Developments in Customary International Law

Theory and the Practice of the International Court of Justice and the International *Ad Hoc* Criminal Tribunals for Rwanda and Yugoslavia

Birgit Schlütter

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For my parents

Contents

List of Abbreviations

ACHR	American Convention on Human Rights
African YBIHL	African Yearbook on International Humanitarian Law
AJIL	American Journal of International Law
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)
ARIEL	Austrian Review of International and European Law
ASIL	American Society of International Law
BIICL	British Institute of International and Comparative Law
BVerfG	*Bundesverfassungsgericht* (Federal Constitutional Court)
BYBIL	British Yearbook of International Law
CCL 10	Control Council Law No. 10
CLS	Critical legal studies
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECTHR	European Court of Human Rights
ECOSOC	United Nations Economic and Social Council
EJIL	European Journal of International Law
EPIL	Encyclopedia of Public International Law
EuGRZ	Europäische Grundrechtezeitschrift
FRY	Federal Republic of Yugoslavia
GC (I–IV)	Geneva Convention (I to IV): Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea Convention (III) relative to the Treatment of Prisoners of War. Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War

GYIL	German Yearbook of International Law
Hague YBIL	Hague Yearbook of International Law
HRJ	Human Rights Law Journal
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICSER	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDI	Institut de droit international
ILA	International Law Association
ILM	International Legal Materials
ILR	International Law Reports
ILSA	International Law Students Association
IMT	International Military Tribunal
Intl. L. Rep	International Law Reports
Intl. Rev. Red Cross	International Review of the Red Cross
IsYBHR	Israel Yearbook on Human Rights
ITLOS	International Tribunal for the Law of the Sea
JInt. crim. justice	Journal of International Criminal Justice
LJIL	Leiden Journal of International Law
Mich. JIL	Michigan Journal of International Law
NILR	Netherlands International Law Review
NYIL	Netherlands Yearbook of International Law
NYU JIL & P	New York University Journal of International Law and Politics
OLG	*Oberlandesgericht* (Higher Regional Court of a German *Land*)
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PrepCom	Preparatory Committee on the Establishment of an International Criminal Court
RdC	Recueil des Cours – Collected Courses of the Hague Academy of International Law
Res.	Resolution
Rev.BDI	Revue belge de droit international
RGDIP	Revue générale de droit international public

RIAA	Reports of International Arbitral Awards
RPF	Rwanda Patriotic Front
SFRY	Socialist Federal Republic of Yugoslavia
Trial of the Major War Criminals	Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November 1945–1 October 1946 (Nuremberg, 1946)
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNMIK	United Nations Interim Administration in Kosovo
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
WTO	World Trade Organisation
WTO AB	World Trade Organisation, Appellate Body
YBILC	Yearbook of the International Law Commission
YBIHL	Yearbook of International Humanitarian Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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Foreword

The manuscript of this book was submitted in fulfilment of the requirements for obtaining the degree of *doctor iuris* at Humboldt-University Berlin in February 2008. Since then, the book has been updated and revised to include latest developments in the literature and new judgments of the International Court of Justice, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. Literature and case law up to September 2009 have now been considered.

The idea of researching the development of customary international law came to me when I was reading the *Yerodia* judgment of the International Court of Justice. In that judgment, instead of referring to the two elements of custom described by Article 38 (1) (b) of its Statute, the Court applied the method of deduction in order to find a new rule of public international law on the immunity of foreign ministers: it deduced the rule that a minister of foreign affairs enjoys immunity under public international law deriving from the immunity of heads of states and a comparison of their functions and duties. The judgment thus revealed that there must be more methods of ascertaining new norms of customary international law than suggested by the approach of Article 38 of the ICJ Statute. There are several other judgments of the Court which support this contention. The *Gulf of Maine* judgment, for example, also distinguishes between 'different categories' of customary international law.

However, the *Yerodia* judgment also inspired further research into the evolution of new rules of customary international criminal law: despite being criticised by many scholars, the ICJ held that there was no exception to the immunity of foreign ministers under international law, even when they had committed serious international crimes. It considered that *opinio juris* and state practice had not as yet developed to support the evolution of such a rule. Thus, for evidence of a rule of customary international criminal law, it appeared as if the Court regarded the approach of Article 38 (1) (b) of its Statute to be decisive.

Accordingly, further questions accrued: do new rules of customary international criminal law develop only according to the seemingly stricter rules of Article 38 (1) (b)? How could this be, if practice in this field was so hard to discover? Such questions triggered the eventual idea of conducting further research into the development of the constituent elements of customary international (criminal) law.

Preface

Though some time has passed since the International Court of Justice delivered its judgment in the *Yerodia* Case, the issue of the development of customary international law has not lost its topical relevance. Since then, new judgments of the 'World Court', and the international criminal tribunals for the former Yugoslavia and Rwanda have emerged which further clarify and substantiate their approaches to the formation of new customary international law. Recent discussions in international legal literature and in the International Law Commission (ILC) have also tackled the subject and underline its topicality once again.

In its report on the fragmentation of international law, the International Law Commission clearly identified International Criminal Law as one of the special regimes of international law which have recently emerged internationally.[1] When investigating the relationship of general international law to the law of special regimes, the ILC pointed out that, this relationship was often determined by interpretation of the relevant treaties of the special regime.[2] The ILC remarked that general international law also filled in the gaps in the special regime and provide an interpretative direction for its operation.[3] Moreover, the commission concluded that general international law contained certain principles which also controlled the operation of the special regime. Amongst them were, for example, the rules determining peremptory norms of international law as well as rules determining breaches of requirements of the special regime, i.e. state responsibility.[4]

This 'meta' level of the discussion on the development of general international law, which was addressed by the Report of the International Law Commission of 13 April 2006 should be kept in mind, when further investigating the direction into which customary international law is evolving. Surely, whether international law is influenced by a growing trend of constitutionalisation or whether it is tending towards increasing fragmentation

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[1] ILC, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 13 April 2006, UN Doc. A/CN.4/L.682, 84, 85, para. 158.

[2] ILC (n 1) 85, para. 159.

[3] ILC (n 1) 101, para. 194.

[4] ILC (n 1) 101, para. 194.

is a matter to be left for another treatise and has already been addressed by several international scholars. It is not this book's primary purpose to tackle this issue from the angle of customary international law. Yet the concepts utilised to describe and deal with the two phenomena, or – regarding the fragmentation of international law – to combat their negative side-effects, may also help us to advance further a coherent concept of customary international law.

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I am indebted to all those who shared their views on this book and were there during its formation: above all, to my Ph.d. supervisor Prof. Dr. Dr. h.c. Tomuschat who continuously provided fruitful and encouraging comments for almost five years. I owe him my sincere regards for the timely preparation of the first examiners report. I am also indebted to Prof. Dr. Gerhard Werle for his second examiner's report and his helpful critique and comments, as well as to Prof. Dr. Martin Heger for his inspiring comments during the *viva voce* examination in February 2008.

I am also grateful to all those who responded to my questions when I was trying to understand all the practical aspects which accompany the formation of new customary law in the International Court of Justice and the International Criminal Tribunals for the former Yugoslavia and Rwanda. I have to thank, in particular, Judge Simma of the International Court of Justice, Judge Pocar of the International Criminal Tribunal for the Former Yugoslavia, Morton Bergsmo, at that time Legal Officer at the International Criminal Court and Jason Dominguez and Steffen Wirth from the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia.

Helpful comments, critique and great company when writing this book at libraries in Berlin, London and the Hague and at the Max-Planck Institute in Heidelberg have also been provided by fellow colleagues from Humboldt-University Berlin, Bonn University and elsewhere, in particular by Friederike Bredt, Boris Burghardt, Jeannine Drohla, Edgar Lenski, Regina Lotter, Ingo Niemann, Christine Schuon, Sükrü Usculan, Caroline Volkmann, Jan-Eric Wetzel, Xuezhe Zhang and many others. I also have to thank my parents, Arne Peters and all my dear friends, who endured continuous absence from socializing during the writing phase, for their moral and practical support.

No less important, I have to thank the *Land* Berlin and Humboldt-University Berlin for the great financial support which facilitated the research into and writing of the book for almost two years.

Finally, I thank the German Foreign Office for its generous provision of funds towards the final publication of this work.

Introduction

I

The prosecution of international crimes is a task which the international community has taken on ever more intensely in recent years. The Rome Statute of the International Criminal Court (ICC) has come into operation, the Court is now working and is dealing with its first cases in Uganda, Sudan and the Democratic Republic of the Congo.[1] Even despite the 'universal jurisdiction' proclaimed by the Rome Statute, new tribunals dealing with international crimes committed in particular situations have been established. The War Crimes Chamber of the Constitutional Court of Serbia and Montenegro, but also the Extraordinary Chambers in the Courts of Cambodia, dealing with the crime of genocide committed in the 1980's by the Khmer Rouge[2] and the latest establishment of a Special Tribunal for Lebanon, which will inquire into the death of the Lebanese Prime Minister Rafik Hariri[3] and into crimes related to this issue, have to be mentioned in this regard. But also national courts seem increasingly involved in questions tackling the nature and existence of norms of (customary) international criminal law.[4] International criminal law thus seems to be an ever-growing field of international law.

This book tries to investigate the development of one of the main sources of international criminal law, viz. customary international law.

Custom is one of the major sources, if not the most important one, of general international law. According to Article 38 (1) (b) of the ICJ Statute, it derives from a 'general practice, accepted as law'. Hence, for the formation of

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[1] Compare ICC, Situations and Cases, at: <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited 10 December 2009).

[2] At: <http://www.eccc.gov.kh/english/default.aspx> (last visited 10 December 2009).

[3] On 30 May 2007, the UNSC adopted Res. 1757 (2007), UN Doc. S/RES/1757 (2007), establishing the Special Tribunal for Lebanon, which entered into being on 10 June 2007. Previously, a Commission of Inquiry into the death of Rafik Hariri was established pursuant to UNSC Res. 1664 (2006), UN Doc. S/RES/1664 (2006), of 29 March 2006. The ultimate extension of the Commission's mandate took place with the adoption of UNSC Res. 1748 (2007), UN Doc. S/RES/1748 (2007), on 26 March 2007. See also <http://www.stl-tsl.org/action/home> (last visited 9 December 2009).

[4] See the recent decision of the Britsh House of Lords affirming the customary international law character of the crime of aggression: *R. v Jones et al.* [2006] UKHL 16, paras. 12ff.

new customary international law, the presence of two elements, *opinio juris* and state practice, is commonly assumed to be necessary. Although Article 38 is only binding on the ICJ, it has generally become the point of departure for doctrinal discussions and for the practical application of customary international law.

Nevertheless, custom plays an even greater role in the field of international criminal law. When the Tribunals of Nuremberg and Tokyo and, fifty years later, those for Yugoslavia and Rwanda were established, they were responsible for applying the law which had been violated prior to their establishment. Due to the lack of applicable international treaty law in the cases of Nuremberg and Tokyo (and due to the uncertain treaty law situation in the Former Yugoslavia), convictions could thus be based on the source of customary international law alone.[5]

Hence, this book will explore the development of the rules of customary international law in general and customary international criminal law in particular. The investigation of the development of customary rules is meant here in the true sense of the word: ultimately, the book attempts to indicate a trend or direction in which the formation of customary norms of international law might evolve. Accordingly, it attempts to verify certain tendencies which have been advanced for the development of customary rules of international criminal law. For example, whether one – as Meron has done – can already speak of the humanisation of humanitarian law,[6] whether – as Ambos has maintained – in the area of international criminal law, custom and general principles of international law have been blended into one single source of international law,[7] or whether such findings are still too far-reaching, even in such new fields of international law as international criminal law. In its utmost consequence, the book will provide some practical guidelines to determine the evolution of new customary international (criminal) law.

II

At present, the customary international law character of certain 'core' prohibitions of international criminal law is nearly uncontested. Scholars and international courts and tribunals alike have, time and again, affirmed the

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[5] Compare *T. Meron* (2005) 99 AJIL, 817, 821.

[6] *T. Meron* (2000) 94 AJIL 239ff.

[7] *K. Ambos* (Allgemeiner Teil) 43, 44.

customary nature of the prohibition of torture, genocide and of the 'grave breaches provisions' of the Geneva Conventions.[8]

Moreover, customary international law, and in particular customary international criminal law, is often cited as containing so-called norms of 'universal' international law, i.e. norms which are of a high normative value, which contain rules of a high moral character or which can be considered as derived from of a general principle of international humanitarian law.[9] Rules of customary international criminal law are also often deemed to belong to those rules of international law which make out the 'constitution' or basis of the international community. For example, a growing number of scholars assesses the development of new customary international criminal law in the light of the 'elementary considerations of humanity' contained in the so-called Martens Clause. This clause constitutes the preamble of Hague Convention No. IV Respecting the Laws and Customs of War on Land of 1907 and reads:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as the result from the usages established among civilized peoples, *from the laws of humanity and the dictates of the public conscience*.[10] (emphasis added)

Sometimes, in particular in the jurisprudence of the ICTY, rules have been characterised as customary just because of their highly 'humanising' character or purpose. In this case, the development of customary international criminal law could prove the growing 'constitutionalisation' of international law in which the emergence of new rules is determined by the 'core values' of the international community.[11]

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[8] Compare *C. Tomuschat* (Human Rights) 287; further compare the jurisprudence of international courts and tribunals on the customary nature of the international crime of genocide: see ICJ, *Reservations to the Convention on the Prevention and Puishment of the Crime of Genocide* (Advisory Opinion), ICJ Reports 1951, 24; Israel, dist. Ct. Jerusalem, *Eichmann* (1961) 36 Intl. L. Rep., 5, para. 12; ICTR, *Akayesu*, Trial Chamber Judgment, Case No. ICTR-96-4-T, 02.09.1998, paras. 204 - 28; *Kayishema and Ruzindana*, Trial Chamber Judgment, Case No. ICTR-95-1-T, 21 May 1999, paras. 41–49; ICTY: *Jelisić*, Trial Chamber Judgment, Case No. IT-95-10-T, 14 December 1999, paras. 78–83; *Krstić*, Trial Chamber Judgment, Case No. IT-98-33-T, 2 August 2001, paras. 539–569.

[9] For the view that general principles of international law may serve as constitutional principles see *R. Kolb* (2006) 53 NILR 27.

[10] For a critical assessment of the clause see *A. Cassese* (2000) 11 EJIL 187ff; further *T. Meron* (2000) 94 AJIL 78ff.

[11] For the concept of the International Community: *C. Tomuschat* (1995) 33 Archiv des Völkerrechts 1ff; earlier: *H. Mosler* (1976) 36 ZaöRV, 31.

Hence, this study shall verify whether this highly normative character of a certain rule of international law or the fact that the rule can be considered as deriving from a certain 'constitutional' or general principle of international humanitarian law contributes in any particular way to the development of a customary rule in this field of international law.

On the other hand, this study shall also verify whether the development of customary international law follows different rules in different fields of international law. In other words, it shall explore whether custom may not be one of the fields of international law in which the growing fragmentation of international law may be first detectable.

As indicated above, international criminal law is probably one of the fastest developing areas of international law. It is a field of law which, at the time of the creation of the League of Nations or even of the United Nations, was virtually non-existent, or only existed to a very limited extent. With the creation of the international criminal tribunals of Nuremberg and Tokyo, international criminal law made its first major appearance on the international stage after the end of World War II. Hence, questions remain as to how norms of customary international law could develop so rapidly in this 'specialised area' of international law.[12]

At least, for international human rights law and international humanitarian law in general, as well as for international criminal law in particular, which actually comprises many rules of the foregoing two fields, the 'classic' two-fold concept of custom, building upon the elements of *opinio juris* and state practice appears to be problematic. Two main reasons may be invoked for such findings. First, rules of international criminal law are mostly of a prohibitive character. Secondly, the field of international criminal law is still a relatively new area of international law. In many areas, the existence of certain rules was discussed for the first time before the international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) came into being.[13] Therefore, hard evidence of state practice and *opinio juris*, which according to Article 38 of the ICJ Statute make up a customary rule, is generally not easy to find.[14]

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[12] *M. Lattimer* in *P. Sands and M. Lattimer* (Justice) 410.

[13] See the application of common Article 3 to international as well as non-international armed conflicts in the *Tadić* Interlocutory Appeal Judgment (*Tadić,* Interlocutory Appeal, Case No. IT-94-1-AR72, 2 October 1995) and the application of the principle of command responsibility to non-international armed conflicts in the *Hadzihasanovic* decision (*Hadzihasanovic, Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, Case No.: IT-01-47-AR72, 16 July 2003).

[14] Compare the quantitative assessment carried out by *L. Gradoni* (Nullum crimen sine consuetudine); see *id.* in *M. Delmas-Marty et al.* (Sources) 25ff.

It is also worth questioning whether the notion of custom is still the most adequate description for international criminal norms. It may be more suitable to identify the norms as general principles of international law according to Article 38 (1) (c) ICJ Statute or even as a whole new form of international law which has developed outside the general framework of Article 38. The omission of 'custom' as a source of law in Article 21 of the Rome Statute may provide evidence of a step in this direction.

So far, only a few authors have attempted an assessment of the formation of customary international criminal law.[15] Often, theories on the formation of customary international law do not recognise the peculiarities of international criminal law. And authors who solely focus on the international criminal law aspect of customary international law rarely recognise the connections between public international law and criminal law which have led to the creation of the discipline of international criminal law.[16]

III

This study will thus critically assess the current state of customary international law and, in particular, of customary international criminal law. By reviewing the jurisprudence of the International Court of Justice and the International *ad hoc* Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) it hopes to delineate the different methods employed to determine the formation of a particular norm of customary international law. Furthermore, it will attempt to ascertain whether there is a particular approach to custom which has been favoured in international jurisprudence, both regarding general international law and international criminal law.

However, this enquiry into custom shall not only contain a review of jurisprudence. It shall relate the jurisprudence to the relevant theories on customary international law and customary international criminal law. In addition, other jurisprudential methods such as interpretation or analogy will be assessed. In particular, overlaps between these methods and those employed for the determination of a customary rule will have to be identified to determine whether a particular method is truly able to define a new customary rule. This will also serve to point out some of the benefits and flaws of current theory and practice on customary international law. Finally, the outer limits of the methods employed to determine new customary international law will have to be delineated.

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[15] A recent exception is *T. Meron* (2005) 99 AJIL 817ff.

[16] Compare *M. Boot* (Nullum crimen sine lege) at 16–18.

IV

The first chapter of the study is concerned with an assessment of the present state of customary international law. It will briefly outline the source character of custom and introduce the different theories which are being advanced on the formation of customary international law. The first chapter will also address the issue, which evidentiary material may be considered when assessing the formation of new rules of customary international (criminal) law. Following this analysis, the second chapter will attempt to relate custom to the other sources of international law. In particular, it will make reference to the general principles of (international) law which have quite recently been advanced as a more adequate source of international human rights and international humanitarian law. Moreover, the second chapter will assess the relationship between interpretative methods and those employed to discover new customary law, as the jurisprudence of the international *ad hoc* criminal tribunals has revealed that there may exist significant overlaps.

The third chapter of the study will focus on the actual development of customary international law and present the different theories that have been advanced so far on this issue. Following this introduction, the fourth and fifth chapters will eventually study the case law of the ICJ and the *ad hoc* international criminal tribunals. They will investigate and critically assess the different methods employed by these courts to discern new customary international law. Both chapters will focus on the different methods employed by the Court to determine the customary nature of a particular rule of international law. Yet, the fifth chapter will further differentiate the methodological approaches chosen by the ICTY and the ICTR alongside the material criminal law. This will be done to facilitate navigation through the bulk of jurisprudence which the two courts have produced so far, even on the matter of customary international criminal law. It is hoped that this differentiation will also shed light on the particular context in which the particular method was applied.

The sixth chapter will then consider further implications of the evolution of new customary international criminal law. It will assess Article 21 of the Rome Statute, which has been held to constitute the equivalent of Article 38 of the ICJ Statute in international criminal law.[17] Yet, a great part of the chapter will be dedicated to the *nullum crimen sine lege* principle which,

[17] *M. McAuliffe de Guzman* in *O. Triffterer* (Commentary) 436 para. 1.

as has been demonstrated above, may delimit customary international law-making in the field of international criminal law.[18]

The seventh chapter will relate the findings for the development of customary international criminal law back to the level of general international law. It will thus assess whether the conclusions reached for customary international criminal law support the hypotheses that the evolution of new norms of international law is – either – guided by certain core principles, or that it turns towards an ever increasing specialisation or fragmentation and how the current development of customary international law can best be described. In doing so, it will attempt to circumscribe some of the lessons which can be learned from the development of customary international criminal law for general international law. Based on the foregoing findings, the final part of this chapter will then present an own evaluation scheme for the assessment of new customary international (criminal) law. Cases and literature have been considered till September 2009.

[18] Compare: *I. Josipović*, The ICTY's Approach to Customary Law in *T. Kruessmann* (ed.) (ICTY) 92, 94–95.

Chapter One

Customary International Law, Theoretical Conceptions and Evidence of its Formation

I. INTRODUCTION

This chapter will explore the notion of custom and its function as a source of international law. However, the concept of customary international law, i.e. its source function and the question of which individual elements are needed for its formation, are issues which are hopelessly disputed in international scholarship. The different perceptions advanced are almost innumerable since they are in the main closely connected to the individual perceptions of each international scholar of the general nature of international law. The majority of the arguments exchanged in this field are well known.

Nevertheless, as outlined above, this book attempts to relate the conclusions drawn from the development of customary law in a particular field of international law – international criminal law – to the development of customary international law in general. In particular, it will try to identify and assess which concepts underlie the discovery and development of customary norms in international criminal law and in international law in general. In order to carry out such assessment, it is necessary to have some knowledge of the broad ideas underlying custom and general international law. Thus, this chapter will refer to the different theories on the formation of custom and, secondly, to the underlying idea of the nature of general international law.

II. CUSTOMARY INTERNATIONAL LAW

A. *Custom as a source of international law*

Customary international law is usually defined as international law which has been generated from a "general practice, accepted as law", as stated in Article 38 (1) (b) of the ICJ Statute. Along with international treaties and conventions, it is considered to be the major source of public international

law.[1] Any discussion of the formation of customary international law must therefore start with its definition set out in Article 38 of the ICJ Statute. Although this Article is binding only with respect to cases before the ICJ, it is widely as having itself attained the status of customary international law.[2] Nevertheless, as Sir Robert Jennings observed in 1981, the definition of custom in Article 38 (1) (b) of the ICJ Statute can merely be the starting point of a discussion on the creation and formation of rules of customary international law. Since it is based on a draft which dates back to 1920, it may not always meet the demands of modern international law.[3] Yet before we delve more deeply into the concept of customary international law represented in Article 38 of the ICJ Statute, some preliminary aspects of custom merit consideration.

1. *Custom*

In nearly every society, custom serves as a source of rules ordering society's everyday life.[4] The rules develop almost unconsciously among the members of the group and are maintained by them by means of social pressures.[5] At national level, custom is frequently regarded as a rather cumbersome source of law.[6] It has often been superseded by more sophisticated mechanisms of law-making, such as by the establishment of a formal legislature.[7] At international level, however, custom, together with treaties, is the most or second most important source of legal norms. This is commonly ascribed to the fact that the international legal order lacks a formal legislature and other centralised government organs.[8]

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[1] *H. Kelsen* (Principles) 304, 417; *L. Henkin* (International Law) 27; *G. Van Hoof* (Rethinking the Sources) 58; *C. Sepúlveda* (1990) 33 GYIL, 438: "Custom was, at a time, the queen of sources, and provided part of the rules of the international legal order"; however contrast the Soviet conception of international law: *infra* on page 29ff.

[2] *R. Jennings and A. Watts* (Oppenheim's International Law) vol. 1, peace, 21, note 1.

[3] *R. Jennings* in *M. Koskenniemi* (Sources) 29.

[4] *H. L. A. Hart* (Concept of Law); *M. Mendelson* (1998) RdC, vol. 272, 165–167; see *R. Unger* (Law in Modern Society).

[5] *M. Shaw* (International Law) 68.

[6] *M. Shaw* (n. 5) 69.

[7] *M. Shaw* (n. 5) 68.

[8] *M. Shaw* (n. 5) 69.

2. *Sources of international law*

Further to understand the role of custom within the system of international law, we still need to clarify what exactly a source[9] of law is. It is usually understood as a systemic or conceptual approach to categorising the origin of legal norms: the phrase 'source of law' is typically employed as a term of art describing the underlying concept or methodologies which generate legal norms. However, the ultimate definition of a source depends on what is determined to constitute the fundamental context or concept of international law. Kelsen, for example, remarked that the term "source of law"

> …peut désigner d'une part le fondement dernier de la validité d'un ordre juridique donné, c.-à.-d. la norme suprême ou la norme fondamentale d'où découle la validité de toutes les autres normes et sur laquelle repose l'unité du système.[10]

Shaw, on a very general level, defines 'sources' as "provisions operating within the legal system on a technical level", excluding such ultimate sources as reason or morality, or more functional sources, such as law libraries or journals.[11] Mendelson and Müllerson, Special Rapporteurs of the International Law Association (ILA) on the formation of customary international law, remarked that a source of law describes "the process or means by which rules of law are created or, as the case may be, determined."[12] In the same vein, Jennings and Watts held that the concept of a source of law symbolised the process by which norms become identifiable and distinguishable as rules of law.[13] Keeping in mind the ever-changing nature of the international legal system, this last definition of a source of law as a process or method of identification of rules of law is probably the most suitable definition.

3. *Formal and material sources of international law and further distinctions*

As regards the sources of international law, another common distinction is that made between formal and material sources.[14] The vast majority of scholars regard a formal source of law as the processes from which a legal

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[9] Though originally belonging to the field of hydrology, the term by now has also acquired a standing in (international) legal discourse and jurisprudence. Compare *ILA, Committee on Formation of Customary (General) International Law* (Final Report) 12.

[10] *H. Kelsen* (1939) Revue Internationale de la Théorie du Droit, 253.

[11] *M. Shaw* (n. 5) 66.

[12] *ILA*, *Committee on Formation of Customary (General) International Law* (n. 9) 12.

[13] *R. Jennings and A. Watts* (Oppenheim's International Law) vol. 1, peace, para. 8, 23.

[14] *M. Mendelson* (1998) RdC, vol. 272, 184; *G. Fitzmaurice* in *M. Koskenniemi* (Sources) 57; *ILA, Committee on Formation of Customary (General) International Law* (Final Report), 12.

rule derives its validity.[15] The material source, however, is home to the substantive content of the rule[16] – 'the stuff out of which the law is made.'[17] It is the "historic origin of a rule which only obtains its legal force, however, when it is subjected to a law-making process (a formal source)."[18] According to this distinction, customary international law is commonly regarded as a formal source of international law. However, some scholars maintained that this differentiation distracts from a more important problem, namely that of clearly distinguishing between substantive and procedural elements, which is particularly difficult in international law.[19]

A further distinction is made between formal and historical sources.[20] Ultimately, a historical source often describes a material source. It is referred to as the place the rule came from, as a matter of historical fact. It describes the inspiration for the rule – "the quarry from which it was hewn".[21] For example, the proposal of a rule at an international conference could be regarded as its historical source, whereas the treaty in which it is finally adopted serves as the formal source.[22] Historical sources may become important when one interprets the actual rule they helped to give birth to.

A final important distinction is that between a source of law and a so-called law-determining agency, which Schwarzenberger proposed.[23] The latter constitutes no formal source of law itself, but the actual evidence for its existence. Law-determining agencies hence constitute the pivotal element in the investigation of the evolution of a new rule of customary international law.

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[15] *ILA, Committee on Formation of Customary (General) International Law* (n. 9) 12.

[16] See *R. Jennings and A. Watts* (Oppenheim's International Law) vol. 1, peace, para. 8, 23.: "Thus, the formal source may be custom, although its material source may be found in a bilateral treaty, concluded many years previously, or in some state´s untilateral action."; further: *M. Mendelson* (1998) RdC, vol. 272, 184; *G. Van Hoof* (Rethinking the Sources) 58–59, who wants to introduce another, procedural differentiation between a. a source of international law as the basis for the binding legal force of its obligations, b. a constitutive element of international law as a criterion, which determines whether a norm can count as a norm of public international law and c. the manifestation of this norm, upon which the presence or absence of the constitutive element may be determined.

[17] *G. Fitzmaurice* in *M. Koskenniemi* (Sources) 57.

[18] *ILA, Committee on Formation of Customary (General) International Law* (n. 9) 12.

[19] *See M. Shaw* (International Law) 67.

[20] *ILA, Committee on Formation of Customary (General) International Law* (n. 9) 12.

[21] *M. Mendelson* (1998) RdC, vol. 272, 192.

[22] *M. Mendelson* (n. 21) 192.

[23] *Schwarzenberger* (Inductive Approach), 19–21.

B. *Assessment*

As may be discerned already from the foregoing findings, any definition of the sources of international law and the nature of the origins of customary international law, as well as any distinction between formal and material or formal and historical sources of international law or law-determining agencies, depends on the underlying theory regarding the nature of international law. Without going into detail prematurely about the theory of customary international law, it must be observed here that a concept of sources already displays a positivist understanding of international law. It presupposes a formalistic understanding of law which assumes that the validity of a norm depends only on compliance with a certain formal legislative process. One cannot characterise a norm as legal merely by looking at its content.[24]

In general international law, the process of law-making is defined only by Article 38 of the ICJ Statute. And as we have already seen, Article 38 differentiates between three processes: treaty, custom and general principles of law. In the next section, the underlying theoretical concept of customary international law will be explored in more detail.

III. INTRODUCTION TO THE THEORY OF CUSTOMARY INTERNATIONAL LAW

Customary international law represents the most anarchic source of international law. Article 38 (1) (b) of the ICJ Statute sets out two elements which underlie a norm of customary international law: *opinio juris* and state practice. However, as there are multiple and varying factors which influence the development of a customary rule in the different fields and areas of international law, this definition in Article 38 of the ICJ Statute can barely encompass all the factors which contribute to the formation of a new norm of customary law.

In view of the immense amount of controversial literature produced on the formation of customary norms, broadly speaking, the only thing which seems to be generally agreed upon is that a category of international law exists which is created through custom. Of course, there may also have been nihilist approaches which deny altogether the legal character of international law;[25] nonetheless, those we can leave aside for a moment. Any discussion of

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[24] See *A. Kaufmann* in *id. and W. Hassemer* (Einführung) 73.

[25] In fact, most of the authors cited to follow a nihilist conception do not as such deny the legal character of international rules. For further reference: *I. Detter de Lupis* (Concept) 35, at n. 124 and 125.

the theoretical underpinnings of custom presupposes the acceptance of the concept as legal in the first place. Otherwise, no discussion of its formation would be necessary.

One of the first controversial aspects which is usually answered differently by each of the theories advanced is the question of which elements are needed for the formation of a customary rule. Most of the time, theories on the formation of customary international law not only determine the normative character of a customary rule but also the prerequisites for its formation.

IV. SCOPE OF THE THEORETICAL ASSESSMENT

Nevertheless, the scope of our assessment of the different theories on the formation of customary international law must first be defined. We must determine what is meant by the formation of norms of customary international law.[26] First, an assessment of that will have to clarify the methodological approach chosen to explore the formation of legal norms. Secondly, it must also be kept in mind that this study focuses on an assessment of the formation of norms of international criminal law. This will entail a consideration of the formation of customary norms of international human rights law, as some human rights provisions also belong to the sphere of international criminal law. However, this also means that a general overview of all the problems of the formation of general customary international law[27] cannot be given here.[28] Particular issues, such as the time factor,[29] the existence of norms of regional customary international law[30] and the impact of UNGA resolutions[31] and of international treaties on custom will thus be assessed only as far as they are relevant in the particular context of this study. Thirdly, this assessment of the formation of customary international law will concern the particular elements favoured for the formation of a customary norm. That is, it will focus upon the issue of whether the formation of custom requires the existence of the *opinio juris* and state practice elements. This will entail an outline of the

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[26] See for a similar delimitation: *ILA, Committee on Formation of Customary (General) International Law* (n. 9) 5.

[27] *ILA, Committee on Formation of Customary (General) International Law* (n. 9) 5.

[28] For an assessment of the general problems arising with regard to the formation of customary international law, see *R. Kolb* (2003) 50 NILR, 119ff.

[29] Compare *R. Piotrowicz* (1994) 21 Polish Yearbook of International Law 69–85.

[30] Compare ICJ, *Asylum Case*, 266ff.

[31] See *Bin Cheng* (1965) 5 Indian Journal of International law 36.

particular definition of those elements according to the particular approach in question.

Finally, we will discuss the actual evidence which can prove the existence of a prevalent *opinio juris* or state practice and, eventually, the formation of a new rule of customary international law. This will entail referring to the issue of which actors or subjects of international law can contribute to the formation of a norm of customary international law and an assessment of what particular evidence may actually serve as a determinant of either *opinio juris*, or state practice.

V. THEORY OF THE FORMATION OF CUSTOMARY INTERNATIONAL LAW

Sometimes, analyses of the different theories of customary international law concentrate only on the individual elements which the scholars deem necessary for the evolution of a new customary rule. Accordingly, various writings divided the bulk of theories produced on the formation of customary international law merely according to whether the theoretical approaches favour either the element of *opinio juris* or the requirement of state practice, or both or neither.

However, rather than concentrate solely on the ingredients necessary for the development of a customary rule, it is even more essential to view the different theories on custom formation in the broader context of their understanding of the nature of international law. Since custom is one of international law's major sources, debate on its concept is almost always interwoven with the individual concept of international law of the particular scholar involved. Hence, the following discussion of the theory of customary international law will be divided according to the major philosophical schools currently existing in international legal doctrine. Taking this categorisation as a starting point, it may be possible then to outline if one of those theoretical streams is currently the most influential, i.e. whether there is a general direction in which customary international theory is evolving.

The two main philosophical conceptions of international law are and remain naturalism and positivism. However, from the twentieth century on opinions have diversified, and one can further identify realist thoughts advanced by the New Haven School of International Law, or the so-called New Approaches to International Law (NAIL), which encompass, for example, Critical Legal Studies theory.[32] Nonetheless, modern international legal

[32] Among the various existing names for neo-realist or critical international theory, I found the differentiation by *J. A. Beckett* (2005) 16 EJIL 213–238 the most convincing.

theory has assimilated many concepts from other fields of study. As such, it draws upon international relations theory,[33] social theory[34] or international discourse theory,[35] to name but a few. As Müllerson observed, it is now increasingly difficult to define which theory belongs to which stream of legal philosophy.[36] However for the purposes of assessing customary international law theory, it is hoped that our chosen categorisation can also encompass the approaches from other disciplines which assist in explaining the formation of customary international law.

A. *Positivism*

The positivist perception of international law is commonly held to have emerged out of utilitarian thought developed by Bentham and Austin in England in the late eighteenth century. Whereas Bentham was one of the first authors to reject conceptions of natural law and subjective values,[37] Austin introduced the notion of 'positive' law to jurisprudence.[38] He also provided us with an early definition of international law, which he deemed to be compsed of the rules "which are imposed upon nations or sovereigns by opinions current amongst nations."[39]

Early positivism is considered to be closely connected with the empirical or inductive method of jurisprudence.[40] Generally, induction and deduction, or a combination of both, describe the methods by which the existence or formation of (international) legal norms is proven. Whereas deduction describes the method of inferring legal norms from general propositions, i.e. hierarchically higher standing norms or principles of law, induction describes the process of deriving a particular rule of law from examples of practice, i.e.

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[33] Compare *B. Simma* (1972) 23 Österreichische Zeitschrift für öffentliches Recht 293–324; *A. M. Slaughter* (1993) 87 AJIL 205–239.

[34] Compare the differentiation by *E. Blenk-Knocke* in *R. Bernhardt* EPIL vol. 4, 449–452.

[35] *M. Koskenniemi* (Apology); *id.* (1990) 1 EJIL 4, 4–31; *D. Kennedy* (Structures).

[36] *R. Müllerson* (Ordering Anarchy) 25.

[37] *J. Bentham* (Introduction) chap. 4.

[38] *J. Austin* (Province) 122, 123.

[39] *J. Austin* (n. 38) 123: "There are laws which regard the conduct of independent political societies in their various relations to one another: Or, rather, there are laws which regard the conduct of sovereigns or supreme governments in their various relations to one another. And laws or rules of this species, which are imposed upon nations or sovereigns by opinions current amongst nations, are usually styled *the law of nations or international law*." (emphasis in the original).

[40] See *A. Kaufmann* in *id. and W. Hassemer* (Einführung) 91, 143; *M. Shaw* (International Law) 25.

from facts alone, leading to a general presumption as to the existence of the rule or support for an author's thesis as to the existence of a rule.[41]

Positivism rejects rationalist theories structured upon deductions from absolute principles and introduces scientific method into jurisprudence, taking into account actual problems and facts and inducing general rules from these common factual structures.[42] Probably the most consistent application of the inductive approach in positivist writing on international law can be found in Schwarzenberger's treatise *The Inductive Approach to International Law*.[43] Later on, positivism diversified and strictly normative approaches were developed, of which Hans Kelsen's *Pure Theory of Law*,[44] developed in the late 30s, is the most outstanding. These approaches are concerned with the formal structure of norms, not with their content.[45]

Positivist views of international law are best understood as the opposite of natural law conceptions. Positivist scholars believe the law to be created by a sovereign or any legitimised legislative entity. Hence, a legal rule attains positive quality if it can be derived from an act of creation which took place in history and may be perceived objectively.[46] This entails the logical separation of law and morality, the *is* and the *ought*.[47] Consequently, positivist conceptions of international law have been characterised as focusing on the process of factual application of and adherence to the law, while rejecting any metaphysical legal reasoning.[48] They provide a constructivist and formal method for the finding of justice and the application of the law.[49] Generally, we may say that positivist perceptions of international law embrace any value-neutral concept of international law, or draw upon strictly normative constructions.[50]

To assess the theory on customary international law, we must further distinguish between positivist conceptions of international law. On the one hand, there are those scholars who still represent the majority in their views of customary international law theory: they argue for the formation of customary international law from the two elements of state practice and *opinio*

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[41] See *A. Kaufmann* in *id and W. Hassemer* (Einführung) 157; see further the definition of inductive and deductive method by *J. Kammerhofer* (2001) 15 EJIL, 537.
[42] *A. Kaufmann* in *id.* and *W. Hassemer* (Einführung) 92.
[43] *G. Schwarzenberger* (Inductive Approach).
[44] *H. Kelsen* (Reine Rechtslehre).
[45] *A. Kaufmann* in *id. and W. Hassemer* (Einführung) 93.
[46] *R. Ago* in *R. Bernhardt* EPIL vol. 3, 1073.
[47] *T. Campbell* (Legal Positivism) xiii; for the opposing view: *J. M. Finnis* (Natural Law) 81.
[48] *U. Scheuner* (1950/1951) 13 ZaöRV 569.
[49] *U. Scheuner* (n. 48) 569.
[50] See *J. A. Beckett* (2001) 12 EJIL 629.

juris. On the other hand, we also encounter one-element views, of those scholars who emphasise either the element of *opinio juris* or the element of state practice. They believe in strictly voluntarist conceptions or follow entirely practice-based approaches.

1. *Voluntarist conceptions*

Since the beginning of the twentieth century, voluntarist concepts have been employed to explain the formation of international law.[51] Strictly speaking, voluntarism is not just a strand of legal positivism, since naturalist concepts have also drawn upon voluntarist theory to characterise international law-making and international law.[52]

Narrowly understood, voluntarism predominantly describes the theory of Triepel and other German scholars in the late nineteenth century.[53] Their thinking has been influenced to a great extent by the philosophy of Hegel who regarded the will as "the basis of reason of the state".[54] As Triepel explaines in his treatise *Völkerrecht und Landesrecht*, a norm of international law can come into being only when there is a coincidence of wills and they are amalgamated into a common will (*Gemeinwille*) in a treaty which creates norms of international law (*Vereinbarung*, or agreement).[55]

Nevertheless, modern voluntarist conceptions of international law may contain more than Triepel's *Vereinbarung* theory. Following a much broader understanding, the voluntarist approach can also include modern consensualist perceptions, which regard the consensus of sovereign states as a basis for the binding nature of international law.[56] This theory of common consent or modern voluntarism currently constitutes one of the main strands of positiv-

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[51] See *G. Jellineck* (Staatenverträge), 5: „Alles Recht ist Wille der staatlichen Gemeinschaft, der in Form des Gesetzes oder der Rechtsgewohnheit auftritt." Jellineck argues that if the nature of international law is based upon the will of the state, this assumption presupposed the self-restraint of the state: the state has to be able to oblige itself to obey the law. (8 and 17). Hence, every act of will of a state at the same time has to entail the will to restrain itself (27); Further at 45: „die völkerrechtlichen Normen sind nicht das Producct einer über dem Staate stehenden höheren Macht, welche ihm dieselben etwa aufdränge, es ist das Völkerrecht kein überstaatliches Recht, sondern es entspringt formell derselben Quelle, wie alles objective Recht: dem Willen des rechtssetzenden Staates." For a general assessment of this epoch: *M. Koskenniemi* (Gentle Civilizer) 188ff.

[52] *F. Suárez* in *J. B. Scott* (Classics) 344, para. 189; *H. Grotius* (Prolegomena) para. 17.

[53] See *M. Koskenniemi* (Gentle Civilizer) 188ff.

[54] See *G. F. W. Hegel* in *M. D. A. Freeman* (Introduction) 991: "The basis of the state is the power of reason actualising itsef as will".

[55] *H. Triepel* (Völkerrecht) 32.

[56] *R. Jennings and A. Watts* (Oppenheim's International Law) vol. 1, peace, para. 5, at 14.

ist perceptions of international law-making.[57] It derives the binding nature of a norm of international law, independently of the individual source of law, from implicit or explicit agreement or consensus.[58] For the requirement of consent as a basis for legal obligations authors have often referred to Roman law texts, which indicate that law is what the people wills expressly (legislation) and customary law is what it wills or consents to implicitly.[59]

One famous representative of modern consensualist doctrine is Sir Robert Jennings, who considers the consensus of the members of the international community to form the basis of international law:

> It is, however in accord with practical realities to see the basis of international law in the existence of an international community the common consent of whose members is that there shall be a body of rules of law – international law – to govern their conduct as members of the international community. In this sense 'common consent' could be said to be the basis of international law as a legal system.[60]

The existing system of sources of international law outlined in Article 38 of the ICJ Statute reflects this state-oriented vision of the law. On this, Danilenko remarked: "All formulae of Article 38 directly or indirectly presuppose an active law-making role of states as the principal actors on the international level."[61]

Voluntarist notions of international law have also assumed a leading role in the jurisprudence of the PCIJ and ICJ. The most fervent adherent to the voluntarist perception of international law was probably the PCIJ in the *Lotus Case*, where the judges found:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in

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[57] *L. Henkin* (International Law) 27; *R. Jennings and A. Watts* (Oppenheim's International Law) vol. 1, peace, para. 5, 14; *I. Lukashuk* in *J. Makarczyk* (Theory) 488; see *A. D'Amato* (Concept) 75; *Bin Cheng* (1965) 5 Indian Journal of International Law, 37; *V. Lowe* (1983) 9 Review of International Studies, 207–209.

[58] *E. de Vattel* (Droit de gens 1959) para. 27; *H. Grotius* (Prolegomena) para. 17; *F. Suarez* (1612) VII; chap. 13,6; *E. Suy* (Actes Unilatéraux).

[59] *M. Mendelson* (1998) RdC, vol. 272, 254, note 269; citing: *Cicero*, de invent, 2. 22.67.: "consuetudine jus esse putatur id, quod vonluntate ominum sine lege vetustas comprobavit"; Digest 1.3.32.1 (Julian, 84 Dig.) "Inveterata consuetudo pro lege non immerito custoditur et hoc est jus quod dicitur moribus constitutum. nam cum ipsae leges nulla alia ex causa nos teneant quod judicio populi receptae sunt, merito et ea quae sine ullo scripto populus probavit tenebunt omnes: nam quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis?"

[60] *R. Jennings and A. Watts* (Oppenheim's International Law) vol. 1, peace, para. 5, at 14, recently this idea has been further elaborated by *O. Elias* (1995) ICLQ, 513.

[61] *G. Danilenko* (Law-making) 193.

> conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[62]

Nonetheless, its successor, the ICJ, also maintained in the *Nicaragua Case*:

> …in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited.[63]

A conception of customary international law, which viewed custom as the result of the tacit consent of states was supported as early as 1758. De Vattel in his *Le droit des gens ou principes de la loi naturelle* wrote on custom:

> It [the customary law of Nations] is based on tacit consent or, if one may want, on a tacit agreement of those Nations which regard it as binding for themselves.[64]

However, the Soviet theory of international law took the strict voluntarist conception of international law to its most extreme conclusions. It considered the 'agreement' and, ultimately, international treaties to be the main and formal sources of international law,[65] since the agreement between the members of the community of states found its primary expression therein.[66] Customary international law, on the other hand, was regarded as a kind of backward and underdeveloped law.[67] As Mr. Koretzky, the Russian delegate to the Committee on Customary International Law of the ILC, put it:

> "…a number of members seemed to feel that customary law was the basic source of international law. That view was wrong. A correct study of the evolution of international law would show that customary law was bound by tradition, backward and always lagged behind social development."…"Customary law…belonged to the period of the 'white man's burden', the period of the

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[62] PCIJ, *Lotus*, PCIJ Series A. 10 (1927), at 18.

[63] ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Merits, ICJ Reports, 1986, 135, para. 269.

[64] Translation of the author: „Es [das Gewohnheitsrecht der Nationen] gründet auf die stillschweigende Zustimmung oder, wenn man will, auf ein stillschweigendes Übereinkommen derjenigen Nationen, die es unter sich beachten." *E. de Vattel* (Droit de gens 1959) para. 25.

[65] See *G. Tunkin* (Theory) 146–147: "…the soviet doctrine, (…) regards the international treaty as the basic source of international law."; *K. Wolfke* (Custom) in particular 70–76, 158–166; *id.* (1993) 24 NYIL, 1, 5.

[66] See *T. Schweisfurth* in *R. Bernhardt* (ed.), EPIL vol. 4, 435.

[67] ILC, *Committee on Making the Means for the Evidence of Customary International Law More Readily Available*, 32nd Meeting, UN Doc. A/CN.4/6, Yearbook of the ILC, 1949, 232; *G. Tunkin* (Theory) 95ff.

> domination by a few powerful states who had disregarded the national sovereignty of weaker States."…"conventional law, not customary law, was the basic source of international law".[68]

Since Soviet theory viewed international treaties as an *explicit* agreement between the states of the international community, the formation of a norm of customary international law was considered to take place after a *tacit* agreement between states:

> The essence of the process of creating a norm of international law by means of custom consists of *agreement between states*, which in this case is *tacit*, and not clearly expressed, as in a treaty.[69]

This tacit agreement was imagined to come into being in two phases: first through actual conduct and secondly through its recognition[70] as an international norm. Hence, international practice, i.e. the repetition of certain acts by states, as well as their omission,[71] was seen as the decisive element for the formation of a norm of customary international law.[72] Recognition of that practice rendered it of binding legal character and ultimately reflected its acceptance as a rule of customary international law. Nevertheless, following Soviet theorists, such recognition could also result from a tacit agreement:[73]

> *Opinio juris* signifies that a State regards a particular customary rule as a norm of international law, as a rule legally binding on the international plane. This is an expression of the will of a State, in its way a proposal to other states. When other States also express their will in the same direction, a tacit agreement is formed with regard to recognizing a customary rule as an international legal norm.[74]

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[68] ILC (n. 67) at 232, para. 13, 14.

