....	113
3. Crimes Against Humanity: 'Organizational' Policy, Article 7(2)(a) ICC-Statute.....	116
4. General Principles of Criminal Liability.....	123
a) 'Unless Otherwise Provided', Article 30(1) ICC-Statute.....	123
b) 'With Intent and Knowledge', Article 30(1) ICC-Statute.....	125
c) 'Indirect Co-Perpetration', Article 25(3)(a) ICC-Statute.....	128
IV. Conclusions and Outlook.....	131
1. Tensions between the Applicable Law in its Original Meaning and the Needs Prevailing at a later Point in Time.....	131
2. The Role of Dynamic Interpretation.....	133
3. Methodological Aspects.....	136
a) Elements of Crimes, Article 9(1) ICC-Statute.....	136
b) Internationally Recognised Human Rights, Article 21(3) ICC-Statute.....	139
c) Object and Purpose, Article 31(1) VCLT.....	141
d) Subsequent Agreements, Article 31(3)(a) VCLT.....	142
e) Subsequent Practice, Article 31(3)(b) VCLT.....	143
f) Relevant Rules of International Law, Article 31(3)(c) VCLT.....	145
g) Conclusion.....	146
4. Dynamic Interpretation and the Principle of Legality.....	146
5. Evaluation.....	148

D. SCSL.....	150
I. Applicable Law.....	150
II. Specific Rules of Interpretation.....	150
III. Instances of Dynamic Interpretation?.....	151
1. Conscripting or Enlisting Children into Armed Forces or Groups, Article 4(c) SCSL-Statute.....	151
2. Intentionally Directing Attacks against Peacekeepers, Article 4(b) SCSL-Statute.....	153
3. Forced Marriage.....	155
4. Sexual Slavery, Article 2(g) SCSL-Statute.....	157
IV. Conclusion.....	158
E. STL.....	160
I. Applicable Law.....	160
II. Specific Rules of Interpretation.....	161
III. The Definition of Terrorism as an Instance of Dynamic Interpretation?.....	162
IV. Conclusion.....	166

Part Three: Evaluation

A. International Criminal Law and the Time.....	167
B. The Role of Dynamic Interpretation in International Criminal Law.....	168
C. Methodological Aspects.....	170
D. Dynamic Interpretation and the Principle of Legality.....	173
I. Does the Principle of Legality Prohibit a Dynamic Interpretation of International Criminal Law?.....	173
II. Criteria for Distinguishing between an Instance of Dynamic Interpretation and Retroactive Creation of Law.....	176
III. Conformity of the Jurisprudence with the Pertinent Criteria.....	178
IV. Conclusion.....	179
E. Final Remarks.....	179

Bibliography

A. International Criminal Courts and Tribunals.....	182
I. International Military Tribunal.....	182
II. International Criminal Tribunal for the former Yugoslavia.....	182
III. International Criminal Tribunal for Rwanda.....	186
IV. International Criminal Court.....	187
1. Situation in the Democratic Republic of the Congo.....	187
2. Situation in Darfur, Sudan.....	188
3. Situation in Kenya.....	189
4. Situation in the Central African Republic.....	190
5. Situation in Uganda.....	190
V. Special Court for Sierra Leone.....	190
VI. Special Tribunal for Lebanon.....	191
B. Other International Judicial Organs.....	191
I. Permanent Court of International Justice.....	191
II. International Court of Justice.....	191
III. European Court of Human Rights.....	193
IV. Inter-American Court of Human Rights.....	194
C. International Arbitral Awards.....	194
D. National Jurisprudence.....	195
I. Germany.....	195
II. Israel.....	196
III. Spain.....	196
E. United Nations.....	196
F. Non-Governmental Organisations.....	200
G. International Treaties.....	200
H. Literature.....	202

Introduction

All legal rules are linked to the factual and legal circumstances prevailing at the time of their emergence. As a matter of principle, they reflect the knowledge, experiences and expectations of their drafters at that time. Take, for instance, a legal rule which provides that particular waters may be used by vessels for commercial purposes. Inevitably, such a rule rests upon the notions of 'vessel' and 'commerce' at the moment of codification. Yet, once the rule is established, the meaning of these notions may evolve. On the one hand, factual changes may occur – such as new types of vessels or novel forms of commerce – which were not foreseeable when the rule was formulated. On the other hand, the legal framework in which the rule operates may evolve. For instance, certain forms of commerce may become illegal. Finally, the preferences and needs of the different subjects concerned may change. For example, a consensus may emerge not to apply the rule to certain types of vessels. Due to such changes, tensions may arise between legal norms as originally conceived and the requirements at a later moment in time. Consequently, in any legal system, the question arises as to how the existing law is affected by subsequent developments. Generally, one may conceive of three different answers to this question: first, the law may not be affected at all. Placing an emphasis on the aspect of stability, it may be applied as if the changes had not occurred until it is formally amended by the legislator. Second, contrarily, an emphasis may be placed on the aspect of flexibility. Certain developments may be considered as altering the existing law in substance. Third, in between these extremes, subsequent developments may have an influence on the interpretation of the existing law. While the law remains identical in formal terms, its meaning evolves in accordance with certain developments. This latter exercise is what shall be called a 'dynamic' or 'evolutive' interpretation.

