

Alexander Grabert  
**Dynamic Interpretation in  
International Criminal Law**

Striking a Balance between  
Stability and Change



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## Europäisches und Internationales Recht

herausgegeben von

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## Table of Abbreviations

AC	Appeals Chamber
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AFRC	Armed Forces Revolutionary Council
AJIL	American Journal of International Law
AP	Protocol Additional to the Geneva Conventions
ARIEL	Austrian Review of International and European Law
ASP	Assembly of the States Parties to the Rome Statute
ATS	Australian Treaty Series
ATNIF	Australian Treaties not in Force
BGBI	<i>Bundesgesetzblatt</i> (German Federal Law Gazette)
BGH	<i>Bundesgerichtshof</i> (German Federal Supreme Court)
BGHSt	<i>Entscheidungen des Bundesgerichtshofes in Strafsachen</i> (Decisions of the German Federal Supreme Court in Criminal Matters)
BT-Drs	<i>Bundestagdrucksache</i> (Bulletin of the German Federal Parliament)
BVerfG	<i>Bundesverfassungsgericht</i> (German Federal Constitutional Court)
Bull	Bulletin
CDF	Civil Defence Forces
CLF	Criminal Law Forum
CLR	California Law Review

cf	<i>confer</i> (L: compare)
CWRJIL	Case Western Reserve Journal of International Law
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECtHR	European Court of Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
esp	especial(ly)
et al	<i>et alii</i> (L: and others)
f / ff	and the following (singular / plural)
EU	European Union
F.2d	Federal Reporter 2nd
F.Supp	Federal Supplement
fn / fns	footnote(s) (external to the work)
FYIL	Finnish Yearbook of International Law
GAOR	UN General Assembly Official Records
GC	Geneva Convention
GYIL	German Yearbook of International Law
HOWLJ	Howard Law Journal
HRC	Human Rights Committee
HRLR	Human Rights Law Review
HRR	Human Rights Review
HVILJ	Harvard International Law Journal
ie	<i>id est</i> (L: that is)
ibid	<i>ibidem</i> (L: in the same place)

ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICLQ	The International and Comparative Law Quarterly
ICLR	International Criminal Law Review
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILM	International Legal Materials
ILR	International Law Reports
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IRRC	International Review of the Red Cross
IYHR	Israel Yearbook on Human Rights
JCLC	The Journal of Criminal Law & Criminology
JHIL	Journal of the History of International Law
JICJ	Journal of International Criminal Justice
JILPAC	Journal of International Law of Peace and Armed Conflict
LCC	Lebanese Criminal Code
LJIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
LPICT	The Law and Practice of International Courts and Tribunals

mn /mns	marginal note (s)
MOU	Memorandum of Understanding
n / nn	footnote (s) (internal to the work)
NCLR	New Criminal Law Review
NStZ	<i>Neue Zeitschrift für Strafrecht</i> (New Criminal Law Gazette)
NYIL	Netherlands Yearbook of International Law
OLG	<i>Oberlandesgericht</i> (German Higher Regional Court)
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PrepCom	Preparatory Committee on the Establishment of an International Criminal Court
PTC	Pre-Trial Chamber
PTJ	Pre-Trial Judge
qv	<i>quod vide</i> (L: which see)
RG	<i>Reichsgericht</i>
RGSt	<i>Entscheidungen des Reichsgerichts in Strafsachen</i> (Decisions of the German <i>Reichsgericht</i> in Criminal Matters)
RQDI	<i>Revue Québécoise de Droit International</i>
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
STJIL	Stanford Journal of International Law
STL	Special Tribunal for Lebanon
TC	Trial Chamber
UDHR	Universal Declaration of Human Rights
UN	United Nations

UNCAT	United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
UNCHR	United Nations Commission on Human Rights
UNTS	United Nations Treaty Series
VAJIL	Virginia Journal of International Law
VALR	Virginia Law Review
VCLT	Vienna Convention on the Law of Treaties
YaleLJ	The Yale Law Journal
YBILC	Yearbook of the International Law Commission
YIHL	Yearbook of International Humanitarian Law
ZaöRV	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i> (Gazette of Public Law and Public International Law)
ZIF	<i>Zeitschrift für Internationale Strafrechtsdogmatik</i> (Gazette of International Criminal Law Dogmatic)

## **Note on Citations**

Citations generally follow the *Oxford Standard for Citation of Legal Authorities (OSCOLA)*, 2010, available at <http://www.law.ox.ac.uk/publications/oscola.php>.