[69] Translation of the author: "Die Herausbildung einer Völkerrechtsnorm durch Gewohnheit besteht also in einer Vereinbarung zwischen den Staaten, die in diesem Fall stillschweigend ist, und nicht offen ausgedrückt wie im Vertrag". *G. Tunkin* (Völkerrechtstheorie) 154; see *I. Lukashuk* in *J. Makarczyk* (Theory) 488.

[70] As *G. Tunkin* (Theory) at 133 held: "In recognizing a norm of international law, a State takes upon itself before other States the obligation to comply with a rule of conduct as binding upon itself, from which it may not arbitrarily free itself"; for an earlier account of the element of recognition see *P. Heilborn* (Grundbegriffe) 38.

[71] *G. Tunkin* (n. 70) 125.

[72] See *G. Tunkin* (n. 70) 122.

[73] *T. Schweisfurth* in *R. Bernhardt* EPIL vol. 4, 436.

[74] *G. Tunkin* (Völkerrechtstheorie) 163; for the English translation see also: *G. Tunkin* (n. 70) 143.

Critiques identified the Soviet approach relatively quickly as untenable.[75] Its greatest flaws were seen in its description of custom as a form of tacit agreement, which could not explain why states which effectively had no knowledge of the relevant practice or no potential interest in its creation should acquiesce in the formation of a new norm of international law.[76]

Following criticism from Brownlie on that very issue, one of the main supporters of the Soviet theory, Tunkin, even admitted that

> There is a certain contradiction between the real and legal relations [of States]. Certainly the position of the majority of States, including those of the two systems, and, above all, the position of the super powers has a decisive role in the process of the formation of generally accepted rules of international law.… It thus results that in international relations, the majority of states will be unable to create binding rules for all States and that this majority does not have the right to try to dictate those rules to others.[77]

However, he did not offer any further arguments to overcome the inconsistencies of his own theory. Nevertheless, the defects of the Soviet approach do not necessarily lead to the conclusion that the voluntarist approach has no value at all as an explanation of the creation of customary law obligations.[78]

Even later approaches took up the notion of consent underlying the creation of every norm of international law. Although most of them purport to have developed suppositions for the tacit-consent element, they corroborate only the impression that some form of tacit agreement is still considered a necessary element for the formation of a new norm of customary international law.

Günther and Müller, as well as Villiger and Danilenko, developed a model of customary international law which builds upon the concept of *aquiescence / estoppel* as a replacement of the tacit-agreement construction.[79] They argue

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[75] See: *H. Kelsen* (Principles) 317; *J. Charney* (1985) 56 BYBIL, 16f; *C. Tomuschat* (1999) RdC, vol. 281, 327

[76] See: *M. Koskenniemi* (1990) 1 EJIL, 22; *M. Mendelson* (1998) RdC, vol. 272, 257, 258.

[77] Translation of the author. "Hier besteht ein gewisser Widerspruch zwischen den realen und den rechtlichen Beziehungen. Zweifellos hat die Stellung der Mehrzahl der Staaten, einschließlich der Staaten der beiden Systeme, und vor allem die Stellung der Großmächte entscheidende Bedeutung im Prozeß der Schaffung allgemein anderkannter Völkerrechtsnormen. (…) Daraus ergibt sich, daß in den internationalen Beziehungen die Mehrheit der Staaten keine Normen schaffen kann, die für andere Staaten bindend sind und daß sie nicht das Recht hat, zu versuchen, anderen Staaten diese Normen aufzuzwingen." *G. Tunkin* (Völkerrechtstheorie) 159. For the English version see *G. Tunkin* (n. 70) 139.

[78] *M. Mendelson* (1998) RdC, vol. 272, 264.

[79] *H. Günther* (Völkergewohnheitsrecht) 145; *M. Villiger* (Customary International Law 2nd ed.) 39, para. 51; H. Günther and M. Villiger seem to consider the concepts of acquiescence and estoppel to have identical requirements and identical legal effects.

that rules of customary international law can develop if states act in such a way that other states can rely on this behaviour and assume that it will not be deviated from in the near future.[80] As the authors contend, this approach deviates from strictly voluntarist conceptions which regard the will of states as the basis of legal obligation. They thus presume a tacit agreement between states on the formation of a new norm of customary law in a kind of *prima facie* liability, which serves as an explanation of the *opinio juris* element.

Although the concept of aquiescence has already been named by de Vattel as the underlying basis of customary international law,[81] the authors argue that it best reflected the development of international law by new communication techniques, which permitted much more rapid communication between states on new rules of international law than in the past.[82] Villiger, for example, expressly names UN conferences or diplomatic conferences which premise the conduct of states on certain expectations.[83]

Danilenko, on the other hand, carries the aquiescence concept further and suggests differentiation between an individual *opinio juris* and a collective *opinio juris*.[84] Of these two, only individual *opinio juris* can be proven according to the concept of acquiescence developed by Villiger and the foregoing authors. A collective *opinio juris*, on the other hand, can merely be derived from uncoordinated acts of general practice, which, by way of repetition, assume precedential value.[85] Danilenko thus suggests applying the concept of aquiescence with two safeguards: firstly, only states whose interests are affected by the customary norm can be held to have acquiesced in their coming into existence and, secondly, states must have known of the particular practice developing towards the formation of a new customary norm.[86]

Nevertheless, the doctrine of acquiescence has not been applied as universally in international disputes as has often been suggested. In practice, it has been invoked mostly in territorial disputes.[87] In its decisions the ICJ has been quite reluctant to invoke the doctrine as a general principle applicable to the formation of customary international law.[88] Generally, it can be concluded that the doctrine encounters some of the very same difficulties for which

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[80] *H. Günther* (Völkergewohnheitsrecht) 156.
[81] *E. de Vattel* (Droit de gens 1959) 26.
[82] *J. P. Müller* (Vertrauensschutz) 242.
[83] *M. Villiger* (Customary International Law 2nd ed.) 40, para. 52.
[84] *G. Danilenko* (Law-making) 102.
[85] *G. Danilenko* (n. 84) 119.
[86] See also *M. Shaw* (International Law) 77.
[87] See *J. Müller* and *T. Cottier* in *R. Bernhardt* EPIL vol. 1, 15.
[88] See ICJ, *Arbitral Award Made by the King of Spain on 23 December 1906*, ICJ Reports 1958.

strictly voluntarist approaches could be criticised: above all, it overlooks the fact that a state's failure to act can also result from its incapacity or unwillingness to act in the particular circumstances. As Shaw warns, the danger of saying that a failure to act over a long period creates a negative custom is reflected in such an absurd proposition as "a continual failure to act until the late 1950s is evidence of a legal rule not to send artificial satellites or rockets into space."[89] Finally, from a constructivist perspective, the acquiescence doctrine renders a voluntarist approach devoid of any meaning: It asserts the existence of a customary norm even against the will of a particular state. Such a result stands in almost diametric opposition to the initial aim of the voluntarist perception, which is to make the creation of legal norms entirely dependent on the will of states. Thus, the main objection to strictly voluntarist approaches does not seem to have been overcome by the acquiescence doctrine.

2. *Other* opinio juris*-based approaches to customary international law*

Two other *opinio juris* based approaches were developed by Bin Cheng and Ago in the 1960's when the Cold War had reached one of its heights. Broadly speaking, both thus represent innovative approaches to customary law-making, which try to break up the natural deadlock which results if state practice has not developed within a significant time to support a nascent *opinio juris*.

Bin Cheng first invented his theory of instant customary law when investigating the normative character of UNGA resolutions 1721 A (XVI) of 20 December 1961 and 1962 (XVIII) of 13 December 1963, which by consensus had adopted principles of outer space law.[90] These resolutions were particularly remarkable in terms of customary international law-making as, prior to their adoption, it was still thought that the sovereignty of a state would prevail indefinitely from its territory to outer space.[91] Yet, with the launch of the first satellites into space, states quickly agreed upon a new international regime to govern these new activities. Over time, Bin Cheng's theory found other supporters.[92]

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[89] *M. Shaw* (International Law) 77.

[90] *Bin-Cheng* (1965) 5 Indian Journal of International Law 36ff; *id.* in *R. S. Macdonald and D. M. Johnston* (Structure) 513ff; *id.* in *A. Anghie* (Visions) 377ff; for further analysis of the time element in the formation of customary international law see *R. Piotrowicz* (1994) 21 Polish Yearbook of International Law, 69–85.

[91] *Bin-Cheng* (1965) 5 Indian Journal of International Law 23–48; *W. Graf Vitzthum* (Völkerrecht) I, para. 138, 86.

[92] *I. Lukashuk* in *J. Makarczyk* (Theory) 494.

According to Bin Cheng, only the *opinio juris* element is necessary for the creation of a new customary rule.[93] He maintains that this element depicts the abstract norm of customary international law and determines its legal character as well as its content.[94] State practice, on the other hand, only serves as proof of the contents of the particular customary international law norm or of the *opinio juris* of a particular state.[95] As long as a particular *opinio juris* about the existence of a new rule of international law is not rejected by members of international society,[96] Bin Cheng finds that a customary international law norm might be created instantly 'over night'.[97] This had happened in the case of the Outer Space Resolutions and could happen with future resolutions if UN member states agreed only, in an *opinio juris communis* or *opinio generalis juris generalis*, upon the customary international law character of the rules contained therein.[98]

Lukashuk also supports the formation of customary norms from *opinio juris* alone. He maintains that 'instant' custom is comprised mainly of rules which have been initially articulated in international treaties or "non-legal acts, such as those adopted by international organs or organizations."[99] Yet he emphasises that instant custom is still to exist side by side with traditional custom, crystallised out of state practice and an accompanying *opinio juris*.[100]

3. *Ago's theory of spontaneous law*

Ago's theory of spontaneous law is not as easily categorisable as theories on custom examined previously. On the one hand, Ago criticises positivist approaches to customary international law for providing an entirely formalistic view of the formation of international norms. He further opposes auxiliary constructions such as Kelsen's *Grundnorm* theory, which he finds do not represent current international realities. According to Ago, positive law shall be termed positive only if derived from an appropriate law-making process

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[93] *Bin Cheng* in *R. S. Macdonald and D. M. Johnston* (Structure) 531; *id.* (1965) 5 Indian Journal of International Law at 36.

[94] *Bin Cheng* in *R. S. Macdonald and D. M. Johnston* (Structure) 531.

[95] *Bin Cheng* (1965) 5 Indian Journal of International Law 36.

[96] *Bin Cheng* in *R. S. Macdonald and D. M. Johnston* (Structure) 547.

[97] *Bin Cheng* in *R. S. Macdonald and D. M. Johnston* (Structure) 532, 536; *id.* (1965) 5 Indian Journal of International Law, 46.

[98] *Bin Cheng* (1965) 5 Indian Journal of International Law 38; further: *id.* in *R. S. Macdonald and D. M. Johnston* (Structure) 541.

[99] *I. Lukashuk* in *J. Makarczyk* (Theory) 493.

[100] *I. Lukashuk* in *J. Makarczyk* (Theory) 493; further: 496 (two different forms of state practice), 508 (for two different forms of customary international law).

by a formal source of international law.[101] Since in his view customary international law does not derive from any source of law at all, however qualified, it has to be considered 'spontaneous' law.[102] Therefore, only if positive international law is equated with the 'law in force' can norms of spontaneous law be embraced by it.[103]

With respect to the formation of individual norms of customary international law, Ago argues that the elements of *opinio juris* and state practice function as elements of proof of whether a rule of customary international law is reflected in the general conscience of states.[104] In a broader understanding, his approach to custom therefore emphasises the *opinio juris* element, because it focuses on the 'general conscience of states' as the main law-creating element. Nonetheless, following Ago, only the inductive method may be utilised in order to ascertain new customary rules. He states that only "induction from a series of concrete manifestations of *opinio juris* by members of the social body, not deduction from the occurrence of an artificially constructed process deemed to have been legally pre-established" have to determine the formation of a customary rule.[105]

After all, from a closer perspective, Ago's approach does not differ much from other positivist-voluntarist explanations of the formation of general and customary international law. His rejection of positivism is mainly founded on a rejection of formalistic approaches to positivism. However, since Ago also focuses on an induction of customary norms from examples of *opinio juris* of states, his theory presents an entirely positivist concept of international law.

4. *Practice-based approaches*

Positivist conceptions of customary international law focussing solely on the element of state practice are relatively common in international doctrine.[106] In its 1949 work on the formation of customary norms, the ILC also emphasised the importance of state practice for the formation of norms of customary international law.[107] However, even though many approaches purport to

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[101] *R. Ago* (1956) RdC, vol. 90, 950.
[102] *R. Ago* (n. 101) 935, 944.
[103] *R. Ago* (n. 101) 949.
[104] *R. Ago* (n. 101) 932.
[105] *R. Ago* in *R. Bernhardt* EPIL vol. 7 (1984), 390.
[106] See *R. Quadri* (1964) RdC, vol. 113, 327–329; similarly: *E. Suy* (Actes Unilatéraux) 265; On a positivist concept of customary international humanitarian law compare *D. Graham* in *A. Wall* (Kosovo Campaign), 382.
[107] ILC, *Report of the ILC to the General Assembly*, A/1316, ILC Yearbook, 1950, 367–374.

be purely practice-based, most of them rely upon a voluntarist or consensualist understanding of international law. Hence, they base the existence of the *whole source* of customary international law on the consensus of the international society of states.[108] Furthermore, they presuppose that a general practice among states created the presumption that all states had consented to the primary rule embodied in the practice.[109] Nonetheless, practice-based approaches to custom do not require a *particular norm* of customary international law to be rooted in the will of the members of the international community. Hence, some authors have described this approach as the implied consensus approach.[110] As Mendelson and Müllerson point out in the ILA's Final Report on the Formation of Customary International Law:

> …it is a fallacy to reason that, just because the identification of the processes by which the law is created (i.e. the sources) depends on the will of states, it necessarily follows that any given process (and in the present context customary law) has consent as its sole or indispensable ingredient.[111]

Nevertheless, most practice-based approaches do not argue that custom is created by empirical induction from examples of state practice alone.[112] Many of the theories examined draw in addition from some kind of '*opinio*-based' qualifier, sometimes taken also from the concept of acquiescence discussed earlier. This enables them to distinguish customary international law norms from mere usages, i.e. norms based upon the will of the members of the international community from rules for which there is no will that they become binding in nature.[113]

5. *Strict normativism: Hans Kelsen's pure theory of international law and neo-Kelsenian approaches*

Hans Kelsen's strictly normative theory of international law is diametrically opposed to the consensualist approaches assessed previously. It has been most influential for modern positivist conceptions of international law, as we will see later. Kelsen rejects the idea of consent as a basis for international law. He maintains that it is hardly distinguishable from the fiction of the

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[108] *R. Quadri* (1964) RdC, vol. 113, 328.

[109] See *R. Quadri* (1964) RdC, vol. 113, 320 and 272; *V. Lowe* (1983) 9 Review of International Studies, 208–209; *P. Allot* (Eunomia) 145–177; *J. Raz* (Practical Reason) 123–129.

[110] See *M. Byers* (Custom) 144.

[111] *ILA*, *Committee on Formation of Customary (General) International Law* (n. 9) 38.

[112] Concerning the importance of Resolutions of the UN General Assembly in this process see: *E. Suy* in M. MacDonald and R. Johnston (Human Welfare), 190.

[113] One famous example is the use of white paper for the correspondence of diplomats.

social contract of the natural-law doctrine.[114] According to Kelsen, custom is a law-creating fact[115] which presupposed that it has a law-creating character in international law. This hypothesis, he finds, has found its expression in the basic norm (*Grundnorm*), which ultimately determined the formation of all customary international law.[116] The basic norm is a norm which has not been created by the will of states, but which is presupposed by "the jurists interpreting legally the conduct of states."[117] Its content is determined by the "matériel positif qu'on veut comprendre comme droit, par les actes humains effectivement accomplis dans l'espace et dans le temps et qui doivent être interprétés comme des actes juridiques."[118] In one of his later works, Kelsen defines this norm as: "states ought to behave as they customarily behaved."[119]

Kelsen, moreover, emphasises that a long-established practice of a great number of states is sufficient for the actual creation of norms of customary international law.[120] Contrary to the subjective element, the element of practice can be stated objectively and is relatively easy to prove.[121] Hence Kelsen maintains that it is sufficient for a custom to emerge if the actors simply realise that some norms derive from law, moral commandments or justice.[122] This recognition, however, cannot be equated with the subjective element of custom. It merely serves to "maintenir l'idée de la souveraineté des Etats selon laquelle un Etat ne peut être obligé que par sa propre volonté."[123]

Only recently has found the Kelsenian perception of custom-formation a certain interest among younger international legal theorists.[124] Kammerhofer, in particular, points out that custom – unlike voluntarist perceptions of customary international law – has to be understood as a behavioural regularity. Like Kelsen, he observes that any act of will constituting custom is represented in "[t]he will of the subjects of law that the subjects of law ought to observe that behavioural regularity."[125] He thus finds that a new custom can be established by the recognition of the norm-creating character of a certain practice.[126]

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[114] *H. Kelsen* (Principles) 311, 316.
[115] *H. Kelsen* (n. 114) 308.
[116] *H. Kelsen* (1939) Revue Internationale de la Theorie du Droit, 258.
[117] *H. Kelsen* (n. 114) 314.
[118] *H. Kelsen* (n. 116) 256.
[119] *H. Kelsen* (n. 114) 441.
[120] *H. Kelsen* (n. 114) 313.
[121] *H. Kelsen* (n. 116) 264.
[122] *H. Kelsen* (n. 114) 307.
[123] *H. Kelsen* (n. 116) 271.
[124] *J. Kammerhofer* (2004) 15 EJIL, 532ff; compare *H. Taki* (2008) 51 GYIL, 447ff, at 460f.
[125] *J. Kammerhofer* (n. 124) 547.
[126] *J. Kammerhofer* (n. 124) 547.

6. *Assessment*

Strictly normative approaches have always been accused of being too distanced in their approach to the formation of customary international law. They are incapable of taking into account the practical social realities of international relations and international life in general and often ignore issues which transcend the legal sphere.[127] However, as we will see later, international criminal law has developed a great deal through law-making processes which have actually departed from the traditional ones we are familiar with in general international law. These different developments and factors influencing international law-making cannot be acknowledged by normative approaches. Such approaches explain the law from a viewpoint concentrating solely on the inside of the legal system and its inner logical coherence.

7. *Later approaches: Haggenmacher, Mendelson and others*

Kelsen's normative concept of customary international law has been influential also for further positivist conceptions. In this regard, Haggenmacher was the first to take up his distinction between objective and subjective elements of customary international law. His concept of customary international law was further modified by later constructions, in particular those of Mendelson, Müllerson and the 2000 concept of custom presented by the ILA. Nonetheless, Mendelson's theory, in particular, is influenced to a great extent by the Kelsenian idea of a *Grundnorm*-based conception of customary international law. As Mendelson was also the chairman of the working group of the ILA concerned with the formation of customary rules, his theory was adopted almost in its entirety by the organisation.

Writing in the late 1980s, Haggenmacher questions the function of the *opinio juris* element in the process of the formation of customary rules[128] and argues that it concerned only the interpretation of state practice at international level.[129] Consequently, he concludes:

> n'est donc le fruit ni d'une recherche effective sur les motivations ni, moins encore, d'une psychoanalyse des divers « sentiments », « croyances » et « convictions » des auteurs des actes materiéls allégués à l'appui de la règle coutumière … L'*opinio juris sive necessitatis* est essentiellement le fait de l'interprète.[130]

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[127] *R. Müllerson* (Anarchy) 29; similarly: *G. Tunkin* (Völkerrechtstheorie) 255.
[128] *P. Haggenmacher* (1986) 90 RGDIP 103.
[129] *P. Haggenmacher* (n. 128) 114.
[130] *P. Haggenmacher* (n. 128) 117.

Nevertheless, Haggenmacher further opines that custom does not rest solely upon objective, empirically provable acts of state practice alone. In his view, the element of state practice contains "aspects 'matériels' et 'psychologiques'".[131] According to Haggenmacher, these aspects, however, are subject to interpretation by the courts.[132]

Yet, in an essential departure from the Kelsenian perception, Haggenmacher continues that the formation of state practice is also determined by "principles" of international law which form an independent basis for this practice. In his opinion, these 'principles' are not to be regarded as customary or derived from international practice.[133] Rather, their original source is the international judicial order itself.[134] This is an exception to the entirely positivist concepts discussed previously, which we will also find with Müllerson's and the ILA's concept of customary international law.

Like Haggenmacher, Mendelson also maintains that the *opinio juris* element is of only limited utility.[135] In his view, its valuable function is reduced to the provision of a distinction between custom and usage.[136] Due to the difficulties which arise with its application, he states that the element cannot be considered as a determinant in the customary process. Eventually, it has to be considered superfluous.[137]

Müllerson, on the other hand, points out that objective and subjective elements of state practice exist, but that there is no separate element of *opinio juris* besides state practice.[138] In reality, the two elements of customary international law are just two sides of the same coin, which "may be separated for analytical purposes but which cannot exist independently from each other."[139]

Mendelson, yet again, asserts – despite his strong rejection of the influence of any subjective element in the customary law-making process – that only the 'legitimate expectations of the international community' give a particular state's practice legal quality.[140] Accordingly, he concludes that customary international law must be defined as follows:

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[131] *P. Haggenmacher* (n. 128) 114.
[132] *P. Haggenmacher* (n. 128) 115.
[133] *P. Haggenmacher* (n. 128) 118.
[134] *P. Haggenmacher* (n. 128) 119.
[135] *M. Mendelson* (1995) 66 BYBIL, 184ff.
[136] *M. Mendelson* (1998) RdC, vol. 272, 282.
[137] *M. Mendelson* (1998) RdC, vol. 272, 292, 293.
[138] *R. Müllerson* (1997) 2 ARIEL 345.
[139] *R. Müllerson* (1997) 2 ARIEL 344.
[140] *M. Mendelson* (1998) RdC, vol. 272, 188.

> *A rule of customary international law is one which emerges from, and is sustained by, the constant and uniform practice of States and other subjects of international law, in their international relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future.* (emphasis in the original)[141]

Similarly, Müllerson argues that the element of *opinio juris* constitutes

> that part of the subjective element of state practice which reflects (expresses) the attitude of a state to its own behaviour or to the behaviour of other states in the light of its understanding of what international law is or what it ought to be.[142]

'Legitimate expectations' of other states thus constitute the ersatz *opinio juris* element in Mendelson's, as well as in Müllersons definition of customary international law.

Nonetheless, like the realist approaches which will be discussed later, Mendelson's view is that custom formation is a constant process of claim and response, in which rules are identified by empirical methods.[143] As he observes, this reflects the "authentic world of politics, rather than some ideal world which may owe more to rhetoric than to reality."[144] However, unlike the policy-based New Haven School, Mendelson favoures a normative approach to international law and promotes 'legitimate expectations of the international community' forming the *Grundnorm* or basis of the international legal system.[145]

Mendelson's theory was adopted almost wholsale by a report of the Committee of the International Law Association on the Formation of Norms of Customary International Law and in a subsequent resolution of the organisation on the formation of customary international law.[146] Yet, most interestingly, as the Committee's report explains, there might also be "some principles of unwritten law which are axiomatic and which therefore do not need to be supported by practice over time,"[147] such as the principles of sovereign equality and of non-intervention. The report admits that its theory does not support the denomination of these principles as customary international law. Accordingly it continues:

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[141] *M. Mendelson* (1998) RdC, vol. 272, 188.
[142] *R. Müllerson* (1997) 2 ARIEL 347.
[143] *M. Mendelson* (1998) RdC, vol. 272, 181.
[144] *M. Mendelson* (n. 143) 190, 191.
[145] *M. Mendelson* (n. 143) 184.
[146] *ILA, Committee on Formation of Customary (General) International Law* (n. 9); ILA, Resolution 16/2000, 'Formation of General Customary International Law'.
[147] *ILA, Committee on Formation of Customary (General) International Law* (n. 9) 21.

> To some extent, this point could be met by observing that the notion of customary international law is not necessarily coterminous with that of unwritten law, so that these other forms of unwritten law are perhaps not really "customary law" at all.[148]

On the other hand, also Müllerson admits that international human rights law might not fit his practice-based scheme of customary international law. "Value-loaded norms" like international human rights, he argues, are constantly counteracted by the practice of states. This poses a problem for their categorisation as customary within the traditional concept of customary international law.[149] As a consequence, Müllerson remarks that these norms must be considered general principles of international law.[150] Nonetheless, he adds that "value-loaded norms" like international human rights can survive notwithstanding contrary *de facto* practice because of the strong support of *opinio juris generalis*. Value-neutral norms, according to Müllerson, need much more consistent actual practice for their formation as well as survival.[151]

> The more consistent and general is practice, the lower is the necessity to look for the subjective element confirming the acceptance of such practice as legally binding. And on the contrary, strong *opinio juris generalis* is able to compensate the lack of consistency in 'actual' practice.[152]

8. *Commentary on the late positivist approaches*

An exemption of entire fields of international law from the processes of custom-formation undermines to a great extent a practice-based theory of customary international law.[153] The conclusion that 'universally accepted principles' of sovereign equality and non-intervention do not fall within the category of customary international law at all casts major doubts on this theory's functionality and comprehensiveness. The list of "axiomatic principles" of the ILA could easily be extended to include other "universally accepted" norms of international human rights law or international humanitarian law. Hence, entire branches of international law would not be included in the theory and would have to be labelled "not really customary international law at all."

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[148] *ILA, Committee on Formation of Customary (General) International Law* (n. 9) 21.
[149] *R. Müllerson* (Anarchy) 228.
[150] *R. Müllerson* (Anarchy) 228; this was already maintained by *A. Verdross* (Verfassung), 62.
[151] *R. Müllerson* (1997) 2 ARIEL 356.
[152] *R. Müllerson* (1997) 2 ARIEL 356.
[153] See *S. Yee* (2000) 43 German YBIL, 232f.

9. *Other practice-based conceptions*

Several other recent authors emphasise the importance of the element of state practice for the formation of customary international humanitarian law.[154] For example, Abi-Saab in his discussion of the customary international law character of the Geneva Conventions and their Additional Protocols underlines the character of custom as an "interactive and cumulative process which works itself out in time or along a time schedule."[155] However, as demonstrated above, authors emphasising the element of state practice almost always take into account some subjective element which helps to qualify practice for the formation of a norm of international law. Furthermore, many authors also note that in fields like international human rights law, custom formation is not orientated towards the element of state practice. The approaches thus appear to differ only in nuances from those which take into account both elements of custom.

B. *Two-element approaches*

Two-element theories on customary international law underlie the concept of Article 38 of the ICJ Statute and, despite all trends promoting the abandonment of the idea of Article 38, they currently still reflect the view of the majority of scholars of international law.[156] The two-element concept has also been chosen by the ICRC in its study on customary international humanitarian law as the approach to be followed regarding the formation of humanitarian rules.[157]

Basing their approach to customary international law on the element of *opinio juris* as well as on an assessment of state practice, two-element approaches are able to embrace voluntarist conceptions and positivist ideas of international law-making. Since state practice must be qualified by an underlying *opinio juris*, expressing the legal will of a state, international law

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[154] *G. Abi-Saab* in *A. Delissen and G. Tanja* (Humanitarian Law) 124; *D. Graham* in *A. Wall* (Kosovo Campaign), 382.

[155] *G. Abi-Saab* in *A. Delissen and G. Tanja* (Humanitarian Law) 124.

[156] See *M. Akehurst* (1974–5) BYBIL vol. XLVII, 20; *V.-D. Degan* (1990) 1 Finnish Yearbook of International law, 11; *R. Higgins* (Problems and Process) 22; *P. Guggenheim* (1958) RdC, vol. 94, 5ff; *A. D'Amato* (Concept) 48; *M. Bos* (1982) GYIL 9ff; *K. Wolfke* (Custom); *L.Le Fur* (1927) RdC, vol. 18, 263ff; *K. Doehring* (1976) 36 ZaöRV, 77ff; *A.Verdross* (Verfassung); *I. Brownlie* (Principles 5th ed.) 5f; *ILA, Committee on Formation of Customary (General) International Law* (n. 9) 7, para. 10.

[157] *J.-M. Haenkaerts and L. Doswald-Beck* (Customary International Humanitarian Law) vol. I, xxxii.

can still be conceived of as deriving from the underlying consensus of the members of the international community. As Tomuschat aptly remarked, the ingenuity of the two-element approach to custom formation lies in the fact that it is able to strike a balance between the world of the *is* and the world of the *ought*.[158] However, in contrast to strictly voluntarist views, two-element approaches do not require the (tacit) agreement of all states for the formation of a customary norm. Generally, the views of a representative majority, including those especially affected and/or influential states and/or the absence of significant protest by those states, are considered to be sufficient to form the relevant *opinio juris* for the creation of a new rule of customary international law.[159]

By and large, the two-element approach to customary international law dates back to the drafting process of Article 31 of the PCIJ Statute, the predecessor of Article 38 of the ICJ Statute, which spells out the requirements of custom identically.[160] During the drafting process of Article 31, different perceptions prevailed as to what should be the underlying concept of customary international law. Lord Phillimore, for example, emphasised that custom had to be considered according to the Anglo-Saxon conception of law.[161] Others were clearly influenced by the German historical school of legal theory – of which Savigny and Puchta are the most egregious representatives[162] – and maintained that customary international law rested upon the legal convictions and needs of nations.[163] The historical school believed that a norm could emerge from custom only if the customary practice were legitimised by the *Volksgeist* (national spirit) in the sense of the legal conscience of the nation, which would consider the customary norm as law[164] – one possible interpretation of the phrase *opinio juris sive necessitatis*.[165] In the end, it may be said that the historical school prevailed, as the draft which was finally adopted defined custom as "evidence of a general practice which is accepted as law."[166]

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[158] *C. Tomuschat* (1993) RdC, vol. 241, 290.

[159] See ICJ, *North Sea Continental Shelf Cases* ICJ Reports 1969, 43, para. 74; further: *L. Condorelli* in *M. Bedjaoui* (Achievements), 203ff; *M. Shaw* (International Law) 75, 76.

[160] Text of the draft as adopted on 22 July 1920: "2. International custom, as evidence of a general practice, which is accepted as law"; compare PCIJ, Advisory Commitee of Jurists (Procès Verbaux) June 16th–July 24th 1920, 636, 648.

[161] PCIJ, Advisory Commitee of Jurists (Procès Verbaux) June 16th–July 24th 1920, 295.

[162] See *G. F. Puchta* (Gewohnheitsrecht) 143; *F. K. von Savigny* (Beruf unserer Zeit).

[163] *Descamps* in PCIJ, Advisory Commitee of Jurists (Procès Verbaux) June 16th–July 24th 1920, 322; see *Ricci Buscatti* in *ibid*., 605.

[164] *G. F. Puchta* (Gewohnheitsrecht) vol. 3 (1828), 24–119, at 33–39.

[165] See *ILA, Committee on Formation of Customary (General) International Law* (n. 9) 32.

[166] PCIJ, Advisory Commitee of Jurists (Procès Verbaux) June 16th–July 24th 1920, 636.

However, nowadays, as the ILA report on the formation of customary international law remarks, theories like that of the historical school, "which were of dubious validity even in the context of domestic, let alone international, law, have long since been rejected."[167] Rather, it may be observed that since the discussions in the Advisory Committee of Jurists, two-element approaches to the formation of customary international law have become ever more diverse. Often, supporters of the two-element approach identify additional criteria to support the traditional elements of Article 38 of the ICJ Statute. The most famous is probably the definition of custom formulated by Special Rapporteur Hudson of the ILC in his working paper of 1950, which has attained a status almost as recognised as the definition of Article 38 of the ICJ Statute:[168]

(a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations
(b) continuation or repetition of the practice over a considerable period of time;
(c) conception that the practice is required by, or consistent with, prevailing international law; and
(d) general acquiescence in the practice by other States.[169]

Similar criteria have been put forward, for example, by Brownlie.[170] The Czech public international lawyer David, in turn, maintains that a 'consciousness of societal necessity' should be relevant in addition to the two elements identified by Article 38 (1) (b) ICJ Statute.[171] Other approaches also try to amplify the two-element conception.[172]

The development of additional criteria and further methodological conceptions reflects a certain tendency to try to compensate for insufficiencies which arise in the course of the application of a two-element approach. The approaches discussed earlier have already indicated that theory risks sliding down a slippery slope when trying to explain the formation of customary international human rights and humanitarian law in the conventional way, i.e. solely by reference to the elements of *opinio juris* and state practice.

Regarding norms of international criminal law in particular, many theoretical approaches are unable to explain how a certain rule of international

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[167] *ILA, Committee on Formation of Customary (General) International Law* (n. 9) 32.
[168] UN Doc. A/CN.4/16, YBILC 1950, 24.
[169] *Hudson*, UN Doc. A/CN.4/16, YBILC 1950, 26.
[170] *I. Brownlie* (Principles 6th ed) 7, who named duration, uniformity, consistency and generality as criteria, which the element of state practice must fulfil to qualify in the process of customary international law creation.
[171] *V. David* in *Graefrath* (Probleme des Völkerrechts) vol. 2, 13ff., 19
[172] *H. Meijers* (1978) NYBIL 6.

criminal law could emerge within such a short time span and which underlying state practice or *opinio juris* actually determined its formation. Higgins, for example, argues with regard to the customary nature of the torture prohibition that it does not *lose* its customary character without the great majority of states both engaging in contrary practice and withdrawing their *opinio juris*.[173] Though an explanation for the continuity of customary norms despite contrary practice is quite common, it does not explain how the relevant prohibition could have become a norm of customary international law *in the first place*.

For the formation of custom in those areas of international law, a whole array of different approaches and methodologies has been suggested all of which take the two-element approach of Article 38 (1) (b) of the ICJ Statute as a starting point for their considerations. Hence, a closer analysis of two-element conceptions of customary international humanitarian and human rights law seems to be a worthwhile endeavour.

C. *Two-element conceptions of the formation of customary international criminal law and customary international human rights law*

Problems of custom formation in international human rights law and international humanitarian law have been addressed under different headings. Early theory discussed the issues under the broader subheading of inconsistent practice.[174] Scholars observed that human rights norms and other prohibitions of state conduct often comprised prohibitions alone. These prohibitions, however, they maintained, were frequently violated without the consequence that the corresponding prohibition ceased to be part of customary international law.[175] Somewhat later, authors addressed the formation of norms of international human rights and humanitarian law under the heading 'different sorts or forms of customary international law.'[176] Modifications of the traditional two-element approach to custom were also supported by the contention that customary international human rights and humanitarian norms were "strongly supported by and important to international order and human values."[177] This led to the development of two main explanations of the formation of norms of customary international human rights and

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[173] *R. Higgins* (Problems and Process) 22.

[174] *R. Higgins* (Problems and Process) 22; *M. Akehurst* (1974–5) 47 BYBIL, 20.

[175] See the illustration of the issue by *R. Higgins* (Problems and Process) 22.

[176] See *R.-J. Dupuy* in (Mélanges Rousseau) 82; *R. Kolb* (2003) 50 NILR, 119ff; *C. Tomuschat* (1993) RdC, vol. 241, 291; *id*. (1999) RdC, vol. 281, 332.

[177] *O. Schachter* in *J. Makarczyk* (Theory) 538; see *T. Meron* in *id.* (War Crimes) 170, 171.

humanitarian law, which dominate international legal human rights theory and international criminal theory to date: the deductive approach to custom formation and the 'core rights' approach.

1. *Different sorts of customary international law*

René-Jean Dupuy identified different sorts or approaches to customary international law at a very early stage. His categorisation of custom as *coutume sage* and *coutume sauvage* has been referred to in many subsequent discussions on the formation of customary international law. Dupuy maintains that in certain areas of international law a particular custom prevails which cannot be characterised as other than revolutionary. It has a different structure from that of customary international law based on *opinio juris* and state practice, since it emphasises almost exclusively the voluntary element.[178] He explaines:

> Dans la coutume révolutionnaire, sans nul doute, l'idée précède le fait; on assiste à une projection factuelle de l'idée politico-juridique. On ne saurait s'étonner qu'avec l'avènement de groupes sociopolitiques, la coutume universelle soit battue en brèche; elle-même est soit, pour certaines règles, d'un ressort plus sociologique que volontaire, soit, pour d'autres, rattachée à un ordre établi sous l'inspiration de grandes Puissances dont l'autorité est aujourd'hui contestée.[179]

Sometimes, Dupuy contends, this new revolutionary customary international law develops only with the help of underlying resolutions or other legal texts, such as in the case of the rules on territorial waters.[180] He further holds that the actual process of custom formation has accelerated. Hence, a new *coutume sauvage* has emerged in the international socio-political process responds spontaneously to the needs of international society.[181]

> Elle assume une mission que la coutume sage ne peut remplir en raison de sa somptueuse lenteur; elle agit comme la coutume sauvage, avec la même ardeur, mais elle réagit contre la barbarie du monde technologique et industriel; elle puise sa sagesse dans la science qui a dénoncé les périls, son dynamisme dans la nécessité de faire vite. Elle est tout à la fois coutume savante et alertante.[182]

Authors who have distinguished different sorts of customary international law or different ways of custom formation almost always identify one category of customary rules which may be derived by way of deduction from higher

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[178] See *R.-J. Dupuy* in (Mélanges Rousseau) 84.
[179] *Ibid.*
[180] *R.-J. Dupuy* in (n. 178) 86.
[181] *R.-J. Dupuy* in (n. 178) 87.
[182] *R.-J. Dupuy* in (n. 178) 86.

principles of law.[183] Sur remarks that this category of law includes rules "*qui seraient en quelque sorte nécessaires, dictées par les exigences de la coexistence entre Etats, et constitueraient un irréductible noyau dur du droit coutumier «…«comme un droit coutumier naturel de la société interétatique."*[184] Schachter and Degan classify these rules as a special category of norms which are regarded by governments as obligatory, despite even widespread violations. Norms which are part of this general international law can even be defined as "higher law", in the sense that its rules are in a hierarchy above the rules consented to by states.[185] The authors argue that the rules which belong to the 'general international law' category can be evidenced by the positions taken by the generality of governments and juridical bodies. This also signifies that they may be identified with the help of *opinio juris* alone.[186] Moreover, Schachter claims that norms which form part of this general international law, like the prohibition of aggression and the principle of self-defence, entail some "higher normativity", i.e. a recognised claim to compliance.[187] Such reasoning is very similar to the argument which is commonly brought forward to prove the existence of *jus cogens* norms.[188] In fact, the category of customary rules derived from the element of *opinio juris* alone and the category of *jus cogens* norms, in particular in the field of international humanitarian law, may often overlap.

Henkin's work of 1995 takes this differentiation between different classes of custom the furthest. He promotes not only different categories of customary international law –'established customary law' and 'contemporary customary law' – but also the categories of 'constitutional law' and 'basic law' as new categories of a 'new international law of fundamental values.'[189] For the two categories of customary international law, Henkin further explains that 'contemporary customary international law' is created by systemic consent[190] within the international community and that 'established customary law' is composed of the elements of *opinio juris* and state practice. Nevertheless,

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[183] *S. Sur* (Coutume) 1ff; *O. Schachter* in *J. Makarczyk* (Theory) 539f; *id.* (1982) RdC, vol. 187, 334; *id*. in *Y. Dinstein* (Perplexity) 718; *id.* (1987) 81 Proceedings of the Am. Soc. Intl. Law 157, 158; *V. U. Degan* in *J. Makarczyk* (Theory) 144; *L. Henkin* (International Law) 34ff.

[184] *S. Sur* (Coutume) 1.

[185] *V. U. Degan* in *J. Makarczyk* (Theory) 144.

[186] *O. Schachter* in *J. Makarczyk* (Theory) 540; *id.* (1982) RdC, vol. 187, 334.

[187] *O. Schachter* in *Y. Dinstein* (Perplexity) at 734.

[188] On this category of norms and the discussions which revolve around it see only the most recent works of *C. Tomuschat and J.-M. Thouvenin* (Fundamental Rules) and *D. Shelton* (2006) 100 AJIL, 291–323, 297ff.

[189] *L. Henkin* (International Law) at 39.

[190] *L. Henkin* (n. 189) 38.

human rights law, according to Henkin, form part of established customary law, ascertained by practice and *opinio juris*.[191]

2. *The deductive approach to custom-formation*

Despite its overall importance for the formation of general customary international law, the so-called deductive approach to custom formation constitutes one main approach developed to explain the distinctive nature of, amongst others, customary norms of international human rights and humanitarian law.[192] It focuses primarily on the *method* by which norms of customary international law are generated and, more precisely, on the deductive method of the finding of justice. Early naturalists were some of the first to introduce the deductive method into international jurisprudence. For example, Thomas Aquinas explained the validity of norms of *ius gentium* by deducing them from natural law. He held:

> … human law is divided into the common law of mankind [ius gentium] and civil law [ius civile] according to the two ways in which things can be derived from natural law … For those things belong to the common law of mankind which are derived from the natural law as conclusions from principles, such as just buying and selling and the like without which men cannot live together …[193]

However, most naturalist perceptions – ancient or modern – presuppose the formation of customary norms by their use of the deductive method. Naturalist scholars rely on higher moral principles, which, in their understanding, represent the underlying basis for the international legal order.[194] Hence, in at least some cases they have to use the deductive method to arrive at a particular prohibition or rule of international law.[195]

Nevertheless, as shown earlier on, a purely deductive approach exists also in modern positivist international jurisprudence. Kelsen argues for the validity of international norms on the basis of the *Grundnorm*, which forms the underlying basis for the existence of all other norms; hence he employes an entirely deductive way of reasoning. His strict separation of the *is* and the *ought* presupposes a deductive approach. According to his submissions, an *ought* can refer back only to a (hierarchically higher standing) *ought*, but never to an *is*.

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[191] *L. Henkin* (n. 189) 34.

[192] See *C. Tomuschat* (1993) RdC, vol. 241, 291.

[193] *H. J. Wolff* (Roman Law) 95, a. 4, c.

[194] See *F. Teson* (Humanitarian Intervention), 1ff; *A. Buchanan and D. Golove* in *J. Coleman and S. Shapiro* (Oxford Handbook) 871ff.

[195] *A. Buchanan and D. Golove* in *J. Coleman and S. Shapiro* (Oxford Handbook) 871ff.

When we discussed the 'different sorts of custom' approach, it should have become clear that the deductive method has become a popular modern basis for a theoretical approach to the formation of norms of customary international human rights and humanitarian law.[196] The roots of this theory can be found in some of the approaches discussed above and even in earlier conceptions.[197] Schachter and Henkin, for example, distinguish between general customary international law and norms of a "higher law."

As an individual theory of customary international law, the deductive approach has been put forward mainly by Tomuschat, who first suggested this method of custom formation in his 1993 course at The Hague.[198] Tomuschat's deductive concept of custom is strongly interlinked with his concept of international law as a whole: he advocates a constitutive order of the international community which has at its hierarchical summit some fundamental principles from which individual norms could be derived by way of deduction.[199] These – universally accepted – principles comprise for example, the principle of sovereign equality of states, from which the prohibition of the use of force derived, principles of environmental law or other rules and principles.[200] Likewise, they include the common values of mankind, from which certain rules of international humanitarian law could be deduced.[201]

Nevertheless, Tomuschat calls for a cautious application of the deductive approach. Particularly in the field of international criminal law, he argues, it may conflict with the principle of *nullum crimen sine lege* if the latter is understood broadly.[202] Therefore, in a more recent article, he advocates a narrower interpretation of the principle's *ratione materiae* scope. At

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[196] See *C. Tomuschat* (1999) RdC, vol. 281 334; *T. Meron* (2003) RdC, vol. 301, 378; for an application of this method to the customary law on the use of force: *E. Cannizzaro* in *id.* and *P. Palchetti* (Use of Force), 245ff, 268.

[197] Already in. 1943 and 1946 respectively, *Ziccardi* and *Sperduti* differentiated between a 'consuetudine-fondamento' (custom as a basis of international law) and a 'consuetudine-fonte' (custom as a source of international law in day-to-day international relations). See *P. Ziccardi* (Constituzione) 161ff, at 241 ("consuetudine fondamento"), at 271 ("consuetudine fonte"); *G. Sperduti* (Fonte suprema) 181f.

[198] *C. Tomuschat* (1993) RdC, vol. 241, 291ff; *id.* (1994) IsYBHR 41ff; (1999) RdC, vol. 281, 334; *id.* in *R. Wolfrum* and *V. Röben* (Developments in Treaty-Making) 405.

[199] *C. Tomuschat* (1993) RdC, vol. 241, 292; for a recent elaboration see *id.* 4 (2006) J.int.crim. justice, 838, 839.

[200] *C. Tomuschat* (1993) RdC, vol. 241, 292.

[201] *C. Tomuschat* (n. 200) 300, 301.

[202] *C. Tomuschat* (n. 200) 303; *id.* 24 Israel YBHR (1994), 42; *id.* (Human Rights) 287. Thus, in a most recent article Tomuschat concludes that the scope of the principle in international criminal law has to be reduced to include crimes which derive from higher principles of international humanitarian law, such as the Martens Clause (see *id.* 4 (2006) J.int.crim. justice, 835, 836).

international level, he argues, "conduct that the international community unequivocally condemns"[203] must be excluded from the principle's coverage. If interpreted this closely, the deductive method of custom formation may not conflict with the premise of the *nullum crimen* principle.

According to Tomuschat, this reduction in scope of the *nullum crimen* principle has found expression in several international legal instruments. On the one hand, he argues that it was recognised in Article 15 (2) of the ICCPR, which permits departures from the prohibition of retroactive criminal laws with regard to acts regarded as "criminal according to the general principles of law recognised by the community of nations."[204] As a result, Tomuschat concludes, the deductive approach could be employed by the ICTY in the *Tadić Case*, allowing it to penalise breaches of humanitarian law in non-international armed conflict.[205] He also suggests applying the method to fundamental norms of international human rights law.[206]

Yet, according to Tomuschat, deductive customary international law still constitutes one of several classes of customary international law. In view of that, there remains a category of customary rules which are the result of the interplay between *opinio juris* and state practice, as laid down in Article 38 (1) (b) of the ICJ Statute.[207] This has found recognition among several authors. When examining the jurisprudence of the ICJ on customary law, Cahin and Cannizaro also find that the deductive approach is only one of several approaches employed by the Court to arrive at a particular customary norm.[208] Moreover, even Tomuschat admits that a deductive approach is hardly reconcilable with the requirements of custom as expressed in Article 38 (1) (c) of the ICJ Statute. However, to explain newly developed international law by reference to the ancient concept of custom, he argues, would not provide "the right answers for the issues of the contemporary world".[209]

Most recently, Cannizzaro has developed Tomuschat's concept a little further for the area of law on the use of force. He maintains that the method

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[203] *Id*. 4 (2006) J.int.crim.justice, 835.

[204] *C. Tomuschat* (n. 200) 304.

[205] *C. Tomuschat* (1999) RdC, vol. 281, 334; see *id.* (Human Rights) 250.

[206] *C. Tomuschat* (1999) RdC, vol. 281, 334.

[207] *C. Tomuschat* (1993) RdC, vol. 241, 291.

[208] *G. Cahin* (Coutume) 662, pointing at the jurisprudence of the ICJ in the *North Sea Continental Shelf Cases*; *E. Cannizzaro* in *id.* and *P. Palchetti* (Use of Force), 268; see further: *V. U. Degan* in *J. Makarczyk* (Theory) 146 and *T. Stein* in *A. Cassese and J. H. Weiler* (Change and Stability) 13, who points out that methodology will develop towards a principally interpretative approach.