The extent to which a 'dynamic' approach to interpretation is admissible depends upon the balance of stability and flexibility within a particular legal regime. This balance is contingent on the characteristics, principles and sources of law of the pertinent legal area. Yet in international criminal law ('ICL'), this balance is particularly difficult to define. On the one hand, ICL provides for the criminal responsibility of individuals. Hence, as in any liberal criminal justice system, there is an enhanced requirement for certainty and foreseeability of the law. According to the principle of legality, the addressee of the law must be able to identify the prohibited conduct in advance in order to be able to avoid criminal sanctions. If the factual or legal circumstances of a criminal rule change, there is only a small scope for considering these changes in the process of interpretation to the detriment of an accused. Rather, it is the task of the legislator to adapt the

law to such developments. On the other hand, however, ICL forms part of international law. Thus, it derives to some extent from international treaties which cannot be adapted to changing circumstances within a short period of time. Instead, lengthy amendment procedures are required. Yet the forms of criminal conduct are continuously evolving. The reality is developing at a pace that the law cannot always match. As such, there is a certain need to account for these developments within the framework of interpretation. Furthermore, ICL is closely related to the fields of international human rights law (IHRL) and international humanitarian law (IHL). Within these disciplines, dynamic interpretation is a well established tool to ensure the progressive development of the law. Due to the fact that ICL is to some extent based upon IHRL and IHL, there may thus arise a need to reflect some of these developments for the purposes of ICL. Altogether, the need for legal certainty is contrasted with a need for some degree of flexibility in the interpretation of international criminal rules. Accordingly, the interpretive process in ICL rests upon conflicting assumptions: while there is only a small scope for dynamic interpretation under the principle of legality, some degree of flexibility is required in order to keep the law in tune with its changing environment. The opposing interests of stability and change are both of fundamental relevance in ICL.

In the following study, the consequences of this conflict for the interpretation of rules of ICL are subjected to an analysis. In particular, the interpretive process in ICL is scrutinised with regard to the phenomenon of 'dynamic interpretation'. The object of enquiry of this study is to examine how this interpretive technique may contribute to achieving a balance between the conflicting interests of stability and change. Due to the scope of the principle of legality, the study will focus on rules belonging to substantive criminal law.

In *Part One* of the study, the foundations are set out. After explaining the use of terms, the role of dynamic interpretation within different legal regimes is described. First, the scope for dynamic interpretation in (domestic) criminal justice systems is analysed. Second, its scope in the law of treaties is set out. Third, the ambivalent role of dynamic interpretation in ICL is outlined. Finally, several research questions are formulated which shall guide the remainder of the analysis.

In *Part Two*, the judicial practice of different international criminal courts and tribunals is analysed with regard to these research questions. How are the needs of flexibility and stability balanced in practice? In particular, the study focusses on the interpretation of international crimes as well as of principles of criminal responsibility. It gives examples of dynamic interpretation in judicial practice and comments on the approach applied by the respective international court or tribunal. In fact, the purpose of this analysis is not to comment on each

interpretive issue in depth. Nor does the study purport to set out how a particular notion *should* be interpreted. Rather, an emphasis shall be placed on the time factor in the interpretation of ICL and the methodology applied in this context: How have international criminal judges coped with tensions between established legal rules and recent circumstances? Did they apply a dynamic approach to interpretation? Or did they reject such an approach with a view to legal certainty? Which role have they ascribed to the principle of legality?

In *Part Three*, the outcome of the analysis is evaluated and some general conclusions as to the role of dynamic interpretation in ICL are drawn. In a nutshell, the present study argues that a dynamic approach to interpretation constitutes a valuable tool in order to bring into balance the conflicting requirements of stability and change. While such an approach is necessarily in conflict with the principle of *nullum crimen sine lege* when applied to the detriment of an accused, it is not absolutely prohibited by this guarantee. Rather, it is well established that a certain degree of interpretive flexibility is compatible with the legality principle. More precisely, the meaning of criminal rules may evolve as long as the evolution is foreseeable to the accused and remains within the core meaning of an offence. However, this tool must be used with the utmost caution. Of particular importance is the strict adherence to these named criteria. The persuasiveness of a dynamic interpretational approach largely depends on whether or not the accused was in a position to actually foresee this dynamic. In this context, the present study argues that there is a close correlation between the foreseeability of a dynamic interpretation and the methodology applied in a given case. So while a purely teleological approach can often lead to results that would have been unforeseeable, the foreseeability of a progressive interpretation may be established by certain developments occurring before the commission of the crime. Overall this study posits that dynamic interpretation can make an important contribution to the further cautious development of International Criminal Law, provided it is based on a convincing and transparent methodology and adheres to the limits of the principle of legality.

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