Treaties can be found in the *United Nations Treaty Series (UNTS)*, the *Australian Treaty Series (ATS)* or the *Australian Treaties not in Force (ANTIF)* which is accessible without subscription at <http://www.austlii.edu.au/au/other/dfat/>.



## 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.

# Part One: The Concept of 'Dynamic Interpretation'

## A. Use of Terms

### I. 'Interpretation'

The term 'interpretation' is usually defined as 'the action of explaining the meaning of something'.<sup>1</sup> In a legal context, this action is aimed at determining the meaning of legal rules, mostly laid down in written documents.<sup>2</sup> In public international law, objects of 'interpretation' are mainly treaties, unilateral declarations of states, decisions or resolutions of international organisations etc.<sup>3</sup> However, the notion of 'interpretation' does not necessarily presuppose a written document.<sup>4</sup> A need for identification or clarification may arise in the context of unwritten law as well. In principle, rules of customary international law may also be the subject of an interpretive act.<sup>5</sup>

### II. 'Dynamic' or 'Evolutive' Interpretation

While the notion 'dynamic' or 'evolutive' interpretation is sometimes used as implying a particular method of interpretation,<sup>6</sup> it shall be used here in a more general sense. For the purpose of the present study, an act of interpretation shall be called 'dynamic' or 'evolutive' if the original, historical meaning of a legal notion is extended or replaced by a more modern, contemporary meaning. With regard to treaties, such an approach may be based upon the original intentions of the parties, subsequent agreements and practice<sup>7</sup> or the principle of systemic integration.<sup>8</sup> Hence, the result of the interpretive process, rather than the methodology applied, shall be considered as the relevant criterion.<sup>9</sup>

---

1 'interpretation *noun*', Oxford Dictionary of English, Edited by Angus Stevenson, Oxford University Press, 2010, Oxford Reference Online <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t140.e0417660>> accessed 12 March 2011.

2 'interpretation *n*. The process of determining the true meaning of a written document', A Dictionary of Law, Jonathan Law and Elizabeth A Martin, Oxford University Press, 2009, Oxford Reference Online <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t49.e2041>> accessed 12 March 2011, see also Bernhardt, EPIL, vol II, 1417.

3 cf Bernhardt, EPIL, vol II, 1417ff.

4 cf Garner, Black's Law Dictionary, 894: 'interpretation, *n* [...] The process of determining what something, esp. the law or a legal document, means'.

5 cf *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, ICJ, Judgement, 5 February 1970, Separate Opinion of Judge Tanaka, 116; Orakhelashvili, Interpretation of Acts and Rules in Public International Law, 496-510; Fastenrath, Lücken im Völkerrecht, 206-208.

6 See eg Arato, Subsequent Practice and Evolutive Interpretation, *in toto*.

7 cf Article 31(3)(a) and (b) VCLT.

8 cf Article 31(3)(c) VCLT.

9 cf Bernhardt, Evolutive Treaty Interpretation, Especially of the European Convention on Human

The phenomenon of 'dynamic' interpretation shall be illustrated with the help of an example from the jurisprudence of the International Court of Justice ('ICJ'). In the case of *Costa Rica v Nicaragua*, the Court was concerned with a dispute over navigational and related rights of Costa Rica on the San Juan River.<sup>10</sup> In 1858, the two countries had concluded a Treaty of Limits, granting Costa Rica a perpetual right of free navigation on the Nicaraguan river for purposes of commerce ('*con objetos de comercio*').<sup>11</sup> Nowadays, the parties disagreed as to whether the transport of passengers was covered by the perpetual right. Nicaragua argued that '*objetos de comercio*' pertained only to the transport of goods for commercial purposes. In particular, it emphasised that 'in 1858 the word "commerce" necessarily meant trade in goods and did not extend to services, the inclusion of services being a very recent development'.<sup>12</sup> In contrast, Costa Rica contended that also the transport of passengers, including tourists would be 'commercial'.<sup>13</sup> It thus suggested a modern understanding of the term 'commerce'.<sup>14</sup> While the ICJ did not fully subscribe to either position,<sup>15</sup> the historical argument raised by Nicaragua was explicitly rejected:

The Court concludes [...] that the terms by which the extent of Costa Rica's right of free navigation has been defined, including in particular the term "comercio", must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning. Thus, even assuming that the notion of "commerce" does not have the same meaning today as it did in the mid-nineteenth century, it is the present meaning which must be accepted for purposes of applying the Treaty.<sup>16</sup>

The meaning of the term 'commerce' was thus identified from a modern point of view. Accordingly, the Court opined 'that the right of free navigation in question applies to the transport of persons as well as the transport of goods, as the activity of transporting persons can be commercial in nature nowadays'.<sup>17</sup>

---

Rights, 12; Distefano, L'Interprétation Évolutive de la Norme Internationale, 373ff.