[209] *C. Tomuschat* in *R. Wolfrum* and *V. Röben* (Developments in Treaty-Making) 406.

of deduction itself functions as a balancing of principles and values, which have already assumed a legal form as rules of behaviour within the realm of the international community.[210]

3. *The 'core rights' approach*

Another very differentiated approach to the formation of customary international humanitarian and human rights law has been developed by Meron.[211] His theory of customary international human rights and humanitarian law takes up several aspects of approaches discussed earlier, in particular those of Henkin and Schachter.

Meron rejects a purely empirical approach to customary international humanitarian law. As this law is directed towards the protection of human dignity and of universally accepted values of humanity, he finds that individual customary norms cannot be identified merely by reference to state practice.[212] In this regard, Meron affirms Tomuschat's findings: the methodology employed to discover new customary norms has shifted from empiricism to a deductive approach.[213] Courts in their jurisprudence have relied on *opinio juris* or general principles of humanitarian law derived from the Geneva, the Hague or other humanitarian conventions.[214] However, Meron also agrees with Schachter's findings on the formation of customary international human rights law: because of their value-loaded character, he finds that in the hierarchy of norms human rights norms are on a higher level than other norms of international law. According to Meron, this view is underlined by the concept of *ius cogens*, which reflects "the quest of the international community for a normative order in which higher rights are invoked as particularly compelling moral and legal barriers to derogations from and violations of human rights."[215]

According to Meron's findings, the amount of evidence necessary for the establishment of a customary norm often depends on whether a violation of it triggered a 'broad condemnation by the international community'. If this is the case, he observes that a lesser amount of confirmatory evidence is

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[210] *E. Cannizzaro* in *id.* and *P. Palchetti* (Use of Force), 263, 264.

[211] *T. Meron* (1996) 90 AJIL 238ff; *id.* in *id.* (War Crimes) 170, 171; see *id.* (Human Rights); *id.* (1998) 9 EJIL 18ff; *id.* (2000) 94 AJIL 239ff; *id.* (2001) 94 AJIL 78ff; *id.* (2003) RdC, vol. 301, 378; *id.* (2005) 99 AJIL 817ff.

[212] *T. Meron* (Human Rights as Customary Law) 94; *id.* (2003) RdC, vol. 301, 22.

[213] *T. Meron* (2003) RdC, vol. 301, 378.

[214] *T. Meron* (2003) RdC, vol. 301, 27.

[215] *T. Meron* (Human Rights as Customary Law) 9.

needed for its formation.[216] As a consequence, evidence of a customary norm can be obtained by reference to *opinio juris* alone. In addition, he demands that the standard of proof to be discharged to demonstrate the establishment of a customary human rights norm should be less onerous in international humanitarian law than in other fields of international law which are based on reciprocal interests of states.[217] As he maintains, "[t]here is a direct relationship between the importance attributed by the international community to particular norms and the readiness to lower the burden of proof required to establish custom."[218]

For the formation of norms of customary international criminal law, Meron observes a trend within the jurisprudence of international courts and tribunals to focus almost exclusively upon the element of *opinio juris* for the formation of customary norms.[219] Following his analysis, the jurisprudence of the ICJ and ICTY has revealed that this tendency is particularly marked when the norms concerned have been laid down, for example, in the Geneva Conventions.[220] On the other hand, he remarks that in some cases international *ad hoc* criminal tribunals have been guided solely by value-driven considerations, such as the heinousness of the act:

> Given the scarcity of actual practice, it may well be that tribunals have been guided, and may continue to be guided, by the degree to which certain acts are offensive to human dignity. The more heinous the act, the more willing the tribunal will be to assume that it violates not only a moral principle of humanity but also a positive norm of customary law.[221]

This development entails some negative side-effects, Meron observes. In his view, it has quickly become clear that in many cases

> [t]he 'ought' merges with the 'is', the *lex ferenda* with the *lex lata*. The teleological desire to solidify the humanizing content of the humanitarian norms clearly affects the judicial attitudes underlying the 'legislative' character of the judicial process.[222]

Meron's assessment of the formation of customary international humanitarian and human rights law reveals that an approach to custom based on *opinio juris* is almost always a value-based concept. As he explains in his 2003 lectures at The Hague, the core of difficulties related to the determination

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[216] *T. Meron* (2003) RdC, vol. 301, 378.
[217] *T. Meron* (Human Rights as Customary Law) 131.
[218] *T. Meron* (2003) RdC, vol. 301, 388.
[219] *T. Meron* in *id.* (War Crimes) 264.
[220] *T. Meron* (n. 219) 158.
[221] *T. Meron* (n. 219) 157.
[222] *T. Meron* (n. 219) 157.

of customary norms of international human rights law and international humanitarian law does not emerge from the inadequacy of the law, but from a lack of shared values in the field of international humanitarian law.[223]

Meron's approach has found many supporters in international scholarship. There is a range of authors who, according to a 'core rights' approach, deviate from the two-element requirement and support the formation of customary norms with the help of the element of *opinio juris* alone, if those norms belong to the canon of norms which can be held to represent the 'core values' of the international community. Pocar and Cassese, for example, support the formation of customary international criminal law under the influence of *opinio juris* alone, if the new customary rule is reflected in the Martens Clause, i.e. the laws of humanity or the dictates of public conscience.[224] Finally, Bassiouni also subscribes to the view that international criminal law norms are supported by humanitarian principles, which inhere in every human society.[225]

4. *Two-element approaches to customary international human rights and humanitarian law: assessment*

The assessment of the theories so far examined reveals that almost all of them suffer from decisive weaknesses which render them dysfunctional in one respect or another, but particularly when applied to problems of international humanitarian and human rights law. Moreover, even a two-element approach to customary international law based more on voluntarism cannot negate the inherent circularity of any argument trying to explain the formation of customary international law according to the elements of *opinio juris* and state practice: evidence of the element of *opinio juris* has to be recruited from evidence provided by the actions of states, i.e. state practice, and, vice-versa, evidence of the element of state practice is also extracted from examples of *opinio juris*.[226]

On the other hand, theorists such as Weil have criticised approaches like those of Schachter, Tomuschat or Meron, which suggest the existence of a

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[223] *T. Meron* (2003) RdC, vol. 301, 110.

[224] *F. Pocar* (2002) 31 IsYBHR, 154, 155, 157; *A. Cassese* (International Law) 122.

[225] Compare *M. Cherif Bassiouni* (Crimes 1992) 153–165; yet, he understands the development of customary international human rights and criminal law more in terms of an evolutionary and progressive development: compare *id.* (1982) 9 Yale Journal of World Public Order, 193 in *R. Lillich* (International Human Rights) 898; this is why his theory has also been held to contain elements of social theory: *H. Steiner* in *R. Bernhardt* EPIL vol. 7 (1984), 307.

[226] See *M. Koskenniemi* (1990) 1 Finnish YBIL 90; *id.* in BIICL (Theory) 17.

customary international law of different velocities, i.e. a different approach to custom in the fields of international humanitarian and international human rights law. Weil fears that relative normativity would result from the introduction of a system of norms of different importance.[227] He finds that it would establish a factor of great instability and create uncertainties relating to the relationship of international norms.[228] Weil thus argues that:

> One can scarcely overemphasise the uncertainties inflicted on the international normative system by the fragmentation of normativity that the theories of *jus cogens* and international crimes have brought in their wake. A normativity subject to unlimited gradation is one doomed to flabbiness, one that in the end will be reduced to a convenient term of art, covering a great variety of realities difficult to grasp.[229]

Rather, according to Weil, the legally binding character of a rule must be established in such a way that it is clear whom it binds and whom it benefits. However, current international law has established too many obligations, so that their addressees are not clear.[230]

Weil's criticism is certainly telling insofar as it highlights the uncertainties created by the application of different approaches to the formation of customary international law. However, as the theories of Tomuschat and Meron have revealed quite eloquently, a two-element concept of custom cannot cope with the particularities involved in the formation of custom in international humanitarian and human rights law. Mere reference to a diffuse fear of uncertainty or 'relative normativity' therefore does not offer a solution to the aforementioned problems. Neither does the observation that the "binding legal character of a rule" must be established more clearly. This is precisely what all the aforementioned theories try to establish: a method of proving the customary character of a particular norm.

On the other hand, lack of clarity and certainty is a problem faced by all approaches which deviate from the two-element theory in the field of international human rights and international humanitarian law. As already observed by Tomuschat, a deductive approach might conflict with a narrow interpretation of the *nullum crimen sine lege* principle in international criminal law. In a later chapter of this book, its actual scope in international law will thus have to be explored in order to determine whether it may or may not restrict current customary theory.

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[227] *P. Weil* (1983) 77 AJIL, 413ff.
[228] *P. Weil* (n. 227) 428.
[229] *P. Weil* (n. 227) 430.
[230] *P. Weil* (n. 227) 430.

Finally, almost all of the deviating approaches are based upon the recognition of certain core rules or core values; a fact which easily tarnishes them as subjective, or even idealist constructs. This is a criticism which naturalist theories of the formation of customary norms are also often confronted with. Countering such criticism, Degan has emphasised controlling the process of deduction of customary norms. As he maintains, new customary rules must be supported by "what we now call *communis opinio juris*, as confirmed in practice of most states".[231] This suggestion takes the deductive approach back to the requirements of Article 38 (1) (b) of the ICJ Statute: it utilises *opinio juris* and state practice as outer limitations of any new method of determining new customary law. It will be seen in due course that this may in fact be a viable way of delimiting the scope of application of the deductive method of finding new customary international humanitarian and human rights law.

D. *Naturalist conceptions*

In contrast to positivist conceptions of international law, naturalist theories of international law comprise a range of views which regard international law as a legal order which exists independently of the will of states and which constitutes a legal order above the state.[232] The central part of naturalist conceptions is their relationship with law and ethics or morality.[233]

Naturalist conceptions may be considered to form the basis of so-called modern international law, of which Vitoria,[234] Suárez,[235] Gentili[236] and, above all, Grotius[237] have often been named as the founding fathers. In the sixteenth and seventeenth century, they were the first scholars to explore the phenomenon of international law as well as its theoretical bases in a more comprehensive manner. And, in fact, this is the particular characteristic which even today justifies the classification of this era as the eve of 'modern' international law.

Over the centuries, it seems that international legal theory has always referred to naturalist conceptions. Though the idea of the divine basis of international law was left behind very quickly after the idea of 'modern'

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[231] *V. U. Degan* in *J. Makarczyk* (Theory) 146.
[232] See *U. Scheuner* (1950/1951) 13 ZaöRV 571.
[233] *M. Davies* (Delimiting the Law), 1.
[234] *F. Vitoria* (De indis) in *J. B. Scott* (Classics) 151, para. 386.
[235] *F. Suarez* (De legibus) in *J. B. Scott* (Classics) 341–350, 349.
[236] *Gentili* (De jure belli libri tres) in *J. B. Scott* (Classics).
[237] See *H. Grotius* (De jure belli liber unum / libri tres).

international law had found recognition among scholars,[238] moral theoretical conceptions of law have been utilised through all the following decades to explain the formation of international legal rules.

A certain 'revival' of naturalist ideas and a retreat from positivism may be discerned especially in the late twentieth century. Proposals appear to try to make up for the insufficiencies of positivist conceptions in adequately explaining new developments in international law, such as international human rights law or the issue of new actors or subjects of international law.[239] Even most recent concepts of customary international humanitarian and human rights law refer back to moral theory, in order to provide a more comprehensive explanation of the formation of legal rules in these fields of international law.

1. *Moral theoretical approaches to the formation of customary international law*

A recent, detailed elaboration of a naturalist model of the formation of norms of international humanitarian and human rights law can be found in Teson's treatise *Humanitarian Intervention*. He refers to the philosophical concepts of law of Dworkin[240] and Rawls,[241] and their perception of the relationship between law and morality.[242]

To Teson's view, the content of a customary norm can be determined only by a value judgement; that is, it may only be understood as part of a framework of a broader moral-political theory.[243] He states that principles and rules of international law embody fundamental moral perceptions. Hence, in his opinion, they must be interpreted 'purposively' in the light of the values underlying a particular rule in question. State practice contradicting this interpretation may be regarded only as a violation of international law.[244] In

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[238] Even Suárez distanced himself from theories which underscored the divine nature of natural law. Later, Grotius held theology to be irrelevant for the study of international law. According to his view, international law was founded upon convention and usage alone, and had to be separated from natural law (*H. Grotius* (De jure belli libri tres), chap VIII, 295). See *F. Suárez* in *J. B. Scott* (Classics) 344, para. 189.

[239] On the 'revival' of naturalist ideas in modern international law: *U. Scheuner* (1950/1951) 13 ZaöRV 583.

[240] Compare *R. Dworkin* (Law's Empire) 87 (Dworkin regards law as an interpretative concept). For an examination of Dworkin's theory see *R. M. Watkins-Bienz* (Hart Dworkin Debatte) 74ff.

[241] Compare *J. Rawls* (Theory of Justice).

[242] *F. Teson* (Humanitarian Intervention) 10.

[243] *F. Teson* (n. 242) 11.

[244] *F. Teson* (n. 242) 12, 13.

areas of international law involving the use of force and human rights, Teson argues, the determination of custom presupposes a value judgement, since such attribution can be made only by subjects of international law themselves.[245]

There are several other authors who base their argument on the formation of customary international law and customary international humanitarian and human rights law upon moral theory and value-driven considerations.[246] Most of the time, they have combined considerations about the nature and formation of customary international norms with a critique of the state as the sole actor of current international law.[247] Accordingly, they suggest that individuals should be awarede the status of subjects of international law,[248] simply reject a state-centred concept of international law[249] or argue that international law should be becoming more democratic.[250]

2. *Assessment*

Though naturalist conceptions of the formation of customary international law attempt to fill gaps which purely positivist conceptions cannot, they nevertheless introduce non-legalistic, value-based principles into the process of the formation of customary norms. In fact, they make the whole international law-making process entirely dependent on the morals or values of international society or, which is even worse, on the values which are supported by a few powerful members of international society. Such a moral-theoretical conception of international law was criticised by Hart. He explained:

> a morality cannot (logically) contain rules which are generally held by those who subscribe to them to be in no way preferable to alternatives and of no intrinsic importance. Law, however, though it contains much that is of moral importance, can and does contain just such rules, and the arbitrary distinctions,

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[245] *F. Teson* (n. 242) 14. According to Hart, the internal characterisation of a norm equals to the characterisation a part of the society, where the rule is applied. Since Teson considers individuals as well as states to be subjects of international law, our judgement upon a particular (customary) rule of international law can be only 'internal' in a Hartian understanding.

[246] *A. Buchanan and D. Golove* in *J. Coleman and S. Shapiro* (Oxford Handbook) 885; *J. Puente Egidio* in *R. Bernhardt* EPIL vol. 3, 519. Puente Egidio supports a naturalist perception of international law which leans on historicism; *A. A. Cançao Trindade* (Derecho Internacional) 328–332.

[247] *A. A. Cançao Trindade* (Derecho Internacional) 319.

[248] *A. A. Cançao Trindade* (Derecho Internacional) 326.

[249] *A. Buchanan and D. Golove* in *J. Coleman and S. Shapiro* (Oxford Handbook) 879.

[250] *A. Buchanan and D. Golove* in *J. Coleman and S. Shapiro* (Oxford Handbook) 886.

> formalities, and highly specific detail which would be most difficult to understand as part of morality, are consequently natural and easily comprehensible features of law. For one of the typical functions of law, unlike morality, is to introduce just these elements in order to maximise certainty and predictability and to facilitate the proof or assessments of claims.[251]

The resulting weakness for the formation of customary norms has already been explored above. The process of the formation of customary norms becomes vulnerable to and entirely dependent on subjective considerations alone; legal principles and norms of customary international law can no longer be determined by objective prerequisites. Besides, the international legal society is far from being composed of a homogeneous set of values. Who or which entity is going to determine which values count for the creation of an international legal norm? At least, world-order conceptions and explanations of the formation of customary international law must be considered carefully if they are based, for example, on Western-Christian values alone.[252]

Finally, certain particularities concerning the formation of customary international humanitarian and human rights law also have to be considered: an entirely subjective basis for law-making will hardly be compatible with the requirements of the principles of legality and of *nullum crimen sine lege*, which dominate law-creation in the field of international criminal law. In the worst case, the conviction or acquittal of an accused would be entirely dependent on the value judgement of a judge. Norms have to be clearly defined in international human rights and humanitarian law, too. Otherwise, violations and international responsibility for those violations cannot be determined.

E. *Realist Conceptions*

Realist conceptions of general international law and of customary international law developed mainly in the 1950s and 1960s in the United States as a reaction to the impasse in which the international legal system was caught during the Cold War. Although it seems that since the fall of the iron curtain there has been a certain loss of interest in realist conceptions, some reinvention of the ideas has taken place in the last few years. For international law in general, the events following September 11 were influential in this regard. Concerning customary international law in particular, the 'game theory' – usually utilised only by economists – has recently been discovered by realists to explain some of the phenomena of its formation.

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[251] *H. L. A. Hart* (Concept of Law) 229.
[252] *M. Koskenniemi* (2005) 16 EJIL 122.

Realist approaches to international law may be characterised by three distinctive features. The first and probably most important is "its challenge to the orthodox claim that legal thought was separate and autonomous from moral and political discourse".[253] A second characteristic of realism is often seen in its hostile attitude to abstractions, and here especially to the deductive method,[254] but also to any formal concept of law.[255] The third important aspect of realism is its interdisciplinarity: realism accommodates insights from sociology and ethics, from economics, international relations, policy analysis, political theory, anthropology, systems theory, phenomenology, and many other disciplines.[256] Lastly, as Llewellyn remarked, another decisive aspect of realist conceptions is its idea of law in flux, the conception of 'law as a means to social ends, and not as an end in itself' and the conception of society in flux.[257]

1. *New Haven and similar approaches*

Myres S. McDougal's, Ventaka Raman's and Harold Lasswell's New Haven School of international law is a major representative of the earlier realist conceptions of international law developed in the 1960s.[258] Yet, it is not a theory developed exclusively to explain the formation of custom. According to the New Haven approach, international norms derive from a global social and power process of interaction, the aim of which is a realisation of values according to the desires of the international community.[259] In this social and power process it is not just states which contribute to the formation of legal norms, but also other actors, including non-governmental organisations, transnational business entities and individuals.[260] McDougal states that international law is comprised of mere

> …perspectives of authority – perspectives about who should decide what, with respect to whom, for the promotion of what policies, by what methods — which

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[253] *M. Horwitz* (Transformation of American Law) 193; cited in *M. Koskenniemi* (Gentle Civilizer) 475.

[254] *M. D. A. Freeman* (Introduction) 813.

[255] Compare *M. Koskenniemi* (Gentle Civilizer) 479.

[256] Compare *M. Koskenniemi* (Gentle Civilizer) 476.

[257] *K. Llewellyn* (1931) 44 Harv. L. Rev., 1234.

[258] See *M. McDougal* (1953) RdC, vol. 82, 137ff; *id.* (1955) 49 AJIL 357–8; *id.* and *H. Laswell* in *id.* (Studies) 42–154; for a later development of this theory: *M. Reisman* (1987) 17 California International Law Journal, 133ff; *id.* in *R. Wolfrum* and *V. Röben* (Developments in Treaty-Making) 15–30.

[259] *M. McDougal* (1953) RdC, vol. 82, 137ff, 207.

[260] See *M. Reisman* in *R. Wolfrum* and *V. Röben* (Developments in Treaty-Making) 19.

> are constantly being created, terminated, and recreated by established decision makers located at many different positions in the structures of authority or of both states and international governmental organizations.[261]

The theory follows a strictly empirical approach to the formation of international norms,[262] be they "customary or conventional or however derived".[263] It determines the legal quality of international rules according to the utility of the rule for benefitting the expectations of the international community, the level of authority of the different actors of international law and their power of control. Following McDougal and his fellow authors, customary international law constitutes only one form of communication for legal opinions and expectations in the sense of a collaborative relationship.[264] Yet, apart from developing determinants within the customary law-making process, the theory has not expanded methodology on custom any further. The creation of norms of customary international law is embedded only in the general concept of norm-creation through a global power process and processes of interaction.

In one way or another, several authors have taken up the approach put forward by the New Haven School.[265] Byres, for example, propagates an interdisciplinary approach to customary international law, based on positivist approaches and aspects of international relations theory.[266] And D'Amato has argued that norms of customary international law are "manifested by the behaviour of these [state (B.S.)] units and their interactions with each other".[267] Following his view, international and customary international law[268] must be understood as being in constant flow and development.[269] Nonetheless, his theory still constitutes a variation of the two-element approach, based on Article 38 of the ICJ Statute,[270] which defines custom as the result of the expression of an international legal rule by the state,[271] and the commitment of a state to such a rule.[272]

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[261] *M. McDougal* in *id.* (Studies) 229.
[262] *M. McDougal* (1953) RdC, vol. 82, 140.
[263] *M. McDougal* (n. 262) 150.
[264] *M. McDougal* (n. 262) 368.
[265] *A. D'Amato* (1988) 82 ASIL Proceedings 257; see *id.* (1965) 59 AJIL, 321; *M. Byers* (Custom) 155.
[266] *M. Byers* (Custom) 155.
[267] *A. D'Amato* (1988) 82 ASIL Proceedings 242, 243.
[268] *A. D'Amato* (1988) 82 ASIL Proceedings 257; see *id.* (1965) 59 AJIL, 321.
[269] *A. D'Amato* (1988) 82 ASIL Proceedings 246.
[270] See *A. D'Amato* (Concept) 74, 94 for his conception of the elements of state practice and *opinio juris*.
[271] *A. D'Amato* (Concept) 74.
[272] *A. D'Amato* (Concept) 94.

It is an interesting aspect that even realist approaches to custom have been modified when considering the formation of the norms of human rights law. Byres, in particular, maintains that if the interests of states are so obvious as in international human rights law, careful examination of state practice is not required.[273] At least, this would apply to those customary rules having a peremptory or *jus cogens* character, "such as the most fundamental of human rights or the prohibition against aggression."[274]

D'Amato, on the other hand, finds that customary norms and customary international human rights law can be created by generalisable provisions in bilateral and multilateral treaties,[275] but only if these treaties set up an objective regime.[276] According to D'Amato, if the treaty provisions apply to all subjects of international law without exception, they can be called generalisable.[277] He maintains that the provisions may then become customary directly, without the need for supporting subsequent practice.[278]

2. *The customary international law game*

One very recent approach, which takes realist thought and theory to its fullest consequence, is the game theoretical approach to custom formation, as favoured by Goldsmith and Posner,[279] Norman and Trachtman[280] and Guzman.[281]

As was indicated earlier, the game theory is a popular theoretical concept developed to describe human economic behaviour.[282] Its application to the formation of rules of customary international law views the process of custom formation as a power- and interest-based interaction between players on the international plane. As Goldsmith and Posner emphasise, payoffs arising from cooperation or deviation in the situation of the prisoner's dilemma are the sole factors explaining why states would engage in behavioural processes,[283] which can ultimately be labelled customary international

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[273] *M. Byers* (Custom) 163, 164.
[274] *Ibid.*
[275] *A. D'Amato* (Concept) 104; *id.* (1982) 82 Columb. JIL, 1128f, 1131.
[276] *A. D'Amato* (Concept) 106.
[277] *A. D'Amato* (1982) 82 Columb. JIL, 1131.
[278] *A. D'Amato* (1982) 82 Columb. JIL, 1133.
[279] *J. Goldsmith and E. Posner* John M. Olin Law and Economics working paper No. 63 2,3, 12 [(1999) 66 University of Chicago Law Review 1113ff].
[280] *G. Norman and J. P. Trachtman* (2005) 99 AJIL, 541–580.
[281] *A. Guzman* (How international Law Works 2008); *id.* (2005) 23 MichJIL 115–176.
[282] See *J. von Neumann* and *O. Morgenstern* (Theory of Games 1947).
[283] *J. Goldsmith and E. Posner* John M. Olin Law and Economics Working Paper No. 63 2,3, 12 [(1999) 66 University of Chicago Law Review 1113ff]; *G. Norman and J. P. Trachtman*

law.[284] Customary international law norms of universal or general validity do not exist: they do not reflect true multilateral cooperation.[285] Ultimately, according to Goldsmith and Posner, only state practice generates norms of customary international law.

Norman and Trachtmann, on the other hand, define custom as *opinio juris*-based behaviour. In their view, *opinio juris* constitutes

> a way of referring to the intent of states to propose or accept a rule of law that will serve as the focal point of behaviour, implicate an important set of default rules applicable to law but not to other types of social order, and bring into play an important set of linkages among legal rules.[286]

The customary character of norms of international human rights law, Goldsmith and Posner maintain, may easily be explained as a coincidence of interests within the framework of the game theory: There is no gain or interest for states in promoting, for example, the commission of genocide among their citizenry.[287] Moreover, according to their view, the customary character of certain international human rights also results from the fact that powerful and influential states exercise sufficient pressure on less influential states to ensure their compliance with such norms.[288]

A modern mixture of game theoretical approaches to customary international law with an *opinio juris* based approach to customary international law was advocated recently by Guzman and Meyer[289] who have already found some eminent followers.[290] The authors describe the formation of customary international law as a process of rational choice which states undergo in their interaction with other states. In their view, this process of interaction

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(2005) 99 AJIL, 548. The prisoner's dilemma describes the following situation: two partners in crime are put into separate rooms at the police station and given a similar deal. If one implicates the other, he may go free while the other receives a life sentence. If neither implicates the other, both are given moderate sentences, and if both implicate the other, the sentences for both are severe. Each player has a dominant strategy to implicate the other, and thus in equilibrium each receives a harsh punishment, but both would be better off if each remained silent. In a repeated or reiterated prisoner's dilemma, cooperation may be sustained through trigger strategies such as tit for tat.

[284] *J. Goldsmith and E. Posner* John M. Olin Law and Economics working paper No. 63, 24.

[285] *J. Goldsmith and E. Posner* John M. Olin Law and Economics working paper No. 63, 25.

[286] *G. Norman and J. P. Trachtman* (2005) 99 AJIL, 542.

[287] *J. Goldsmith and E. Posner* John M. Olin Law and Economics working paper No. 63, 93–4.

[288] *Ibid.*

[289] *A. Guzman and T. Meyer* Customary International Law in the 21st Century, in *R. Miller and R. Bratspies*, *Progress in International Law* (Martinus Nijhoff, Leiden 2008) 197– 217.

[290] *R. Higgins* A Babel of Judicial Voices? Ruminations from the Bench in *C. Ku and P. Diehl*: International Law: Classic and Contemporary Readings (Lynne Rienner, London 2009), 206.

is determined by reputational sanctions[291] and incentives not related to legal obligations.

3. *Assessment of the New Haven and the game theory concepts of custom*

The main criticism which can be raised against realist approaches, especially against the New Haven theory, lies in the fact that it elaborates only on the *processes* which lead to the formation of a particular norm of (customary) international law. It is silent on the question of what the law *is*, and how it may be distinguished from the non-law, which is even more urgent in our case.[292] Even though the formation of norms of customary international humanitarian and human rights law may be a policy-driven process, international courts and tribunals operating on the basis of a framework of customary norms need more than mere lists of variables which explain how policy considerations could have led to the formation of a particular rule. Rather, it seems that such elaboration of lists of variables oriented towards the realisation of the values of the international community presents an explanation of law-making processes which does not differ significantly from naturalist conceptions of customary international law.[293] Realist approaches like the New Haven theory therefore fail to answer those who ask questions about the structure and elements of international law.[294]

On the other hand, the maximisation of the game players' personal gain is at the centre of game theoretical approaches. Such understanding of customary law regards custom only as a means for the optimal realisation of a state's ends. However, customary law, and especially customary international human rights and humanitarian law, does not aim to maximise gain and personal value for a state, but to protect individual human beings. This is an entirely altruistic aim which is difficult to translate into personal gain. Moreover, human rights can sometimes even conflict with the realisation of certain aims of states, be they economic or part of general security policy.[295]

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[291] *A. Guzman and T. Meyer* Customary International Law in the 21st Century, in *R. Miller and R. Bratspies*, *Progress in International Law* (Martinus Nijhoff, Leiden 2008) 204, 206, 207.

[292] For further critique of rational choice models see *N. Petersen Rational Choice or Deliberation*, 6, 7.

[293] See *M. Koskenniemi* (Gentle Civilizer) 476, 477: "an old-fashioned naturalism in disguise".

[294] See *M. Koskenniemi* (Gentle Civilizer) 495.

[295] Examples are: the protection of human rights versus realisation of certain interests regarding the exploitation of natural resources (see the *Ogoni case* before the African Commission on Human and Peoples Rights, Communication of 27 May 2002; obligation to protect

Hence, a game theoretical approach to the formation of customary international norms of international criminal law or international human rights law cannot fully cope with the peculiarities of this area of international law either.

F. *New Approaches to International Law*

The category of New Approaches to International Law (NAIL) encompasses those relatively new approaches developed from the 1990s onwards which seek a concept of (customary) international law beyond the classic approaches based on Article 38 of the ICJ Statute. Here, the title describes the programme: NAIL theorists try to explore novel ways of custom formation which draw from the several concepts discussed earlier. They combine positivist, naturalist or realist ideas with other elements, following trails off the beaten tracks of Article 38 of the ICJ Statute and other traditional theoretical concepts. Beckett characterises them as often providing consensualist or synthesist approaches to the classic theories, or as aggregationist, "in the sense that they perceive the two elements as radically separate, and as combining in aggregate".[296]

1. *The Sliding-Scale Approach*

In a discussion of the *Nicaragua* judgement of the ICJ,[297] Kirgis concludes for the first time that there are different kinds of customary international law, which depend on a different emphasis on the elements of custom reflected in Article 38 of the ICJ Statute. He argues that the evolution of customary international law must thus be considered on a sliding scale, one end of which is home to those norms created by way of the dominant influence of *opinio juris*, and the other end of which is home to those created under the influence of state practice alone. Following Kirgis, the elements of custom are not without any dynamics and do not exclude one another.[298] Yet, he finds that it is dependent on the activity in question and on the 'adequacy' of the customary international law norm, how much *opinio juris* is capable

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the rights of refugees versus national economic interests (refugees cause expense and may not contribute significantly to a state's economy).

[296] *J. Beckett* (2005) 16 EJIL, 231.

[297] *F. Kirgis* (1987) 81 AJIL, p. 146; *id.* (2001/2002) 53 Alabama Law Review, 421.

[298] *F. Kirgis* (1987) 81 AJIL, p. 146, 149

of replacing the element of state practice.[299] In the end, he maintains that the creation of a norm of customary international law ultimately depends on the importance of the act in question and on the accuracy and propriety of the legal rule in question.[300]

Tasioulas mixes the idea of custom on a sliding scale with aspects of Dworkin's interpretative theory of law.[301] He maintains that it is not the elements of *opinio juris* and practice which must be represented on the sliding scale, but the criteria 'fit' and 'substance', which – following Dworkin – both refer to the interpretation of legal practice.[302] Tasioulas argues that these elements must be balanced against each other in an interpretative process which entails diverse criteria and values.[303] In this process, he finds, certain constitutional values describing the basis of norms of international society are determinant. According to the author, these norms retain their validity, even if states expressly repudiate them.[304]

More recently still, Anthea Roberts has taken up the idea of a sliding-scale for her own approach to custom formation.[305] She affirms that two different approaches/species of customary international law must be differentiated: one is the traditional approach to custom, based on the two elements of *opinio juris* and state practice. The other may be characterised as more 'modern', since it requires only the presence of the *opinio juris* element for the formation of a customary rule, applying a deductive methodology. Roberts observes that the major field of application of this 'modern approach to

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[299] *F. Kirgis* (1987) 81 AJIL, 146, 149: "It is instructive here to focus on rules that restrict governmental action. The more destabilizing or morally distasteful the activity – for example, the offensive use of force or the deprivation of fundamental human rights – the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable. The converse, of course will be true as well. If the activity is not so destructive of widely acceptable human values, or if the asserted rule seems unreasonable under the circumstances, the decision maker is likely to be more exacting in finfin the necessary elements for the rule. A reasonable rule is always more likely to be found reflective of state practice and / or the *opinio juris* than is an unreasonable (for example, a highly restrictive or inflexible) rule".

[300] *F. Kirgis* (1987) 81 AJIL, 149: "[t]he more destabilizing or morally distasteful the activity – for example, the offensive use of force or the deprivation of fundamental human rights – the more readily international descision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable."

[301] *J. Tasioulas* (1996) 16 Oxford Journal of Legal Studies, at 111.

[302] *J. Tasioulas* (n. 301) 113.

[303] *J. Tasioulas* (n. 301) 113–115.

[304] *J. Tasioulas* (n. 301) 117.

[305] *A. Roberts* (2001) 95 AJIL 757; further: *id.* Traditional and Modern Approaches to International Law in: *C. Ku and P. Diehl* International Law: Classic and Contemporary Readings (Lynne Rienner, London 2009), 49–75.

custom' is in areas of international law which have developed only recently, such as international human rights law or international criminal law.[306] In her view, modern customs often concern *lex ferenda* aspects:

> what the law should be, as well as respect for procedural normativity to ensure that all nations are able to express their views about what substantive aims should be pursued.[307]

For the actual formation of customary international law, Roberts utilises Tasioulas' elements of 'fit' and 'substance' and the sliding-scale model: the element of fit is fulfilled if sufficient practice supports an application of the traditional two-element approach to custom. The element of substance, on the other hand, is satisfied if the content of a customary norm is moral or if it has come into existence through a legitimate process.[308] However, both elements, fit and substance, must stand in a so-called reflective equilibrium or the best balance between practice and moral principles to lead to the creation of a new customary international norm.[309] Yet, the more compelling a moral norm, the less practice is required for its formation.[310]

2. *Ascending and descending conceptions of international criminal law*

For the field of international criminal law, Powell and Pillay provide a critique of custom-formation which very closely resembles the preceding sliding-scale suggestion. They portray customary international criminal law as caught in tension between naturalist and positivist conceptions, which they categorise as ascending and descending.[311] According to their view:

> the mainstream approach to international law is that it is ascending…It takes the existence of states as starting point and attempts to construct the legal order on the basis on the 'factual' state behaviour.[312]

The descending view, on the other hand, corresponds to universalist or value-based concepts of international law.[313] Following Powell and Pillay, the two categories, 'ascending' and 'decending', may thus also be utilised as

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[306] *A. Roberts* (n. 305) 757, 764.
[307] *A. Roberts* (n. 305) 774.
[308] *A. Roberts* (n. 305) 778.
[309] *A. Roberts* (n. 305) 781.
[310] *A. Roberts* (n. 305) 783.
[311] *C. Powell and A. Pillay* (2001) 17 SAJHR 489; ascending and descending tendencies of international law – albeit with a different connotation – have already been observed by *M. Koskenniemi* (Apology 1989) 40–42.
[312] *C. Powell and A. Pillay* (2001) 17 SAJHR 489.
[313] *C. Powell and A. Pillay* (n. 312) 489.

synonyms for the empirical and deductive methods of ascertaining international norms.

The authors find that the ascending/descending tension was revealed in particular by the fact that in international criminal law the enforcement of international penal codes is usually left to the individual state (which is an element belonging to the ascending approach), even though the main object and purpose behind international criminal norms is "to protect the common interest of humankind"[314] (which describes the descending view). An entirely voluntarist – ascending – conception would thus not fit the formation of the norms of international criminal law. Rather, they argue, the formation of customary international criminal law should be based on descending, i.e. naturalist, value-oriented conceptions and on the general principles of international law.[315] They further suggest taking account of the acts of non-state entities, even when assessing the formation of customary norms according to the elements of practice and *opinio juris*.[316] If moral values find no recognition within the process of custom formation, Powell and Pillay remark, it would remain "a mixed bag of ill suited concepts bearing no relation to the orthodox definition of customary international law".[317]

3. *Evaluation of the sliding-scale approach and subsequent up and down arguments*

As may have become clear from our previous discussions, a more flexible explanation of the formation of customary international law would certainly be able to embrace the particularities, the existence of which has fostered the development of special approaches dedicated to explaining the formation of customary norms of international criminal law and international humanitarian law.

Nevertheless, even taking into account the flexibility provided by the sliding-scale approach advanced by Kirgis and Tasioulas, it has to be borne in mind that this theory remains, first and foremost, an exclusively subjective theory of customary international law; just like other entirely naturalist theories discussed earlier in this chapter. Though international law is not a neutral law, absent any value judgements or value-based norms and principles, value judgements alone do not provide the hard and fast and, above all, revisable basis for the formation of legal norms which we seek here – at least in the

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[314] *C. Powell and A. Pillay* (n. 312) 490.
[315] *C. Powell and A. Pillay* (n. 312) 496.
[316] *Ibid.*
[317] *C. Powell and A. Pillay* (n. 312) 497.

area of international criminal law. In the same vein, Kirgis' and Tasioulas' approach does not provide us with any criteria of differentiation which would aid identification of the norms of customary international law. And also Powell and Pillay's ascending and descending description of customary international criminal law must be confronted with the same arguments of subjectivity, insofar as it attempts to assess customary international criminal law by reference to international values alone.[318] However, it remains to be seen whether their suggestion to include the contributions of non-state entities in the international law-making process can provide an adequate basis for the formation of customary norms.

Finally, Roberts tries to combine positivist, practice-based theory with a more naturalist, value-based conception of custom formation by advocating that norms of customary international law can emerge only if these two elements – international practice and value-based principles accepted in an international law-making process or value judgements alone – occur in an effective equilibrium. As we shall see later, this reflects to some extent current realities in international law-making, and especially the law-making processes before international criminal tribunals. However, like other sliding-scale approaches, Roberts' suggestion does not provide us with any stable criterion which serves to identify when a particular norm necessitates more value-based elements or *opinio juris* for its formation or when more state practice ultimately contributes to its formation. This was criticised by Koskenniemi, who contends that it involves the risk of degenerating custom into manipulable oscillation, simply in order to avoid choice itself.[319] Yet the question remains whether such choice, demanded by Koskenniemi, is ultimately necessary or even possible with regard to international human rights and humanitarian law.

4. *Institutionalised law-making: Charney's 'universal international law' and subsequent ideas*

There are several other new approaches to custom formation which fall into the broader category of NAIL.[320] They take special account of the changes

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[318] See the critique of *J. Beckett* (2005) 16 EJIL, 227ff, who maintains that the formation of customary international law rather had to be understood as a claim- and counter-claim-oriented process in which the claim of a state on the customary nature of a norm of international law and the reaction of other states towards that claim counted for the formation of a customary norm

[319] *M. Koskenniemi* (1990) 1 EJIL, 8; see *J. Beckett* (2005) 16 EJIL, 632.

[320] For a utopian concept, which envisages a concept of international law without the idea of sovereingty as its underlying basis, see *P. Allot* (Eunomia) para. 16.14, 302 and para. 16.62, 322.

which the modern international legal system has experienced since the establishment of the PCIJ and thus favour a more institutionalised approach to customary law-making which takes full account of the potential that international institutions and new international actors offer for international law-making processes.

Charney's conception of the formation of customary international law, for example, makes the evolution of customary norms entirely dependent on international instruments and decision-making processes in international institutions.[321] Though states are still the main actors of international society, Charney remarks that nowadays the Security Council or the UNGA, as well as international organisations, plays a role in the creation and shaping of contemporary international law. Accordingly, he maintains that international legal rules arise mostly from the proposals or resolutions elaborated in those forums.[322] Moreover, according to Charney, the amount of support of a norm in the relevant forum determines whether additional evidence of state practice and *opinio juris* is needed for it to emerge as a new rule of customary international law.[323]

In a subsequent proposal, Gunning takes Charney's theory even further, and recommends including the acts of NGO's in the process of the formation of new customary rules, albeit only as an auxiliary tool, if state practice and *opinio juris* based upon evidence provided by state action do not yield sufficient results.[324] And even more recently, Tietje suggests expanding Charney's idea of a new 'universal international law' to the field of international criminal law.[325] According to Tietje, Article 38 of the ICJ Statute is no longer of much importance in the field of international criminal law. In his view, what is more important is whether the international rule concerned aimed at the protection of global public goods.[326]

5. *Assessment of institutionalised law-making approaches*

Charney's assumption of custom suffers from two decisive weaknesses. First, it does not appreciate the evidentiary character of other forms of proof of *opinio juris* or state practice, which can be found outside the law-making processes, especially in international forums. On the other hand, a consistent

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[321] *J. Charney* (1993) 87 AJIL 544; see *id.* (1986) 61 Wash.L. Rev., 971, 981.
[322] *J. Charney* (1993) 87 AJIL 544; see *id.* (1986) 61 Wash.L. Rev., 971, 981.
[323] *J. Charney* (1993) 87 AJIL 546.
[324] *I. Gunning* (1991) 31 Virginia Journal of International Law, 218.
[325] *C. Tietje* in *A. Zimmermann* (International Criminal Law) 113.
[326] *C. Tietje* in *A. Zimmermann* (International Criminal Law) 113.

application of Charney's approach would render any agreement approved in such a forum customary in nature. That this is not the case can be shown simply by examining the ratification status of many international agreements. Though each and every instrument nowadays has either been adopted in or legitimised by an international forum, acceptance and application of the rules contained in these instruments by states is often low. Hence, more often than not, they remain rather ineffective.

The contribution of non-state actors to custom-formation, advocated by Gunning, is an issue which certainly merits closer scrutiny; however, it is also controversial, because it gives them authority without accountability.[327] A full assessment of the problems associated with such a course of action cannot be carried out within the scope of this work. Nonetheless, it would also have to take into account the downsides of such an approach. For example, even international NGOs represent only the particular interests of a fraction of international society. Their contributions to international law-making processes cannot be construed as representative on the whole. Hence, a substitution of evidence of state practice and *opinio juris* by their actions seems of dubious usefulness.

6. *Critical Legal Studies perceptions of the formation of customary norms*

The Critical Legal Studies (CLS) stream can be understood as another branch of the great bundle of theories which make up the NAIL; it developed at about the same time. Nevertheless, it is recognised as an individual strand of international legal theory with its own conception of the formation of (customary) international rules. It shares the realist movement's scepticism of orthodoxies and the rejection of formalism.[328] Hence, conceptions which build upon the concept of custom as provided by Article 38 of the ICJ Statute will be sought in vain here. Like realists, supporters of the CLS school also employ and draw upon interdisciplinary approaches to the philosophy of international law. Although social theory is the main basis of the CLS approach,[329] it also builds upon insights from critical philosophy, literary theory or feminist jurisprudence.[330]

Some authors have argued that the influence of the CLS movement has now declined.[331] However, it is more correct to conclude that it has in fact

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[327] See *A. Roberts* (2001) 95 AJIL, 775; *P. J. Spiro* (1996) 18 Cardozo L. Rev. 962–967.
[328] *M. D. A. Freeman* (Introduction) 1040, 1041, 1046.
[329] See *M. Koskenniemi* (Apology 1989) 490ff.
[330] *M. D. A. Freeman* (Introduction) 1040.
[331] See *M. D. A. Freeman* (Introduction) 1055.

progressed in multiple and distinct directions.[332] Feminist and race theory in particular, as well as literary and social theory, have by now evolved into individual streams of jurisprudence.[333]

Kennedy's explanation of the formation of customary norms utilises a dialectic approach to international law and international sources doctrine which has not got much to do with traditional sources doctrine.[334] His work treats the whole discipline of international law as a form of rhetoric, or an area of discourse, composed of hard and soft arguments.[335] Nonetheless, concerning his understanding of the individual elements of customary international law, he seems to have built his discourse theory upon a voluntarist basis: he finds that the requirement of *opinio juris* resembles that of treaty law; it must be understood as an expression of sovereign will, expressed in a communally recognised form.[336] This is paralleled by his conception of the doctrinal structure of international law: according to Kennedy, custom and treaty must be differentiated according to their internal components. Thus, custom seems softer as it is tempered by consent, "while doctrines about initiating treaty obligations are harder – tempered by systemic considerations."[337] Nevertheless, he maintains that it is essential to view arguments about the authoritative character of a norm in the light of their individual content and application.[338] Discourse on sources, Kennedy finds, must achieve a compromise between the different problems of international legal theory, hence providing "the transposition of theoretical scepticism into doctrinal proliferation."[339]

Koskenniemi's critique of current customary doctrine certainly contains a most exceptional concept.[340] He describes customary theory as caught in an insoluble dilemma between apology and utopianism, viz. positivist and naturalist tendencies, in which arguments on the formation of custom oscillate constantly between these extremes without being able to find a stable equilibrium.

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[332] *I. Ward*, *An Introduction into Critical Legal Theory* (Cavendish, London, 1998), 157.

[333] This would possibly be a conclusion to which also Koskenniemi would consent, who in a recent article wrote that he does not want his theoretical work to be labelled as belonging to the rather wide school of the Critical Legal Studies or the New Approaches to International Law (*M. Koskenniemi* (1999) 93 AJIL, 352).

[334] See *D. Kennedy* (Structures).

[335] *D. Kennedy* (n. 334) 80.

[336] *D. Kennedy* (n. 334) 82.

[337] *D. Kennedy* (n. 334) 82.

[338] *D. Kennedy* (n. 334) 99.

[339] *D. Kennedy* (n. 334) 106, 107.

[340] *M. Koskenniemi* (1990) 1 Finnish YBIL, 79ff; *id.* (Apology 1989); *id.* (Apology 2005); *id.* 1 EJIL (1990), 4; *id.* (Gentle Civilizer); *id.* in BIICL (Theory) 3ff; *id.* (2005) 16 EJIL 329.

According to Koskenniemi, the dilemma of custom exists on four levels:[341] the first tackles the legal nature of custom, the second its identification through the requirements of *opinio juris* and state practice, the third touches upon the methodology employed for an identification of custom and the fourth concerns the interpretive stage.[342] Koskenniemi argues that all four stages are easily affected by either utopian or apologetic critique.[343] In his view, custom

> has tended to become a catch-all category for all types of law which cannot without difficulty be argued into 'treaty' and whose relegation into 'general principles of law recognised by civilised nations' might throw doubt on their binding character.[344]

According to Koskenniemi, the 'general principles of international humanitarian law' can serve as a good example of the insufficiencies of current customary doctrine. In his view, the ICJ has never determined their exact legal provenience. Neither have they been incorporated into the theory and methodology of custom, he observes.[345] Moreover, he maintains, a classification of the principles of humanitarian law as customary works only as long as their customary content is undisputed. Once questions about their content arise, they reveal all the insufficiencies of custom and the general principles of law as sources of international law.[346] Koskenniemi, using similar arguments, criticises the conception of 'constitutional norms of international society' (*Völkerverfassung* norms).[347]

In Koskenniemi's view, traditional theory lacks a coherent concept of custom.[348] Existing concepts mostly build on a circular argument of custom formation: they assume behaviour to be evidence of *opinio juris* and the latter to be evidence of which behaviour is relevant as custom.[349]

As a potential exit from this vicious circle, he suggests equitably balancing the elements of custom against each other.[350] In his opinion, equity or, more precisely, a process of bilateral equity constitutes the core of custom and delimits what states claim as their customary rights and duties.[351]

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[341] For the identification of five stages see *J. Beckett* (2005) 16 EJIL, 223.
[342] *M. Koskenniemi* (Apology 1989) 350.
[343] *M. Koskenniemi* (Apology 1989) 362.
[344] *M. Koskenniemi* in BIICL (Theory) 19.
[345] *M. Koskenniemi* (Apology 2005) 402.
[346] *M. Koskenniemi* (n. 345) 408.
[347] *M. Koskenniemi* (n. 345) 406, 407.
[348] *M. Koskenniemi* (n. 345) 409.
[349] *M. Koskenniemi* (n. 345) 437; *id.* (1990) 1 Finnish YBIL 120–126; *id*. (1990) 1 EJIL, 26.
[350] *M. Koskenniemi* (1990) 1 Finnish YBIL 148.
[351] *M. Koskenniemi* (1990) 1 Finnish YBIL 148; *id.* (Apology 2005) 472.

