Analysis of Citations of the Rome Statute in U.S. Federal Case Law

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There is widespread hostility to references to international law in U.S. court decisions. It is therefore especially surprising that U.S. federal judges have been discussing the Rome Statute (Statute) in their decisions, and sometimes citing it as an authority.

In between November 9th, 2009 and July 14th, 2014, the International Criminal Court (ICC) and the Rome Statute have been mentioned in U.S. judicial decisions twenty-one times, despite the U.S. not having ratified the Statute. The Fourth Circuit has stated that although the Statute is not binding on the U.S., it "does not lessen its import as an international treaty, and thus, a primary source of the law of nations." *Aziz v. Alcolac, Inc.*, 653 F.3d 388, 400 (4th Cir. 2011). The Statute appears in various contexts; the five most frequent situations involve the intent (mens rea) standard in aiding and abetting, immunity, corporate liability, defining crimes against humanity and defining war crimes.

The majority of the listed cases involve plaintiffs filing claims under the Alien Tort Claims Act (ATCA). The ATCA allows U.S. federal courts to hear civil suits brought by victims of human right abuses or other international crimes which are in violation of the laws of nations or a treaty that the U.S. has ratified. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court held that the laws of nations are comprised of international norms that are accepted by the civilized world and defined with specificity.

Aiding and Abetting:

Aiding and abetting is a form of secondary actor liability. The issue with this area of law is what level of mens rea is required. Article 25(3)(C) of the Statute provides that a person shall be criminally responsible and liable for punishment if that person facilitates the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing means for its commission. The courts have looked to the Statute because customary international law is unclear on a mens rea requirement for aiding and abetting. The courts have been divided in their interpretation of this requirement.

Some of the decisions use the definition provided in Article 25 of the Statute. *See, e.g., Lui Bo Shan v. China Constr. Bank Corp.*, 2010 U.S. Dist. LEXIS 63938 (S.D.N.Y. June 28, 2010). Other decisions have refused to use the Statute. *See, e.g., Du Daobin v. Cisco Sys.*, 2014 U.S. Dist. LEXIS 22632 (D. Md. Feb. 24, 2014)(the plaintiffs wanted to look at the Rome Statute and apply a lesser mens rea standard of knowledge but the court refused to do so because of a domestic precedent that settled the issue).

However, a few courts have used very strong language in support of the Statute. In *Doe v. Drummond Co.*, 2009 U.S. Dist. LEXIS 132594 (N.D. Ala. Nov. 9, 2009), the court relies in part on the Statute for the appropriate aiding and abetting standard. In *Aziz v. Alcolac, Inc.*, 653 F.3d 388 (4th Cir. 2011), the court concluded that adopting the standard in the Rome Statute "hews as closely as possible to the *Sosa* limits of requiring any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms the Supreme Court has recognized." *Aziz*, 653 F.3d. at 400-401 (Internal

citations omitted). The court in *Aziz* goes on to say that the Statute's mens rea standard for the crime of aiding and abetting "is more authoritative than that of the ICTY and ICTR Tribunals." *Id*. at 400.

Immunity:

The idea that no one is immune from the Court's jurisdiction is one of the most important principles found in the Statute. Article 27(1) states that "the Statute shall apply equally to all persons without any distinction based on official capacity." Plaintiffs in U.S. federal courts have cited Article 27 in their arguments. *See, e.g., De Leon v. City of San Antonio*, 2014 U.S. Dist. LEXIS 94510, at *12 (W.D. Tex. May 23, 2014)(arguing the ICC "explicitly rules out immunity for anyone"); *Devi v. Rajapaska*, 2012 U.S. Dist. LEXIS 127825, at *10 (S.D.N.Y. Sept. 4, 2012) ("The emergence of international criminal forums such as the … International Criminal Court demonstrate the international community's recognition of the principle that no one, regardless of official position, should be immune from prosecution or suit for jus cogens violations.")(Internal citations omitted). Although these courts discussed the Statute, they did not find it authoritative.

Corporate Liability:

The issue of whether liability extends to corporations was discussed in two of the listed cases. Article 25 states, among other things, that the court shall have jurisdiction over natural persons. Furthermore, "[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment…." (Quoting art. 25(2)). In *Sikhs for Justice v. Nath*, 892 F. Supp. 2d 598 (S.D.N.Y. 2012), the court looked to, among other things, the Rome Statute as a source that limits jurisdiction to natural persons. The court concluded that corporate liability cannot form the basis of suit under a violation of the laws of nations in an ATCA claim. In *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), the defendant cited the Rome Statute and Rwandan War Crimes Commission in support of not allowing corporate liability. The court in *Sarei* concluded there was no such bar.

Crimes Against Humanity:

U.S. federal courts accept the definitions of crimes against humanity provided in the Rome Statute as authoritative because the international community has failed to provide an instrument which would both punish and prevent crimes against humanity. Article 7 of the Statute is cited in *Karunamunige Chamila Krishanthi v. Rajakumara Rajaratnam*, 2010 U.S. Dist. LEXIS 88788 (D.N.J. Aug. 26, 2010), *Velez v. Sanchez*, 693 F.3d 308 (2d Cir. 2012), and *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 304 (D. Mass. 2013). In *Karunamunige,* the court uses strong language in support of the Statute. *See*, *Karunamunige*, 2010 U.S. Dist. LEXIS 88788 , at *32 ("Nonetheless, in assuming, without concluding, that the norm for crimes against humanity is specific, obligatory, and universal, the court relies on the Rome Statute to ascertain the viability and plausibility of plaintiffs' claims.")

In *Sarei,* the court discusses the Statute in depth, but is unable to use the persecution definition provided by the Statute because it was bound by a domestic decision.

War Crimes:

In *Hamdan v. United States*, 969 F.3d 1238 (D.C. Cir. 2012), the court uses the Statute as an example of a statute that incorporates some forms of terrorism into the definition of war crimes. The court had to

determine whether providing material support for terrorism is a violation of international law of war. The court cited the Rome Statute, concluding that in its extensive list of war crimes, providing material support for terrorism is not included and therefore is not a war crime. The court relied on the Rome Statute because it provides one of the most detailed descriptions of war crimes in international law and the crimes of terrorism has not been codified in other places.

Conclusion:

The drafters of the Statute did not intend for the treaty to be considered customary international law. Article 10 states "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing of developing rules of international law for purposes other than this Statute." Furthermore, in *Prosecutor v. Germian Katanga*, the judges at the ICC noted that the Statute is not customary law. Despite explicit language in the Statute, U.S. judges often turn to the Rome Statute because they find international customary law is ambiguous or inadequately developed for the courts to rely on. In *Aziz*, the court discussed how "[g]ranting the Rome Statute preference over customary international law… is particularly appropriate given the latter's elusive characteristics." *Aziz*, 658 F.3d at 400. Although the U.S. has not ratified the Statute, the courts will use the Rome Statue because it has been signed and ratified by numerous countries, "including most of the mature democracies of the world." *Aziz*, 658 F.3d at 395 (quoting *Khulumani v Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 275 (Katzmann, J., concurring)).

The mentioning of the International Criminal Court and the Rome Statute in U.S. courts is extremely important. The assumption that U.S. courts will always turn their backs on the Statute no longer stands. While the references are not always favorable, the courts are considering the Statute nonetheless. If the U.S. Administration continues on its path of interacting with the Court, it is likely that the U.S. courts will turn to the Statute more often. As this happens, the standing and acceptance of the Statute and the Court among American judges and lawyers will spread further, eventually influencing political and popular attitudes toward the Court.