10 *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, ICJ, Judgement, 13 July 2009, (2009) ICJ Reports 213ff.

11 cf *Navigational and Related Rights (Costa Rica v Nicaragua)*, ICJ, Judgement, 13 July 2009, paras 19, 43: '*libre navegación [...] con objetos de comercio*'.

12 *Navigational and Related Rights (Costa Rica v Nicaragua)*, ICJ, Judgement, 13 July 2009, para 58.

13 *Navigational and Related Rights (Costa Rica v Nicaragua)*, ICJ, Judgement, 13 July 2009, para 45.

14 *Navigational and Related Rights (Costa Rica v Nicaragua)*, ICJ, Judgement, 13 July 2009, para 59: '[...] "commerce" as used in the Treaty takes in any activity in pursuit of commercial purposes'.

15 *Navigational and Related Rights (Costa Rica v Nicaragua)*, ICJ, Judgement, 13 July 2009, paras 60ff.

16 *Navigational and Related Rights (Costa Rica v Nicaragua)*, ICJ, Judgement, 13 July 2009, para 70.

17 *Navigational and Related Rights (Costa Rica v Nicaragua)*, ICJ, Judgement, 13 July 2009, para 71.

Against the background of the above definition, one may in fact describe this approach as a 'dynamic' or 'evolutive' interpretation of the term 'commerce'.<sup>18</sup>

In general, for the purpose of the present study, an interpretive act shall be called 'dynamic' or 'evolutive' if the original meaning of a legal term is extended or replaced by a contemporary meaning. In order to depict an instance of 'dynamic' interpretation, one must thus compare the meaning of a legal rule in different moments of time. In the first step, the original significance of the rule must be identified. Several sources may be considered for this purpose, such as the drafting history, the initial interpretation within and outside the respective regime as well as pronouncements in legal writing. In the second step, the contemporary meaning of the term must be elaborated. Finally, these findings must be compared – if there is an alteration in the course of time, one may speak of a 'dynamic' or 'evolutive' interpretation. In some cases, however, it may be difficult to distinguish an instance of 'dynamic interpretation' from other legal exercises.

## **1. 'Dynamic' Interpretation v 'Specifying' Interpretation**

First, there may be an area of intersection between a 'dynamic' interpretation and a 'specifying' or 'concretising' interpretation. Indeed, the application of general rules to concrete situations always implies some element of dynamism. This may be illustrated with the help of an example from ICL. Generally, crimes against humanity presuppose the commission of a particular criminal offence in a certain context.<sup>19</sup> While the law of crimes against humanity explicitly provides for a variety of specific offences (such as murder, extermination, enslavement etc), it also provides for the residual category of 'other inhumane acts'.<sup>20</sup> Indeed, this category is very broad and may encompass various forms of conduct.<sup>21</sup> In a way, whenever a particular type of conduct is found to be 'inhumane', the original meaning of this notion is extended with regard to the respective conduct. Yet this is not a 'dynamic' interpretation in a narrow sense. Rather, one may characterise this dynamism as the corollary of applying a general rule to a concrete set of facts.

However, there may be a stronger emphasis on the temporal aspect if the pertinent offence is explicitly 'new'. This may be illustrated by an example from the jurisprudence of the Special Court for Sierra Leone ('SCSL'). In the

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<sup>18</sup> cf Arato, Subsequent Practice and Evolutive Interpretation, 447ff; Bjorge, International Court of Justice, Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua) Judgment of 13 July 2009, 272ff.

<sup>19</sup> See further Cassese, International Criminal Law (2nd edn), 98ff.

<sup>20</sup> See Article 5(i) ICTY-Statute, Article 3(i) ICTR-Statute, Article 2(i) SCSL-Statute, Article 7(1)(k) ICC-Statute.

<sup>21</sup> For pertinent examples, see eg Mettraux, International Crimes and the "ad hoc" Tribunals, 73ff.