Nonetheless, he has realised too that equity in fact describes only a procedural concept and provides only for criteria to evaluate legal relationships. Thus, he concludes, it has to be accepted that the law is conflictual and cannot be understood as a meta-law of ideals determining a coherent programme for the basic framework of the international world order. Accordingly, any solution must be found by taking into account the underlying conflicting claims.[352] The formation of legal rules ultimately has to be based on the "actual verifiable behaviour, will and interest of the members of society-states".[353]

7. *Assessment of the CLS conception of customary international law*

CLS approaches present us with a diverse range of suggestions on the formation of customary norms. Kennedy, for example, places all arguments as to the formation of custom and the problems connected with it on a theoretical meta-level, at which questions about the formation of customary norms should be resolved independently of states' interests. However, it is only on a practical level, i.e. in the case of the invocation of a customary international (criminal) law norm before an international (criminal) court, that problems of its customary nature are revealed. On the level of principle, it is quite easy to agree upon generalities like 'core crimes' or the criminality of acts which violate core humanitarian values. Likewise, most scholars would agree that finding a certain act as criminal under international law must take into account the implications of the principle of *nullum crimen sine lege*. However, it is mainly in detailed questions that problems of the sources of international law reveal themselves.

Koskenniemi, on the other hand, provides us with quite an exact picture of the deficiencies and fallacies of the current doctrine of the formation of customary norms. Especially with regard to the 'elementary considerations of humanity' which are under examination here, he presents convincing arguments that they fit neither into the category of custom, nor into that of the general principles of international law. However, his approach remains primarily a critique and this critique could in fact establish a fundamental critique of any modern legal system.[354] It does not seem to provide a real solution to the problem. Even the new ground which Koskenniemi suggests for the formation of customary norms, equity and justice, seems unstable and is, like Kennedy's suggestion, situated on a theroretical meta-level: the concept of equity does not provide hard criteria for the determination of

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[352] *M. Koskenniemi* (n. 345) 559; see *id*. (1990) 1 EJIL, 7.
[353] *M. Koskenniemi* (1990) 1 EJIL, 7.
[354] For a most recent assessment see *C. Möllers* (Frankfurter Allgemeine Zeitung) 39.

a legal norm, and a merely procedural view of custom does not depict its potential for conflict. Koskenniemi's solution, which suggests that conflicts about the law shall be resolved in bilateral consultation, still does not tell us what the law is.

In the end, his approach has also been criticised for trying to reconcile the irreconcilable: his demands of normativity and concreteness cannot be fulfilled.[355] He points to the supreme ideal of (customary) international law which is impartial, objective, formally equal, and representative of the values and desires of all.[356] Although this seems an aim should generally be followed when one tries to retrieve a workable definition of customary international law, Habermas has already pointed out, and Koskenniemi seems to have conceded,[357] that law is (only) an expression of society.[358] Hence, it is fragmented and one encounters conflict and uncertainties, as it merely reflects the different subjects, actors and participants who interact in society. Beckett puts it more explicitly: customary international law is not good law.[359] It is as imperfect and incoherent as international society itself.[360]

G. *Theory of customary international law: tentative conclusions*

On viewing the broad range of different theories which exist today with regard to the formation of customary international law, the first thing which seems certain is that it is nearly impossible to discern a general direction into which theory is evolving. Even the latest approaches, which have taken account of the particularities of international humanitarian and international human rights law, like the ILA's voluntarist conception, the game theory explanation of custom or Merons 'core rights' and Tomuschat's deductive approach, still cover almost the full spectrum of theoretical approaches identified. Nonetheless, there is a great majority of authors who have acknowledged that there exists a certain tension between the traditional scheme of custom formation, provided for by Article 38 of the ICJ Statute, and the formation of customary international humanitarian and human rights law.

However, actual analysis of the different theories advanced has revealed that nearly every theory on custom can be criticised for certain deficiencies.

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[355] *J. Beckett* (2005) 16 EJIL, 222.
[356] *J. Beckett* (2005) 16 EJIL, 221.
[357] *M. Koskenniemi* (1990) 1 EJIL, 7.
[358] *J. Habermas* in *id.* (Einbeziehung des Anderen) 322.
[359] *J. Beckett* (2005) 16 EJIL, 221.
[360] See also *J. Kammerhofer* (2004) 15 EJIL, 553.

Entirely positivist theories are unable to explain sufficiently the formation of international human rights norms or international humanitarian law. Moreover, most of them still make use of some kind of *opinio juris* substitute, which ultimately undermines the whole practice-based concept from the start and makes it indistinguishable from other two-element concepts. Two-element approaches, on the other hand, simply do not work in international humanitarian and human rights law, where there is hardly any state practice available to support the evolution of a new customary norm. Additionally, they fall all too easily into a trap of mere circularity. Theories which actually take proper account of the peculiarities applying to the field of international humanitarian or international human rights law tend to lean towards the naturalist end of the spectrum, emphasising the important fundamental and universal values which underlie these two fields of international law.

Hence, the first conclusion which can be drawn from the assessment of the different theories on the formation of customary international law is that one coherent theory on custom probably does not exist. Possibly one would have to admit that international law and its different fields are so diverse that it is virtually inevitable that methodological approaches to the sources of international law will diverge when applied to those different fields.

A second observation can be made about the developing nature of customary international law. Most of the recent theories on the formation of customary international law have emphasised the changing nature of international relations. They have concluded that this has to be reflected in customary international law theory. Charney wrote that

> Customary international law is not static. It changes as the patterns of State behaviour change and *opinio juris* evolves to reflect current realities of obligation. Extant rules of law are subjected to change.[361]

With regard to the rapidly developing field of international criminal law, we may therefore conclude that probably only a theory of custom which takes the changing nature of this source of international law into account will be able to explain adequately the formation of customary norms of international law and international human rights law. To a certain extent, this could also include taking into account the views of an important non-state actor in this field, namely those expressed in the work of the ICRC.

Yet a theory of customary international law must present a rule-based approach to international law, building predominantly upon structure and formalism, to provide legal certainty and clarity. This requirement also

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[361] *J. Charney* (1985) 56 BYBIL, 21.

derives from the influences and requirements set by international criminal law. Two notions inherent in the concept of law are justice and equity. As noted by Koskenniemi, any concept of customary international law must strive to meet these criteria.

However, even if we take these criteria as prerequisites to any approach to customary international law, the spectrum of possible methodologies is still broad. In some cases, a deductive approach to custom may be the ultimate method of ascertaining rules of customary international law. In others, custom may be discerned only by reference to the traditional two-fold approach of Article 38 of the ICJ Statute. Thus, it is possible that the theories of customary international law which provide a sliding-scale conception of custom within the general framework of of Article 38 come the closest to reflecting the present state of customary international law. They accept the methodological pluralism which prevails in the field of customary international law, without deviating entirely from the accepted frame of the elements of Article 38 of the ICJ Statute.

Ultimately, such a framework will have to be the lynchpin and starting point of any theory of customary international law. It is important to view the development of customary international law from within the system of international law. Structure and formalism can result only from the rules this system builds on. A theory which tries to establish this from the outside will not provide and sustain its legitimacy.

The following chapters of this book will explore whether these tentative conclusions for a theory on customary international law will provide an adequate framework for the development of customary international law and customary international criminal law.

H. *Evidence*

After considering the different theoretical conceptions of customary international law it is worthy discussing what kind of evidence or law determining agency may be invoked to prove the two elements of customary international law, *opinio juris* and state practice, or either of them (depending on the theoretical approach applied in the particular circumstances). There is a wide range of possible items of evidence which may become relevant:[362]

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[362] For the enumeration of a range of possible sources see *A. Guzman* (2005) 27 Mich.JIL 115, 116; *M. Akehurst* (1974–75) 47 BYBIL; for the evidence of state practice and *opinio juris* in the field of international humanitarian law, see *ICRC, Customary International Humanitarian Law*, vol. 1, xxxii–xlv.

resolutions of international organisations, international case law and international conventions are only some examples; concerning the element of state practice, the ICRC has held that 'physical and verbal acts of States' are its most prevalent proof.[363] According to its study on customary international humanitarian law, physical acts can include behaviour on the battlefield, the use of certain weapons and the treatment meted out to different categories of persons. Verbal acts, on the other hand, can be given credence in military manuals, national legislation, national case law and so on.[364]

Nonetheless, assignment of this evidence to the two elements of customary international law encounters a number of difficulties. First, the ultimate decision of which evidence may actually be invoked and considered in the assessment of the formation of a new customary rule may depend on the concrete theoretical conception of custom one is following. Voluntarists and theorists emphasising the *opinio juris* element in customary international law focus on all evidentiary material which may manifest the belief of a state, i.e. on verbal acts such as statements of state officials.[365] However, scholars adhering to a positivist concept of custom and focussing on the element of state practice utilise the same verbal acts as evidence of state practice.[366]

Second, adherence to a particular theoretical approach may also determine, which individual piece of evidence is relevant in the assessment of customary rules. With regard to only the element of state practice, for example, some authors have taken a restrictive view, advocating that only physical acts of states can count as pertinent evidence.[367] Others have suggested including everything which might actually reflect the actions of states.[368]

Third, as just demonstrated by our example concerning the different theories of customary international law, there is a great amount of evidence which may be invoked for either element of customary international law.[369] This applies in general international law as well as in the field of international humanitarian law or international criminal law; it involves for example evidence which is generated by the practice of international organisations in

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[363] *ICRC, Customary International Humanitarian Law*, vol. 1, xxxii.

[364] *ICRC, Customary International Humanitarian Law*, vol. 1, xxxii.

[365] *ILA, Committee on Formation of Customary (General) International Law* (n. 9) 14.

[366] *ILA, ibid.*

[367] *A. D'Amato* (Concept), 88.

[368] *M. Akehurst* (1974–75) 47 BYBIL.

[369] This is a perception which is shared by a great number of international scholars. See, for example *G. Haggenmacher*, RdC (1986), 5, 114; *ILA, Committee on Formation of Customary (General) International Law* (n. 9) 7.

their own right[370] or by the concerted action of states at the international level. Prominent examples of this international practice may be the resolutions of the GA or international conventions;[371] both consist of verbal acts of states expressed within an international institutional framework.[372] The ICRC remarked rightly, when assessing the evidence of the customary rules contained in its study, that

> it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. More often than not, one and the same act reflects practice and legal conviction.[373]

Finally, the actual choice of a particular piece of evidence may indicate whether the person or entity employing it as evidence of a new customary rule adheres to a more modern concept of international law, which supports, for example, the idea of constitutionalisation,[374] or believes in the traditional conception of international law.[375] Evidence which proves support of the idea of constitutionalisation, for example, may be evidence, which is not really evidence of customary international law in the traditional sense, either because it is difficult to apply it *ratione temporis*, or because it is difficult to prove the will or practice of states. One example which reflects these difficulties in the *ratione temporis* application of customary evidence is the use of the Rome Statute in the case law of the ICTY:[376] the ICC was created much later than the ICTY and the crimes considered by the ICTY were committed long before the actual adoption of the Rome Statute. The invocation of decisions of international courts and tribunals as well as the application of statements of the ICRC is a good example of the this problem. Even though their judgements have high precedential value, international courts and tribunals are usually acting independently of the states appointing them.[377] Yet, in the words of the ICRC, a finding of an international court on a rule of customary international law may 'constitute persuasive evidence to

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[370] *ILA, Committee on Formation of Customary (General) International Law* (n. 9) 19; *ICRC, Customary International Humanitarian Law*, vol. 1, xxxv.

[371] Compare: *North Sea Continental Shelf* (n. 658) para. 73; *Galic*, Appeals Chamber Judgment, Case No. ICTY-98-29-A, 30 November 2006, para. 85.

[372] *ILA, Committee on Formation of Customary (General) International Law* (n. 9) 19.

[373] ICRC, *Customary International Humanitarian Law*, vol. 1, xl.

[374] See below, chapter 3 II.2, 187.

[375] See *I. Scobbie* in *E. Wilmshurst and S. Breau* (eds.) *Perspectives on the ICRC Study* (CUP 2008), 27 who concludes that the ICRC in its study on customary international humanitarian law followed a modern approach to custom formation.

[376] *Infra*, 216ff.

[377] *ILA, Committee on Formation of Customary (General) International Law* (n. 9) 18, 19.

that effect'.[378] And so do the statements of the ICRC, not the less because the organisation enjoys international legal personality.[379]

In the end, the ultimate choice for or against a particular item of evidence of either element of customary international law depends on the actual theoretical approach followed by the user. It is impossible to evaulate the evidence independently of the underlying methodological conception. Yet, the evidence utilised in the particular circumstances may elucidate and explain in turn the particular methodological approach applied by the court or tribunal in the particular circumstances. This is why this study focuses on an assessment of the case law of the ICJ, ICTY and ICTR to define methodological approaches to general customary law and customary international criminal law.

[378] *ICRC, Customary International Humanitarian Law*, vol. 1, xxxiv.
[379] *ICRC, Customary International Humanitarian Law*, vol. 1, xxxv.

Chapter Two

Customary International Law and its Relationship with other Sources and Methods of Law-Identification

I. INTRODUCTION

As this study focuses on the different methods employed to ascertain a new norm of customary international law, it is important to assess which methods which lie at the heart of other law-making processes of international law. Regarding this issue, the general principles of international law are of particular interest: they have been named as the underlying constitutive source of international human rights law.[1] Hence, this chapter will analyse the relationship between customary international law and this source of international law.

There are also other techniques employed in the process of finding norms of international law which may indicate not the customary or principle character of a new rule of international law, but whether a new international rule can be derived from of the canon of those already existing. This is done by interpretation and analogy, in particular. These methods and their relationship with custom will be analysed in more detail, too.

II. THE RELATIONSHIP OF CUSTOMARY INTERNATIONAL LAW WITH OTHER SOURCES OF INTERNATIONAL LAW: GENERAL PRINCIPLES OF INTERNATIONAL LAW AND CUSTOMARY INTERNATIONAL LAW

As should have become clear from the assessment of the different theories on customary international law, it seems extremely difficult to explain the existence and formation of customary norms of international human rights

[1] Compare *B. Simma and P. Alston* (1988/89) 12 Australian Yearbook of Intl. Law 90ff.

law and international humanitarian law with the two-fold concept of custom which is enshrined in Article 38 (1) (b) of the ICJ Statute. Moreover, it was indicated in the introduction to this study that assessment of the formation of customary norms in these areas of international law appears so complex in the main because of the lack of supporting evidence of state practice.

Consequently, instead of taking custom as the underlying legal source, quite a number of authors have tried to explain the common applicability and binding character of norms of international human rights law and international criminal law by reference to 'general principles of international law'.[2] Ambos even argues that in international criminal law the general principles of international law and customary international law have been blended into one single source, the "principles and rules of international law" according to Article 21 (1) (b) of the ICC Statute.[3] Because custom found no specific recognition as a source of law in the Rome Statute, at first sight, such a conclusion does not seem too far fetched. Hence, in this section it will be necessary to explore whether international humanitarian law and human rights law have developed towards such a principled approach. In particular, it will have to be assessed whether the 'general principles of international law' may in fact serve as a basis and source of international human rights law and international criminal law.

Nonetheless, the function of the general principles of international law is of interest not just when one considers their character as a separate source of international human rights law and international criminal law. Moreover, as indicated earlier, 'general principles of humanitarian law', and in particular the Martens Clause as their main expression, have been mentioned by the ICJ as well as by scholars of international law as constituting fundamental principles of international law from which customary norms of international human rights law and humanitarian law may be derived by way of deduction.[4] Hence, the characteristics of such fundamental principles of international law also need further clarification.

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[2] *B. Simma and P. Alston* (1988/89) 12 Australian Yearbook of Intl. Law, 90ff; see for the field of international criminal law: *K. Ambos* (Allgemeiner Teil) 43; *O. Yasuaki* in *R. MacDonald, D. M. Johnston* (World Constitutionalism) 174; contrast: *C. Bassiouni* (Crimes 1992) 121, 122; for a most recent treatise see *R. Kolb* (2006) 53 NILR, 1–36, 27ff.

[3] *K. Ambos* (Allgemeiner Teil) 43, 44.

[4] See *C. Tomuschat* (1999) RdC, vol. 281, 340 – regarding the jurisprudence of the ICJ in the Nicaragua case and in the Advisory Opinion on Nuclear Weapons; *O. Yasuaki* in *R. MacDonald, D. M. Johnston* (World Constitutionalism) 174, who, nevertheless, argues toward the existence of norms of general international law as an entirely separate source of international law.

In particular, to examine the source character of the 'general principles of international law', we must assess whether this notion of general principles can be equated with the 'general principles of law' of Article 38 (c) of the ICJ Statute. This implies further clarification on whether the general principles of law of Article 38 of the ICJ Statute encompass principles deriving from the law *in foro domestico*, or whether they also include principles of international law which are generated solely on the international plane.

III. GENERAL PRINCIPLES OF LAW IN ACCORDANCE WITH ARTICLE 38 (C) AND OTHER GENERAL PRINCIPLES

The source character of the general principles of law of Article 38 (1) (c) of the ICJ Statute will be the starting point of our considerations. It needs to be clarified, first and foremost, whether the 'general principles' belong to the accepted canon of sources of international law. Otherwise, additional evidence of their source character would be necessary.

A. *Preliminary considerations*

General principles of law are the third source listed in Article 38 of the ICJ Statute on which the ICJ may draw in its assessment of the applicable law. However, it is generally assumed that this does not imply that they are ranked in third place. Though the Committee of Jurists first issued a draft of Article 38 in 1920 which included a provision that the items listed in Article 38 should be applied in *ordre successif*, it is far from clear that this should also imply a hierarchy of the listed sources.[5] In any case, later on, the words were deleted by the Sub-Commission of the Third Committee of the First Assembly of the League of Nations.

There are numerous views on what the concept of 'general principles' in Article 38 (1) (c) of the ICJ Statute is intended to refer to. Even from the moment when 'general principles of law' were agreed by the Committee of Jurists to constitute a possible source of law for the Court, their particular origin was unclear.[6] Debate on the character of the general principles is, yet again, rooted in the division between naturalist and positivist conceptions

[5] Similar *M. Akehurst* (1974–75) 47 BYBIL, 274.

[6] See *F. A. von der Heydte* (1933) 33 Die Friedenswarte, 290, 291; *H. Mosler* in *R. Bernhardt* EPIL vol. 2, 515, 516.

of international law.[7] Naturalist writers regard the general principles as a general concept which underlies the whole of international law, constituting one of the main methods of ascertaining the validity of international rules.[8] Judge Tanaka in the *South-West Africa Cases*, for example, contends that there is a certain amount of natural law inherent in the notion of the general principles of Article 38 (1) (c) of the ICJ Statute which extend "the concept of the source of international law beyond the limit of legal positivism"[9] Similarly, Van Boven has shown that the general principles denote some "fundamental or suprapositive norms which lie at the basis of the whole human society."[10] Positivists, on the other hand, regard the principles in question as being based on a general consensus which elevates them to the status of international law. Though this is disputed, such consensus may be viewed as being reflected in legislation (domestic law), in law-creating treaties or resolutions of world wide international bodies (viz. the UNGA, the Security Council, other international organisations).[11]

Despite these varying opinions on the nature of the general principles, however, most current writers regard them as a separate source of law, albeit of limited scope.[12] This is supported by their very existence and listing as a source of law in Article 38 (c) of the ICJ Statute as well as in its predecessor, Article 31 of the PCIJ Statute. The latter clearly indicated "that treaty and custom do not provide an exhaustive source of legal norms in international law."[13]

B. *General principles of national or international origin*

Now that we have clarified the source character of the 'general principles' in Article 38 (1) (c) of the ICJ Statute, we must further elucidate which principles may be called 'general principles' according to Article 38. Do they derive from principles of domestic origin alone or does Article 38 (1) (c) of the ICJ Statute also include principles of a genuine international origin?

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[7] See *M. McAuliffe deGuzman* in *O. Triffterer* (Commentary) 441.

[8] *G. Dahm and J. Delbrück* (Völkerrecht) vol. I/1 para. 4, 65; further reference in *H. Mosler* in *R. Bernhardt* EPIL vol. 2, 514.

[9] See *Tanaka*, dissenting opinion, ICJ, *South West Africa Cases* ICJ Reports 1966, 298.

[10] *T. van Boven* in *K. Vasak and P. Alston* (International Dimensions) vol. 1, 107; similarly: *H. Mosler* in *R. Bernhardt*, EPIL vol. 2, 514.

[11] *H. Mosler* in *R. Bernhardt*, EPIL vol. 2, 514.

[12] *M. Shaw* (International Law) 94; *A. Verdross and B. Simma* (Universelles Völkerrecht), 386, para. 605; contrast *M. Akehurst* (1974–5) 47 BYBIL, 278.

[13] *S. Hall* (2001) 12 EJIL, 292.

1. *General principles of national origin*

As indicated above, interpretations of the scope of Article 38 (1) (c) differ widely. However, the current prevalent one is narrow. It perceives the principles as deriving only from principles of national law, which, because of their wide acceptance in the major legal systems of the world, can be transferred into the sphere of international law.[14] There was already a suggestion during the discussions on the adoption of Article 31 of the PCIJ Statute that this common reading of Article 38 (c) be broadened, facilitating the inclusion of general principles of international law.[15] This was triggered by the fact that difficulties sometimes arose with the exact classification of international norms as belonging to the categories of treaties, custom or general principles, if understood in a narrow sense. To prevent a *non liquet* occurring, some of the members of the Committee of Jurists wanted to broaden the competences of the Court.[16] However, this proposal did not receive the approval of the members present and thus was not adopted in the Statute's final version.[17]

2. *General principles of a genuine international origin*

However, time and again international scholars have advocated the existence of genuine principles of international law, derived from the sphere of international law alone. They are often referred to as 'general principles of international law' as opposed to the 'general principles of law' recognised by civilised nations, defined in Article 38 (1) (c) ICJ Statute. The Soviet theory of international law, in particular, objected to a narrow understanding of Article 38 (1) (c), which regards as general principles only those principles derived from the national jurisdictions of states.[18] Soviet scholars considered the general principles of international law to be principles abstracted

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[14] *M.Virally* in *M. Sørensen* (Manual) 144; *M. Akehurst* (1974–5) 47 BYBIL, 279.

[15] See *Lord Philimore* who maintained that the general principles of law had to be derived from principles *in foro domestico*; PCIJ, Advisory Commitee of Jurists (Procès Verbaux) June 16th–July 24th 1920, 335; contrast *Loder*, *ibid.* who held that it was the duty of the Court to establish universally recognised principles of international law; see suggestions of *Lapradelle, ibid.* 346, who wanted to leave it open, whether the general principles derived from national or international principles.

[16] As for example proposed by *Hagerup* in PCIJ, Advisory Commitee of Jurists (Procès Verbaux) June 16th–July 24th 1920, 296; see *Lapradelle*, *ibid.*, 346.

[17] PCIJ, Advisory Commitee of Jurists (Procès Verbaux) June 16th–July 24th 1920, 351.

[18] *G. Tunkin* (1979) 19 IJIL, 474, 482; *G. Herczegh* (General Principles) 35.

from positive international law, independent of the specific will or consent of states.[19]

In view of the current development and diversification of international law, there has been an increase in the number of scholars who consider it enough if the general principles of law of Article 38 (1) (c) originate directly in international relations.[20] Accordingly, 'general principles' may be derived, amongst others, from resolutions of international organisations or international conferences[21] or from other sets of facts which, due to a lack of comparable situations in national jurisdictions, would not give rise to a particular principle of law. Tomuschat, for example, confirms the independent character of the 'general principles of international law' and their application within the framework of Article 38 (1) (c) of the ICJ Statute. In his General Course of 1999 he explains that general principles of international law constitute an independent source of international law. Nevertheless, he also maintains that they are not "an instrument of law-making", but provide a "residual framework of general precepts for instances where treaty and custom are silent on how to resolve a specific legal issue."[22] They thus have acquired a limited 'source character', which ranks them as an auxiliary means just before the 'judicial decisions and the teachings of the most highly qualified publicists of the various nations' of Article 38 (d) of the ICJ Statute.

3. *A third category?*

Mosler has even identified three categories of general principles applicable in international law. First, there are the general principles derived from national jurisdictions. Second, there are the principles derived from international relations, and third, the general principles applicable to all kinds of legal relations, such as the principles of good faith and equity,[23] which "belong to any workable system of law".[24] According to Mosler, these principles represent

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[19] *V. U. Degan* in *J. Makarczyk* (Theory) 128f.

[20] *H. Mosler* (1976) 36 ZaöRV, 6, 44; *B. Sloan* (1987) 58 BYBIL, 79, 80; *M. Sørensen* (Les Sources) 128; *A. Verdross and B. Simma* (Universelles Völkerrecht) 386, para. 606.

[21] *U. Fastenrath* (Lücken) 103; *A. Verdross* (1935) 52 RdC, p. 128; *A. Verdross and B. Simma* (Universelles Völkerrecht) paras. 606, 639; *G. Dahm and J. Delbrück* (Völkerrecht) vol. I/1, S. 66; contrast: *H. Strebel* (1976) 36 ZaöRV 339, 342.

[22] *C. Tomuschat* (1999) RdC, vol. 281, 335.

[23] *H. Mosler* in *R. Bernhardt* EPIL vol. 2, 513; see the very similar identification of several categories of general principles in *F. F. Martin* (2002) 65 Saskatchewan Law Review, 333, 361, 362.

[24] *H. Mosler* in *R. Bernhardt* EPIL vol. 2, 514.

> …basic values which must be guaranteed by any legal system which deserves to be considered as governed by the rule of law. These are moral commandments which, in the present stage of the development of human civilization, are considered by the conscience of mankind to be indispensable for the coexistence of man in organized society. It is in this category that the fundamental human rights to life and development in society belong.[25]

Finally, other authors have affirmed the existence of 'general principles of international law', but deliberately leave open the definition of the source of law to which the general principles belong.[26]

4. *General principles of international law originating from any source of international law*

Yet probably the most prevalent view is to assume the existence of 'general principles of international law', but *within* the general framework of the sources of international law. Akehurst, for example, regards the general principles of international law simply as broader principles of international law derived from any source of international law,[27] i.e. from norms of customary international law or other sources of international law and from national jurisdictions as explained in Article 38 (c) of the ICJ Statute.[28]

Moreover, several authors have emphasised the universal character of such 'general principles of international law': Virally, for example, argues that there exists a category of general principles of international law "so universal and well established that the judge or arbitrator relying upon them does not think it necessary to adduce precedents for their proof".[29] He suggests that due to their universality, these principles may also be termed 'international constitutional law.'[30] However, in his view, such principles of international constitutional law do not constitute a source on their own but belong to customary international law.

Abi-Saab, on the other hand, discusses a category of 'universal international law' or 'droit international général' which can be derived from the various

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[25] *H. Mosler* in *R. Bernhardt* EPIL vol. 2, 514.

[26] *M. Mendelson* (1998) RdC, vol. 272, 370, *id.* in *K. Hossain* (Legal Aspects) 95, at 102–103.

[27] *M. Akehurst* (1974–5) 47 BYBIL, 279.

[28] *M. Akehurst* (1974–5) 47 BYBIL, 279.

[29] *M. Virally* in *M. Sørensen* (Manual) 144.

[30] *M. Virally* in *M. Sørensen* (Manual) 145; but see at 166: " In international law, according to this view, the highest plane consists of customary law. Treaties, whose binding force depends upon the customary rule *pacta sunt servanda*, take their place immediately below; and finally, at the bottom, lie judicial decisions and acts of international institutions done in execution of treaties."

existing sources of international law, such as treaty and custom. He maintains that the rules belonging to this category of 'droit international général' are comprised of norms which derive their generality *ratione personae* from their transpersonal or impersonal character and from their applicability to all subjects of law.[31]

Abi-Saab is of the view that, amongst others, the norms of the Geneva Conventions have attained this status of universal international law, due to their 'purely humanitarian and civilising purpose'. He states:

> Indeed the ICJ has operated a significant and useful shift in the *Nicaragua Case*, by referring not so much to custom but to general international law. In fact what one tries to achieve through an exercise such as the reaffirmation and development of humanitarian law is to launch rules into the orbit of general international law. Up to now we knew (or recognized) only one vector or process capable of achieving this result: custom. But there is no reason why such a result cannot be reached by other means or vectors, such as successive treaties; as is indeed the pattern of development of humanitarian legal norms which evolve from convention to convention, each updating and perfecting the former in response to changing conditions and in the light of experience.[32]

According to Abi-Saab, the universal character of certain international norms was affirmed by the ICJ, which, when considering principles belonging to the category of a 'droit international général', merely stated the law itself in an axiomatic manner, as if the existence of the norm did not need to be proven.[33] He finds that the Court also confirmed that norms of universal international law may be derived from several sources of international law: the *Nicaragua* judgement, for example, affirmed the customary international law character of the prohibition of the use of force, despite its codification in Article 2 (4) of the UN-Charter.[34]

Nevertheless, Abi-Saab further explains that it must be borne in mind that, although there might be several sources which affirm a certain principle of general international law, they would rarely express exactly the same content.

> il ne peut jamais y avoir identité absolue entre les deux règles, car au moins leur champ d'application *ratione personae* sera toujours différent, la règle conventionnelle étant toujours du droit international spécial, même si les deux ont le même contenu normatif *ratione materiae*.[35]

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[31] *G. Abi-Saab* (1987) RdC, vol. 207, 197.
[32] *G. Abi-Saab* in *A. Delissen and G. Tanja* (Humanitarian Law) 121, 122.
[33] *G. Abi-Saab* (1987) RdC, vol. 207, 199.
[34] *G. Abi-Saab* (n. 33) 200.
[35] *G. Abi-Saab* (n. 33) 202.

5. *Preliminary Conclusion*

It is evident from the foregoing assessment that the scope of the general principles of law of Article 38 (1) (c) of the ICJ Statute, and in particular the inclusion of 'general principles of international law' within this source of international law, has been contentious since the deliberations of the Advisory Committee of Jurists in 1921.

Yet, some things may be considered to be well-established regarding the general principles of law of Article 38 (1) (c): first of all, it seems clear that the general principles of law of Article 38 (1) (c) have acquired an individual character as a source of international law. Moreover, it appears equally established that the general principles of law of Article 38 (1) (c) of the ICJ Statute may *at least* be recruited from common principles of *national* jurisdictions of the world. Lastly, it also seems indubitable that there are certain principles of international law which have a fundamental character, at least in the particular field of international law to which they apply. The humanitarian considerations contained in the Martens Clause, for example, dominate the interpretation of humanitarian norms contained in the Geneva Conventions. This is evident from the acceptance of the clause in the preamble to the Conventions. On the other hand, the *pacta sunt servanda* principle and the principle of good faith have been accepted as 'universally recognised' in the preamble to the Vienna Convention on the Law of Treaties.[36] Hence they dominate the application and interpretation of norms concerning international treaties.

Consequently, it seems a logical conclusion that the abovementioned 'fundamental' principles may – because of their dominant character and the influence they exert in a particular area of international law – also shape the formation of new customary international law in that area of law. Whether new customary rules may actually be derived from such principles by way of deduction, however, will be assessed later in more detail, when the case law of the ICJ, the ICTY and the ICTR is considered. Nonetheless, actually to apply the principles within the area of law to which they belong, it does not seem necessary to assume their additional source character as general principles of law within the framework of Article 38 (1) (c). As Akehurst and other authors have demonstrated, it suffices if such principles may be derived from relevant treaty law or from customary international law.

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[36] The paragraph in the preamble reads: "Noting that the principles of free consent and of good faith and *the pacta sunt servanda* rule are universally recognized".

The source quality of the 'general principles of international law' and their distinctive character in relation to customary international law has also been criticised by other scholars. Some find that there are only two ways of assuming that the general principles have attained the status of a source of international law: the first is believing that they are based in natural law, and the second is deriving them from a generalisation of international (state) practice.[37] However, the latter procedure does not provide an alternative to the methods of assessing new customary international law. Meron also concludes that

> in the final analysis, general principles prove vulnerable to some of the criticisms addressed against the customary method, which at least benefits from some methodological objectivity and wide acceptance of the process.[38]

In the light of the demands of the principle of clarity which applies in the field of international criminal law and international human rights law, such a conclusion can only be supported.

The foregoing assessment clarified, albeit on an abstract level, the preconditions for application of the 'general principles of international law'. Let us now examine the approaches which have been developed for the particular fields of international human rights and international criminal law.

C. *General principles of law as a source of international human rights and international criminal law*

As was explained in the introduction to this part, numerous authors have tried to establish that some norms of international human rights and international criminal law have acquired the status of general principles of international law.[39]

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[37] *M. Koskenniemi* (Apology 1989) 355.

[38] *T. Meron* (2003) RdC, vol. 301, 393, 394.

[39] A most recent concept, which combined such a general principles approach with a positivist theory of customary international law has been provided by *J. Wouters and C. Ryngaert* 'Impact on the Process of the Formation of Customary International Law' in *M. Kamminga and M. Scheinin* (eds.), *The Impact of Human Rights Law on General International Law* (OUP, Oxford, 2009) 111–131, as well as by *N. Petersen*, 'Customary Law Without Custom?' (2008) 23 Am. U ILR 275ff.

1. *Simma's and Alston's approach to international human rights law*

The first authors to have promoted such an idea are Simma and Alston, whose approach mainly reflects a criticism of contemporary human rights literature and jurisprudence, which increasingly assumes that legal rules in this field have customary character without further support from state practice.[40] The authors find that in the area of international human rights law the main evidence for the legal and universally binding character of norms of human rights law can be found in the activities of the UNGA, the Commission on Human Rights and other UN bodies; "on the modest 'hard law' basis of a few very generally worded Charter provisions."[41] Customary international law thus cannot adequately reflect the normative character and universality of norms in this field. The customary process, they argue, can be considered functional only in situations where state practice is crucial, i.e. where states interact, and in situations which concern the apportionment and delimitation of certain rights.[42] Hence, Simma and Alston consider it more compatible with a concept of international human rights law to include norms of this field within the scope of the general principles of law of Article 38 (1) (c) of the ICJ Statute.[43] As, according to their view, these principles are based on the acceptance of the generality of states, such an approach would be legitimate.[44] Instead of general principles being deriving solely from national doctrine, they can also be derived from international norms:

> The emphasis on the acceptance *in foro domestico* was simply caused by the necessity to validate general principles in a reliable way; it cannot be read as closing the door to alternative means of objective validation.[45]

2. *Kolb, Henkin and Yasuaki*

Similarly, in a recent article, Kolb explains that a 'general principles' approach to certain core norms is in fact inevitable, since in some areas of international law, such as international criminal law, an application of the two-element

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[40] *B. Simma and P. Alston* (1988/1989) 12 Australian Yearbook of Intl. Law 95.
[41] *B. Simma and P. Alston* (n. 40) 98.
[42] *B. Simma and P. Alston* (n. 40) 99.
[43] *B. Simma and P. Alston* (n. 40) 102ff.
[44] *B. Simma and P. Alston* (n. 40) 81–108; compare: American Law Institute, *Restatement of the Law, Third*, vol. 2, § 702, 168, which emphasises on the customary as well as on the general principles character of certain core norms of international human rights law.
[45] *B. Simma and P. Alston* (n. 40) 102; similarly: *J. Wouters and C. Ryngaert* (n. 39) 122.

model of customary international law has proved to be highly unconvincing.[46] In his view, this results from the fact that the norms and principles in question "involve a maximum dissociation between the *Sein* and the *Sollen*, maintaining themselves as supra-factual… This of course is incompatible with the very notion of custom."[47]

It has also been argued by Henkin and, most recently, by Yasuaki that international human rights law enjoys the status of general principles.[48] Yasuaki, in particular, views general principles of international law as an entirely separate source of law from the sources of international law listed in Article 38 of the ICJ Statute. He maintains that these general principles derive from multinational treaties of a universal nature such as the Geneva Conventions or the UN Charter. These treaties provide

> far more explicit and transparent evidence of the commitment of the overwhelming number of states than the fictitious notion of "state practice" or "*opinio juris*" advocated by the traditional theory of customary international law.[49]

3. *Simma's and Paulus' approach to international criminal law*

Simma's suggestion of a general principles character of norms of human rights law becomes slightly modified when norms of international criminal law are considered. Together with Paulus, he emphasises that customary norms of international criminal law often lack the clarity prescribed by the *nullum crimen sine lege* principle, which applies in this field.[50]

Although, in their view, general principles of international law have already found application in the field of international criminal law, Simma and Paulus admit that the determination of the criminality of an act solely by reference to the general principles remains questionable.[51] They maintain that without further reference to customary law general principles of international law seldom have the precision required for a norm of international criminal law to penalise certain behaviour.[52] Thus, the general principles referred to by the ICTY and the ICJ must, they believe, be regarded not as

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[46] *R. Kolb* (2003) 50 NILR, 125.

[47] *R. Kolb* (2003) 50 NILR, 127; further: *R. Kolb* (2001) 39 Canadian Yearbook of International Law, 74, 81, 84ff.

[48] See *L. Henkin* in *R Bernhardt and J. A. Jolowicz* (International Enforcement), 6; *O. Yasuaki* in *R. MacDonald, D. M. Johnston* (World Constitutionalism) 174.

[49] *O. Yasuaki* in *R. MacDonald, D. M. Johnston* (World Constitutionalism) 185.

[50] *B. Simma and A. Paulus* in *H. Ascensio* (Droit International Pénal) 60.

[51] *B. Simma and A. Paulus* (n. 50) 64.

[52] *B. Simma and A. Paulus* (n. 50) 64.

general principles in the technical sense, but as general principles recognised by the Nuremberg Statute and customary international law.[53]

4. *Discussion of a general principles approach to international human rights and international criminal law*

As is easily observed from Simma's, Alston's and Paulus' approach, authors view international criminal law as a separate field of international law which, though overlapping significantly with general international law, is determined by its own characteristics and principles. Accordingly, they can conclude that norms of international human rights law can derive from general principles of law, whereas norms of international criminal law cannot.

However, the differing methodologies put forward by authors for the fields of international criminal law and international human rights law cast some doubt on the whole benefit of the general principles approach. First, the areas of international criminal law and international human rights law overlap significantly. For example, the prohibition of torture and the prohibition of forced disappearance are also part of international criminal law. Second, it can hardly be maintained that the requirement of legal clarity applies only in the field of international criminal law. Usually, it would be expected that, propositions are relatively precise in determining the scope and applicability of a human rights norm in the field of international human rights law, too. Human rights determine the rights of individuals vis-à-vis the state and also prepare the ground for possible claims. Third, differentiation between international human rights law and international criminal law diminishes the quality of the general principles of international law as a source of international law. According to the authors, the 'general principles of international law' serve as a source of law in only one particular field of international law, i.e. in international human rights law. The practicality of such a suggestion, bearing in mind that such source quality usually carries with it universal applicability, again is doubtful.

Another problem of Simma's, Alston's and Paulus' approach to international criminal law and international human rights law is that their proposal actually dilutes the normative force and rule character of the norms belonging to these fields of international law. Further to illustrate this issue, it is useful to recall what constitutes a 'principle of law'.[54] The Umpire in the *Gentini Case* in 1903 distinguishes 'rules' and 'principles' as follows:

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[53] *B. Simma and A. Paulus* (n. 50) 64.

[54] See the useful differentiation in *P Sands* (Principles) 233.

> A 'rule…' 'is essentially practical and, moreover, binding… [T]here are rules of art as there are rules of government', while principle 'expresses a general truth which guides our action, serves as a theoretical basis for the various acts of our life and the application of which to reality produces a given consequence.'[55]

Similarly, Dworkin holds that principles and rules

> …point to particular decisions about legal obligations in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."[56]… "[A principle] states a reason that argues in one direction, but does not necessitate a particular decision… All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one way or another.[57]

A general principles approach which views human rights norms and norms of international criminal law as principles of international law would thus reduce their 'hard' customary law character to the status of 'international principles', which would merely require that they be taken into account 'if relevant'. This effect has also been criticised by Meron, who contended that such a view limits itself "to the rather obvious proposition that human rights are a matter of international concern and that a State cannot evade international scrutiny by shielding itself behind the principle of sovereignty."[58] Furthermore, it runs into the danger of downgrading customary international law "to interaction, claims and tolerances between States. This would exclude such valuable sources of custom formation as, for example, normative resolutions."[59] In any case, it runs counter to the requirements of the *nullum crimen sine lege principle* principle, which demands full review of the norms of international law which form the basis for the criminality and prosecution of individuals.

After all, though the authors may be correct in their observations on the inadequacy of custom as a source of international human rights law and international criminal law, their suggestion of utilising 'general principles of international law' as a new source of international human rights and international criminal law does not offer a real solution to the problem. It merely

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[55] *Gentini case* (Italy v Venezuela) M.C.C. (1903) in *J. H. Ralston and W. T. S. Doyle* (Venezuelan Arbitration of 1903) 720, 725, cited in *B. Cheng* (General Principles) 376.

[56] *R. Dworkin* (Taking Rights Seriously) 24.

[57] *R. Dworkin* (Taking Rights Seriously) 26.

[58] *T. Meron* (2003) RdC, vol. 301, 384.

[59] *Ibid.*

relocates the debate on the character and scope of the norms of customary international law to the general principles of law.

D. *Concluding remarks on the relationship of custom and the general principles of law*

Although the above assessment could not verify that the general principles of law of Article 38 (1) (c) of the ICJ Statute may serve as an independent source of international human rights law and international criminal law, it should have been able to cast some light on the relationship between the general principles of law and customary international law as sources of international law.

First, it showed that several categories of principles are commonly assumed to apply on the international plane: general principles of law derived from national legal systems and general principles of international law. It was demonstrated that only the first category should be recognised as a source of law according to Article 38 (1) (c). An independent source character of 'general principles of international law' cannot be substantiated. It must be underlined that the provenance of the general principles is derived instead from existing sources of international law.

Our analysis has also revealed that both sources, i.e. the 'general principles of law' and customary international law, overlap significantly or exist side by side. Yet this view is quite common in international legal theory. The majority of scholars agree[60] that it is often difficult to draw a dividing line between the concepts of customary law and general principles of law.[61] Notably, Tomuschat has pointed out that in borderline cases, such as in the field of international human rights law,

> [c]ustomary law, general principles recognized by civilized nations and general principles of international law form an intricate network of principles and rules the substance of which is identical while their legal validity is derived from different basic concepts.[62]

Finally, it was demonstrated that norms of international human rights law and international criminal law cannot be based upon the source of 'general principles of law' alone. General international law, as well as international

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[60] *R. Müllerson* (1997) 2 ARIEL, 354; *T. van Boven* in *K. Vasak and P. Alston* (International Dimensions) vol. 1, 87; *M. Mendelson* (1998) RdC, vol. 272, 370.

[61] *T. van Boven* in *K. Vasak and P. Alston* (International Dimensions) vol. 1, 107. *R. Müllerson* (1997) 2 ARIEL, 356; *C. Tomuschat* (1999) RdC, vol. 281, 334.

[62] *C. Tomuschat* (1999) RdC, vol. 281, 334.

criminal law, is thus far from having generated a new, single source of law which comprises 'general principles of law' instead of customary international law. Ambos' conclusion seems rather premature in this regard. Moreover, such a suggestion would conflict with aspects of legal clarity, which must find consideration in both international human rights law and international criminal law.

This conclusion actually corresponds to current realities in international criminal law: the Report of the Secretary General on the establishment of the ICTY, for example, mentions customary international law only as a source of law for the tribunal.[63] However, this will be discussed more in more depth below, when we consider the influence of the *nullum crimen sine lege* principle on the formation of customary international criminal law. Nonetheless, it must be borne in mind that 'general principles of law' and even 'general principles of international law', the existence of which is not denied here, can still *influence* the formation of customary international human rights law and international criminal law: such principles, just like any other source of international law may shape and even determine the normative content of new customary rules.

IV. INTERPRETATIVE METHODS AND THEIR RELATIONSHIP WITH THE FINDING OF CUSTOMARY INTERNATIONAL LAW

When we discuss the actual content of new or existing rules of customary international law, another issue needs closer examination: one needs to differentiate between the scope of an *existing* rule and the actual discovery of a *new* rule of international law. As this study aims to depict the development and definition of the prerequisites and methods employed for the formation of a *new* rule of customary international law, this differentiation is of particular relevance: First of all, it may provide a helpful distinction between *lex ferenda* and *lex lata* aspects, as it ultimately determines what is still covered by the normative content of a certain rule of international law. On the other hand, it may determine the point in time at which the search for a new rule of customary international law is really necessary.

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[63] See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704 (1993), 9, para. 34; contrast: Article 21 (1) (c) ICC Statute, which mentions "general principles of law derived by the Court from national laws of legal systems of the world, including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with the Statute."

In the area where treaty overlaps with customary law, this differentiation between new and existing rules of international law has become most important. For example, in several cases before the ICJ, the same norms under both customary international law and international treaty law were invoked by the parties.[64] In the case of the ICTY, the parallel invocation of custom and treaty rules resulted from the uncertain status and applicability of particular treaty norms.[65] Moreover, norms contained in a treaty may not have the same scope as under customary international law,[66] with either the treaty or the customary norm being wider than the other. Accordingly, one of the sources is sometimes invoked to make up for the deficiencies of the other. However, this last issue should not serve as a starting point for delving right into the controversy about the existence of so-called *lacunae* in international law.[67] Rather it is simply one area in which interpretation becomes relevant. Lastly, treaty norms may also be invoked by the parties to support the contention that a new norm of customary international law has emerged.[68]

As will be seen later, international courts and tribunals frequently do not differentiate between the methods employed to arrive at the applicable law governing a particular issue. Hence, in many cases, it remains unclear whether the Court merely interpreted existing treaty law or whether it proved the existence of a new customary norm.[69] Sometimes it can even be shown that a court employed interpretive methods to ascertain the customary law character of a norm of international law.[70]

However, we should look not only at international case law when asking questions about the difference between treaty interpretation and custom formation. The same questions can arise when one looks at the different theories

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[64] For a prominent example regarding the prohibition of the use of force, the principle of non-intervention and the right to self-defence see ICJ, *Nicaragua Case*, ICJ Reports 1986, para. 176, 181, 203, 212.

[65] *Infra*, pages 180f.

[66] Compare the principle of self-defence and the discussion of the ICJ in the *Nicaragua Case*, ICJ Reports 1986, para. 176.

[67] For this expanding and very controversial field of international law see *U. Fastenrath* (Lücken); *J. Kammerhofer* (2004) 15 EJIL, 523ff;

[68] ICJ, *Continental Shelf Case*, ICJ Reports, 1969, para. 38 where the parties called upon the equidistance principle as part of customary international law because of its codification in the vienna convention on the continental shelf.

[69] See *Kupreškić*, Trial Chamber Judgment, Case No. IT-95-16-T, 14. January 2000, para. 524.

[70] *Čelebići*, Trial Chamber Judgment, Case No. IT-96-21-T, 16 November 1998; *Kupreškić*, Trial Chamber Judgment, 14. January 2000, Case No. IT-95-16-T; *Hadžihasanović*, Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Case No.: IT-01-47-AR72, 16 July 2003.

advanced for the formation of customary international law. One may wonder, for example, which criteria distinguish *opinio juris*-based approaches or even the deductive approach from the 'mere' interpretation of existing principles of international law, contained, amongst others, in international treaties?

Consequently, this part of the book examines the methods employed for the interpretation of international law and answers the question whether there are any criteria which distinguish methods of interpretation from the existing methods and theories to discern customary international law.

A. *Interpretation*

3. *The notion of interpretation*

Before analysing the relationship of custom and interpretation, we must first define what is understood here by the notion of interpretation. At the national level, interpretation is usually defined as a process of legal reasoning: "the art or process of discovering and ascertaining the meaning of a statute, will, contract, or other written document."[71] With regard to international law, it can be described as a method of demonstrating and ascertaining the specific content and meaning of a norm of international law in the light of the particular circumstances at hand.

Regarding the relationship of interpretation with other rules determining the conflict of norms in international law, MacLachlan demonstrated that interpretation "precedes all of these techniques, since it is only by means of a process of interpretation that it is possible to determine whether there is in fact a true conflict of norms at all."[72] However, many authors understand interpretation differently, and neither its exact scope nor content is uncontroversial.[73]

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[71] See *H. Black* (Black's Law Dictionary, 6th ed) 817.
[72] *C. MacLachlan* (2005) 54 ICLQ 286.
[73] *M. Bos* (Methodology) 106.

In the case law of the PCIJ[74] and the ICJ[75] as well as in international legal scholarship,[76] interpretation has been discussed only in the context of assessing the meaning of written international law.[77] This is obvious from the writings of de Vattel, who as early as 1758 formulated his 'ordinary meaning rule' for use in the interpretation of written international agreements:

> …il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation. Quand un Acte est conçû en termes clairs & précis, quand le sens en est manifeste & ne conduit à rien d'absurde; on n'a aucune raison de se refuser au sens que cet Acte présente naturellement.

Although there are some authors who have advocated applying rules of interpretation to customary international law,[78] it is commonly understood that such rules apply only to norms of written international law, i.e. treaty law. Hence, at least in this regard, it is neither common nor advisable to extend the rules on interpretation to rules deriving from other sources of international law.[79]

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[74] PCIJ, *Advisory Opinion on the treatment of Polish Nationals in Danzig*, Judgments, etc., Series A/B, No. 44, 33.

[75] The ICJ so far has discussed interpretation only with regard to international treaty law: *Corfu Channel Case* Merits, Judgment, ICJ Reports 1949, 24; *Case Concerning the Competence of the United Nations General Assembly for Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, 7; *Reservations to the Genocide Convention, Advisory Opinion*, ICJ Reports 1951, 24; *Ambatielos Case*, ICJ Reports 1952, 40; *Case Concerning Sovereignty over Certain Frontier Land*, ICJ Reports 1959, 257; *Certain Expenses*, Advisory Opinion, ICJ Reports 1962, 151; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, ICJ Reports 1970, 31, para. 53; *Aegean Sea Continental Shelf Case* ICJ Reports 1978, 23, para. 54; *Tehran Hostages Case*, Judgment, ICJ Reports 1980, para. 10; *Case Concerning the Frontier Dispute* ICJ Reports 1986, 567, 568, para. 28; *Territorial Dispute* ICJ Reports 1994, para. 52; *Case Concerning Maritime Delimitation and Territorial Questions Between Quatar and Bahrain*, Jurisdiction and Admissibility, ICJ Reports 1995, para. 35; *Case Concerning Kasikili/Sedudu Island* ICJ Reports 1999, 88; *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan* Judgment, ICJ Reports 2002, para. 37; *Oil Platforms Case* Preliminary Objection, Judgment, ICJ Reports 1996, 812, para. 23; *Avena and other Mexican Nationals v. the United States of America* ICJ Reports 2004, para. 84; *Consequences of the Construction of a Wall in the Palestinian Territories*, Advisory Opinion, ICJ Reports 2004, para. 94; for the interpretation of a written unilateral declaration see *Anglo-Iranian Oil Case* ICJ Reports 1952, 104.

[76] See *R. Bernhardt* in *id*., EPIL vol. 2, 1417.

[77] Only most recently, *A. Orakhelashvili* has presented a more holistic approach to interpretation of international rules. For this most detailed work on interpretation *see id. The Interpretation of Acts and Rules in International Law* (Oxford University Press, Oxford 2008).

[78] See *M. Bos* (Methodology) 255–258; ICJ, *Barcelona Traction Light and Power Company* ICJ Reports 1970, dissenting opinion Judge Tanaka, para. 116.

[79] See also *R. Bernhardt* in *id.* EPIL vol. 2, 1420ff.

2. *Underlying concepts*

As is the case with the theory underlying the concept of customary international law, the theoretical concepts underlying interpretation and its particular methods are the subjects of much controversy in international legal scholarship.[80] The varying views on interpretation yet again depend on each interpreter's individual idea of the nature of international law.[81] Schüle commented that this results from the fact that international law cannot be understood both theoretically and constructively if it is still unclear where this law comes from, how it comes into existence and how it ceases to exist.[82]

In early writings on the topic of treaty interpretation, three main theoretical streams were usually differentiated. The three approaches advanced were subjective, textual and functional.[83] Subjective approaches to interpretation have a strong voluntarist background. They regard only the sovereignty of states and their will as relevant for treaty interpretation.[84] On the other hand, objective theories consider the ordinary meaning of the text of a treaty as relevant for its interpretation.[85] Functional theory, finally, takes the aims of the treaty in question as well as of law in general – to provide a judicial order based on the principle of justice[86] – as its starting point and ultimate aim.[87] Generally speaking, it tends more towards naturalist concepts of international law.[88]

Today, however, methods and means of interpretation have become more diverse.[89] It can no longer be contended that interpretation is dominated by subjective, objective or functional approaches, which, very roughly, represent

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[80] See *Sorel* in *O. Corten*, and *P. Klein* (VCT Commentaire) vol. 2, 1332.

[81] See *R. Zippelius* (Methodenlehre) 23.

[82] *A. Schüle* in *Berichte der Deutschen Gesellschaft für Völkerrecht* (1959) 7,8: "Diese Verbindung liegt darin, dass das Völkerrecht theoretisch-konstruktiv nicht begriffen werden kann, wenn nicht zugleich auch geklärt wird, woher dieses Recht stammt, wie es als Ganzes und in seinen Arten zur Entstehung kommt und unter welchen Umständen es wieder außer Kraft tritt."

[83] See *G. Fitzmaurice* (1957) 33 BYBIL, 204; *U. Fastenrath* (Lücken) 187.

[84] *Bartos*, *Tunkin* at the 765th meeting, A/Cn.4/167/Add.3, YBILC, 1964 I, 279; *G. Tunkin* (Völkerrechtstheorie) 235; see ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Quatar and Bahrain*, dissenting opinion Judge Schwebel, 27.

[85] See *R. Falk* (1969) 63 AJIL, 510.

[86] *U. Fastenrath* (Lücken) 188.

[87] *U. Fastenrath* (Lücken) 188, 189.

[88] Fastenrath, for example, names the striving for a just and value-oriented world order as one aim of treaty interpretation. See *U. Fastenrath* (Lücken) 188.

[89] See *S. Ratner, A. Slaughter* (1999) 93 AJIL, 291ff.

voluntarist, normative or naturalist tendencies.[90] Like the discussions on the theoretical foundations of customary international law, depending on the theoretical background of each scholar, realist as well as critical concepts of interpretation can be differentiated; there are those who may combine approaches[91] or deny them altogether.[92]

The subjective and functional conceptions of interpretation discussed above have been criticised for bearing the same weaknesses as entirely subjective or positivist approaches to customary international law. Koskenniemi, for example, points out that a subjective approach to interpretation is not functionable. He maintains that intent cannot be the ultimate goal of interpretation if it also constitutes its starting-point.[93] Following his view, an entirely objective concept of treaty interpretation is similarly impossible. The consensual nature of the international system denies that there is such thing as "objective normality" by which a treaty may be evaluated. As long as the system of treaty interpretation lacks a theory about the evidentiary value of different possible manifestations of intent, he finds that there will never be objective interpretation without reference to some subjective criteria.[94] This critique illustrates most vividly the weaknesses of subjective as well as objective approaches. However, even functional approaches to interpretation can be criticised for providing a rational model which leans too far towards naturalist conceptions, building upon ideals of universal justice or a just and value-oriented world order. As desirable as it may be, taking this as the ultimate aim of interpretation is not concordant with actual realities in international law.

Hence, as was shown in great detail when we assessed the theories and concepts underlying customary international law, it is nearly impossible to countenance a concept which may not have some weakness, tending towards either a too subjective or unattainable objective standard. Rather, it seems that Sorel is correct in stating that:

> …dans la société post-moderne, toutes les interprétations semblent être des interprétations justes, c'est-à-dire juste des interprétations; autrement dit, des interpretations qui correspndent seulement aux aspirations et aux intérêts des différents groupes sociaux. Tout réside donc dans l'opinion que l'on se fait du phénomène interpretatif, autrement di de l'interprétation de l'interprétation.[95]

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[90] But see *U. Fastenrath* (Lücken) 188.
[91] *M. McDougal and H. Lasswell and J. Miller* (Interpretation) 40, 111.
[92] *M. Koskenniemi* in BIICL (Theory) 22.
[93] *M. Koskenniemi* (Apology 1989) 294.
[94] See also *M. Koskenniemi* (Apology 2005) 336, 337.
[95] *Sorel* in *O. Corten* and *P. Klein* (VCT Commentaire), 1334.

Thus, with regard to the underlying methodological approach to interpretation, it appears more prudent to follow the concept of Simma and Schüle, who support methodological pluralism; i.e. the use of the whole spectrum of juridical methods to find solutions to individual normative problems in international law.[96] The provision of solutions to individual problems with the help of methodology turns out to yield more results than a methodologically "pure" concept which, because of its "purity", loses any practical relevance and plausibility.[97]

B. *Particular methods: Articles 31–33 VCT*

Rules applicable to the interpretation of international treaties were codified in the 1969 Vienna Convention on the Law of Treaties (VCT), and, more particularly, in its Article 31 to 33. According to the case law of the ICJ, we can say with certainty that these rules are by now universally accepted and constitute customary international law.[98]

1. *Article 31 (1) and (2) VCT*

Article 31 (1) VCT constitutes the starting point of any interpretation of written international law. The paragraph lays down de Vattels ordinary meaning rule in a rather broader context, stating that generally a treaty shall be interpreted according to the ordinary meaning of its text and in the light of its object and purpose.[99] Paragraph (2) of Article 31 shows which additional instruments are to be considered to ascertain object and purpose in a particular case. The Article lists, amongst others, instruments which were made by the parties with regard to the treaty, subsequent agreements or subsequent practice.

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[96] *B. Simma* in *H. v. Bonin* (Festschrift Kolb) 340, 341; see *A. Schüle* in *Berichte der Deutschen Gesellschaft für Völkerrecht* (1959) 24.

[97] *B. Simma* in *H. v. Bonin* (Festschrift Kolb) 342.

[98] ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 2007, para. 160; *Consequences of the Construction of a Wall in the Palestinian Territories*, Advisory Opinion, ICJ Reports 2004, para. 94; *Avena and other Mexican Nationals v the United States of America*, ICJ Reports, para. 84; *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan*, ICJ Reports 2002, para. 36, 37.

[99] Article 31 (1) VCT.

2. *Article 31 (3) (c) VCT*

Until recently, Article 31 (3) (c) VCT received little attention from international courts and scholars of international law.[100] There seemed to be an almost 'endemic' reluctance to refer to it.[101] However, the most significant reference to the principle was made by the ICJ in order to interpret the provisions of the Treaty of Amity, Economic Relations and Consular Rights concluded between the US. and Iran in the *Oil Platforms Case*.[102] Even more recently, it has gained some prominence as an ordering principle in the debate on the fragmentation of international law before the ILC.[103]

Article 31 (3) (c) VCT actually involves customary international law "the other way around" in the application of international treaty law. It provides that 'any relevant rules of international law applicable to the relations between parties' shall be taken into account, together with their context, in the interpretation of an international treaty. As 'any relevant rules' include rules contained in customary international law, the Article establishes that customary norms may determine the interpretation of the norms of international treaty law. However, this is the case only if the customary norm relates to the subject matter of the treaty norm and can be considered binding for

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[100] But see *P. Sands* (1998) 1 YHRDL, 85; *C. MacLachlan* (2005) 54 ICLQ 279ff; brief references to the principle may be found in the following judgements: Iran-US Claims Tribunal, *Esphahanian v. Bank Tejarat*, Iran-US C.T.R., vol. 2, 1983-I, 157; ECtHR, *Golder v. the United Kingdom*, Judgment 21 February 1975, ECtHR Series A (1975) No. 18, 13–14, paras. 27–31; *Loizidou v. Turkey* (*Merits*) Judgment of 18 December 1996, ECtHR 1996-VI, 2231, para. 44; *Al-Adsani v. the United Kingdom*, Judgment of 21 November 2001, ECtHR 2001 – XI, 100, paras. 55–6; see also *Fogarty v. the United Kingdom*, Judgment of 21 November 2001, ECtHR 2001 – XI, paras. 35–6; *McElhinney v. Ireland*, Judgment of 21 November 2001, ECtHR 2001 – XI, paras. 36–7; further: WTO AB: *EC – Measures Affecting the Approval and Marketing of Biotech Products* (7 February 2006) WT/DS291–293/INTERIM, 300, para. 7.70.

[101] *P. Sands* (1998) 1 YHRDL, 96, para. 28.

[102] ICJ, *Case Concerning Oil Platforms* ICJ Reports 2003, esp at para. 41.

[103] See ILC, Report by William Mansfield on 'The interpretation of Treaties in the Light of "any relevant rules of international law applicable in the relations between the parties" (Article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community', summarised in ILC, *Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.663/Rev.1, of 28 July 2004, para. 50ff; ILC, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 13 April 2006, UN Doc. A/CN.4/L.682, 231ff, para. 424ff; further: *P. Sands* (1998) 1 YHRDL, 85; *C. MacLachlan* (2005) 54 ICLQ 279; *Sorel* in *O. Corten* and *P. Klein* (VCT Commentaire) vol. 2, 1323.

both parties to the treaty.[104] Moreover, Sands has pointed out that in accordance with Article 31 (1) (c) VCT, customary rules can be invoked at any time when one is interpreting the norms of international treaty law: in contrast to the position under Article 32 VCT, they are not merely to be referred to where the meaning of a particular norm is "ambiguous, obscure, manifestly absurd or unreasonable".[105]

Article 31 (3) (c) has also been invoked as an international constitutional principle: through the involvement of general customary norms, it may be able to ensure some unity in the application of international treaty law. It has been maintained that the Article has "a potentially generic application, which could encompass the relationships between other areas and other norms, including human rights and development, trade and labour, and even the law of the sea and human rights."[106] This of course assumes that certain universally applicable customary norms have attained such importance within the international legal order that they can determine the interpretation and application of the rules of international treaty law.

The result of applying Article 31 (3) (c) VCT is that the customary norm "shall be taken into account" in the interpretation of a rule of international treaty law. Although this phrase is not defined in international law, it means that the adjudicatory body cannot decide on the application of the customary norm solely on a discretionary basis.[107] Thus, whether constitutional or not, Article 31 (3) (c) VCT shows that customary norms can contribute to the contemporary interpretation of the norms of international treaty law. At the same time, it illustrates once again the interdependence and interaction of custom and treaty: just as treaty norms can influence the development of new customary rules, customary norms can also influence current understanding of certain international treaty norms.

3. *Article 31 (3) (c) and the* Oil Platforms Case

To illustrate the interplay between custom and treaty further, let us consider the recent *Oil Platforms* judgement of the ICJ in more detail. In this dispute about the destruction of certain oil platforms in the Persian Gulf by the US, the parties Iran and the US had limited the jurisdiction of the Court to a joint treaty of amity. To justify the destruction of the platforms, the US claimed

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[104] See *P. Sands* (1998) 1 YHRDL, 102.
[105] See *C. MacLachlan* (2005) 54 ICLQ 291.
[106] See *P. Sands* (1998) 1 YHRDL, 87.
[107] See *C. MacLachlan* (2005) 54 ICLQ 103.

that the treaty did not preclude the application of force on the basis of the following Article:

> The present treaty shall not preclude the application of measures:
> …(d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.[108]

The Court, on the other hand, considered that this provision could not operate outside the scope of the permissible use of force and self-defence allowed under customary international law.[109] It hence concluded:

> … under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Article 31, paragraph 3*(c)*). The Court cannot accept that Article XX, paragraph 1*(d)*, of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by…the 1955 Treaty.[110]

The judgement of the Court is remarkable in two important aspects. First, it applied Article 31 (3) (c) VCT to a treaty which, notably, predated the VCT. Secondly, the judgement was uncompromising in incorporating the provisions of the treaty into the recognised customary rules on the *ius ad bellum*, i.e. the norms regulating the legitimate use of force under international law.[111] Regrettably, the Court refrained from expanding much upon the general role and interpretation of Article 31 (3) (c) VCT within the general system of treaty interpretation in international law.

4. *Further interpretative rules of the VCT*

Further interpretative rules are laid down in Articles 32 and 33 of the Vienna Convention. Article 32 VCT defines the so-called supplementary means of treaty interpretation. They include recourse to *travaux préparatoires* or the

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[108] See Art XX para. 1(d); ICJ, *Case concerning Oil Platforms* Judgment, ICJ Reports 2003, para. 32.

[109] ICJ, *Case concerning Oil Platforms*, Judgment, ICJ Reports 2003, para. 78.

[110] ICJ, *Case concerning Oil Platforms*, Judgment, ICJ Reports 2003, para. 41.

[111] Compare *C. MacLachlan* (2005) 54 ICLQ 309.

circumstances in which the treaty was concluded. However, as was indicated before, the rule contained in this Article applies only when the meaning of a treaty norm is "ambiguous, obscure, manifestly absurd or unreasonable". Article 33 VCT includes further rules for the interpretation of treaties concluded in one or more languages.

5. *Subsidiary means of interpretation*

It is evident from the wording of Article 31 (3) (c) VCT that the list of interpretative methods contained in Article 31–33 VCT is not exhaustive. Methods and means of interpretation vary and they are frequently disputed.[112] This also becomes clear when one views the *travaux préparatoires* to Arts 31–33 VCT: they suggest that the rules contained therein represent merely a limited selection of interpretative techniques which can apply at international level. In a commentary preparatory to the Vienna Convention,[113] Special Rapporteur Waldock, for example, emphasised the non-obligatory character of the rules on treaty interpretation applied by international courts.[114] Most of the time, he maintained, interpretative principles and rules had been taken from the national background of the individual judge applying them. Thus, Waldock explained, it could be held with certainty that they applied to the same extent and with the same character at international level.[115] Rather, they were

> …, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions which they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document (…) Even when a possible occasion for their application may appear to exist, their application is not automatic and depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory, and the interpretation of documents is to some extent an art, not an exact science.[116]

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[112] YBILC 1966 II, 218.

[113] See *H. Waldock*, 'Third Report on the Law of Treaties', A/CN.4/167 in YBILC 1964 II, 6ff, 54, 58; YBILC 1966 II, 218.

[114] See Ruda at the 765th meeting, A/Cn.4/167/Add.3, YBILC, 1964 I, 277.

[115] See *H. Waldock*, 'Third Report on the Law of Treaties', A/CN.4/167 in YBILC 1964 II, 6ff, 54, 58; YBILC 1966 II, 218.

[116] *H. Waldock*, 'Third Report on the Law of Treaties', A/CN.4/167 in YBILC 1964 II, 6ff, at 54.

In current literature, at least four interpretative methods have been agreed to apply on the international plane: grammatical, systemic, historical and teleological interpretation.[117] However, other methods have been added,[118] of which subsequent practice and the relevance of changing social conditions[119] are probably the most frequently mentioned. Several principles like the *ejusdem generis* rule[120] or the *argumentum a contrario*[121] are also held to dominate the process of legal interpretation. Most of the time they are derived from national jurisdictions, and caution must be exercised when applying them to international circumstances.[122]

To conclude, at least from a theoretical perspective interpretative methods seem to exist *ad infinitum*. Moreover, the foregoing analysis still has not clarified which approaches ultimately apply in a certain case, either as a matter of Articles 31–33 VCT or as a matter of customary international law. Nevertheless, the actual application of interpretative techniques by international courts and tribunals may provide a strong indication of which methods have ultimately found acceptance on the international plane.

C. *Interpretation of treaties by the ICJ, the ICTY and the ICTR*

The next section of the book will thus analyse the jurisprudence of the ICJ, the ICTY and the ICTR with regard to their application of interpretative methods. The ICJ has referred to interpretative methods in many of its judgements.[123] The ICTY has also attempted to formulate 'general principles of interpretation' applicable in the field of international criminal law on

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[117] See *U. Fastenrath* (Lücken) 176; *G. Fitzmaurice* (1957) BYIL, 207; *R. Bernhardt* in *id.* EPIL *vol.* 3, 1420ff; see ICTY: *Tadić*, Decision on Defence Motion on Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 71ff. The grammatical, systemic and historical methods date back to the work of von Savigny of 1802/1803: see *F. K. von Savigny* (Juristische Methodenlehre) 19.

[118] See *G. Fitzmaurice* (1957) 33 BYIL, 207; *R. Bernhardt* in *id.* EPIL vol. 3, 1420ff; *M. McDougal and H. Lasswell and J. Miller* (Interpretation).

[119] *R. Bernhardt* in *id.* EPIL vol. 3, 1421.

[120] See *Kupreškić*, Trial Chamber Judgment, IT-95-16-T, 14 January 2000, para. 564.

[121] *U. Fastenrath* (Lücken) 135.

[122] *R. Bernhardt* in *id.* EPIL vol. 3, 1421.

[123] For the ICJ see, for example *Avena and other Mexican Nationals v. the United States of America*, para. 84; *Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan*, ICJ Reports 2002, para. 625; *Territorial Dispute* Judgment, ICJ Reports 1994, para. 41, 21–22.

various occasions.[124] The ICTR, however, has not discussed the application of interpretative methods as intensively.[125]

While we try to determine which methods have been applied throughout the jurisprudence of the ICJ, the ICTY and the ICTR, particular attention will be drawn to the immediate relationship between interpretation and methods of ascertaining customary international law. An attempt will be made to clarify which methods are used for ascertainment of new customary norms and which for the interpretation of existing norms of international treaty law. As was pointed out earlier, it is of particular interest for our assessment whether there are any overlaps between the individual methods employed for the ascertainment of custom and the interpretation of international treaty law.

1. *Grammatical interpretation, supporting elements and systematic interpretation*

The ICJ, ICTY and ICTR usually try to orientate their jurisprudence concerning the interpretation of international instruments along the customary rules of interpretation expressed in the VCT.[126] Thus, the most important method referred to in their judgements is the literal or grammatical inter-

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[124] See ICTY: *Čelebići*, Trial Chamber Judgment, 16 November 1998, Case No. IT-96-21-T, para. 158–171; *Furundžija*, Appeals Chamber Judgment, 21 July 2000, Case No. IT-95-17/1-A, para. 271–277; *Stakić*, Trial Chamber Judgment, Case No. IT-97-24-T, 31 July 2003, para. 412–416. Another assessment of the interpretative methods used by the international *ad hoc* criminal tribunals can be found in *W. Schabas* (UN International Criminal Tribunals), 80–82.

[125] See ICTR: *Akayesu*, Trial Chamber Judgment, 2 September 1998, Case No. ICTR-96-4-T, para. 501.

[126] For the ICJ see, for example: *Avena and other Mexican Nationals v. the United States of America*, ICJ Reports 2004, para. 84; *Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan*, ICJ Reports 2002, para. 625; *Territorial Dispute* Judgment, ICJ Reports 1994, para. 41, 21–22; For the ICTY see *Čelebići*, Appeals Chamber Judgment, Case No. IT-96-21-A, 20 February 2001, para. 67; *Furundžija*, Appeals Chamber Judgment, 21 July 2000, Case No. IT-95-17/1-A, para. 271–277; *Jelisić*, Trial Chamber Judgment, 14 December 1999, Case No. IT-95-10-T, para. 61; *Sikirica*, Trial Chamber Judgment, Case No. IT-95-8-T, 3 September 2001, para. 63; *Stakić*, Trial Chamber Judgment, Case No. IT-97-24-T, 31 July 2003, para. 411; *Tadić*, Appeals Chamber Decision on Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 44; for the ICTR: *Akayesu* Trial Chamber Judgment, 2 September 1998, Case No. ICTR-96-4-T, para. 501ff.

pretation of a treaty.[127] It focuses on the treaty text and the ordinary meaning of its terms.[128]

However, it can be observed that for the specification of a certain word or notion recourse is often made to so-called soft law, i.e. to resolutions of the UNGA or other organs of international organisations. Recourse is also made to treaties before they come into force, the work of the ILC, general comments of the Human Rights Committee and resolutions of the Institute of International Law or of other institutions vested with a similar authority.[129] Further specification is provided by fundamental decisions of international courts and tribunals, or by their advisory opinions.[130] Ample reference can be found to additional instruments like Security Council resolutions, or the report of the Secretary General on the establishment of the tribunal, especially in the jurisprudence of the ICTY.[131] The ICJ has also emphasised various other occasions on which the preparatory work of a treaty and the circumstances of its conclusion may be referred to as a 'supplement' to grammatical interpretation.[132]

In contrast to this recourse to grammatical interpretation, the ICTY Trial Chamber decision in the *Stakić Case* warned that great caution had to be exercised with regard to any systematic interpretation of the rules applicable before it. It found that unlike national laws, the provisions of the Statute do not form a 'coherent closed system of norms'.[133]

2. *Object and purpose, effectiveness and other circumstances*

As with the application of the grammatical method of interpretation, the ICJ has had recourse to preceding instruments or other related indicia when

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[127] See PCIJ, *Polish Postal Service in Danzig*, Series B, No. 11, 39; ICJ, *Case concerning the Competence of the United Nations General Assembly for Admission of a State to the United Nations*, ICJ Reports 1950, 7, 8; *Ambatielos Case* ICJ Reports 1952, 40, 45; *Territorial Dispute*, Judgment, ICJ Reports 1994, 21–22, para. 41; *Case Concerning Kasikili/Sedudu Island* ICJ Reports 1999, 88; ICTY: *Aleksovski*, Trial Chamber Judgment, 25 June 1999, Case No. IT-95-14/1-T, para. 75.

[128] *R. Bernhardt* in *id.* EPIL vol. 3, 1420.

[129] *U. Fastenrath* (Lücken) 179; See ICTY, *Tadić*, Decision on Defence Motion on Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 45.

[130] *U. Fastenrath* (Lücken) 180.

[131] See *Tadić*, Appeals Chamber Judgment, Case No. IT-94-1-A, 15 July 1999, para. 295, 296.

[132] ICJ, *Territorial Dispute* ICJ Reports 1994, Judgment, 21–22, para. 41; *Case Concerning Maritime Delimitation and Territorial Questions between Quatar and Bahrain*, ICJ Reports 1995, Jurisdiction and Admissibility, para. 33.

[133] ICTY: *Stakić*, Trial Chamber Judgment, Case No. IT-97-24-T, 31 July 03, para. 413.

considering the object and purpose of a treaty norm.[134] The ICTY, on the other hand, has also determined the object and purpose of a norm by reference to the corresponding obligation contained in customary international law.[135]

Though the customary rules of interpretation embodied in the VCT remain the major rules of interpretation employed by the ICJ, ICTY and ICTR, the ICJ has not refrained from having recourse to principles not mentioned therein. For example, it has referred to the principle of effectiveness on various occasions.[136] The ICJ has further emphasised the importance of taking into account the conditions of a particular legal system at the time of interpretation. In its *1971 South West Africa Advisory Opinion*, it held:

> That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.[137]

Moreover, in the *Tehran Hostages Case*, the ICJ stressed that an interpretation of an international legal instrument always had to take into account the surrounding circumstances.[138] In academic literature, 'changing social conditions'[139] or the 'emergent purpose'[140] of a treaty have also been mentioned as guidelines to interpretation.

Finally, in the *Stakić* Trial Chamber decision, the ICTY also enlisted subsidiary means ("sources") of interpretation to provide guidance on the interpretation of its Statute:

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[134] ICJ, *Reservations to the Genocide Convention, Advisory Opinion*, ICJ Reports 1951, 24.

[135] *Tadić*, Appeals Chamber Judgment, Case No. IT-94-1-A, 15 July 99, para. 287; *Blaškić* Trial Chamber Judgment, ICTY, Case No. IT 95 14 T, 29 July 2004, para. 314.

[136] PCIJ, *Lighthouses Case* Series A/B, No. 62, 1934, 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 35, para. 66; *Aegean Sea Continental Shelf Case* ICJ Reports 1978, 22, para. 52; *Territorial Dispute* Judgment of 3 February 1994; para. 52.

[137] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 31, para. 53.

[138] *Tehran Hostages Case*, ICJ Reports 1980, para. 10.

[139] *R. Bernhardt* in *id.* EPIL vol. 3, 1421.

[140] *G. Fitzmaurice* (1951) 28 BYBIL 8; *id.* (1953) 33 BYBIL, 208.

> the Trial Chamber has used previous decisions of international tribunals, the primary source being judgements and decisions of this Tribunal and the Rwanda Tribunal, and in particular those of the Appeals Chamber. As a secondary source, the Trial Chamber has been guided by the case-law of the Nuremberg and Tokyo Tribunals, the tribunals established under Allied Control Council Law No. 10, and the Tribunal for East Timor.[141]

3. *Customary international law*

The influence of customary international law on the interpretation of certain provisions of the ICTY Statute was emphasised by the *Furundžija* Appeals Chamber judgement. In that case, the Chamber pointed out:

> If there is a relevant rule of customary international law, due account must be taken of it, for more than likely, it will control the interpretation and application of the particular provision.[142]

However, the Chamber also stressed that ultimately the existence of certain customary rules would not decisively influence the interpretation of a particular treaty rule. Rather, the context, purpose and ordinary meaning of a rule still had to be taken into account.[143]

4. *Assessment*

Assessment of the jurisprudence of the ICJ, the ICTY and the ICTR has shown that there is indeed an interplay of interpretation and the ascertainment of customary norms: customary norms, as well as evidence of their individual elements, i.e. resolutions of the UNGA and of the ILC, decisions of international courts and tribunals and human rights bodies and so forth have often been employed by the cited courts to support a particular interpretation of the provisions of international instruments. However, this means, on the other hand, that methods of ascertaining the formation of customary norms may seldom be differentiable from interpretative methods. At least at the current stage of our investigation it may be concluded that there does not seem to be a sharp dividing line between treaty interpretation and custom formation. Rather, the relationship between interpretation and the formation of new customary law appears as a grey zone in which methodologies

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[141] ICTY: *Stakić*, Trial Chamber Judgment, Case No. IT-97-24-T, 31 July 2003, para. 414.

[142] *Furundžija*, Appeals Chamber Judgment, Case No. IT-95-17/1-A, 21 July 2000, para. 275.

[143] *Furundžija*, Appeals Chamber Judgment, Case No. IT-95-17/1-A, 21 July 2000, para. 280.

have merged into one another, particularly in areas where both methods are applicable. Yet, it still needs to be assessed here whether this conclusion is also true for another method, which needs further consideration, namely that of analogy.

D. *Analogy*

1. *Introduction*

Though analogy is not an interpretative method in the true sense of the word, it is a method which has nevertheless been utilised to discern new rules of law, also in an international context. It has been introduced into international law mostly by scholars. Meron in particular argued that an analogous application of customary norms of international human rights law could affect the interpretation and status of norms of international humanitarian law.[144] However, analogy has also found application in international jurisprudence. Both the ICJ and the ICTY have – on several occasions – analogously applied rules of international treaty law and of customary international law.[145]

Because analogy extends the normative content of a rule to a set of facts which is similar to that covered by its regular scope of application, it seems hardly differentiable from situations which require an enquiry into the formation of a new customary rule. Both methods utilise the same situation as a starting point for their application: a new set of facts requires regulation. This close similarity alone makes it worthwhile assessing the method of analogy and its particular scope of application in more detail. Moreover, the same considerations which lead the enquiry into the methods of interpretation apply also to the issue of analogy: differentiation between analogy and the methods of custom-formation helps to strike a balance between *lex ferenda* and *lex lata* aspects and enables us to determine when one of these techniques ultimately becomes relevant.

2. *Notion and theoretical underpinnings*

As was indicated earlier, analogy is generally understood as a comparative method which extends the use of a legal rule to a set of facts which is similar

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[144] *T. Meron* (2003) RdC, vol. 301, 27.

[145] See below pages 104f.

to that regulated by the rule.[146] Though it is not discussed as frequently as other issues, there is extensive debate on analogy as an interpretative method in international law. Generally speaking, it is dominated by three controversies. First, debate is influenced by the individual Civil or Common Law background of each international scholar. Secondly, it is – again – predetermined by a scholar's theoretical perception of international law. Thirdly, discussion on analogy is closely connected to the problem of *lacunae* in international law.

Most Civil Law systems regard methods of interpretation as limited by the literal sense of the norm; they are tied to the formulation of the law.[147] Thus, analogy always goes beyond the literal sense: it operates in situations where a factual matrix is not covered by this literal scope of a norm.[148] In Common Law systems, due to the interplay of statutory provisions and precedents, analogy is used in a slightly wider sense.[149] Black's law dictionary defines it as an

> identity or similarity in proportion, where there is no precedent in point. In cases on the same subject, lawyers have recourse to cases on a different subject-matter, but governed by the same general principle.[150]

Following MacCormick, analogy is understood here in the sense "that a rule can contribute to a decision on facts to which it is not directly applicable."[151] This is clearly a more open definition of analogy than that accepted in Civil Law jurisdictions; it makes the application of analogy independent of the literal scope of the norm.

As was elaborated earlier, opinions on the potential application of analogy in international law differ depending on the theoretical background of each scholar. Herczegh, for example points out that analogy brings into action "the process of the evolution of international customary law."[152] For Kelsen, in contrast, the use of analogy amounts to law-making which, currently, is not legitimised by a positive rule of international law.[153] Several other authors

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[146] See *U. Fastenrath* (Lücken) 134; see also *M. Bos* (Methodology) 143.
[147] See *K. Strupp* (1934) RdC, vol. 47, 337.
[148] *R. Zippelius* (Methodenlehre) 73.
[149] For the field of international criminal law this has also been affirmed by *M. C. Bassiouni* (Crimes 1992) at 88, 89; See *B. Broomhall*, Art. 22, in *O. Triffterer* (Commentary) 457, para. 39.
[150] *H. C. Black* (Black's Law Dictionary, 6th ed..) 84.
[151] *N. MacCormick* (Legal Reasoning) 155.
[152] Emphasis in the original. *G. Herczegh* (General Principles) 114.
[153] *H. Kelsen* (Principles) 305.

refuse to grant analogy a role on the international plane.[154] Finally, there are authors who want to allow its application only as far as it is complementary to the will of the parties.[155]

Moreover, discussion on the application of analogy is closely connected to the question of the existence of *lacunae*, i.e. gaps in international law. If a narrow definition of analogy is adopted, the existence of *lacunae* is very relevant: within a strict concept of analogy a *lacuna* will constitute a prerequisite for its application.[156] On the other hand, the existence of *lacunae* is often doubted by authors.[157] Writers relying on entirely voluntarist conceptions of international law hardly ever assume their existence,[158] as their understanding of the coming into existence of rules of international law is entirely dependent on the will of states. Yet, a *lacuna* can certainly not be assumed if international law has explicitly decided against the regulation of a certain field of law.[159]

Conversely, a wider definition of analogy which understands the concept as an interpretative method may narrow down the definition of *lacunae* or even eliminate their existence altogether. Bleckmann, for example, maintains that a *lacuna* describes all those cases in which a certain norm could not be applied without invoking and developing further legal rules.[160] Similarly, Bos views *lacunae* to exist "when in a certain NCL (normative concept of law, B.S.) no rule exists applicable to a certain factual situation."[161] Hence, he concludes, "no *lacuna* exists where analogy is still available."[162]

3. *Analogy in the jurisprudence of ICJ and ICTY*

Such a wider conception of analogy, which does not require the existence of a *lacuna* as a prerequisite for its application, corresponds to the understand-

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[154] Contrast *D. Anzilotti* (Lehrbuch des Völkerrechts) 82–84; *H. Kelsen* (Principles) 305; *K. Strupp* (1934) RdC, 1934 I, 337.

[155] *G. Dahm and J. Delbrück and R. Wolfrum* (Völkerrecht, 2nd ed) vol. I/1 81.

[156] See *R. Zippelius* (Methodenlehre) 64 et seq; *J. H. W. Verzijl* (International Law) vol. 1, 50–51; *L. Siorat* (Lacunes) 148; for an extensive exploration of the problem of gaps, including definitions, see *U. Fastenrath* (Lücken) 213ff.

[157] See *U. Fastenrath* (Lücken).

[158] See *K. Strupp* (1934) RdC, vol. 47, 337–339; *J. Kammerhofer* (2004) 15 EJIL, 544.

[159] *A. Bleckmann* (Methoden) 204.

[160] *A. Bleckmann* (Methoden) 207.

[161] *M. Bos* (Methodology) 144.

[162] *M. Bos* (Methodology) 144.

ing of analogy of the ICJ[163] and ICTY.[164] Both courts have made use of analogous argument in several of their judgements. However, two judgements of the ICJ are worthy of special mention: in the *Barcelona Traction Light and Power Case*, the Court referred to analogy when determining the nationality of the Barcelona Traction company. In the oral submissions to the case it was argued that the rules determining the diplomatic protection of individuals working in an international organisation should apply analogously to companies.[165] Nonetheless, the Court emphasised that the rules determining the nationality of a company had to be derived from an analogy with the rules determining the nationality of natural persons under international law.[166] In the end, however, the 'genuine link' test developed by the Court to establish the nationality of natural persons[167] could not apply due to the factual and legal particularities of the case.[168]

Another reference to analogous argument may be found in the *Nicaragua Case*. Here, the Court suggested utilizing the rules which govern the termination of treaties under international law. In the Court's view, they were to be applied to the unilateral declaration of the United States under Article 36

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[163] See, for example: ICJ, *Legal Consequences of the Construction of a Wall in the Palestinian Territories*, separate opinion *Higgins*, ICJ Reports 2004, 208, para. 5; *Nicaragua Case*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, 420, para. 63; *Yerodia Case* ICJ Reports 2002, dissenting opinion *Al-Khasawneh*, 98, para. 6; *ibid.* dissenting opinion *Van den Wyngaert*, 146 para. 14; *Continental Shelf* ICJ Reports 1982, separate opinion *Judge Arechega*, 137, para. 115; *Appeal relating to the jurisdiction of the ICAO Council*, ICJ Reports 1972, separate opinion *Onyeama*, 110; *Legal Consequences of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970)*, Judgment, ICJ Reports 1971, separate opinion *De Castro*, 174, para. 6, 184, para. 3, 268, para. 72; *Case Concerning the Barcelona Traction Light and Power Company, Limited* ICJ Reports 1970, 38, para. 53, 42, para. 70; *ibid.*, separate opinion *Sir Fitzmaurice*, 80, para. 28; *Reparation for Injuries Suffered by Agents of the United Nations in Course of Performance of Duties*, Advisory Opinion ICJ Reports 1949, 182.

[164] *Kordić, Čerkez*, Appeals Chamber Judgment, 17 December 2004, Case. No. IT-95-14/2-A, para. 169; *Jelisić*, Appeals Chamber Judgment, Case No. IT-95-10-A, 5 July 2001, para. 11; *Tadić*, Trial Chamber Judgment, Case No IT-94-1-T, 7 May 1997, para. 639; *Tadić*, Appeals Chamber Judgment, Case No. IT-94-I-A, 15 July 99, para. 119; *Čelebići*, Trial Chamber Judgment, Case No. IT-96-21-T, 16 November 1998, para. 162.

[165] *Case concerning the Barcelona Traction Light and Power Company, Limited*, ICJ Reports 1970, 38, para. 53.

[166] *Case concerning the Barcelona Traction Light and Power Company, Limited* ICJ Reports 1970, 42, para. 70.

[167] *Nottebohm Case*, ICJ Reports, 1951.

[168] *Case concerning the Barcelona Traction Light and Power Company, Limited* ICJ Reports 1970, 42, para. 70.

(3) of the ICJ Statute.[169] The analogous application of certain domestic rules was also put forward by the parties to the *Continental Shelf Case*. However, it ultimately did not appear in the Court's final decision.[170]

The ICTY considered the application of analogy on various occasions. For example, in the *Čelebići Case*, the Trial Chamber named analogy as one of the means to be applied if the grammatical interpretation of a norm did not yield convincing results.[171] Moreover, in the *Tadić Appeals Chamber* Judgement, the Court analogously applied the rules established for *ultra vires* actions of state agents to determine the non-international character of the conflict in ex-Yugoslavia.[172] Finally, in the *Kordić Trial Chamber* decision, the Court even derived individual criminal responsibility for violations of Additional Protocol I to the Geneva Conventions by analogy:

> By analogy, violations of Additional Protocol I incur individual criminal liability in the same way that violations of common Article 3 give rise to individual criminal liability.[173]

4. *Final considerations on the relationship between analogy and custom*

The findings of the ICJ and the ICTY demonstrate that analogy seems to have been recognised as a method of discerning applicable norms of international law in a particular situation. However, the exact scope of the concept may not be established from the cases examined. The ICTY in particular does not yet seem to have a clear-cut stand on this: whereas the *Čelebići* Trial Chamber defined its scope narrowly in the Civil Law tradition, the *Tadić* Appeals Chamber and the *Kordić* Trial Chamber appeared to adopt a more open notion which applies to written international law and customary international law alike: the legal rules analogously applied belonged in both cases to established customary international law. On the other hand, the ICJ also applied both treaty law and customary rules to draw analogies from them for other contexts.

However, the application of analogies in international law, and to rules of customary international law in particular, remains problematic and has thus

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[169] *Nicaragua Case*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, 420, para. 63.

[170] *Continental Shelf*, 24 February 1982, ICJ Reports 1982, separate opinion Judge *Arechega*, 137, para. 115; on private law analogies in international law see *H. Lauterpacht* (Analogies).

[171] *Čelebići*, Trial Chamber Judgment, Case No. IT-96-21-T, 16. November 1998, para. 162.

[172] *Tadić*, Appeals Chamber Judgment, Case No. IT-94-I-A, 15 July 1999, para. 119.

[173] *Kordić, Čerkez*, Appeals Chamber Judgment, 17 December 2004, Case. No. IT-95-14/2-A, para. 169.

been rejected by most international scholars.[174] Bos, for example, maintains that "the specificness [sic!] of behaviour and the frailty of the psychological element in custom […] are very much in the way of analogy in the application of custom."[175] Such an argument shows that an analogous application of customary rules contravenes at least the voluntarist conception of customary international law: If an international rule has emerged for a particular set of facts, there may not have been any intention for it to be extended to another set of facts, even if similar. Moreover, if the emergence of a rule is already controversial, use of analogy may not be advisable at all. In addition, one would have to take into account whether the analogous extension of the rule was covered by supporting *opinio juris* or state practice.

This ultimate consideration only demonstrates, however, that the concept of analogy is in fact hardly compatible with the concept of customary international law: if the application of analogy is made dependent on its support by existing *opinio juris* and state practice, this may as well be used to prove the formation of a new customary rule. Since analogy takes the normative content of an existing legal norm and extends its scope to a similar set of facts, it also overlaps with the deductive approach to custom formation, which derives a particular norm from a broader, existing principle of international law.

Applying analogy in the field of international criminal law is even more problematic. It contravenes the *nullum crimen sine lege* principle, which dominates material criminal reasoning, even at international level.[176] Hence, the analogous application of rules to establish individual criminal responsibility should not be permitted. At the very least, findings like those of the ICTY in the *Tadić Case*, which try to establish individual criminal responsibility merely by analogous reasoning, will hardly comply with this principle. Nonetheless, this conclusion is quite new: Of the existing statutes of international criminal tribunals only the Rome Statute has prohibited the application of analogy in Article 22 (2). Yet, as set out below, the precise scope of this prohibition is unclear and has yet to be further elaborated by the Court.

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[174] See *M. Bos* (Methodology) 255–258.

[175] *M. Bos* (Methodology) 256.

[176] See *infra* pages 297ff.

E. *Final assessment of the relationship between interpretation and analogy and the discovery of new customary international law*

Several conclusions may be drawn from our analysis of the methods of interpretation and analogy. First, it must be observed that the evidence which provides the supplementary means of interpretation corresponds to the evidence commonly used for the identification of new norms of customary international law: Resolutions of the UNGA, the ILC, decisions of international courts, tribunals and other judicial bodies and similar evidence have been referred to by the ICJ and the *ad hoc* Tribunals both to support the interpretation of rules to be applied by them and to determine whether there is any *opinio juris* or state practice supporting the development of a new customary norm. This is the first fact which makes it difficult to differentiate the interpretation of an existing treaty rule from the formation of new customary law.

Second, analysis of the jurisprudence of both the ICJ and the ICTY and of Article 31 (3) (c) VCT has revealed that norms of customary international law play an important part in the interpretation of international (treaty) rules. Nonetheless, this influence also works reciprocally: written rules of international law further and influence the development of customary norms in the field in question. Hence, differentiation between treaty interpretation and the finding of customary norms will continue to be difficult, if not impossible, if custom and treaty rules exist side by side in a given area of law.

Third, there are a number of conclusions to be drawn from applying the concept of analogy. As demonstrated by the jurisprudence of the ICJ and the ICTY, analogous reasoning seems not to be completely unfamiliar at the level of general international law. Though it is not used as often as other methods, it appears to have found recognition as one way of ascertaining the applicable law in a given situation. Moreover, the principle so far has not been invoked on its own to establish the law applicable in a certain situation. It has mostly been used as a supplementary method only.[177]

Nevertheless, the concept, its scope and application at international level appear doubtful. It does not look as if there was a common definition of it either at the ICJ, the ICTY or in international legal theory. If it is to be applied at all, the limits of this principle have to be more clearly defined. Moreover, in particular with regard to the jurisprudence of the ICTY, the application of analogy clearly has to be reconciled with the *nullum crimen sine lege* principle, as shown below in greater detail.

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[177] See ICJ, *Case concerning the Barcelona Traction Light and Power Company, Limited* ICJ Reports 1970, 38, paras. 53, 42, 70.

Finally, the conclusion which may be drawn here is that it is not the methods themselves, but their interaction with the concept of customary international law which causes the most problems. When applying different methods, courts and lawyers will both have to be more careful in distinguishing the two. Recognition of the individual value of each particular method thus seems worthwhile.

Chapter Three

Visions of Development

I. INTRODUCTION

In very general terms, as far the theory of customary international (criminal) law is concerned, there are only few hypotheses which envisage a general concept of the *development* of customary norms. Theories develop upon issues concerning the formation of customary international law in a particular area of international law or a particular problem which has arisen in practice. Nevertheless, some theories – developed mainly in the field of international human rights and international humanitarian law – put their conception of the formation of customary rules in a greater perspective: one is that of the humanisation of humanitarian law emphasising the 'dictates of public conscience' and the 'laws of humanity', as expressed in the Martens Clause. Another builds on the concept of the international community and on certain fundamental values serving as its constitutional basis. Contrary to that, it has also been held that the development of custom in the field of international criminal law could be viewed as evidence of the growing fragmentation of international law.

As this book tries to show whether a development of customary international law has actually taken place and how, it will be interesting to see whether the developments described by those three theories may actually be traceable and hence provide an adequate picture of the current status of this source of international law.

II. THEORETICAL CONCEPTIONS OF THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL (CRIMINAL) LAW

Some of the theoretical conceptions outlined in the previous chapters of this book also comprise methodological suggestions of the development of customary international criminal law. Yet, there are not many such theories: in fact, only concepts which recognise the existence of different sorts of customary

international law[1] as well as a particular category of customary norms of a hierarchically higher position, such as the deductive approach[2] or the 'core rights' approach,[3] take into account an overall concept for the development of customary rules. Moreover, theories asserting that certain value-loaded norms of international human rights law of international humanitarian law are characterised by general principles of international law agree on their particular and influential position within the international legal system.[4] As a matter of fact, naturalist approaches to customary international law will also refer to a greater concept of the development of international law, as they too assume that international law is based on certain core values which determine the formation of all legal rules and principles.[5]

Reluctance to outline a general perspective for the formation of customary rules or for the development of international law as a whole, yet again depends on the individual conception of the theories developed for the formation of customary rules. Positivist conceptions, for example, which rely on entirely formalistic approaches to international law find no need to point in a general direction for the possible future development of international law. To them, customary international law is in reality only the outcome of a formal process of the formation of legal rules.[6] The three main approaches envisaging a general perspective for the development of rules of customary international criminal law will be introduced briefly below.

A. *The humanisation of humanitarian law*

The most specific approach to the formation of customary norms of international human rights and humanitarian law is the core rights theory developed by Meron, as stated in the first chapter of this book. His approach propagates the "humanization of humanitarian law",[7] which he interprets as

> a process of osmosis or application by analogy… [by which] the recognition as customary of norms rooted in international human rights instruments has affected the interpretation and eventually the status, of the parallel norms in instruments of international humanitarian law.[8]

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[1] See above, 37ff.
[2] See above, 39ff.
[3] See above, 42ff.
[4] See above, 73ff.
[5] See above, 48f.
[6] See above, 16ff.
[7] *T. Meron* (2000) 94 AJIL, 239ff.
[8] *T. Meron* (n. 7) 244.

According to Meron, the humanising development in international humanitarian law is promoted, first and foremost, by the Martens Clause which, "with its invocation of the laws of humanity and dictates of public conscience, explains its resonance in the formation and interpretation of international humanitarian law."[9]

Meron further explains that the humanisation of international humanitarian law would be traceable by the introduction of international human rights law into this field.[10] He believes that human rights norms have influenced the drafting and content of certain norms of international humanitarian law, in particular, of common Article 3 to the Geneva Conventions.[11] Norms of international humanitarian law, he states, are increasingly interpreted under the premise of core and content of international human rights law. The language of new conventions has also been influenced to a great extent by international human rights law.[12] According to Meron, further evidence of the humanising development would be provided by the fact that in international humanitarian law the distinction between non-international and international armed conflict had increasingly become blurred,[13] that there was no longer a nexus requirement for crimes against humanity and that crimes against humanity now applied in non-international as well as international armed conflict.[14] Meron's concept of the influence of humanitarian principles on the formation of customary international criminal law has also been taken up by other authors, as mentioned.[15]

B. *A communitarian vision*

As stated above, possibly the most elaborate framework for the development of rules of customary international criminal law has been provided by Tomuschat, who extended the concept of the international community into a holistic concept of the formation of international norms in several papers. His concept has been taken up by other authors, too.[16]

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[9] *T. Meron* (n. 7) 245.

[10] See also T. Meron (2003) RdC, vol. 301, 27.

[11] *T. Meron* (n. 7) 253.

[12] *T. Meron* (n. 7) 253, 254, for the Third Geneva Convention.

[13] *T. Meron* (n. 7) 262.

[14] *T. Meron* (n. 7) 264.

[15] See above, Impact on the Process of the Formation of Customary International Law in *M. Kamminga and M. Scheinin* (eds.), *The Impact of Human Rights Law on General International Law* (OUP, Oxford 2009), 44.

[16] *J. Wouters and C. Ryngaert* 128; see also *M. Bothe* 8 (2005) YBIHL 178, who concludes that customary international law currently develops along common values and that certain procedures have developed which implement this value system.

Previously, only Mosler had developed a basic concept of the international community. He thought of it as a necessary order or minimum of uniformity at international level.[17] According to his view, this uniformity related to certain values which might be considered to form the goals of the community or to legal principles which it is the duty of all members to give effect to.[18] Although this theory did not encompass any conception of the formation of customary international law, it presupposed that the universal principles and goals set out also influence the creation of new international norms, which may as well be customary in nature.

Tomuschat, on the other hand, considers the international community to be dominated by certain universal values to which all members of the community have agreed. He maintains that behind this notion of a constitution stands, in particular, "buttressed…by the UN Charter, the idea of a legal framework determining certain common values as the guiding principles States are bound to observe and respect."[19]

Only recently, Tomuschat explained that the concept of the international community also underlies the field of international criminal law. He believes that this

> may become visible and take concrete shape through rules and mechanisms designed to uphold certain common values the integrity of which is essential for the peaceful coexistence of mankind as a whole.[20]

As said by Tomuschat, the development of certain core values dominating the field of international criminal law had been fostered by the Nuremberg trials, in particular. The trials convicting key German war criminals had endowed the core values "of the leading states", which stand behind the crimes that were the basis of the guilty verdicts, with an effective enforcement machinery. This enabled international criminal prosecution to "become the hallmark of the emergence of an (or the) international community."[21] Thus, Tomuschat concluded that from those internationally agreed principles and values norms of customary international law may be derived by way of deduction.[22]

There are several other authors who utilise the concept of fundamental values of the international legal order or of a constitution of international

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[17] See *H. Mosler* (1976) 36 ZaöRV, 31.
[18] *H. Mosler* (International Society), 17.
[19] *C. Tomuschat* (1993) RdC, vol. 241, 236.
[20] *C. Tomuschat* (2006) 4 J.int.crim.justice, 839.
[21] *Ibid.*
[22] See above 39ff.

society in order to delineate a more holistic concept of the formation of customary norms in particular, but also of general rules of international law.[23] René-Jean Dupuy's concept of a *coutume sage* and a *coutume sauvage*, for instance, is based on the assumption of the existence of an international society.[24] He argues that there is even a category of norms or a basic set of international values which may be called constitutional principles or even constitutional law,[25] standing on a hierarchically higher level than other international law and thus influencing international law-making processes and, in particular, the formation of customary international law.[26] Most recently, the ILA's Committee on International Human Rights Law and Practice undertook an assessment on the influence of international human rights law on general international law and reached very similar conclusions.[27] In its final report, it affirmed the important influence of certain rules of human rights law on international law-making processes and the deductive approach for the finding of new rules of international humanitarian law, in particular.[28]

The idea of an international society or community, the existence and further development of which is regulated by these fundamental values or constitutional principles, therefore underlies almost all the theoretical concepts just mentioned. It is even shared by those authors who do not approve of the customary character of norms of international humanitarian law and international human rights law. Authors who maintain that rules of international humanitarian law as well as of international human rights law have the character of general principles of law[29] nevertheless accept the universally binding character of those norms,[30] as well as their ability to influence international law-making processes.

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[23] *S. Sur* (Coutume) 1ff; *O. Schachter* in *J. Makarczyk* (Theory) 539f; *id.* (1982) RdC, vol. 187, 334; *id.* in *Y. Dinstein* (Perplexity) 718; *id.* (1987) 81 Proceedings of the Am. Soc. Intl. Law 157, 158; *V. U. Degan* in *J. Makarczyk* (Theory) 144; *L. Henkin* (International Law) 34ff.

[24] *R.-J. Dupuy* in (Mélanges Rousseau) 87.

[25] See *L. Henkin* (International Law) 39.

[26] See above, 37ff; compare further *B. Simma* (1994) RdC, vol. 250, 293, who does not support the view that constitutional values may influence the formation of customary international law, because custom still represents a bilateral concept which stands in diametric opposition to the concept of an international community.

[27] *ILA*, *Committee on International Human Rights Law and Practice*, 'Final Report on the Impact of International Human Rights Law on General International Law' (Rio de Janeiro 2008); *M. Kamminga* Final Report on the Impact of International Human Rights Law on General International Law in *id. and M. Scheinin* (eds.) *The Impact of Human Rights Law on General International Law* (OUP, Oxford 2009), 1ff.

[28] *ILA*, *Committee on International Human Rights Law and Practice* (n. 27) 6.

[29] See above, 80ff.

[30] *B. Simma and P. Alston* (1988/ 1989) 12 Australian Yearbook of Intl. Law, 98.

C. *Increasing fragmentation*

There is one final vision of a development of customary international criminal law which is not as optimistic as the above mentioned concepts. When writing on the nature and development of international criminal law, in particular, scholars also referred to the growing fragmentation of international law.[31] They emphasised the peculiarities of international criminal law which have moved away from the public international law 'roots' of the subject towards a unique field of international law, including a distinctive concept of legal sources.[32] Above all, Ambos argued that in international criminal law custom and the general principles of international law have merged into one single source of law.[33] Moreover, on assessing the formation of customary international criminal law in particular, Ruiz-Fabri pointed out:

> D'un point de vue systémique, l'impression qui en résulte est celle d'une concrétisation de la fameuse « fragmentation » du droit international. Certes, c'est en des termes limités puisqui'il ne s'agit pas de nier l'existence de la règle, simplement son accessibilité et son applicabilité. Mais, comme tout raisonnement fondé sur la spécificité, il tend à séparer, l'argument trouvant toutefois sa limite dans l'objection qu'il faudrait démonter sa préexistence d'une quelconque unité du droit international.[34]

When referring to the alleged threat of a growing fragmentation of international law, however, most authors assessing the formation of customary international criminal law do not further specify the particularities of such an outcome. Neither do they refer to much evidence of the deviation of substantive international criminal law from the general development of international law. Instead, the proliferation of new international criminal tribunals, as well as the diverging views of the ICTY in the *Tadić* case and of the ICJ in the *Nicaragua* case on the imputability of acts of militia groups, often remain the only examples cited as a evidence of the growing fragmentation of international law.[35] This also led Ruiz-Fabri finally to conclude that an analysis of the jurisprudence of the ICTY on customary international law did not confirm a growing fragmentation of international law; it in fact appeared

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[31] *G. Hafner* (2004) 25 Mich. JIL, 851; *J. Klabbers* in *A. Zimmermann* (International Criminal Law) 102.

[32] *K. Ambos* (Allgemeiner Teil) 40, 41; *id.* (Internationales Strafrecht) 79.

[33] *K. Ambos* (Allgemeiner Teil) 43, 44.

[34] *H. Ruiz-Fabri* in *M. Delmas-Marty et al.* (Sources) 387.

[35] *G. Hafner* (2004) 25 Mich. JIL, 858; *C. Romano* (1999) 31 NYUJ IL & P, 710; *G. Abi-Saab* (1999) 31 NYUJ IL & P, 923, 924; See also the recent findings of the ICJ in the *Case Concerning the Application of the Convention on Prevention and Punishment of the Crime of Genocide*, ICJ Reports 2007, para. 403, 404.

that the judges of the ICTY and the ICTR had mastered applying the source of customary international law within the limits of its own discipline:

> le rapport de Gradoni me semble moins démontrer une véritable spécificité de la coutume en droit international pénal qu'une utilisation assez maiîtrisée par le tribunal pénal international, ce qui, tant en termes de souce que de méthodologie, contribue … au développement et du droit international.[36]

III. ASSESSMENT

It becomes evident from the foregoing assessment that the theories advanced for the future development of international law only complement the particular approaches which were developed for the formation of customary international law and customary international criminal law. Yet, though very similar at first sight, the concepts advanced by Meron and Tomuschat, in particular, differ significantly. Meron offers more an interpretive vision of the future development of international law. His approach centres round the influence of the Martens clause on future interpretations of humanitarian norms and norms of general international law, but not round the issue of the future development of new (customary) international law. The conclusion that the clause exerts great influence on the interpretation of humanitarian and human rights rules does not seem too far fetched as it – stating the main aim of the Geneva conventions – will almost always be taken into account when one *interprets* the rules of the Geneva Conventions according to their object and purpose.

If we transfer Meron's considerations to the field of customary international law, his approach does not differ significantly from that offered by the authors supporting a communitarian vision: authors of this theory consider the Martens Clause as one of the constitutional principles, from which individual rules of international humanitarian law may be derived by way of deduction. Yet, in contrast to Meron's concept, the communitarian vision presents a more conceptual approach to the future development of international law. Presupposing the existence of fundamental values of the international community, the theory actually names some of the basic principles which are able to influence the future development of new rules of customary international law, too. In addition, it offers a concept for the whole of international law and is not limited to the field of international humanitarian law. The ILA pointed out that *erga omnes* and *ius cogens* rules may also be

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[36] *H. Ruiz-Fabri* in *M. Delmas-Marty et al.* (Sources) 387.

part of this communitarian vision.[37] It remains open, however, what kind of influence these rules may have on the future development of new customary international law.

In contrast to the foregoing, closer scrutiny of the concept of fragmentation has shown that it is more a description of the current state of international law than a particular theoretical elaboration determining a direction into which international law might evolve in the future. The ILC has shown very aptly that the problems which result from the substantive diversification of international law may – in part – be overcome by the use of methods already available in general international law. Its study has thus reaffirmed doubts about the fact that the phenomenon may threaten the 'unity' of the international legal system. Nevertheless, it is striking that the ILC approached the phenomenon of fragmentation 'the other way round'.[38] Instead of assessing where areas of international law had already deviated from another and in what way, the Commission investigated whether there were particular rules and methods of general international law which would help to overcome such clashes. In doing so, it aimed to prove that the phenomenon of fragmentation was not an issue, as long as means and methods existed which reconnected the specialised areas to general international law. Proceeding thus, the Commission therefore *presupposed* that a certain deviation of specialised areas of international law from general international law *has already occurred*.[39] It did not investigate this particular problem any further. For our assessment of whether customary international criminal law is developing or has already developed into a source of its own, the report of the ILC is thus only of limited use.

Having said that, the findings of the ILC remain important for some of the conclusions that have been drawn hitherto and that are still to be reached in the remaining chapters of this book. The most important one is that there are different methods which may be employed in the finding of justice at international level. The second most important conclusion is that the actual application of those methods may overcome problems of fragmentation. And, thirdly, it is imperative to differentiate between those methods in order to meet the particular challenges posed by the phenomenon of fragmentation in different areas of international law. As this book focuses on the methods utilised to determine the evolution of a new rule of customary international

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[37] *ILA, Committee on International Human Rights Law and Practice* (n. 27) 4, 5.

[38] *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 13 April 2006, UN Doc. A/CN.4/L.682.

[39] Compare paras. 8–20 of the ILC's Report (n. 38).

law, it is able to provide not only an answer to the question whether international criminal law has split apart from general international law, but also to the ensuing question of how the problem of fragmentation could eventually be overcome. On this last issue, the assessment carried out hitherto taught us that, compared to the source of customary international law, other methods and sources of international law do not lose their individual applicability. On the contrary, with custom developing rapidly in new areas of international law, it is even more important to demarcate the exact boundaries of the different ways and means of discerning new international law and new customary international law. Methods like interpretation may actually complement the techniques employed to discern new customary international law. Whether this eventually leads to the effect that principles like Article 31 (3) (c) of the VCT gain increasing importance as 'ordering principles' in international law – as the ILC concluded – can be answered only at the end of this book.

Chapter Four

Practical Developments (Part One): Customary International Law in the Case Law of the PCIJ and the ICJ

I. INTRODUCTION

The ICJ and its predecessor, the PCIJ, have played an important role in the general process of forming of customary norms. The jurisprudence of both courts has contributed greatly to the development of international law in general, but also to the development of customary international law in particular. The customary character of many rules of international law was established for the first time before the PCIJ and the ICJ, and likewise before the ICTY and the ICTR, as shown below.

To use Condorelli's words, analysis of this jurisprudence may help us "to understand the method employed by judges to determine the existence and the content of a customary norm, i.e. the parts of it and the conditions that they consider necessary and sufficient to recognise such a norm".[1] This is precisely what this chapter intends to do. It will deal, in particular, with the appraisal of the PCIJ and the ICJ of the development of customary norms and the methodology they have employed to determine the customary nature of rules of international law.

It can be argued that international judicial practice may not answer the question of which direction the source of customary international law may *develop* into. A picture of such *development*, some will reason, may be provided only by theory itself. But, in order to obtain full understanding of the source of customary international law, one has to be aware that its theory constitutes only one side of the coin. Its other side is international jurisprudence or, in broader terms, international practice, for it is only through this (judicial) practice that we may be able to discern what the law actually *is* and

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[1] *L. Condorelli* in *M. Bedjaoui* (Achievements) 186.

not what it *ought* to be. Thus, the duality of custom appears to be mirrored even in the display of its analysis.

If we proceed as outlined, one important *caveat* must be borne in mind: judgements of international courts and tribunals may never serve as the ultimate indication of how customary international law is formed in international law. Mendelson, in particular, has stated very aptly that an analysis of the pronouncements of international courts and tribunals does

> not provide us with all the answers, for several reasons. First, courts are not in a position to provide systematic expositions of the law: they only deal with such points as happen to come before them. The result is that, whilst there are quite clear rulings on some questions, regarding others, we have only hints or *obiter dicta*; and on yet other questions, total silence.[2]

The following analysis will reveal that the case law of the ICJ on custom is not always consistent and does not always appear to follow an overall concept, as envisaged by the different theories on customary international law.[3] In fact it must be observed that the Court indeed takes a somewhat pragmatic approach to custom. In his commentary on Article 38 of the ICJ Statute, Alain Pellet summarises this very appropriately: "[t]he Court is a judicial body, not a teacher or scholar. When it seeks a customary rule, it does so in relation to a particular case…"[4] As a result, customary norms concerning the law of the sea, for example, will generally consider the two elements of state practice and *opinio juris*, as contained in Article 38 (1) (c) of the Court's Statute. On the other hand, it is more likely that customary humanitarian norms will predominantly build upon the element of *opinio juris* or 'general principles of humanitarian law'. For that reason, the different approaches to custom identified above will serve as a rough categorisation for the jurisprudence of the Court in this assessment.

II. STRICT VOLUNTARISM

A. *The PICJ's* Lotus *Case*

As one of the most prominent cases before the PCIJ, the *Lotus* case is the leading case on at least three core subjects in international law. First, it dis-

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[2] *M. Mendelson* (1998) RdC, vol. 272, 182.

[3] For a very concise analysis of the Court's jurisprudence of custom See *A. Pellet* 'Art. 38' in *A. Zimmermann, C. Tomuschat, K. Oellers-Frahm* (ICJ Statute) 749ff, para. 209ff, 232.

[4] *A. Pellet* 'Art. 38' in *A. Zimmermann, C. Tomuschat, K. Oellers-Frahm* (ICJ Statute) 761, para. 236.

cusses the issue of jurisdiction in criminal matters.[5] Second, as mentioned previously, it serves as one of the main examples of international jurisprudence confirming the nature of international law as a law of strict voluntarism,[6] oriented solely towards the will of states. Third, it is equally important for the study of the formation of customary international law.

The facts of the case are well known: it deals with a dispute between France and Turkey which had arisen out of the criminal investigations carried out by Turkey on board a French ship after a collision. France contested Turkey's jurisdiction under international law to investigate the case. Hence the matter was brought before the PCIJ for adjudication. The Court had thus to decide whether there was a principle under customary international law which would allow Turkey to initiate the proceedings.

The Court first asked whether an international custom could have developed which barred the exercise of jurisdiction by Turkey. However, the Court found that there were only a few examples of jurisprudence, from which no general rule prohibiting the exercise of jurisdiction could be derived. In fact, the contrary had to be assumed:

> Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged…it would merely show that states had often, in practice, abstained from instituting criminal proceedings, and not that they recognised themselves as being obliged to do so, for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand…there are other circumstances calculated to show that the contrary is true.[7]

Since there were no such examples, the Court ruled that the question on jurisdiction in the case was "dictated by the very nature and existing conditions of international law."[8] It then characterized the nature of international law as entirely voluntarist. Its famous dictum has been cited before, but is repeated once again in this context. It found:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing

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[5] The case established the so-called 'effects doctrine' or the objective territoriality principle, See *T. Schweisfurth* in *R. Bernhardt* EPIL vol. 3, (1997) 57.

[6] *Supra*, at 29.

[7] PCIJ, *Lotus*, Ser. A., Judgment No. 9 (1927), 28.

[8] *Lotus* (n. 7) 28.

> independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States therefore cannot be presumed.[9]

The main part of the Court's judgement is of particular interest here: the Court specified how the existence of a particular rule of international law had to be ascertained. It considered, amongst other things, (judicial) precedents to be of major importance as evidence of a new (general) principle of international law.[10] Nonetheless, this should not be understood in a narrow sense as comprising only general principles of international law contained in Article 38 (1) (c) of the ICJ Statute. In fact, the Court wanted to derive guidance from judicial precedents for its findings on new norms of customary international law.

As regards the issue of the customary international law applicable to jurisdiction, the parties were deeply divided. France denied both the existence of the passive personality principle in customary international law and its application.[11] Her agent before the Court illustrated the formation of customary norms as follows:

> [I]l suffit qu'un *consensus gentium* se soit établi, et ce *consensus* sera considéré comme s'étant suffisamment établi lorsqu'on sera en présence d'une solution, d'une manière de se conduire tellement ancrée dans l'esprit commun, dans la pratique commune, que personne ne songe à la contester.[12]

He thus concluded that there is a rule of customary international law which affirms the jurisdiction of the flag state for crimes committed on a vessel on the high seas.[13] The Turkish agent, on the other hand, cited the writings of scholars of international law and examples of national jurisdiction as evidence of the customary international law character of the passive personality principle in international law.[14] Moreover, he argued that since there was no evidence of the existence of an explicit prohibition pertaining to the exercise of the principle, the exercise of jurisdiction by Turkey could not be ruled out.[15] Accordingly, both parties employed an entirely empirical method to prove the existence of a customary rule on jurisdiction.[16]

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[9] *Lotus* (n. 7) 18.

[10] *Lotus* (n. 7) 21.

[11] See PCIJ, *Lotus*, Ser. A, Judgment No. 9, 22; Ser. C, No. 13-II, 'Counter-Memorial of the French Government', 270; 'French Oral Submissions' PCIJ, Ser. C, No. 13-II, 48.

[12] PCIJ, *Lotus,* Ser. C, No. 13-II, 51.

[13] PCIJ, *Lotus,* Ser. C, No. 13-II, 'French Oral Submissions', 78.

[14] PCIJ, *Lotus,* Ser. C, No. 13-II, 'Counter-Memorial of the Turkish Government', 302.

[15] PCIJ, *Lotus,* Ser. C, No. 13-II, 'Turkish Oral Submissions', 116, 117.

[16] PCIJ, *Lotus,* Ser. C, No. 13-II, 'Memorial of the French Government', 187; PCIJ, Ser. C, No. 13-II, 'Counter-Memorial of the Turkish Government', 302.

The outcome of this dispute is well known: Ultimately, the Court ruled that it could not be confirmed that there was an international rule, which attributed exclusive jurisdiction in criminal matters to the flag state.[17] Rather, it had to be assumed that both states enjoyed jurisdiction in the case, i.e. it revealed a situation of concurrent jurisdiction.[18]

B. *Discussion of the* Lotus *findings in the light of the formation of customary international law*

The *Lotus* judgement falls entirely into the voluntarist tradition of (customary) international law. It emphasises that the application of an empirical method focusing on examples of state practice is crucial for the proof of a customary norm. In the view of the Court, mere passive behaviour of a state will hardly be sufficient to establish the customary nature of a certain rule.[19] Further facts will always be required to attribute a certain value of proof to a particular omission.

The dissenting opinions attached to the judgement also reveal that the Court in the *Lotus* case favoured the theory of voluntarism as the predominant concept behind the formation of all international law. The judges laid the main emphasis on the element of *opinio juris* and on its function as an expression of will and *consensus* of a state concerning a particular international rule. Judge Weiss, for example, strongly criticised the French endeavour to prove that the customary character of the principle of passive personality was lacking almost exclusively by the citation of various judgements of national courts and tribunals. He contended

> International law is not created by an accumulation of opinions and systems; neither is its source a sum total of judgements, even if they agree with each other. Those are only methods of discovering some of its aspects, of finding some of its principles, and of formulating these principles satisfactorily. In reality the only source of international law is the *consensus omnium*. Whenever it appears that all nations constituting the international community are in agreement as regards the acceptance or the application in their mutual relations of a specific rule of conduct, this rule becomes part of international law.…[20]

His collegues Nyholm and Altamira accordingly emphasised that the consent of states formed the basis of any new rule of customary international law.[21]

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[17] PCIJ, *Lotus,* Ser. A, Judgment No. 9 (1927), 30.
[18] *Lotus* (n. 17) 31.
[19] See *T. Milej* in *Heintschel von Heinegg* (Casebook Völkerrecht) 116.
[20] *Lotus* (n. 7) dissenting opinion *Weiss*, 43, 44.
[21] *Lotus* (n. 7) dissenting opinion *Nyholm*, 60; *ibid*., dissenting opinion *Altamira*, 103.

Nevertheless, Judge Nyholm still considered the element of state practice, consisting of state "*action* (acts, will, agreement)",[22] to be necessary for the formation of a norm of customary international law. And Judge Altamira similarly emphasised the evidentiary character of precedents as evidence of a new norm of customary international law.[23]

III. TWO-ELEMENT APPROACHES TO CUSTOM: THE CUSTOMARY LAW ON THE CONTINENTAL SHELF AND FURTHER CASES

Despite this strictly voluntarist concept of custom reflected in the *Lotus* judgement, most judgements of the ICJ emphasise the two elements of customary international law, *opinio juris* and state practice, in accordance with Article 38 (1) (b) ICJ Statute. The *North Sea Continental Shelf Case*, in particular, focused on both elements of customary international law, as have the other two *Continental Shelf Case*s.

Nonetheless, it has still been questioned whether the jurisdiction of the ICJ in these and other cases really followed the two-fold concept of Article 38. Twenty years ago, Sir Robert Jennings critically remarked on the continental shelf judgements: "…the law of continental shelf boundaries outside the 1958 Convention, is pure judge-made law. The supposition that the principles emerged from practice is a pure fiction."[24] Jennings further commented that "[i]t would be absurd to try to arrive at the general law of continental shelf boundaries by looking at these agreements for "usage" and "*opinio juris*"; as if one were trying to establish a "custom" in the ordinary meaning of the word."[25] He concluded that from the jurisprudence of the Court it could not be inferred that some kind of customary law based on practice had developed. Such contention would be "bizarre".[26] The next section will thus have to assess which argument describes best the Court's reasoning in the *Continental Shelf Cases*: whether the emphasis of the Court upon the two-element theory truly follows the concept of custom contained in Article 38 (1) (b) of the ICJ Statute or whether such emphasis is only a disguise for applying other concepts and methods of customary law.

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[22] *Lotus* (n. 7) dissenting opinion *Nyholm*, 61.
[23] *Lotus* (n. 7) dissenting opinion *Altamira*, 96.
[24] *R. Jennings* (Cambridge Tillburg Lectures) 36.
[25] *R. Jennings* (n. 24) 36.
[26] *R. Jennings* (n. 24) 37.

A. *The* Asylum Case, *the* Fisheries Case *and further judgements*

Norms of customary international law played a crucial role in two very early judgements of the Court, namely in the *Asylum*[27] and in the *Fisheries Cases*.[28] The *Asylum Case* concerned a dispute between Colombia and Peru regarding the diplomatic asylum granted on 3/4 January 1949 by the Colombian Ambassador at Lima to Victor Raul Haya de la Torre. Although the case is usually referred to as the classic example in any discussion of the existence of regional customary international law,[29] it also reveals the general approach of the Court towards the formation of a customary rule. Colombia argued that there had been a tradition among Latin American states to grant diplomatic asylum which was binding and definitive for other states, and had led to the formation of a regional custom. To establish this contention, it had referred to a large number of extradition treaties as well as to a number of international conventions of the early nineteenth century.[30]

Yet, the root of the matter, as the Court explained, did not lie in the development of a customary rule among Latin American states which permitted the grant of asylum to an offender, but in the unilateral qualification of the offence by the state granting asylum.[31] According to the ICJ, this constituted an intervention which was not covered by the various extradition treaties and conventions Colombia had cited.[32] The Court in fact concluded that:

> The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on different occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law…[33]

Colombia's claim to be competent to grant diplomatic asylum to Haya de La Torre in its embassy in Lima was thus dismissed.

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[27] *Asylum Case*, Judgment, ICJ Reports 1950, 266ff.
[28] *Fisheries Case*, Judgment, ICJ Reports 1951, 116ff.
[29] See *M. Shaw* (International Law) 73; *T. Milej* in *Heintschel von Heinegg* (Casebook Völkerrecht) 111, para. 231.
[30] *Asylum Case*, ICJ Reports 1950, 277.
[31] *Asylum Case* (n. 30) 274.
[32] *Asylum Case* (n. 30) 275, 276.
[33] *Asylum Case* (n. 30) 278, 277.

According to the findings of this case, the element of state practice is of crucial importance for the establishment of a customary rule. Without it, no custom can be established. As the Court had already denied the first element of custom, it did not have to refer further to the element of *opinio juris*. The case can thus be mentioned as a classic example of a two-element approach by the Court to the formation of customary international law.

Yet, state practice also played a predominant role in the *Fisheries Case* in determining the applicable customary law. This case concerned a dispute between the UK and Norway on the breadth of the territorial waters off the Norwegian Coast. Accordingly, the Court had to consider which (customary) international rules were applicable and to determine the delimitation of Norway's fisheries zone, including its baselines.[34]

One of the first issues discussed was the customary law applicable to bays. The ICJ established that the UK's contentions that a bay is customarily defined by a ten sea mile baseline were not supported by sufficient state practice:

> In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different time limit. Consequently, the ten mile rule has not acquired the authority of a general rule of international law.[35]

Consequently, the Court considered the drawing of the Norwegian baselines. As the Norwegian coast consists of a unique belt of scattered islands, islets, rocks and reefs (the "skjærgaard"), the UK had tried to establish the existence of a customary rule to the effect that base-lines drawn across the formations of the "skjærgaard", in analogy by the alleged customary law on bays, must also not exceed ten sea miles. However, the Court ruled that state practice would not permit the assumption of a customary rule to that effect.[36]

Eventually, the Norwegian delimitation of its territorial waters and fisheries zones was considered sufficiently established by historic title and consequent practice. Hence it was mostly state practice which, according to the Court, underlined the existence of Norways historic claim to delimitation.[37]

Accordingly, both the *Asylum* and the *Fisheries Cases* draw predominantly on the element of state practice to support the formation of customary international rules. In both judgements the Court followed the classic way of

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[34] *Fisheries Jurisdiction*, ICJ Reports 1951, 126.
[35] *Fisheries Jurisdiction* (n. 34) 131.
[36] *Ibid.*
[37] *Fisheries Jurisdiction* (n. 34) 138, 139.

establishing rules of customary international law, in accordance with Article 38 (1) (b) of the ICJ Statute.

The Court reaffirmed this classic approach to custom in its judgement *Rights of Nationals of the United States of America in Morocco*,[38] and in the *Nottebohm* decision.[39] As an interesting aspect, in the latter case the Court even deduced the *opinio juris* element from the practice of states. It saw in the practice not to exercise diplomatic protection over nationals who have no continuing link to their state of nationality, an *opinio juris* to the effect that there was a customary rule which required that nationality must correspond with the factual situation, i.e. establish a genuine link with the state of nationality:

> The practice of certain States which refrain from exercising protection in favour of a naturalized person when the latter has in fact, by his prolonged absence, severed his links with what is no longer for him anything but his nominal country, manifests the view of these States that, in order to be capable of being invoked against another State, nationality must correspond with the factual situation.[40]

B. *The* North Sea Continental Shelf Cases

Although the *North-Sea Continental Shelf Case*s built on this two-fold concept of customary international law they constitute the first cases in which the Court actually considered the existence of several approaches to customary international law.

As with most of the Court's early case law, the facts underlying the *North Sea Continental Shelf Case*s are well known: the parties to the cases (Denmark, the Netherlands and Germany) had asked the Court in a special agreement to elaborate the (customary) principles and rules applicable to the delimitation between them of the continental shelf in the North Sea.[41] Although there were rules on that matter set out in the Geneva Convention on the Continental Shelf, the Federal Republic of Germany (FRG) had at that time merely signed but not ratified the Convention, and thus could not be bound by its provisions as a matter of treaty law.[42]

With regard to the customary law of the continental shelf, the ICJ first identified a positivist and a "fundamentalist" aspect. The Court argued that

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[38] *Rights of Nationals of the United States of America in Morocco*, ICJ Reports, 1952, 200.
[39] *Nottebohm Case*, ICJ Reports 1955, 1ff.
[40] *Nottebohm Case*, ICJ Reports 1955, 22.
[41] *North Sea Continental Shelf*, ICJ Reports 1969, 6.
[42] *North Sea Continental Shelf* (n. 41) para. 28.

the positivist facet was based on state practice and the influences of the Geneva Conventions on the Continental Shelf. The fundamentalist one was based on the "natural law of the continental shelf".[43]

It is important to note that this latter notion had been brought forward by the applicants Denmark and the Netherlands to found the contention that the equidistance principle "is seen as a necessary expression in the field of the delimitation of the accepted doctrine of the appurtenance of the continental shelf to the nearby coastal state, and therefore having an *a priori* character of so to speak juristic inevitability"[44] or "logical necessity".[45] In the oral pleadings, Sir Humphrey Waldock for the Netherlands even described the principle of proximity (equidistance) as being a 'fundamental norm of maritime international law'.[46]

However, as for the natural law argument the Court held that "[t]he appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights".[47] It therefore dismissed the contention that methods of delimitation follow as a logical conclusion from the legal regime which governs states' rights over the continental shelf area.

The Court then considered the practice-based (positivist) approach to the equidistance principle. First, it analysed whether the Geneva Convention on the Continental Shelf embodied or crystallised a previously existing or emergent rule of customary international law. The Court explained – and these findings have been cited in many scholarly writings – that a treaty provision could obtain the status of a rule of customary international law only if it was of a "*fundamentally norm-creating* character such as *forming the basis of a general rule of law*" (emphasis added).[48] However, it concluded that this

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[43] *North Sea Continental Shelf* (n. 41) para. 37.

[44] *North Sea Continental Shelf* (n. 41) para. 38.

[45] *North Sea Continental Shelf* (n. 41) para. 60, see *Pleadings and Written Arguments*, ICJ Rep. 1968, vol. 1, 'Counter-Memorial of Denmark', para. 115: "*Inherent* in the concept of a coastal state's title *ipso iure* to the areas adjacent to its coast is the principle that areas nearer to one coast than to any other state are to be presumed to fall within its boundaries rather than within those of a more distant state. In other words, this principle *establishes a direct and essential link* between the provisions of Article 6 and the basic concept of the continental shelf recognized in Arts. 1 and 2 of the Geneva Convention of 1958." (emphasis added), 'Counter-Memorial of the Netherlands', para. 109.

[46] North Sea Continental Shelf Cases, 'Written Pleadings and Oral Arguments', 1968, vol. 2, 95.

[47] *North Sea Continental Shelf* (n. 41) para. 46.

[48] *North Sea Continental Shelf* (n. 41) para. 72.

could not be inferred from the state practice in the course of the codification of the Convention[49] nor from subsequent state practice.[50]

Second, the Court considered the existence of the principle of equidistance as an independent principle of customary international law. Thus, it assessed whether a customary principle had emerged out of *opinio juris* and state practice as identified in Article 38 of its Statute. It also examined the period of time required for a rule of customary international law to come into being. It pointed to the fact that

> within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both *extensive and virtually uniform* in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is invoked (emphasis added).[51]

C. *Discussion of the impact of the* North Sea Continental Shelf *findings on the methodology of customary international law*

From the analysis carried out by the Court it becomes clear that the ICJ accepted two different approaches regarding the discovery of customary international law: a fundamentalist and a positivist one. It also held that for a customary rule to emerge from a treaty provision, the treaty rule must be of 'fundamental law-creating character'. The Court dismissed only the outcome of the argument of the Netherlands and Denmark: namely that the 'natural law of the continental shelf' permitted only the equidistance method as a method of delimitation.[52] It did not dismiss the "fundamentalist approach" in itself as a method for ascertaining new customary international law.

The difficulties which the Court encountered with regard to the determination of the customary law of the continental shelf are similar to the ones we encounter in international criminal law: although there are some treaty provisions on the subject, they cannot be applied for various reasons; thus, the judges are left to decide the matter on the basis of customary international law, for which only scant evidence is available.

Judge Sørensen referred to this problem in his dissent in the *North Sea Continental Shelf Case*. He argued that in the drafting process of the Convention on the Continental Shelf, the ILC had already experienced difficulty in separating the international law still in development from the customary

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[49] *North Sea Continental Shelf* (n. 41) para. 69.
[50] *North Sea Continental Shelf* (n. 41) para. 73
[51] *North Sea Continental Shelf* (n. 41) para. 74.
[52] *North Sea Continental Shelf* (n. 41) para. 46.

international law which had already emerged.[53] Thus he suggested developing the applicable customary rules in a rather unorthodox fashion: the Convention on the Continental Shelf should serve as "an authoritative guide for the practice of states" and a "nucleus" around which new customary rules might crystallise.[54] He further reasoned that a higher authoritative value for the norms could also be derived from the fact that the law on the continental shelf had developed under the UN Charter.[55] However, he was well aware that such a conception of custom "may not even be an adequate expression for the purposes of describing this particular source of law".[56] Other judges also referred to the difficulties which the case presented in the field of custom formation and suggested, for example, the methodology of deduction as a means for discovering a new rule of customary international law.[57]

Even from this short discussion it becomes clear that the method of deriving new customary international law suggested by Article 38 (1) (b) of the ICJ Statute does not suffice for all issues of international law. This, as we have seen, is a conclusion which was reached not only by some judges dissenting in the case; it may in fact also be drawn from the mere factual situation of the case.

D. Continental Shelf Case I *(Tunisia v Libya)*

The *Continental Shelf Case* (Tunisia v Libya)[58] concerned a dispute between Tunisia and Libya over the delimitation of their respective continental shelf zones. In their special agreement submitted to the Court they had asked the Court to state "the principles and rules of international law" applicable to delimitation. They further called upon the Court to take into account *(a)* equitable principles, *(b)* the relevant circumstances which characterise the area, and *(c)* the newly accepted trends in the Third United Nations Conference on the Law of the Sea.

Although both Tunisia and Libya had accepted the decision of the Court in the *North Sea Continental Shelf Case*s as a basis for the adjudication of

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[53] *North Sea Continental Shelf* (n. 41) separate opinion *Sørensen*, 244.

[54] *North Sea Continental Shelf* (n. 41) separate opinion *Sørensen*, 245. His fellow collegues, on the other hand, still stayed with the traditional two-fold approach to custom, as suggested by Article 38 (1) (b) ICJ Statute: see separate opinion *Tanaka*, 175;

[55] *North Sea Continental Shelf* (n. 41) separate opinion *Sørensen*, 247.

[56] *North Sea Continental Shelf* (n. 41) separate opinion *Sørensen*, 245.

[57] *North Sea Continental Shelf* (n. 41) separate opinion *Bustamante Y Rivero*, para. 3.

[58] *Case Concerning the Continental Shelf* ICJ Reports 1982.

their dispute,[59] there were still differences between the parties with regard to the interpretation and application of the principles outlined in the special agreement and in the judgement of 1969.[60] The first controversy revolved around the definition of the concept of equity.[61] Tunisia considered the natural prolongation of the landmass to be decisive for determining the delimitation line.[62] Libya, on the other hand, considered the concept of natural prolongation to be inequitable and emphasised an application of the principle of proportionality.[63] It further maintained that the Court should base any delimitation of the shelf area on relevant state practice.[64]

Accordingly, the Court reiterated the importance of the element of state practice in the formation of customary rules.

> it should be borne in mind that, as the Court itself made clear in that Judgement, it was engaged in an analysis of the concepts and principles which in its view underlay the actual practice of States which is expressive, or creative, of customary rules. The concept of natural prolongation thus was and remains a concept to be examined within the context of customary law and State practice.[65]

Furthermore, the parties had asked the Court to examine whether the principle of natural prolongation, which Tunisia in particular considered to be decisive in the delimitation of the continental shelf area of her coasts, had to be amended or transformed by developments introduced at the Third UN Conference on the Law of the Sea.[66] However, although the Court noted that the principle of natural prolongation had been included in the delimitation rules in the Draft Convention on the Law of the Sea,[67] the draft convention did not introduce any new criteria or aspects of the principle.[68] The extent

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[59] *Case Concerning the Continental Shelf* ICJ Reports 1982, 43, para. 37; *ibid.*, 'Written Pleadings and Oral Arguments', vol. 1 'Mémoire de la Tunisie', 160, 166; *ibid.*, 'Memorial of Libya', 490, 491.

[60] *Case Concerning the Continental Shelf* ICJ Reports 1982, 44, para. 38, 39.

[61] *Case Concerning the Continental Shelf*, 'Written Pleadings and Oral Arguments', 'Counter-Memorial of Libya', vol. 2, 289, para. 375; *ibid.*, 'Written Pleadings and Oral Arguments', Arg. *Prof Jennings* for Tunisia, vol. 4, 417.

[62] *Case Concerning the Continental Shelf*, Written pleadings and Oral arguments, 'Memorial of Tunisia', vol. 1, 164/165, 177; Written Pleadings and Oral Arguments, 'Arg. M Virally for Tunisia', vol. 4, 602.

[63] *Case Concerning the Continental Shelf*, Written Pleadings and Oral Arguments, 'Memorial of Libya', vol. 1, para. 99, 491; *ibid.*, 'Libyan Oral Submissions', vol. 5, 209.

[64] *Case Concerning the Continental Shelf*, Written pleadings and oral arguments, vol. 5, 'Libyan oral submissions', 222.

[65] *Case Concerning the Continental Shelf* ICJ Reports 1982, 46, para. 43.

[66] *Continental Shelf* (n. 65) 47, para. 45.

[67] *Continental Shelf* (n. 65) 48, para. 47.

[68] *Continental Shelf* (n. 65) 48, para. 48.

of the continental shelf area appertaining to each state could also not be ascertained from criteria of natural prolongation alone. The Court held that it had to be determined on the basis of equitable principles.[69] Consequently, the ICJ had to consider the category into which the principle of equity fell among the sources of international law. It maintained:

> Equity as a legal concept is a direct emanation of the idea of justice. The Court, whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term 'equity' has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law.[70]

It is interesting to note that the Court merely presupposed the existence of the principle without further reference to its function amongst the sources of international law. Its existence seems almost natural. Prior to the case, the issue of equity had been addressed by the PCIJ in the *River Meuse Case*.[71] In its judgement the PCIJ had emphasised that equitable principles form part of international law and "have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals".[72] Yet, the PCIJ had neither pronounced upon the legal pedigree of the principle nor classified its role among the sources of international law.

In the *Continental Shelf Case I* the Court categorised the principle of equity as a 'general principle directly applicable as law', which was obviously not intended to be merely a synonym for the general principles of law of Article 38 (1) (c) ICJ Statute. This may also be derived from the Court's stance that discussions on the concept of equity, which had unravelled at national level, were not paralleled at international level. The *Continental Shelf I* judgement can thus serve as evidence for a category of general principles, which exist in addition to the official source of 'general principles of international law' in Article 38 (1) (c) of the ICJ Statute.

E. Continental Shelf Case II *(Libya v Malta)*

The *Continental Shelf Case* (Libya v Malta) also concerned a dispute over the delimitation of the continental shelf between the Libyan Arab Republic and one of its neighbours, the Republic of Malta. Just as in the previous

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[69] *Continental Shelf* (n. 65) 58–60, paras. 69–71.
[70] *Continental Shelf* (n. 65) 60, para. 71.
[71] PCIJ, *Diversion of Waters from the Meuse*, PCIJ, Series A/B, 28 June 1937.
[72] *Continental Shelf* (n. 65), seperate opinion *Eversen*, para. 12, 290.

Continental Shelf I dispute, Libya and Malta had asked the Court to determine the principle and rules applicable to the delimitation of their continental shelf areas.[73] The parties had agreed upon the application of customary international law to the issues of delimitation and had also agreed that some of the provisions of the 1982 Convention on the Law of the Sea were part of customary international law. Following this restatement of the applicable customary international law of maritime delimitation, the Court again emphasised in another of its well-known dicta which prerequisites had to be fulfilled by any new rule of customary international law:

> It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed, in developing them.[74]

In this famous passage, the Court thus highlighted once again the 'traditional' approach to custom formation, building upon the elements of state practice and *opinio juris*.

However, these findings were put to the test in the next part of the judgement, as the parties heavily disputed which principles of delimitation were already part of customary international law. In both the written and oral submissions, Malta and Libya had invoked numerous examples of state practice to prove or disprove the application of the equidistance principle to their delimitation of the continental shelf.[75] Since state practice had been called upon by both parties to prove the existence of principles of delimitation which were the most palatable to their favoured delimitation, the Court could not remain silent on this issue and commented:

> The Court for its part has no doubt about the importance of State practice in this matter. Yet, that practice, however interpreted, falls short of proving the existence of a rule prescribing the use of equidistance, or indeed of any method, as obligatory. Even the existence of such a rule as is contended for by Malta, (…), cannot be supported solely by the production of numerous examples of delimitation using equidistance or modified equidistance, though it is impressive evidence that the equidistance method can in many situations yield an equitable result.[76]

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[73] *Case Concerning the Continental Shelf*, ICJ Reports 1985.

[74] *Case Concerning the Continental Shelf* (n. 73) para. 27.

[75] *Case concerning the Continental Shelf*, Written Pleadings and Oral Arguments, vol. 1, 'Memorial of the Republic of Malta', para. 154; *ibid.* vol. II, 'Reply of Malta', para. 255; *ibid*., vol. 2, 'Libyan Counter Memorial', para. 5, at 5.55; *ibid*., vol. 2, 'Reply of Malta', part 4; ibid., vol. 3, 'plaidoire de M. Weil', 'plaidoire de Ian Brownlie', 468, 469.

[76] *Case Concerning the Continental Shelf* (n. 73) para. 44.

Regarding the concept of equity, the Court needed only to quote from what it had previously held in the *Continental Shelf Case* of 1982 (*Tunisia v Libya*), namely that "the legal concept of equity is a general principle directly applicable as law".[77] Ultimately, the Court also based its final delimitation of the continental shelf between Libya and Malta upon equitable principles.[78]

In their joint dissenting opinion Judges Ruda, Bedjaoui and Jiménez de Aréchaga reiterated the importance of equitable principles for the case, and even declared that "the entire process of maritime delimitation law is dominated by a 'fundamental norm', that of the equitable result, which is as instructive as it is all-embracing."[79] Therefore, they accorded special legal character to the equitable principles which goes well beyond the mere scope of an ordinary norm of customary international law. Judge Mosler in his separate opinion also examined the findings of the Court on the customary nature of the principle of equidistance and commented:

> For the purpose of applying the law in a given situation, the appropriate method will vary according to the particular features of each case.… The determination of the method is therefore indicated by the applicable principles and rules, even when the choice of one method does not logically or necessarily follow from the definition of the principles and rules. If the principles and rules can be carried into effect by more than one method, the choice between them is a matter of judicial propriety.[80]

The Court's emphasis on the element of state practice, as well as the application of equitable principles, were, according to Mosler, 'only' the most appropriate methods which could be employed in the unique circumstances of the dispute.

These findings underline the fact that the methods invoked by the Court to reach a certain solution neither represent the only solution to a problem of customary international law nor reflect a particular method of the Court, which is generally favoured in cases which address issues of customary international law. The validity of this argument can be seen very clearly in this case. The Court commented only on the need to establish both elements of customary international law when the two parties, Libya and Malta, disputed the customary nature of certain norms applicable to the case. The Court's emphasis on the element of state practice therefore does not permit the conclusion that it considers this element of predominant importance for the formation of customary international law *in any case.*

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[77] *Case Concerning the Continental Shelf*, ICJ Reports 1982, 60, para. 71.
[78] *Case Concerning the Continental Shelf* (n. 73), para. 46.
[79] *Continental Shelf* (n. 73) dissenting opinion *Ruda*, *Bedjaoui*, *Jiminéz de Aréchaga*, 81.
[80] *Continental Shelf* (n. 73) dissenting opinion *Mosler*, 119.

F. *The* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons

The first advisory opinion of the ICJ, which followed the 'traditional' two-element approach to custom is the *Nuclear Weapons Advisory Opinion*. The opinion was triggered by the UNGA, which in a resolution adopted on 15 December 1994 had addressed the following question to the Court: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[81]

In answering the above question, the Court, *inter alia*, had to consider whether the use of nuclear weapons was permitted or prohibited by current customary international law. The Court recalled its findings in the *Continental Shelf Case*s that the substance of customary international law must be looked for primarily in the actual practice and *opinio juris* of states.[82] However, the Court could not confirm that non-recourse to nuclear weapons had already been established in the *opinio juris* of states since "the members of the international community are profoundly divided on the matter".[83]

However, the advisory opinion is of great importance for the question whether resolutions of the UNGA may be considered evidence of the element of *opinio juris*. In their submissions to the Court several states had referred to the UNGA resolutions condemning recourse to nuclear weapons to prove the existence of a corresponding prohibition in international law.[84] Above all, Mexico had attributed source character to resolutions of international organisations, even if they did not reflect customary international law. It contended that

> the resolutions… though lacking the binding force of a treaty, often express a general *consensus* – especially if they have been approved by a strong majority – and therefore they confirm or reinforce precedents in international law.[85]

Yet member states were divided on this issue. Russia, for example, denied that UNGA resolutions have any impact on the formation of international law. Its written statement to the Court said: "They do not create new law and do not signify the recognition of any rules as such but are only of a

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[81] *Legality of the Threat of Nuclear Weapons*, ICJ Reports 1996, para. 1.

[82] *Legality of the Threat of Nuclear Weapons* (n. 81) para. 64.

[83] *Legality of the Threat of Nuclear Weapons* (n. 81) para. 67.

[84] *Legality of the Threat of Nuclear Weapons*, Oral Submissions, 2 November 1995, 'Statement of Mexico', 52; Oral Submissions 9 November 1995, Statement of New Zealand, 41; Written Pleadings, United Kingdom, 'Written Statement of 16 June 1996', para. 3.114.

[85] *Legality of the Threat of Nuclear Weapons*, Oral Submissions, 2 November 1995, 'Statement of Mexico', 52.

recommendatory nature."[86] Written and oral statements of the US,[87] the UK[88] and France[89] also expressed strong objections to the contention that resolutions of the UNGA were declaratory of customary international law. Nevertheless, a significant number of states affirmed that UNGA resolutions could express the *opinio juris* of states and serve as evidence for a rule of customary international law if accompanied by 'extensive and virtually uniform'[90] state practice.[91]

Ultimately, the Court noted the following regarding the influence of UNGA resolutions on the formation of customary international law norms:

> General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.[92]

The Court thus affirmed that UNGA resolutions can express an *opinio juris* and contribute to the formation of a new norm of customary international law. Nonetheless, it was still unable to identify a specific customary rule prohibiting recourse to the threat or use of nuclear weapons. In this regard, the emergence of a customary rule was "hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other."[93]

Despite these findings, the advisory opinion is probably one of the first decisions of the Court where 'principles of humanity' were mentioned as an authority in the process of the formation of customary norms, at least by the dissenting judges. As judges Shahabuddeen and Fleischhauer stated, the Court's opinion "provided authority for treating the principles of human-

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[86] *Legality of the Threat of Nuclear Weapons*, Written Submissions, 'Statement of Russia of 19 June 1995', 16.

[87] *Legality of the Threat of Nuclear Weapons*, Written Submissions, 'Letter of the US to the Court', 8, 18.

[88] *Legality of the Threat of Nuclear Weapons*, 'Letter of the United Kingdom', 16 June 1995, para. 3.27; *ibid.*, 'UK Oral Submissions', 15 November 1995, 45–47, 63.

[89] *Legality of the Threat of Nuclear Weapons*, France (20.06.1995), para. 23; *ibid.*, 'Oral Submissions', 2 November 1995, para. 48.

[90] *Legality of the Threat of Nuclear Weapons*, US 'Oral Submissions', 15 November 95, 63.

[91] *Legality of the Threat of Nuclear Weapons*, 'Letter of the United Kingdom to the Court', 16 June 1995, para. 3.114.

[92] *Legality of the Threat of Nuclear Weapons* (n. 81) para. 70.

[93] *Legality of the Threat of Nuclear Weapons* (n. 81) para. 73.

ity and the dictates of public conscience as principles of international law".[94] Shahabudden further maintained that these principles enshrined in the Martens Clause of the Geneva Conventions had to as a source of law for the Court.[95] In the same vein, Judge Fleischhauer also emphasised principles of humanitarian law as an "expression of the overriding considerations of humanity which is at the basis of international law".[96]

G. *The importance of the conclusions of the* Nuclear Weapons *advisory opinion for the formation of customary international law*

The conclusions of the Court in the *Nuclear Weapons* opinion reveal an important development in the formation of customary international law. On the one hand, the Court's ruling ended the long held debate on whether the resolutions of the UNGA alone can produce new, 'instant' customary international law, as maintained by Bin Cheng.[97] On the other hand, it affirmed the influence of UNGA resolutions on the formation of customary norms: the ICJ's opinion approves the character of UNGA resolutions as a collectively formed will of the international community on a certain matter of international law. Nevertheless, although the resolutions may prove the existence of an *opinio juris*, the element of state practice still had to be fulfilled. This is also one of the arguments which can be advanced against too positive an assessment of the *Nuclear Weapons* decision.

Yet some of the dissenting judges even considered the findings on the evidentiary character of UNGA resolutions too far reaching a conclusion of the Court. Judge Schwebel, for example, denied that any UNGA resolutions have any impact on the formation of international law. He maintained that the resolutions do not establish an *opinio juris*. According to his view, a resolution could be declaratory of international law only if it had been adopted unanimously or by consensus, and if it corresponded to actual state practice.[98] President Guillaume also heavily criticised the findings of the Court. He thought it had created new law rather than affirmed its present state:

> … la Cour, en recherchant quelle était la coutume en vigueur, n'a, quoiqu'elle en dise, guère tenu compte de la pratique et de l'*opinio juris* des Etats et s'est trop souvent laissée guider par des considérations qui relèvent plus du droit

[94] *Legality of the Threat of Nuclear Weapons*, dissenting opinion *Shahabuddeen*.
[95] *Ibid*.
[96] *Legality of the Threat of Nuclear Weapons*, dissenting opinion *Fleischhauer*, para. 2.
[97] *Legality of the Threat of Nuclear Weapons*, 'Written Pleadings and Oral Arguments', 2 November 1995, 'Oral Submissions Mexico', 52.
[98] *Legality of the Threat of Nuclear Weapons*, dissenting opinion *Schwebel*.

> naturel que du droit positif, de la *lex ferenda* que de la *lex lata.* Elle a en outre accordé une portée excessive aux résolutions de l'Assemblée générale des Nations Unies.[99]

Nonetheless, such criticism greatly overshoots the mark. The Court's decision still relies wholly on the 'classic' concept of customary international law based on both *opinio juris* and state practice. Thus, it seems too early at this stage to conclude that the Court wanted to introduce a new approach to custom, based upon humanitarian or other fundamental values.

IV. DEDUCTIVE REASONING

On several occasions the Court has also employed a deductive way of reasoning when assessing the formation of customary rules. Those occasions were nearly always closely connected to situations which involved the application of rules of international humanitarian law or those at least serving humanitarian purposes. A landmark decision in this series is the recent *Yerodia Case*, in which the Court examined the immunity of a Minister of Foreign Affairs. The conclusion that the Court has established the deductive approach to custom formation as a regular method of ascertaining customary rules consequently seems inevitable.

A. *The* Corfu Channel Case

The *Corfu Channel Case*[100] deals with a dispute between Albania and the UK on the damage caused by mine explosions to two British warships, which were sailing in Albanian waters in a channel previously swept for mines.[101] Among other issues, the Court had to decide on Albanian responsibility under international law for the damage to these ships. Since there was no evidence that Albania had actually laid the mines, the Court examined its responsibility for failing to warn the British ships of the presence of the mines in good time.[102] Thus, the Court had to discuss whether international law provided for an obligation of Albania to notify and warn the ships of the existence of a minefield in the Corfu Strait. On the nature, source and scope of this obligation under international law the Court found:

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[99] *Legality of the Threat of Nuclear Weapons*, separate opinion of *President Guillaume*, para. 1.
[100] *Corfu Channel*, Merits, ICJ Reports 1949.
[101] *Corfu Channel* (n. 100) 12.
[102] *Corfu Channel* (n. 100) 22.

> The obligations incumbent on the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but *on certain general and well-recognized principles, namely: elementary considerations of humanity*, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[103] (emphasis added)

Albania was thus held responsible for the damage caused to the British ships. The further dispute then revolved around questions of compensation[104] and the liability of the UK for mine-sweeping activities carried out following the incident.[105]

As shown above, the Court considered 'elementary considerations of humanity' to constitute the source of the obligation in international law to notify the laying of minefields. It did so without further scrutinising the legal character of these 'elementary considerations of humanity' and their role among the sources of international law listed in Article 38 of its Statute. Maybe the ICJ thought its conclusions to be so obviously true that it did not consider it necessary to inform us of the methodology employed in arriving at these conclusions. Nonetheless, the methodological approach chosen by the Court to establish that a rule exists under international law which obliges states to notify other states of the laying of minefields is clearly a deductive one; the Court tried to deduce a prohibition from a greater legal principle, namely elementary considerations of humanity.

In the written proceedings the UK had already advanced the argument that there was a 'general principle'[106] of humanitarian law which forbade the laying of mines in times of war. The UK memorial maintained:

> In view of the inevitable danger to the lives and property of innocent persons caused by the existence of minefields, the laying of minefields is *prima facie* forbidden and is an international wrong involving responsibility. This is based on the *elementary principle* that one who, knowingly and without legal justification, creates a danger to the life or property of another is answerable for any injury or damage sustained by that other.[107] (emphasis added)

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[103] *Corfu Channel* (n. 100) 22.
[104] *Corfu Channel* (n. 100) Merits, 26.
[105] *Corfu Channel* (n. 100) 32–35.
[106] *Corfu Channel* 'Written Pleadings and Oral Arguments, 'Memorial of the United Kingdom', para. 68.
[107] *Corfu Channel* (n. 106) para. 63.

Furthermore, the UK stated that Hague Convention No. VIII of 1907 established a minimum standard of humanitarian rules which also forbade the laying of mines in times of peace.[108] In principle, these contentions had also been affirmed by Albania in its counter-memorial. It contended that the laying of mines in times of peace was 'entirely illegal'[109] and later also confirmed that it constituted a "*grave délit international*".[110]

The Court was obviously inspired by the wording of the British memorial for the prohibition because it used the same terminology ('elementary') in its findings on the prohibition on laying mines under international law. It also adopted the methodology of deduction applied to derive the legal character of the prohibition, from the British memorial. The memorial maintained that the prohibition on laying mines in times of peace stemmed from a broader principle which asserted: "the one who knowingly and without legal justification, creates a danger to the life or property of another is answerable for any injury or damage sustained by that other".[111]

B. *The* Advisory Opinion on the Reservations on the United Nations Convention on the Prevention and Prohibition of the Crime of Genocide

The second case of interest when trying to prove the Court's deductive approach to customary international law is the *Advisory Opinion on the Reservations to the Genocide Convention.*[112] Although the case primarily tackles the admissibility of reservations to the Genocide Convention, it reveals some important aspects concerning custom which may have influenced subsequent decisions of the Court, such as the *Nicaragua Case* or the most recent decision in the *Yerodia Case*.

As the title of the case already suggests, it concerned a request by the UNGA to the Court on the permissibility of reservations to the Genocide Convention, which had been formulated by the Assembly in light of the growing number of states objecting to those reservations.[113] On the issue of

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[108] *Corfu Channel* (n. 106) para. 64, 65.

[109] "entièrement illegal"; see *Corfu Channel* 'Written Pleadings and Oral Arguments, 'Counter Momorial of Albania', para. 82, 83.

[110] *Corfu Channel* 'Written Pleadings and Oral Arguments, 'Counter-Memorial of Albania', para. 85, 84; See *ibid*., Reply of the United Kingdom', 272; 'Duplique of Albania', para. 27.

[111] *Corfu Channel* (n. 106) para. 63.

[112] *Genocide Advisory Opinion*, ICJ Reports, 1951.

[113] The questions submitted by the Assembly read as follows:

I. Can the reserving state be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

the reservations permissible within the context of the Convention, the ICJ emphasised the Convention's special characteristics, which would determine their validity. It concluded:

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and *which is contrary to moral law* and to the spirit and aims of the United Nations.... The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on states, *even without any conventional obligation*. A second consequence is the *universal character* both of the condemnation of genocide and of the co-operation required in order to liberate mankind from such an odious scourge.[114] (emphasis added)

It is easily discernible from the above quotation that the very gravity of the crime and its particular heinousness were sufficient for the Court to ascertain its customary character. From a general perspective, this resembles more a conclusion derived by the Court from the object and purpose of the Genocide Convention. This is further supported by the Court's subsequent findings in which it pointed to the universal character of the prohibition of Genocide and the fact that it had been adopted 'for a purely humanitarian and civilising purpose'.[115] As the ICJ explained:

> It is indeed difficult to imagine a convention that has this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality.[116]

The Court continued that a complete exclusion of a state from the Convention by the states objecting to a reservation made by it "would detract

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II. If the answer to Question I. is in the affirmative, what is the effect of the reservation as between the reserving state and:
(*a*) the parties which object to the reservation?
(*b*) those which accept it?

III. What would be the legal effect as regards the answer to Question I, if an objection to a reservation is made
(*a*) by a signatory which has not yet ratified?
(*b*) by a State entitled to sign or accede, but which has not yet done so?

See *Advisory Opinion on the Reservations to the UN Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1951, 16, G.A. Resolution of 16 November 1950.

[114] *Genocide Advisory Opinion*, ICJ Reports 1951, at 23.

[115] *Genocide Advisory Opinion* (n. 114) at 23.

[116] *Ibid.*

from the authority of the moral and humanitarian principles which are its basis",[117] thus affirming the general ability for states to make reservations to the Convention. In contrast to an interpretative approach, such findings may also indicate some early traces of a deductive methodology. The 'elementary principles of morality' in particular, strongly resemble the 'elementary considerations of humanity', invoked in the previous Corfu Channel judgment.

However, as the Court did not have to decide on the customary nature of the prohibition of genocide, it did not have to elaborate further on this question. Nonetheless, it should become clear from these findings that the Court employed an entirely different approach to the attribution of customary status to the prohibition of genocide than it had done with customary norms in its previous judgments. This methodology was heavily influenced by the nature and character of the prohibition of genocide.

Judges Guerrero, McNair, Read and Hsu Mo commented on the object and purpose of the Genocide Convention in their dissenting opinions. They discovered a new 'tendency' in international relations "towards the promotion of the common welfare of the international community with a corresponding restriction of the sovereign power of individual States".[118] Such findings quite accurately reflect the spirit in which the *Genocide Advisory Opinion* was formulated. As shown above, the judges were of the view that the Convention formulated some universal values which could not be endangered by subsequent reservations which would only devoid the treaty of its universal character. Judge Alvarez[119] also described this new development of international law quite clearly in his dissent. He spoke of a *new order* which had arisen and a 'new international law'.[120] In this 'new international law', he contended, public opinion would be an important factor in law making.[121] Hence, conventions like the Genocide Convention which had been

> signed by a great majority of States ought to be *binding upon the others, even though they have not expressly accepted them*: such conventions establish a kind of binding custom, or rather principles which must be observed by all states by reason of their interdependence and of the existence of an international organization. (emphasis added)[122]

The special character of the prohibition of genocide and the Genocide Convention was supported in particular by the written and oral submissions of

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[117] *Genocide Advisory Opinion* (n. 114) 24.
[118] *Genocide Advisory Opinion* (n. 114) 46.
[119] *Genocide Advisory Opinion* (n. 114) 50, 51.
[120] *Ibid.*
[121] *Genocide Advisory Opinion* (n. 114) 52.
[122] *Ibid.*

the UK. She strongly criticised the views advanced, for example by the US, which attributed mere treaty character to fundamental international conventions like the Genocide Convention and the UN Charter.[123] This would strongly challenge the nature and character of the system for which such conventions were devised.[124] The British submissions characterised the Genocide Convention as the "social law-making, or status-régime or system-creating type".[125] Its obligations should equally bind all the parties to it and would have to be carried out universally, once they were owed.[126] Britain further described the nature of the Convention as follows:

> […]benefits as ensue from them are of an intangible and indirect character. This is because the purpose and effect of the conventions is mainly social. Any benefits resulting from these conventions will be the consequence chiefly of the general improvement in world order.[127]

However, these findings were not supported by other states. Israel's agent Rosenne, for example, emphasised that the British classification of the character of the Convention as social or law-making would not serve much purpose.[128] As he maintained, the universal character of the Convention could solely be derived from its acceptance by a large number of states.[129]

C. *Relevance of the findings in the* Advisory Opinion on the Genocide Convention *and further developments: the* Barcelona Traction Case *and the* Genocide Case *(Bosnia Herzegovina v. Serbia Montenegro)*

The *Genocide Advisory Opinion's* findings on the characteristics of the crime of genocide being contrary to moral law and the principles of humanity laid the ground for subsequent cases of the ICJ, the ICTY and the ICTR which will be examined in the course of this book.

In finding that the provisions of the Convention 'confirm and endorse the most elementary principles of morality',[130] the Court made it clear that the prohibition of genocide belongs to the most elementary rules of international society. The ICJ further showed that such considerations of humanity

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[123] *Genocide Advisory Opinion* (1949) 'Written Pleadings and Oral Arguments', 24.
[124] *Genocide Advisory Opinion* (n. 123) 62.
[125] *Ibid.*
[126] *Genocide Advisory Opinion* (n. 123) 64.
[127] *Genocide Advisory Opinion* (n. 123) 68.
[128] *Genocide Advisory Opinion* (n. 123) 332.
[129] *Ibid.*; compare also the French submissions, which did not attribute a special character to the Convention either: *ibid.*, 427.
[130] *Genocide Advisory Opinion*, ICJ Reports 1951, 23.

also constitute the basic object and purpose of the Genocide Convention. As Meron observes:

> The Court's opinion does not address the question whether reservations to conventional rules which are identical to customary rules are in general possible. But in the specific case of the Genocide Convention, the Court appears to suggest that because the principles of the Convention, which correspond to customary law, determine its humanitarian and civilizing objects, such reservations would be contrary to these objects and thus inadmissible.[131]

This method of determining the customary character of a certain rule of international law differs entirely from the two-element approach identified in other judgments of the Court dealing with other questions of international law. It does not take the elements of *opinio juris* and state practice as a starting point, but derives the customary character of a rule directly from the underlying principles.

The findings of the *Genocide Advisory Opinion* were upheld in the *Barcelona Traction Case*[132] where the judges – albeit *obiter* – reaffirmed the customary international law character of the prohibition of genocide and of other fundamental rights.[133] As the Court maintained, obligations of states owed towards the international community as a whole could be derived from those rights:

> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[134]

Although this passage of the judgment refers to the famous and most disputed[135] *dictum* of the Court concerning obligations *erga omnes*,[136] the use of

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[131] *T. Meron* (Human Rights as Customary Law) 12.

[132] *Barcelona Traction, Light and Power Company, Limited*, Second Phase, ICJ Reports 1970, 1ff.

[133] *Barcelona Traction* (n. 132) 32, para. 34.

[134] *Ibid.*

[135] For the debate on *erga omnes* obligations see *C. Annacker* (1994) 2 Austrian Journal of Public and International Law, 131ff; *A.J. Hoogh* (Obligations *Erga Omnes*); *O. Lopez-Pegna* (1998) 4 EJIL 724ff; *S. Rosenne* in *A. Anghie* (Visions) 509ff; *C. Tams* (Enforcing obligations *Erga Omnes*).

[136] *Barcelona Traction* (n. 132) 32, para. 33: "When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of

which will not be discussed any further at this point, it nevertheless reveals the application of a deductive approach by the Court to those fundamental rights. The Court apparently considered those norms to have such a fundamental character that they could form the basis of further obligations.

Finally, the findings of the *Genocide Advisory Opinion* were also reaffirmed by the findings in the *First Genocide Case*.[137] In this case concerning a claim by Bosnia Herzegovina against Yugoslavia (Serbia Montenegro) for atrocities committed in the Balkan war, the Court re-emphasised its 1951 findings on the universal applicability of the Genocide Convention and also affirmed the *erga omnes* character of the prohibition on genocide, which obligated each State to prevent and punish the crime of genocide.[138]

V. A FIRST DRAWBACK FOR THE DEDUCTIVE APPROACH: THE *SOUTH-WEST AFRICA CASES*

A deductive approach to the formation of customary international law was also discussed by the ICJ in the *South-West Africa Cases*, which concerned two joint proceedings[139] instituted by Ethiopia and Liberia against the Republic of South Africa for breaching South Africa's mandate. In identical claims, Ethiopia and Liberia maintained that South Africa, by instituting its policy of apartheid and racial segregation, had violated the mandate itself and Article 22 of the League of Nations Covenant. Article 22 laid down certain provisions on the character of the mandate and on the responsibilities of the mandatory.[140] South Africa, on the other hand, rejected this claim, arguing that the mandate system had lapsed with the dissolution of the League of Nations and that no obligations were owed to the United Nations or had been breached by it.[141]

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all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."

[137] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, (1996).

[138] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, (1996), para. 31.

[139] *South West Africa Cases*, Court Order of 20 May 1961, ICJ Reports, 1961.

[140] See Article 22 (3) and (5) Covenant of the League of Nations; for example at: <http://avalon.law.yale.edu/20th_century/leagcov.asp> (last visited 10 December 2009); See *South West Africa Cases*, ICJ Reports 1966, 10, 12.

[141] *South West Africa Cases*, ICJ Reports 1966, 14; *ibid.*, 'Pleadings, Oral Arguments, Documents', vol. 1, 298ff; *ibid.*, 'Pleadings, Oral Arguments, Documents', vol. 2, 'Counter Memorial of South-Africa', 165ff.

To establish the jurisdiction of the ICJ, both applicants had attempted to deduce a legal right or interest in the conduct of the mandate from the mere existence of the notion of the "sacred trust of civilisation"[142] contained in Article 22 (1) of the Covenant of the League of Nations.[143] It was argued that the notion "sacred trust of civilisation" meant that all civilised nations had an interest in seeing that it was carried out. In particular, 'humanitarian considerations' inherent in the notion of the "sacred trust of civilisation" were invoked to establish that South Africa by its policy and system of apartheid had flagrantly thwarted the very idea of the mandate system.

However, this time the Court did not concur with such reasoning based on humanitarian principles. It explained that for a right or interest to be derived from the notion of humanitarian considerations, inherent in the "sacred trust of civilisation", such interest had to take on a specifically legal character and had to become something more than a moral or humanitarian ideal. In the Court's view, such interest had to be given juridical expression and take on a legal form to generate legal rights and obligations.[144] Furthermore, the judges maintained that the moral ideal behind a certain interest was not to be confused with the legal rules intended to give it effect. The Court thus held:

> Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise it is not a legal service that will be rendered.
>
> Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, in themselves amount to rules

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[142] *South-West-Africa Cases*, 'Pleadings, Oral Arguments, Documents', vol. 1, 'Memorial of Ethiopia', 36, alleging that the concept of the "sacred trust" reflected a responsibility for the dignity and well-being of the individual person; further: *ibid*., 'Observations of Ethiopia and Liberia', 475; *ibid*., 'Pleadings, Oral Arguments, Documents, vol. 4, Reply of Ethiopia and Liberia', 544, 545; *ibid*., vol. 8, 169, 170, 181, 198, 199.

[143] Paragraph 1 of Article 22 of the Covenant of the League of Nations reads:

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

[144] *South West Africa Cases*, ICJ Reports 1966, 34, para. 51.

> of law. All States are interested – have an interest – in such matters. But the existence of an "interest" does not of itself entail that this interest is specifically juridical in character.[145]

Such findings seem in a way to play down and dismiss previous findings of the Court in the *Corfu Channel* judgment or in the *Genocide* Advisory Opinion, which indeed based some of their conclusions on the formation of new customary international law on 'elementary considerations of humanity' and morality, as demonstrated. The findings appear to be a warning shot directed at any unconscious application of a deductive approach. Nonetheless, the circumstances of the *South-West Africa* judgment also have to be taken into account. Due to the political tensions surrounding the case, the Court was eager to emphasise its legal aspects to avoid being accused of engaging in entirely political matters.[146] And since the Court did not see a legal concept in the notion of the 'sacred trust of civilisation', this concept could not serve as a basis for the deduction of further legal rules. According to the Court's view, there was no starting point for the application of a deductive approach.

However, countering the political argument, one has to take into account what Higgins observed in her discussion of the *South-West Africa Cases*: since policy and legal issues in international law cannot be strictly separated from one another, international courts cannot decline to decide a matter on the ground that the dispute at issue was merely political.[147]

It must also be considered that Ethiopia and Liberia tried to deduce their title to bring a claim against South-West Africa, i.e. their *locus standi* before the Court, from the notion of the 'sacred trust of civilisation'. This is a procedural aspect concerning the admissibility of the claim. However, the earlier cases in which 'humanitarian considerations' were invoked by the Court all concerned questions of substantive law, i.e. they discussed the question whether there were certain rights and obligations which – having their basis in elementary considerations of humanity – had to be observed by the parties. They did not have to discuss the question whether the parties had *locus standi* to invoke those rights.

To conclude, the *South-West Africa Cases* do not constitute a step backwards in the entire deductive approach to customary international law. They merely confirm that a right of *locus standi* before the Court deriving from a customary rule must be supported by sufficient proof of *opinio juris* and

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[145] *South West Africa Cases*, ICJ Reports 1966, 34, paras. 49, 50.

[146] This has been emphasised by *R. Higgins* (1968) 17 ICLQ 58ff, in her discussion of the *South-West Africa Cases*.

[147] *R. Higgins* (1968) 17 ICLQ 83.

state practice and may not be deduced from concepts the legal character of which is yet to be clarified.

VI. DEDUCTION AFFIRMED? THE *GULF OF MAINE CASE*

Almost 20 years after the *South-West Africa* decision, the *Gulf of Maine Case*[148] discussed anew the issue of 'deductive customary international law'. It was brought before the ICJ by a special agreement of Canada and the US asking the Court to delimit the single maritime boundary which divides the continental shelf and the fisheries zones in the Gulf of Maine area, which are shared by the two countries.[149] The case is frequently cited because of the unique conditions under which it was brought before and accepted by the Court – with the US and Canada meticulously determining the ICJ's scope of jurisdiction. However, it is also one of the most cited cases underlining the contention that several categories of customary international law exist which derive from the application of different jurisprudential methodologies.

On the formation of customary international law the Court held:

> customary international law…in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, *together with* a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.[150] (emphasis added).

However, this quotation on its own can be interpreted either in support of a deductive methodology or to serve the opposite argument, which favours the empirical method of determining the formation of new customary law. The former opinion is propagated, for example, by Tomuschat, who in his 1993 course at The Hague quoted the *Gulf of Maine* judgement to support his theory of deductive customary law.[151] An adherent to the latter view is Kolb, who maintained that the Court merely wanted to state the fact that there might be a category of customary international law in which proof of *opinio juris* and practice was already settled, and another where the necessary evidence to ascertain to what extent the opinion was confirmed by state practice still needed to be gathered.[152]

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[148] *Gulf of Maine*, ICJ Reports 1984, 246ff.
[149] *Gulf of Maine* (n. 148) para. 5.
[150] *Gulf of Maine* (n. 148) para. 111.
[151] *C. Tomuschat* (1993) RdC, vol. 241, 298.
[152] *R. Kolb* (2003) 50 NILR, 126, Footnote 30.

To verify either suggestion, we need to know more about the context in which the Court formulated the paragraph quoted. Previously, the Court had decided on the issue of maritime delimitation in the *North Sea Continental Shelf Case*, where it had applied "equitable criteria" for delimitation.[153] In the *Gulf of Maine Case*, however, the parties both supported the existence of a "fundamental norm" in international law which stated that any delimitation of a single maritime boundary had to take place according to "equitable principles".[154] However, they differed on the issue of which further rules could be derived from such "fundamental norm". Hence, the Court determined that any accompanying norms had to be derived from a reformulation of the fundamental norm.[155] Such reasoning, however, constitutes another application of the deductive approach: it further elaborates the criteria under which such deduction may be permissible. It determines that the new rules derived from the existing one must be covered by the old rule's literal scope.

Yet regarding the Court's actual findings on the 'different categories' of customary international law, the judgment does not contain any further illustrations. Nonetheless, support for the argument that the Court wanted to differentiate between a deductive and an empirical approach to custom formation may be derived from the fact that it actually employed and further defined such a deductive approach in the paragraph which dealt with the "fundamental rule", and from the fact that it had actually employed a deductive approach in its previous judgments.

VII. DEDUCTIVE AND EMPIRICAL APPROACHES SIDE BY SIDE: THE *NICARAGUA* CASE

A. *The Court's findings*

The *Nicaragua Case*[156] is probably the case in which the ICJ most extensively and explicitly pronounced on the role of customary international law as a source of international law and its constituent elements. In the judgment, customary international law played such a predominant role mainly because of the multilateral treaty reservation which the US had made with regard to the Court's jurisdiction. It excluded jurisdiction over all disputes involving

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[153] See *infra*, 129ff.
[154] *Gulf of Maine* (n. 148) para. 98, 99.
[155] *Gulf of Maine* (n. 148) para. 112.
[156] *Nicaragua Case*, Merits, ICJ Reports 1986.

multilateral treaties. Consequently, the ICJ could decide only on those rules of international law which had a customary character.[157]

Thus, for a start, the Court had to assess – and confirm – custom's independent source character. The US had raised the preliminary objection that the rules of customary international law embodied or recognised in a multilateral treaty were not applicable to the case. Agents for the US argued that customary rules had been subsumed or supervened by the relevant law of the multilateral treaty. However, the Court rejected this claim, finding that even if rules of international law had been incorporated into a multilateral treaty, this would not rule out the continuing binding force of identically constituted customary norms.[158] In particular, it emphasised their independent legal character and applicability besides rules of international treaty law.[159]

Subsequently, the Court discussed the customary international law character of the prohibition of the use of force, the principle of non-intervention and the principle of self-defence, since these were the norms relevant to the case. These findings are also of particular significance here: they demonstrate the different emphases of the Court on methodologies applied for the finding of customary norms.

For the customary prohibition of the use of force, the Court established that its formulation both in the UN Charter and in customary international law derived from a 'common fundamental principle' which aimed at outlawing the use of force in international relations.[160] Furthermore, the Court emphasised that the customary content of this norm had to be derived from the practice and *opinio juris* of states.[161] Nevertheless, it stressed that multilateral conventions had also further recorded, defined and developed the content of the norm.[162] Most importantly however, it held:

> the Court may not disregard the essential role played by general state practice…in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice[163]

Thus, according to the Court, the manifestation of the will of the parties in a treaty commitment should not be the only evidence taken into account

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[157] See *Nicaragua Case*, Merits, ICJ Reports 1986, para. 172ff.

[158] *Nicaragua Case*, Jurisdiction of the Court and Admissibility of the Application, ICJ Reports 1984, 424, para. 73.

[159] *Nicaragua Case* (n. 156) 177.

[160] *Nicaragua Case* (n. 156) para. 181.

[161] *Nicaragua Case* (n. 156) para. 183.

[162] *Ibid.*

[163] *Nicaragua Case* (n. 156) para. 184.

when assessing the customary character of a norm. There are various other instances in which parties could express the recognition of a customary rule of international law. Therefore, the judges found, relevant state practice would have to be appraised in light of the 'subjective element'.[164] However, it could also be that state practice was in fact inconsistent with the rule expressed in the *opinio juris* of states. This was discernible, for example, in the case of the prohibition of the use of force. Thus, the Court considered that corresponding state practice must not be:

> in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indication of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[165]

Furthermore, the Court once again confirmed the impact of UNGA resolutions on the formation of the element of *opinio juris*. It held that *opinio juris* may be deduced from "… the attitude of States towards certain UNGA resolutions and particularly Resolution 2625 (XXV)".[166] The judges found that a state's consent to such a resolution "may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves", so that resolution expressed a corresponding *opinio juris*.[167] They also established that statements by state representatives accepting the customary international law character of a rule could also count towards the assumption of an *opinio juris*.[168]

This passage of the judgement affirms the classic two-fold approach to custom, based on Article 38 (1) (b) of the Court's Statute. Yet, more so than in its previous judgments, the Court emphasised the element of *opinio juris* and its evidence. It discussed *opinio juris* as reflected in the verbal statements of government representatives to international organisations, in the content of UNGA resolutions, declarations and other normative instruments adopted by such organisations, and in the consent of states to such instruments; "[d]espite the variety of reasons which impel states to adopt their respective

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[164] *Nicaragua Case* (n. 156) para. 185.
[165] *Nicaragua Case* (n. 156) at 98, para. 186.
[166] *Nicaragua Case* (n. 156) para. 188.
[167] *Ibid.*
[168] *Nicaragua Case* (n. 156) para. 189.

positions in international fora."[169] On the other hand, the Court made only "perfunctory and conclusory references to the practice of states."[170]

The next and probably most important part of the judgment focuses on an entirely different methodology of custom. It tackles the customary international humanitarian law applicable to the dispute. Nicaragua claimed that the US had breached general and customary international law in wounding and kidnapping Nicaraguan citizens, yet without referring to any particular humanitarian provisions. Thus, the Court declared:

> in its view the conduct of the United States may be judged according to the *fundamental general principles of humanitarian law*; in its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression of such principles.[171] (emphasis added)

In particular, it held common Article 3 of the Geneva Conventions to reflect "elementary considerations of humanity", and thus considered those principles to be applicable irrespective of the multilateral treaty reservation by the US. Furthermore, the Court maintained that the US was obliged to "respect" the Geneva Conventions "in all circumstances". Such an obligation derived not only from the Conventions themselves, but also from the general principles of humanitarian law to which the Conventions merely gave specific expression.[172] Accordingly, the US was obliged not to encourage persons or groups involved in the conflict in Nicaragua to violate common Article 3.[173]

As has been observed before, this approach of the Court to the norms of customary international humanitarian law differs entirely from the two-element approach applied earlier in the judgment to identify new norms of customary international law. In the *Nicaragua* judgment, the ICJ focuses on the application of fundamental principles of international humanitarian law, which – unlike in its findings in the *South-West Africa Case*s – it considers to have a legal, justiciable content according to which the US could be held accountable. Moreover, the fact that certain humanitarian rules like common Article 3 of the Geneva Conventions reflect "elementary considerations of humanity" seems to be sufficient to make this norm customary in character. Methodologically speaking, this is an entirely deductive way of reasoning, which stands in some contrast to the earlier focus of the Court on Article 38 (1) (b) ICJ Statute.

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[169] *T. Meron* in *id.* (War Crimes) 157.

[170] *T. Meron* in *id.* (War Crimes) 157; See the critique of Charney on such an approach: *J. Charney* (1988) 1 Hague YBIL, 18.

[171] *Nicaragua Case* (n. 156) para. 218.

[172] *Nicaragua Case* (n. 156) para. 220.

[173] *Ibid.*

B. *Further assessment of the* Nicaragua *Judgment*

The *Nicaragua* judgment on the merits and the 1984 judgment concerning the preliminary objections have been subject to extensive debate.[174] The criticism related in the main to the fact that the US had decided not to take part in the proceedings. It has been maintained that the US's absence influenced the Court's fact finding, the evidence brought before it and also its findings on the applicable customary international law.

One aspect of the criticism of the Court's findings on the formation of customary norms concerned the issue of customary norms paralleling norms of international treaty law.[175] Judge Jennings, for example, highlights in his dissenting opinion the difficulty of discerning supporting state practice if all practice actually available relates to the relevant rule of international treaty law. He complains that the Court has faced serious

> difficulties about extracting even a scintilla of relevant "practice" on these matters from the behaviour of those few states which are not parties to the Charter; and the behaviour of all the rest, and the *opinio juris* which it might otherwise evidence.[176]

Hence, Jennings denies the development of customary norms paralleling Charter provisions.[177] He finds that any interpretation of customary international law with the help of treaty provisions would give rise to the suspicion that it was only the treaty which was being applied under another name.[178] Accordingly, he maintains that the customary nature of common Article 3 of the Geneva Conventions could hardly be substantiated.[179] Other judges critical of the Court's findings on the formation of customary norms paralleling provisions of international treaty law suggest a rule of priority which gives precedence to a norm of treaty law if it is preceded by a customary norm and *vice versa*.[180]

However, criticism like that of Jennings has to be confronted with the fact that the sources of international law, as listed in Article 38 of the ICJ Statute, are generally not regarded as in a hierarchical order, in which treaty prevails

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[174] See *H. Maier* 81 (1987) AJIL 77–183; *J. Charney* (1988) 1 Hague YBIL, 18; *M. Akehurst* (1987) 27 Indian Journal of International Law, 357ff.

[175] *Nicaragua Case* (n. 156) dissenting opinion *Jennings*, 530, 531; separate opinion *Ago*, 183; dissenting opinion *Schwebel*, 310ff, para. 91ff, 96.

[176] *Nicaragua Case* (n. 156) dissenting opinion *Jennings*, 531.

[177] *Nicaragua Case* (n. 156) dissenting opinion *Jennings*, 531; dissenting opinion *Ago*, 183, para. 6.

[178] *Nicaragua Case* (n. 156) dissenting opinion *Jennings*, 532.

[179] *Nicaragua Case* (n. 156) dissenting opinion *Jennings*, 537.

[180] *Nicaragua Case* (n. 156) dissenting opinion *Schwebel*, para. 96, 97.

over custom etc. This would deprive customary international law of its independent legal character. Moreover, as judge Singh commented,

> This reasoning appears to miss the fundamental aspect of the matter, which is whether, if the treaty base of a concept was removed, that concept would fall to the ground or still survive as a principle of law recognized by the community.[181]

The prioritization of treaties over custom actually reduces the scope of norms of customary international law. It would lead to the result that customary norms applied only to states which were not parties to the relevant international treaty. It would further preclude the application of custom in a case where the treaty was not applicable. This result clearly contradicts Article 38 (1) (b) ICJ Statute, which characterises customary international law as a 'general practice accepted as law', and which thus defines the nature of custom independently from previously concluded agreements.

A second aspect of the criticism advanced on the Court's findings in the *Nicaragua* judgment concerns the deductive approach which the ICJ chose to apply with regard to the customary rules of international humanitarian law applicable to the case.[182] Authors have mainly criticised the lack of due regard by the Court to the element of state practice.[183] They have maintained that, with the deductive method applied by the Court, rules of customary international law could even be ascertained as long as "a rule is placed within a widely adopted treaty and resolutions of the United Nations or regional organisations so long as state practice predicated upon a contrary norm is absent."[184] As Charney argues, proceeding in such a manner would not reflect current realities in international law-making, which still relies on state interests.[185] He further points out that very often the specific context in which a treaty had been adopted would not permit any generalisation towards a norm of customary international law.[186]

On the other hand, the deductive method adopted by the Court and its reliance on 'elementary considerations of humanity' for the ascertainment of new norms of customary international law has also been approved by authors. Fitzmaurice, for example, commented that

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[181] *Nicaragua Case* (n. 156) dissenting opinion *Singh*, 152.

[182] See *Symposium* (1987) 81 AJIL 77–183; *J. Charney* (1988) 1 Hague YBIL, 22.

[183] *J. Charney* (1988) 1 Hague YBIL, 22; further: *T. Meron* (Human Rights as Customary Law) 36 and 37, who maintains that a closer examination of state practice by the Court would have been necessary since Article 3 of the Geneva Conventions, at the time of its drafting, constituted a 'new step' in the development of humanitarian law.

[184] *J. Charney* (1988) 1 Hague YBIL, 22.

[185] *J. Charney* (n. 184) 23.

[186] *Ibid.*

> The way in which the Court brings together and then confronts the elementary considerations of humanity on the one hand and the fundamental right of a state to its own survival on the other emphasises the contradictory legal and philosophical grounds on which the one and the other rely.[187]

Finally, it seems certain that in the *Nicaragua* judgment the ICJ clearly departed from the classic approach to customary international law based on Article 38 (1) (b) of its Statute: not only did it focus on a deductive approach to custom formation, it also referred to methods of custom formation which rely almost entirely on the element of *opinio juris*, without observing the element of state practice. However, it remains to be seen whether a focus on the *opinio juris* element or an entirely deductive approach really 'threatens the institution of customary international law',[188] as some of the Court's critics have maintained.

VIII. RESUMPTION OF THE DEDUCTIVE METHOD: THE *YERODIA* CASE

A. *The ICJ's findings*

The findings of the ICJ in the *Arrest Warrant of 11 April 2000* or *Yerodia Case* gave me reason to conduct this study of the jurisprudential methods of the ICJ and of the *ad hoc* criminal tribunals on the constituent elements of customary international law.[189] The case concerned the claim of the Democratic Republic of Congo (DRC) against the Kingdom of Belgium for the issue and international circulation of an arrest warrant against its former Minister for Foreign Affairs, Mr. Yerodia. The arrest warrant was issued on suspicion that Mr. Yerodia had committed grave breaches of the Geneva Conventions and their Additional Protocols as well as crimes against humanity. Objecting to such measures, the DRC held that Mr. Yerodia, in his capacity as Minister for Foreign Affairs, was entitled to immunity from the jurisdiction of Belgian courts.[190] After the institution of proceedings before the ICJ, however, Mr. Yerodia ceased to be Minister for Foreign Affairs and became Minister of Education, and at the time the Court submitted its judgment he held no ministerial office. Although this could have made the case moot, the Court

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[187] *G. Fitzmaurice* (Law and Procedure) vol. 1, 17.

[188] *J. Charney* (n. 184) 24.

[189] *Arrest Warrant Case*, ICJ Reports 2002.

[190] *Arrest Warrant Case*, ICJ Reports 2002, Memorial of the DRC, 15 May 2001, Introduction, para. 6, 7.

decided that its jurisdiction depended on the act which instituted the proceedings and that it had not lapsed.[191]

On the merits of the case, the ICJ directly proceeded to the question of Mr Yerodia's immunity.[192] From a general perspective, it followed the DRC in this matter, which had argued that Ministers for Foreign Affairs enjoy the same inviolability and immunity from criminal jurisdiction under international law as Heads of State: "[c]ette doctrine reflète une pratique internationale constante et séculaire, ainsi la Cour ne l'ignore pas".[193] Moreover, agents for the DRC explained that this rule derived from the similar functions that a Minister for Foreign Affairs exercised in the discharge of his or her office: "…du fait même de ses fonctions, le ministre des Affaires étrangères est appelé à voyager et à représenter l`État à l'étranger au même titre que le chef d'État."[194] In addition, they maintained that these functional immunities

> …sont accordées automatiquement par le droit international général à la personne qui en bénéficie en conséquence des fonctions officielles que celle-ci exerce et afin de permettre leur bon accomplissement par leur protection contre *toute* ingérence étrangère non autorisée par l'État que cette personne représente.[195]

Finally, the DRC also found that the status of a Minister for Foreign Affairs under international law was very similar to that of a Head of State. The minister was endowed with the same powers and competences under international law to conclude binding (treaty) obligations for his or her state.[196] This was also maintained by the Belgian submissions,[197] which further emphasised the customary character of this rule on immunity in international law.[198]

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[191] *Arrest Warrant Case*, ICJ Reports 2002, Coutermemorial of Belgium, para. 1.17; *ibid.,* ICJ Reports 2002, para. 26.

[192] For proceeding in this manner, without assessing first the question whether the assumption of universal jurisdiction by Belgium, which lead to the issuance of the arrest warrant, was permitted under international law, the Court has been heavily criticised by Judges *van den Wyngaert, Koroma, Higgins, Kooimans* and *Buergenthal* as well as by President *Guillaume*; see *Arrest Warrant Case*, ICJ Reports 2002, *Van den Wyngaert*, separate opinion, 22, para. 42; *ibid*., *Higgins, Kooijmans, Buergenthal*, joint separate opinion, para. 3ff, 46ff; *ibid*., separate opinion *Guillaume*, para. 9; *ibid*., separate opinion *Koroma*, para. 6–9.

[193] *Arrest Warrant Case*, ICJ Reports 2002, Memorial of the DRC, part 3, para. 46.

[194] *Arrest Warrant Case* (n. 193) para. 46.

[195] *Arrest Warrant Case* (n. 193) para. 47.

[196] *Arrest Warrant Case* (n. 193) para. 48.

[197] *Arrest Warrant Case*, ICJ Reports 2002, Counter-Memorial of Belgium, 28 September 2001, para. 3.4.7.

[198] *Arrest Warrant Case*, ICJ Reports 2002, Counter-Memorial of Belgium, 28 September 2001, para. 3.4.6.

However, regarding the customary international law on the immunity of a Minister for Foreign Affairs, the Court affirmed that it was firmly established in international law, that

> … as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.[199]

The ICJ determined that, due to the lack of relevant provisions of international treaty law,[200] the immunity of a Minister for Foreign Affairs had to be decided on the basis of customary international law.[201] As the Court explained, customary international law, nonetheless, mainly accorded immunities to Ministers for Foreign Affairs "to ensure the effective performance of their functions on behalf of their respective States".[202] The Court went on to examine those functions which a Minister for Foreign Affairs carries out. *Inter alia*, it pointed to the need for the Minister for Foreign Affairs to travel and communicate with his or her colleagues and with diplomats and to the fact that a Foreign Minister is generally presumed by the VCT[203] to be a representative of his or her state at international level.[204] Accordingly, examination of the functions of Ministers for Foreign Affairs under international law mainly influenced the Court's findings on the actual customary rule determining their immunity. It concluded:

> … the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.[205]

Nonetheless, it did not take up further submissions of Belgium which stipulated that the immunity would not encompass acts committed in a private capacity.[206] To the contrary, it held that

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[199] *Arrest Warrant Case*, ICJ Reports 2002, para. 51.

[200] See the *Vienna Convention on Diplomatic Relations* of 18 April 1961, *Convention on Consular Relations* of 24 April 1963, *New York Convention on Special Missions* of 8 December 1969; *Arrest Warrant Case*, ICJ Reports 2002, para. 52.

[201] *Arrest Warrant Case*, ICJ Reports 2002, para. 52.

[202] *Arrest Warrant Case* (n. 201) para. 52.

[203] Article 7, para. 2 (a).

[204] *Arrest Warrant Case* (n. 201) para. 52.

[205] *Arrest Warrant Case* (n. 201) para. 54.

[206] *Arrest Warrant Case*, ICJ Reports 2002, Counter-Memorial of Belgium, 28 September 2001, para. 3.4.15ff.

> In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private" capacity, or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office.[207]

Belgium had further challenged the customary rules establishing the immunity of a Minister for Foreign Affairs. Today, it argued, there was an exception in international law which, in the event of the commission of international crimes, did not allow for the application of the immunity regime to bar the initiation of proceedings.[208] The DRC, on the other hand, maintained that there was no exception in contemporary international law which would affirm the individual criminal responsibility of a Minister for Foreign Affairs before national courts, even where international crimes had been committed.[209] In this regard, too, the ICJ followed the reasoning of the DRC. It explained:

> It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[210]

The ICJ further argued that neither the instruments establishing international criminal tribunals, nor their respective jurisprudence, contained provisions or otherwise supported a view which would enable it to conclude that such an exception existed in customary international law with regard to national courts.[211] Nonetheless, the Court emphasised:

> the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity (emphasis in the original).[212]

Thus, acts committed by a Foreign Minister in a private capacity could be prosecuted in three situations: first, before the courts of the state the nationality of which he has; second, in cases where the state of nationality has waived the immunities, and, third, after the Minister of Foreign Affairs has

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[207] *Arrest Warrant Case* (n. 201) para. 55.

[208] *Arrest Warrant Case*, ICJ Reports 2002, Counter-Memorial of Belgium, 28 September 2001, para. 3.4.4. and chap 5, 3.5.1ff.

[209] *Arrest Warrant Case*, ICJ Reports 2002, Memorial of the DRC, part 3 para. 50, 58ff and 70.

[210] *Arrest Warrant Case* (n. 201) para. 58.

[211] *Ibid.*

[212] *Arrest Warrant Case* (n. 201) para. 60.

resigned from office. However, acts committed in an official capacity could not be prosecuted. Finally, a Minister could always be prosecuted before international criminal courts.[213]

B. *Assessment of the* Yerodia *judgment*

As demonstrated above, the findings of the Court as to the customary law on the immunity of Mr Yerodia and the 'international crimes exception' put forward by Belgium do not reflect the classic two-fold approach to custom of Article 38 (1) (b). Rather, two different methods were employed to investigate the customary character of the rules in question. When examining the existence of an *exception* to the immunities of incumbent Ministers for Foreign Affairs in cases of the commission of international crimes, the Court laid its main argument on the lack of a consistent *state practice*.[214] Accordingly, it examined "national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation"[215] as well as the statutes and decisions of international military tribunals.

Contrary to the Court's foregoing findings, the Court *did not* consider these sources of state practice on the issue of immunity itself. It merely deduced the existence of such an immunity provision from the function that immunity provides for "the effective performance of their functions on behalf of their respective states".[216] Later it had to analyse only whether the functions that a foreign minister exercises are so manifold that they require immunity so extensive as also to rule out the criminal responsibility of the minister for the commission of international crimes.

Nonetheless, the ICJ has been heavily criticised for its findings in the *Yerodia Case*. Yet most criticism is concerned with the Court's failure to comment on the exercise of universal jurisdiction by Belgium in the issue of the arrest warrant against Mr Yerodia[217] and the material findings of the Court on the matter of immunity.[218] The method employed by the Court to

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[213] *Arrest Warrant Case* (n. 201) para. 61.

[214] A good assessment of the relationship of immunities in international law and individual criminal responsibility in international criminal law may be found in *G. Werle* (Völkerstrafrecht), 176, 177, paras. 456–461.

[215] *Arrest Warrant Case* (n. 201) para. 58.

[216] *Ibid.*

[217] *Arrest Warrant Case* (n. 201) separate opinion *van den Wyngaert*, para. 42; separate opinion *Higgins, Kooimans, Buergenthal*, 22, para. 3ff, 46ff; separate opinion *Guillaume*, para. 9.

[218] *N. Boister* (2002) 7 Journal of Conflict and Security Law, 293ff; *C. McLachlan* (2002) 51 ICLQ, 959ff; *A. Cassese* (2002) 13 EJIL 853ff; *S. Wirth* (2002) 13 EJIL, 877ff; *M. Spinedi* (2002) 13 EJIL 895ff.

arrive at these findings, however, is criticised less often. Yet, some critics have even disapproved of the deductive method which the Court applied to determine the immunity of the Minister for Foreign Affairs under international law.

Judge van den Wyngaert, for example, maintains that instead of deducing the rule from the functions these ministers customarily fulfil under international law, "[t]he Court should have first examined whether the conditions for the formation of a rule of customary law were fulfilled…"[219] She also contends that the ICJ cannot disregard its own case law on the formation of customary international law,[220] which, most of the time, has proven the existence of a customary rule according to the elements of state practice and *opinio juris*. In this context, van den Wyngaert maintains that negative practice can also serve to confirm the element of state practice.[221] At the same time, however, she accepts scholarly opinion (and in particular that of NGOs such as Amnesty International, Human Rights Watch and Avocats sans frontières) as an influential element within the process of the formation of customary norms. According to her view, this should also have been recognised by the Court:

> This may be seen as the opinion of *civil society*, an opinion that cannot be completely discounted in the formation of customary international law today. In several cases, civil society organizations have set in motion a process that ripened into international conventions.[222]

C. *Compararison: the discussions at the Institut de Droit International on the immunities from execution and jurisdiction of Heads of State and Government in international law*

Assessing the importance of the Yerodia judgment for the formation of rules of customary international law, it may be interesting to recall the discussions at the Institut de Droit International (IDI) on the 'Immunity from Jurisdiction and Execution of Heads of State and of Government in International

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[219] *Arrest Warrant Case*, ICJ Reports 2002, separate opinion *van den Wyngaert*, para. 11.

[220] *Arrest Warrant Case* (n. 219) para. 12.

[221] *Arrest Warrant Case* (n. 219) para. 13.

[222] *Arrest Warrant Case* (n. 219) 14, para. 27; similar arguments were raised by Belgium in its Counter-Memorial. The agent for Belgium, in particular, stressed the 'dynamic nature' of customary international law (see *Arrest Warrant Case*, ICJ Reports 2002, Counter-Memorial of Belgium, para. 3.5.146, *ibid*., Oral Pleadings, 2001–8, 17 October 2001, para. 58.

Law', which were concluded by the adoption of a resolution at the IDI's 2001 session.[223]

Special Rapporteur Verhoeven remarked in his reports to the Institute that international treaty law on immunity is scant[224] and that diplomatic practice and international jurisdiction barely exist on this matter.[225] He found that most of the practice in this field derived from national courts which assumed jurisdiction relying on the principle of universal jurisdiction.[226] Hence, after an assessment of the scant rules and precedents available, Verhoeven came to the same conclusions as the ICJ in the *Yerodia Case*.[227] He maintained that so far state practice did not support an exception to the law on immunity in cases of international crimes.[228] Hence, like the ICJ in the *Yerodia* judgment, he suggests deducing the law on immunity of Minister for Foreign Affairs from the principles on the immunity of Heads of State.

Two important conclusions may be drawn from the discussions at the IDI. First, in international law state practice does not exist on the issue of immunity of Foreign Ministers. Second, there are only two possible conclusions regarding the applicable customary law which can be drawn from this observation: either there is no customary rule by reason of the lack of supporting state practice or a custom may be derived from the existing law on Heads of State only by way of deduction. However, the controversies ensuing from the actual findings of the Court reveal some of the downsides of such a deductive approach. One of its greatest weaknesses, revealed in the last section of this study, is its uncertainty. The individual customary rule which may be derived from the general principle may hardly be determined from the outset: the general principle from which a particular rule is deduced can

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[223] See IDI: (2000–2001) 69 Annuaire de l'Insitut de droit international, 441ff.

[224] IDI (n. 223) 509.

[225] IDI (n. 223) 448, 492.

[226] IDI (n. 223) 449.

[227] See IDI (n. 223) 515–543: Heads of State in office enjoyed absolute immunity from all criminal and civil prosecution, whereas former Heads of State only continued to enjoy immunity for acts committed whilst in office (*ratione materiae*). For acts committed in a private capacity (*rationae personae*), he/she can be liable after cessation of the office. The same principles also applied to a Minister for Foreign Affairs, serving or deceased from his/her office.

[228] IDI: (2000–2001) 69 Annuaire de l'Insitut de droit international, 514, 518, further at 531 (« pratique très fragmentaire ») ; Also *Tomuschat* – at 586 – warned "to interpret the draft resolution of the Institute in a manner that would allow the prosecution of a Head of State charged with committing grave crimes is possible only in that State and nowhere else, would be a fatal mistake, but one should take all precautionary measures to exclude such erroneous interpretations".

show only a general direction. The individual result, however, can still be influenced by a number of factors.

IX. THE IMPORTANCE OF 'ELEMENTARY CONSIDERATIONS OF HUMANITY': THE *ADVISORY OPINION ON THE CONSTRUCTION OF A WALL IN THE PALESTINIAN TERRITORIES* AND FURTHER CASES

A. Advisory Opinion on the Construction of a Wall in the Palestinian Territories

As one of the recent most groundbreaking pronouncements of the Court in many respects, the *Advisory Opinion of the Court on the Construction of a Wall in the Palestinian Territories (Wall Case)* contains some important references to the application and development of customary international law.

One first aspect is the Court's reasoning on the applicability of the Fourth Geneva Convention to the Palestinian Territories. The Court considered Israel's administration of the Palestinian Territories an extraterritorial exercise of Israel's sovereign powers, and thus held the rules of the Fourth Geneva Convention applicable in the Territories. The Court stated that the *travaux préparatoires* to the Convention revealed that the drafters had not intended to restrict their scope of applicability. Rather, it continued, they had been inspirited by the aim to provide protection at all times to a civilian population in an armed conflict. The judges further explained that the conference of the parties to the Fourth Geneva Convention had particularly supported the applicability of the Convention to the occupied Palestinian Territories.[229] In addition, they maintained that the ICRC had also emphasised that the Fourth Geneva Convention must be "recognized and respected at all times by the parties pursuant to Article 142 of the Convention."[230]

Reference to the work of the ICRC at this point in the judgment is particularly remarkable. It reflects the increasing importance of the work of this 'non-state-actor'[231] for the Court's reasoning in the field of (customary)

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[229] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, para. 95.

[230] *Wall Case* (n. 229) para. 97.

[231] The ICRC enjoys an internationally recognised Status under the Geneva Conventions (see Article 125 GC III, on the functions and tasks of the ICRC within the framework of the Geneva Conventions see Articles 3 (2), 9, 10, 11, 22 GCI, Articles 3 (2), 9, 10, 11 GC II; Articles 3 (2), 9, 10, 11, 56, 72, 73, 75, 79, 81, 123, 125, 126 GCIII; Articles 3 (2), 10, 11, 14,

international humanitarian law. Following the findings of the opinion, it may be concluded that the work of the ICRC may count as additional evidence of '*opinio juris*' leading to the formation of a certain customary rule of international humanitarian law. At the least, it was cited to buttress conclusions that were reached on the basis of the other evidence cited.[232]

Another important aspect of the advisory opinion of the Court in the *Wall Case* is its reaffirmation of the concept of *erga omnes* norms. As illustrated above, the Court had referred to the concept of *erga omnes* for the first time in its *obiter dictum* in the *Barcelona Traction Case*. In the *Wall Case*, it reaffirmed those findings[233] and further identified additional *erga omnes* norms breached by Israel's construction of the wall in the Palestinian Territories:

> The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.[234]

It is of special interest here that the Court used the concept of 'elementary considerations of humanity' previously employed in the *Nuclear Weapons Advisory Opinion* to attribute an *erga omnes* character to rules of humanitarian law applicable in armed conflict. Furthermore, the Court utilised the concept to underline the special importance and the customary international law character of fundamental obligations of international humanitarian law, which applied to all states, regardless of whether they had ratified the Geneva Conventions:

> With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . .", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law. (*I.C.J.*

30, 59, 61, 76, 96, 102, 104, 108, 109, 111, 140, 142 GC IV; Articles 5 (3), (4), 6 (3), 33 (3), 78 (3), 81 (1), 97, 98 AP I). The ICTY has affirmed the international legal personality of the ICRC on various occasions (see Simić, *Decision on the prosecution motion under Rule 73 for a ruling concerning the testimony of a witness*, Case No.: IT-95-9-PT, 27 July 1999, released as a public document by Order of 1 October 1999, para 49 and note 9). Nevertheless, it is the only *non-governmental organisation* with such a position in international law.

[232] On the impact of statements of the ICRC on the customary process see *J. M. Henckaerts*, 38 (2008) IYBHR, 257, 258.

[233] *Wall Case* (n. 229) para. 155.

[234] *Ibid.*

> *Reports 1996 (I)*, p. 257, para. 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.[235]

As the Court explained, the obligation of all states to respect the fundamental rules of customary international humanitarian law also followed from Article 1 of GC IV which called on state parties to the Convention to ensure the respect of the Convention in all circumstances.[236] Accordingly, it found that all states parties to the Convention, whether or not involved in a particular conflict, had to ensure compliance with the (customary) requirements of the Convention.[237] Furthermore, the Court held that due to the *erga omnes* character of the stated humanitarian norms, all states were under an obligation not to recognise the illegal situation created by the wall in the Palestinian Territories and not to give Israel any assistance in constructing the wall.[238]

The opinion in the *Wall Case* seems to continue the Court's trend towards underlining the importance and customary character of certain norms of customary international law by referring to 'elementary considerations of humanity'. This was done in the *Wall Case* to affirm the customary international law character of the provisions of GC IV without, however, naming the actual norms in question. As can be easily discerned from the paragraphs of the judgment cited, the Court does not consider other evidence of *opinio juris* or state practice to affirm the customary nature of such humanitarian norms. It derives their customary nature merely from reference to their fundamental humanitarian character.

Nonetheless, applying the deductive approach to affirm the customary nature of the provisions of GC IV as well as the Court's reference to the *erga omnes* concept has encountered great criticism amongst the Court's own judges. Higgins, for example, has explained that the *erga omnes* concept, as elucidated by the commentary to the ILC Draft Articles on State Responsibility, is a matter of *locus standi*, which has nothing to do with the obligation of third states not to recognise the illegal situation created by the construction of the Wall on the part of Israel.[239] She finds that it should have been self-evident that third states have an obligation not to recognise the illegal situation which was created by the construction of the wall on Palestinian territory. The obligation does not rest on the "uncertain concept of '*erga*

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[235] *Wall Case* (n. 229) para. 157.
[236] *Wall Case* (n. 229) para. 158.
[237] *Ibid.*
[238] *Wall Case* (n. 229) para. 159, 160.
[239] *Wall Case* (n. 229) separate opinion *Higgins*, para. 37.

omnes' ", as she maintains.[240] Furthermore, Higgins argues, an invocation of the *erga omnes* concept for provisions of AP I seems equally irrelevant:

> … These intransgressible principles are generally binding because they are customary international law, no more and no less. And the first Article to the Fourth Geneva Convention, under which "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances" while apparently viewed by the Court as something to do with "the *erga omnes* principle", is simply a provision in an almost universally ratified multilateral Convention.[241]

Such criticism reveals that the customary character of a certain rule of international law may rather be derived from the fact that the rules of the Geneva Conventions have been universally accepted than from their status as *erga omnes* norms in international law. This, however, only affirms that these rules can be recognised as customary in current international law.

B. *The* 2002 Congo *Case and the* Srebrenica *judgement*

Two other recent judgments of the Court have adopted the latest trend of the Court to emphasise the fundamental character of rules of customary international humanitarian law. Probably more elusive with regard to the actual application of the prohibition of genocide is the recent *Srebrenica* Case which assessed the applicability and liability of Serbia and Montenegro under the Genocide Convention for the atrocities committed during the Balkan War, in particular in the Srebrenica enclave.[242]

In the *Srebrenica* Case, but also in later cases like the *2002 Congo* Case, the Court laid its main emphasis on the reaffirmation of the *erga omnes* and *jus cogens* character of the prohibition of genocide.[243] To quote from the Court's reasoning in the *2002 Congo* case:

> The Court will begin by reaffirming that "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" and that a consequence of that conception is "the universal character both of the condemnation

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[240] *Wall Case* (n. 229) separate opinion *Higgins*, para. 38.

[241] *Wall Case* (n. 229) separate opinion *Higgins*, para. 39; similarly: separate opinion *Kooijmans*, para. 50.

[242] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 2007.

[243] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 2007, para. 161; *Case concerning Armed Activities on the Territory of the Congo (New Application 2002),* ICJ Reports 2006, para. 64.

> of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)"… It follows that "the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*.[244]

At first sight, it seems that this does not add much to our assessment of the different *methods* applied to determine the *customary* character of a particular norm of customary international law. Nonetheless, such jurisprudence indirectly reaffirms previous judgments of the Court, which have stressed the fundamental character of the prohibition of genocide. This is, in particular, underlined by the fact that the Court once again referred to the "moral and humanitarian principles" which are at the basis of the customary prohibition of genocide.[245]

Moreover, such reference also reaffirms – at least for the customary prohibition of genocide – the deductive approach to customary law which the Court developed as early as in its advisory opinion of 1951. Hence, it seems that, at least for this part of international humanitarian law, the Court regards deductive reasoning as the most viable way to prove and reaffirm the existence of norms of customary international law.

X. CONCLUSIONS ON THE ANALYSIS OF THE CASE LAW OF THE ICJ

A. *The evidence assessed*

This discussion of the case law of the ICJ has shown various aspects of the development of customary international law which demonstrate – first and foremost – that the Court has no single approach to the formation of customary international law. This conclusion applies both to the evidence invoked by the Court and the actual methods employed in the process of finding of new customary rules. Regarding the evidence, in particular, the Court has referred to a great variety of different types of evidence to prove the existence of the elements of custom, *opinio juris* and state practice; a fact which underlines yet again that the Court does not favour just one method of finding new

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[244] See *Case concerning Armed Activities on the Territory of the Congo (New Application 2002)*, ICJ Reports 2006, para. 64. The Court's reasoning in the *Srebrenica* judgement merely utilised this reasoning to stress the *jus cogens* and *erga omnes* character of the prohibition of genocide once again.

[245] *Case concerning Armed Activities on the Territory of the Congo (New Application 2002),* ICJ Reports 2006, para. 64.

customary international law. A number of cases have referred to the classical, physical and verbal evidence of state practice and *opinio juris*. The ICJ has consulted judicial precedents,[246] bilateral extradition treaties,[247] national laws, bilateral and international treaties and conventions, statements by state officials[248] as well as arbitral decisions.[249] In the *Nottebohm* Case, the World Court further emphasised that omissions could also count in the customary process: they evidenced the existence of relevant *opinio juris*. In that case, the failure to offer diplomatic protection to a national reflected the view that nationality must correspond with the factual situation.[250]

Yet, there are also a large number of cases which centred on international evidence when the formation of new customary law, like international conventions or international court judgements, was being assessed. The invocation of such evidence affirms that the ICJ does not shut its eyes to a more modern understanding of customary international law-making which concentrates more on the concerted international action of states at international level than on their individual acts. In the *North Sea Continental Shelf Case*, the ICJ emphasised that the Geneva Convention on the Continental Shelf could provide useful evidence of the practice and legal views of states concerning the law of the continental shelf.[251] In the first *Continental Shelf Case* the Court considered a judgment of its predecessor, the PCIJ, to be indicative of customary rules.[252] The second *Continental Shelf* judgement assessed, amongst other things, whether the parties had ratified multilateral conventions which could indicate what the applicable customary rules on the continental shelf were.[253] Similarly, the *Genocide Advisory Opinion*,[254] the *Barcelona Traction Case*[255] and the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*[256] stressed the universal ratification of the Genocide Convention when referring to the customary or *erga omnes* character of the prohibition of genocide. Last but not least, the *Legality of the Threat of Nuclear Weapons* Advisory Opinion emphasised the evidentiary character of resolutions of the UNGA

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[246] *Lotus* (n. 7) 21.
[247] *Asylum Case* (n. 30) 277, 278.
[248] *Nicaragua Case* (n.) 98, para 189.
[249] *Fisheries Jurisdiction* (n. 28) 131.
[250] *Nottebohm* (n. 39) 22.
[251] *North Sea Continental Shelf* (n. 41) 37.
[252] *Continental Shelf* (n. 58) 290, referring to the *River Meuse* Case.
[253] *Case Concerning the Continental Shelf* (n. 73) 27.
[254] *Genocide Advisory Opinion* (n. 112) 23.
[255] *Barcelona Traction* (n. 132) 32, para 34.
[256] *Case Concerning Application of the convention on the Prevention and Punishment of the Crime of Genocide* (n. 242), para 31.

for the *opinio juris* of states. Finally, and most interestingly, the latest *Wall Case* referred to an item of evidence which actually has no relation whatsoever to the physical and verbal acts of states proper: it held the opinions of the ICRC to be symptomatic of new rules of customary law.[257] This ultimate conclusion is most intriguing, as it does not relate in any way to the actions of states but to another, albeit internationally recognized, subject of international law. The fact that the Court actually considers statements of the ICRC in its assessment of new customary law indicates, once again, its openness towards novel approaches to customary law-making.

However, it is difficult ultimately to assign particular items of evidence utilized by the Court to a particular methodological approach to customary international law. Our assessment of the evidence of custom demonstrated that various methods may refer to one and the same item of evidence and yet differ in their views on whether this item serves as evidence of the existence of *opinio juris*, state practice or both. Thus, as regards the evidence, we can only conclude that the Court seems to be open to certain trends towards modernism, even in customary law-making. However, the pragmatic reasons behind employing more modern evidence cannot be downplayed either. It has to be borne in mind that the Court, even in its assessment of customary international law, "is concerned less with analysis of mental states than with the examination and assessment of the facts proved."[258] Consequently, the exact methods utilized by the Court will be commented on in the following section.

B. *The methods applied*

As stated before, concerning the methods of customary law-making, too, we are dealing with a wide variety of approaches invoked by the ICJ. This development mirrors current trends and developments in general international law and the different emphases which are laid on certain fields of international law. The spectrum of methods invoked by the ICJ can best be illustrated by the ICJ's most recent *Wall Case*, and the PICJ's *Lotus* judgment. In the *Lotus Case* the Court – almost in diametrical opposition to the emphasis which the ICJ in the *Wall Case* had laid on humanitarian principles and human rights law – focused on the individual will of states for the formation of customary international law.

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[257] Wall Case (n. 229) para 97.

[258] *M. Virally* in *M. Sørensen* (Manual) 134–135; similarly: *U. Scheuner* (1950/1951) 13 ZaöRV 582.

The use of various methods by the ICJ in its assessment of customary law has also been observed by Kirchner.[259] As he finds, the Court uses at least five methodological auxiliary means, which – in his view – replace the evidence of state practice in the process of determining new customary law:

1. The Court refers to treaties.
2. The Court refers to UN Resolutions and other documents which are drafted in normative language, but which are not legally binding.
3. The Court uses a deductive approach.
4. The Court uses analogy.
5. The Court refers to a presumption of a freedom of states to act in their own territory in order to impose a burden of proof on the party trying to establish a limiting rule.[260]

However, Kirchner's analysis stops at the identification of these methods. He does not relate them to the different theories advanced on the formation of customary international law. Instead, he claims that "[t]he philosophical foundation of and speculation about the formation of CIL, therefore, seems to be of minor importance".[261] He further contends that, instead of theory, all that is needed is a methodology which is accepted amongst states on how to ascertain norms of customary international law.[262] Yet, it is obvious that a particular methodology is almost always built upon a theoretical concept: theory constitutes the basis upon which further methodology evolves. At least in the field of custom, it is impossible to differentiate between true methodology and theory. The deductive approach, to name just one example, constitutes both simultaneously.

Accordingly, this analysis of custom and the methods employed to ascertain it in the jurisprudence of the ICJ and the international *ad hoc* criminal tribunals provides some chance to assess the different methods and theories advanced with regard to custom formation. In particular, it demonstrates whether certain tendencies, advanced in relation to those different theories – i.e. constitutionalism and fragmentation – are really traceable in the current application of the law before international courts and tribunals.

One first aspect, which the jurisprudence of the ICJ clearly affirms, is that it approves of the deductive approach as one way of discerning new norms of customary international law. It employed and/or mentioned this method

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[259] *J. Kirchner* (1992) 43 Austrian Journal of Public and International Law, 215–239, at 230.
[260] *J. Kirchner* (n. 259) at 230.
[261] *J. Kirchner* (n. 259) 219.
[262] *J. Kirchner* (n. 259) 219.

in the *Corfu Channel Case*, in the *Genocide Advisory Opinion*, the *Barcelona Traction Case*, the *Genocide Case*, the *Gulf of Maine Case* and in the *Nicaragua* and *Yerodia Cases*. Nonetheless, the jurisprudence also reveals that a deductive approach is not seen as the main or single approach to customary international law. In certain cases, such as in the *Haya de la Torre* and *South-West Africa Case*s the Court explicitly refrained from applying it and, instead, focused on actual evidence of custom by searching for evidence of state practice and *opinio juris*. However, particularly when considering the customary prohibition of genocide, the Court repeatedly affirmed the deductive approach, which permits us to conclude that, at least in this area of international law, it has become an established method of proving the existence of customary law.

On the other hand, the Court has kept in reserve the application of the traditional two-element approach to customary international law. As demonstrated, it was employed in the *North Sea Continental Shelf Case*, the *Continental Shelf Case*s, the *Nuclear Weapons Advisory Opinion* and the *Haya de la Torre Case*. Nonetheless, even when referring to the elements of *opinio juris* and state practice, there are also cases in which the Court mixes these elements up. Thus in the *Nottebohm Case*, the ICJ referred to state practice only to prove the existence of a particular *opinio juris*.[263]

Sometimes, the traditional approach has been used side by side with the deductive approach, such as in the *Gulf of Maine*, *Nicaragua* and *Yerodia Cases*. At least in the two latter cases, the Court also focused deliberately on each of the approaches, in order to approve or disprove the existence of a certain customary norm.

Consequently, it is not possible in the final analysis to make out a clear line of preference in the jurisprudence of ICJ and PCIJ which supports either approach to customary international law. Rather, it has to be concluded that several approaches are equally applied and focused on in the jurisprudence of the Court. This leads to one tentative conclusion on our assessment of the different approaches to customary international law. In light of the jurisprudence of the ICJ, it seems prudent to assume that – instead of focusing on either a deductive or an empirical approach to customary international law – the application of a plurality of methodologies should be beneficial.

In some areas of international law, such as in the field of maritime delimitation, an empirical or two-element approach to customary international law may seem the most suitable. This may result from the fact that in the relevant

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[263] This was also noted by *A. Pellet* 'Art. 38' in *A. Zimmermann, C. Tomuschat, K. Oellers-Frahm* (ICJ Statute) 760 para. 232.

field of international law evidence of state practice or *opinio juris* may be more easily accessible.

On the other hand, a deductive approach to customary international law has been employed primarily when norms of customary international humanitarian law have been at stake.[264] This may have been triggered by the fact that in this area of international law hard evidence of state practice and *opinio juris* is more difficult to obtain. However, as the assessment of the jurisprudence of the ICJ has already revealed, in this field the deductive approach has not been applied exclusively. This can be easily deduced from the Court's reasoning in the *South-West-Africa Cases*, the *Nicaragua* and *Yerodia* judgments and the latest *Srebrenica* Case. In all these cases, the Court dismissed the idea of the emergence of new norms of customary international (humanitarian) law due to the lack of supporting state practice.

Thus, it may be concluded that the classic, two-fold approach to custom may serve as an outer limit of too broad an application of deductive reasoning. This contention, at least, would find much support in the *Yerodia* judgment, where the Court first deduced the applicable principles on the immunities of the Minister for Foreign Affairs from the customary law on the immunities of Heads of States. Nonetheless, it confirmed in a second step that there was not enough state practice to support an exception to the immunity rule with regard to international crimes.

[264] *ILA*, *Committee on the Formation of Customary (General) International Law* (Final Report) 6.

Chapter Five

Practical Developments (Part Two): The Case Law of the International *Ad Hoc* Criminal Tribunals on Customary International Criminal Law

I. INTRODUCTION

This chapter will assess the formation of customary international law in one of the specialized areas of international law, international criminal law. The development of customary international criminal law, in addition to general international criminal law, has certain peculiarities which make it worthwhile taking up this area of law in this study.

First, international criminal law is one of the fastest developing fields of international law. Since the two international *ad hoc* criminal tribunals for the Former Yugoslavia and Rwanda were established by the UN after a long period of silence following the closure of the Nuremberg and Tokyo trial files, the development of customary norms in this field is very difficult to establish. Tomuschat's observation on this is correct:

> It would be difficult to show that indeed in accordance with the classical criteria on the formation of customary rules the punishable character of breaches of elementary norms of international law has evolved through a constant practice supported by *opinio juris*. Any such attempt would be doomed from the very outset. In particular, the special category of crimes against peace had no antecedents. The Nuremberg Trial was the first trial where this new concept was actually applied.[1]

Out of necessity rather than anything else customary international criminal law has been at the centre of legal considerations, both in international legal scholarship and in the jurisprudence of the international *ad hoc* tribunals, to adjudicate on the international criminal behaviour of the persons accused. This is due to the fact that substantive provisions of the Statutes of the two Tribunals merely constitute a definition of the scope of their relevant *ratione materiae* jurisdiction.[2]

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[1] *C. Tomuschat* (1993) RdC, vol. 241, 302.

[2] *K. Ambos* (Allgemeiner Teil) 260.

Second, various authors have tried to draw conclusions from developments in the field of international criminal law or international humanitarian law for the development and formation of general international law.[3] By scrutinizing the jurisprudence of the international *ad hoc* criminal tribunals, it could thus be assessed whether international criminal law can indeed deliver some lessons for the development of general customary international law.

Last, as illustrated in chapter three, customary norms of international criminal law also play a role in the greater perception of the development of general international law. On the one hand, authors emphasise the importance of certain customary international humanitarian norms which constitute the '[c]onstitutional foundations of the International Community'.[4] They assert the *ius cogens* character of those 'core crimes'[5] or emphasise that they are influenced by the broad humanitarian ideas of the Martens Clause, general principles of law recognised by civilised nations and general principles of penal law,[6] or the 'collective conscience of humanity'.[7] On the other hand, authors also refer to the development of international criminal law as an example of the imminent threat of the fragmentation of international law and the loss of its normativity.[8] Hence, an analysis of the reasoning of the international *ad hoc* criminal tribunals on customary international law can also show whether these observations or concerns have some standing at the more general level.

II. PRELIMINARY CONSIDERATIONS: THE DEFINITION OF INTERNATIONAL CRIMINAL LAW

Before we delve right into the jurisprudence of the two international *ad hoc* criminal tribunals, some preliminary observations have to be made concerning the definition of international criminal law used in this assessment. Usually, a broad range of crimes is encompassed by the term. Broomhall has described it as a series of concentric rings, which can be narrowed down to an ever more specific definition.[9]

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[3] *T. Meron* (1996) 90 AJIL, 239; *id.* (2003) RdC, vol. 301; *id.* (2005) 99 AJIL 817ff; *A. Zimmermann* (International Criminal Law).

[4] *C. Tomuschat* (1993) RdC, vol. 241, 292ff, 300.

[5] *B. Broomhall* (International Justice) 21; *M. Cherif Bassiouni* (1996) 59 Law and Contemporary Problems, 63; *S. Kadelbach* in *C. Tomuschat and J.-M. Thouvenin* (Fundamental Rules) 39; *P. Tavernier* in *ibid.* 17 and the other contributions in this treatise.

[6] *T. Meron* (2003) RdC vol. 301, 138.

[7] *B. Broomhall* (International Justice) 23.

[8] *P. Weil* (1983) 77 AJIL, 413ff; *id.* (1992) RdC, vol. 237, 173ff.

[9] *B. Broomhall* (International Justice) 9.

Among these concentric rings, the margin is comprised of inter-state criminal law, which encompasses all national criminal laws which relate to a transnational context. At the second layer we will find the many 'suppression conventions' which define international offences which are subject to international prosecution (terrorist bombings, trafficking, drug dealing and the like). A third layer will usually concern the issue of the international crime of a state, which had previously been addressed by the ILC in its draft articles on state responsibility.[10] The smallest of the rings then comprises the most heinous 'core crimes' derived from the legacy of Nuremberg, which establish individual criminal accountability in international law.[11] As indicated at the very beginning of this study, it is only this last core of international crimes which we are concerned with here.

III. THE DIFFERENT APPROACHES OF THE ICTY AND THE ICTR TO CUSTOMARY INTERNATIONAL LAW

Both the ICTY and the ICTR have had the task and opportunity to pronounce extensively on the development of customary international law within their jurisdiction. However, as will be seen below, there are some decisive differences in the approaches of the ICTY and the ICTR. The most outstanding is a marked emphasis on customary international law in the jurisprudence of the ICTY, which does not find a parallel in that of the ICTR. These differences, which to a great extent result from the different legal and factual backgrounds in which the two tribunals were established, have to be borne in mind when assessing their respective judgments on the methods employed in relation to the finding of new customary international law.

A. *Differences in the scope of* ratione materiae *jurisdiction*

Most of the observations relating to the differences in the jurisprudence of the *ad hoc* tribunals on customary international law refer to the scope of the *ratione materiae* jurisdiction of each tribunal. Though very similar at first sight, they differ in some decisive points. The first divergence is revealed when the actual crimes punishable under their respective Statutes are considered. Punishable under the ICTR's Statute are genocide,[12] crimes against

[10] ICL, Draft Articles Provisionally Adopted on Second Reading by the Drafting Committee Part Two, Arts. 51–53.

[11] *B. Broomhall* (International Justice) 11.

[12] Article 2 ICTR Statute (adopted on 8 November 1994 by UNSC S/Res/955/1994).

humanity[13] and violations of common Article 3 of the Geneva Conventions.[14] The ICTY's Statute, in contrast, criminalises grave breaches of the Geneva Conventions,[15] war crimes,[16] genocide[17] and crimes against humanity.[18] As can be deduced from the criminalisation of violations of common Article 3 and of Additional Protocol II to the ICTR Statute,[19] the Statute penalises only violations of international humanitarian law applicable to *non-international* armed conflict: Additional Protocol II, as well as common Article 3 in its plain reading, applies to non-international armed conflict only.[20]

In the case of Rwanda, it was apparent from the outset that the conflict was of a non-international character 'only'.[21] As the Report of the United Nations Secretary General to the Security Council on the establishment of the ICTR confirmed "[t]he use of armed force had been carried out within the territorial borders of Rwanda and did not involve the active participation of any other State."[22]

But then, the Statute of the ICTY in its Article 3 on the 'violations of the laws and customs of war' is not so clear. It leaves open whether it applies only to provisions of the Geneva Conventions which are applicable in *international* armed conflict or whether it entails breaches of provisions which apply to non-international armed conflict as well. [23] This last question needed clarification immediately after the establishment of the Tribunal. In the *Tadić Case* [24] the ICTY ultimately defined the scope of the provisions of its Statute;

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[13] Article 3 ICTR Statute (n. 12).

[14] Article 4 ICTR Statute (n. 12); for a very concise analysis of the development of these crimes in the case law of the ICTR see *L.J. van den Herik* (Rwanda Tribunal).

[15] Article 2 ICTY Statute (adopted on 25 May 1993 by UNSCS/Res/827/1993).

[16] Article 3 ICTY Statute (n. 15).

[17] Article 4 ICTY Statute (n. 15).

[18] Article 5 ICTY Statute (n. 15).

[19] Article 4 ICTR Statute (n. 12).

[20] Article 4 ICTR Statute (n. 12).

[21] UNSG, Report on the Establishment of the International Criminal Tribunal for Rwanda, 8 November 1994, UN Doc.S/1995/134; UNSC, S/RES/955 (1994), 20 para. 91.

[22] *Ibid.*

[23] The Secretary-General in his report on the establishment of the ICTY as well as the Security-Council in its resolution on the establishment of the ICTY had deliberately left open the question whether the conflict on the territory of the Former Yugoslavia constituted an international or a non-international one (see *Tadić*, Interlocutory Appeal, Case No. IT-94-1-AR72, 2 October 1995, para. 76.)

[24] *Tadić*, Appeals Chamber Judgment, Case No. 94-1-A, 7 November 1997, 35, para. 162 ('international armed conflict'); *Tadić*, Interlocutory Appeal, Case No. IT-94-1-AR72, 2 October 1995, para. 77 ('both international and internal'); *Čelebići*, Trial Chamber Judgment, Case No. IT-96-21-T, 26 November 1998, para. 234 ('international armed conflict').

it held that a wide range of provisions of international humanitarian law – such as the prohibition of treacherous killing, attacks on civilian populations and the use of certain weapons – also extends under customary international law to non-international armed conflict.[25]

Second, the scope of *ratione materiae* jurisdiction of both tribunals also differs with regard to the legal sources to be applied by them, i.e. whether they are able to draw on customary international law as a source for their jurisdiction. For the ICTR, the Secretary-General

> …elected to take a more expansive approach to the choice of the applicable law…and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments *regardless* of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime.[26]

The report states as an example:

> Article 4 of the Statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, and for the first time criminalizes common Article 3 of the four Geneva Conventions.[27]

In contrast, the Secretary-General defined the scope of *ratione materiae* jurisdiction of the ICTY as comprising the law which had been laid down in its Statute, and the provisions of customary international law which existed at the time of the commission of the crimes.[28] Hence, unlike in the case of the ICTR, in the case of the ICTY, the Secretary-General as well as the Security Council[29] emphasised the aspect that the punishable crimes were

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[25] *Tadić*, Interlocutory Appeal, 2 October 1995, para. 77; See *G. Werle* (Principles) 283, marginal no. 813.

[26] Report of the UNSG pursuant to paragraph 5 of the Security Council Resolution 955 (1994), UN Doc. S/1995/134, 13 February 1995, 13, para. 12; The UNSC adopted the report of the UNSG in its Resolution 955 of 8 November 1994, UN Doc. S/RES/955 (1994).

[27] Report of the Secretary General pursuant to paragraph 5 of the Security Council Resolution 955 (1994), UN Doc.S/1995/134, 13 February 1995, 14 para. 12.

[28] Report of the Secretary-General to the UNSC on the Establishment of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/25704 (1993), 9, para. 34. But see *W. Schabas* (UN International Criminal Tribunals), at 76 who opines: "[i]t does not appear obvious that the judges of the *ad hoc* tribunals are even entitled to go beyond their statutes for souces of applicable law, given the silence of the statutes in this respect." However, a few paragraphs later he acknowledges that the Tribunals may be entitled to refer to customary international law if their Statutes remain silent on a particular matter (*ibid.*).

[29] Which adopted the report of the SG in resolution 808 of 22 February 1993, see UN Doc.: S/1993/808 of 22 February 1993.

part of international humanitarian law as a matter either of treaty law or of customary international law:[30]

> …it should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.[31]

As the Secretary-General underlined, this was also being done with respect to the *nullum crimen sine lege* principle.[32]

> In the view of the Secretary-General, 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.[33] (first emphasis in the original, second emphasis added)

The Secretary-General thus defined the scope of applicable customary international law as comprising the conventional international humanitarian law which "beyond doubt" had become customary. This would be the case for the law contained in the following instruments:

> The Geneva Conventions of 12 August 1949 for the Protection of War Victims, 3/ the Hague Convention (IV) Respecting the Laws and Customs on Land and the Regulations annexed thereto of 18 October 1907; 4/ the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, 5/ and the Charter of the International Military Tribunal of 8 August 1945. 6/.[34]

After all, the different character of the armed conflicts prevailing in the territory of the respective states at the time the atrocities were committed predetermined the different definitions of *ratione materiae* jurisdiction of the ICTY and the ICTR. The Secretary-General relied on custom as a source of law for the ICTY, mostly because of the difficult treaty law situation which

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[30] Report of the Secretary General to the UNSC on the Establishment of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/25704 (1993), 9, para. 34.

[31] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704 (1993), 8, para. 29.

[32] Report of the Secretary General to the UNSC on the Establishment of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/25704 (1993), 9, para. 34.

[33] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704 (1993), 9, para. 34.

[34] UNSG (n. 33) 9, para. 35.

prevailed there at the time of the commission of the atrocities. To quote the Secretary-General again:

> [T]he 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.*[35] (emphasis added)

The applicability of the Geneva Conventions and their Additional Protocols to the conflict situations in Rwanda and Yugoslavia at the time of the commission of the atrocities will be illustrated in more detail in the following paragraphs.

B. *The applicability of the Geneva Conventions of 1949 and its Additional Protocols to the conflict in Rwanda and the former Yugoslavia*

It is clear from the preceding paragraphs that an assessment of the applicable 'treaty law' may be able to provide some explanation for the 'need' of the respective *ad hoc* tribunal to refer to the source of customary international law: if the law to be applied by the Tribunal is sufficiently determined by treaty law, the application of norms of customary international law is not particularly controversial.

The situation before the Rwanda tribunal will be considered first: Rwanda, at the time of the conflict, was a party to the Geneva Conventions as well as to their Additional Protocols I and II. A question of the applicability of humanitarian law to its territory and to the atrocities committed there thus did not arise.[36] It became a party to the Conventions of 1949 on 5 May 1964 and to Protocol II on 19 November 1984.[37] Thus, the treaty law situation was clear.

The situation in the former Yugoslavia, on the other hand, was particularly problematic, resulting mainly from the disintegration of the former Socialist Republic of Yugoslavia (SFRY), which began with the declaration of

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[35] UNSG (n. 33) 9, para. 34.

[36] See *Kayishema and Ruzindana*, Trial Chamber Judgment, Case No. ICTR-95-1-T, 21 May 1999, para. 156–158; *Rutaganda*, Appeals Chamber Judgment, Case No ICTR-96-3-A, 26 May 2003, para. 90; *Musema*, Trial Chamber Judgment, ICTR-96-13, 27 January 2000, para. 238; *Akayesu*, Trial Chamber Judgment, Case No. ICTR-96-4-T, 2 September 1994, para. 608. However in this judgement, the Chamber also focused on the customary international law nature of common Article 3 and certain provisions of Additional Protocol II.

[37] See ICRC, States party to the main treaties, at: <http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf> (last visited 11 December 2009).

independence of both Croatia and Slovenia on 25 June 1991. The uncertainties revolving around the situation of disintegration had two decisive implications. First, they made it difficult to determine when the parties became parties to the Geneva Conventions and their Additional Protocols. Second, they further complicated defining the existence of an armed conflict prevailing in those countries at the time when the atrocities took place.

C. *The succession situation in the SFRY and the applicable treaty law*

It is worthwhile starting with a short glance at the situation of succession and the problems which this caused for the applicable treaty law. After secession, the Republics of Croatia, Slovenia, Macedonia and Bosnia-Herzegovina almost immediately all became parties to the Geneva Conventions and their Additional Protocols.[38] Yet, the Federal Republic of Yugoslavia (FRY) (Serbia and Montenegro), which came into being on 27 April 1992,[39] announced on the date of its birth that it would continue all the international commitments of the former SFRY.[40] This declaration was confirmed by an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General.[41]

The declared will of the FRY to continue the obligations of the SFRY under international law has caused several legal problems. The ICTY in the *Tadić*

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[38] Croatia became party to the Geneva Conventions and its Additional Protocols on 11 May 1992, Slovenia became party to the Geneva Conventions and its Additional Protocols on 26 March 1992, Macedonia became party to the Geneva Conventions and its Additional Protocols on 1 September 1993 and Bosnia-Herzegovina became party to the Geneva Conventions and its Additional Protocols on 31 December 1992; see ICRC, States party to the main treaties, at: <http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf> (last visited 11 December 2009).

[39] For a short appraisal of the history of the conflict and the legal aspects, related to the secession of the former Yugoslav republics see *Milutinović, Ojdanić, Sinovic*, Decision on Motion Challenging Jurisdiction, Case No. IT-99-37-PT, 6 May 2003, para. 5 et seq; *Tadić*, Trial Chamber Judgment, Case No. IT-94-1-T, 7 May 1997, 20 et seq; *G. Werle* (Principles) 16, marginal no. 48.

[40] Declaration of the Joint Session of the SFRY, Republic of Serbia and Republic of Montenegro Assemblies, 27 April 1992, UN Doc S/23877, Annex (1992), ("Declaration") reprinted in *M. Weller* (Crisis in Kosovo) vol. 1, 63. It read: "The Federal Republic of Yugoslavia, continuing the state, international, legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally".

[41] See ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, ICJ Reports 1996, para. 17.

Interlocutory Appeal[42] and in the *Ojdanić*[43] cases had to discuss its implications for its *ratione loci* jurisdiction. Furthermore, the ICJ in the *NATO Bombing Cases*,[44] in the *Case Concerning the Application of the Genocide Convention*[45] and in the preliminary objections decision in the *Application for Revision Case*[46] had to discuss its implications for the FRY's membership of the United Nations and for its succession to certain international treaties.

In the ICJ's preliminary objections decision in the *Application for Revision Case*, Serbia and Montenegro claimed that on 1 November 2000 it had been admitted to the United Nations as a new member and that therefore it could not have continued the legal personality of the SFRY under international law. Accordingly, it concluded that it could not have been party to the Statute of the Court prior to that date, or to the Genocide Convention.[47] However, the ICJ did not accept these submissions. It pointed to the *sui generis*[48] position the FRY had held in the UN since the disintegration of the SFRY, and determined that the status and the question of the succession of the SFRY to the rights of the SFRY had to be determined on a case-by-case basis.[49] The Court further reaffirmed the succession of the FRY to the treaty obligations of the SFRY[50] and emphasised that the validity of the FRY's declaration could not have been affected by the decision of the UNGA on the acceptance of its membership of the United Nations.[51] In the subsequent *Applicability of the*

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[42] *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995.

[43] See *Milutinović, Ojdanić, Sinovic*, Decision on Motion Challenging Jurisidiction, Case No. IT-99-37-PT of 6 May 2003, para. 2.

[44] *Legality of Use of Force* (Yugoslavia v. Belgium), (Yugoslavia v. Canada), Yugoslavia v. France), (Yugoslavia v. Germany), (Yugoslavia v. Italy), (Yugoslavia v. Netherlands), (Yugoslavia v. Portugal), all: ICJ Reports 2004, (Yugoslavia v. Spain), ICJ Reports 1999, (Yugoslavia v. the United Kingdom), ICJ Reports 2004, (Yugoslavia v. The United States of America), ICJ Reports 1999, all at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> (last visited 11 December 2009).

[45] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, ICJ Reports 1996, 595.

[46] *Case Concerning the Application for Revision of the Judgment of 11 July 1996 In the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* Preliminary Objections, ICJ Reports 2003.

[47] *Application for Revision Case* (n. 46), para. 18.

[48] *Application for Revision Case* (n. 46), para. 71.

[49] *Application for Revision Case* (n. 46), para. 70.

[50] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* Preliminary Objections, ICJ Reports 1996, 610, para. 17.

[51] *Application for Revision Case* (n. 46), para. 71.

Use of Force judgment,[52] the Court concluded that the *sui generis* position of Serbia and Montenegro in relation to the United Nations was solely applied as a "descriptive term" to illustrate "the amorphous state of affairs in which the Federal Republic of Yugoslavia found itself during this period."[53]

Only on 16 October 2001 did the FRY end its "succession policy" and become a party to the Geneva Conventions and its Additional Protocols.[54] Until that date, it can be deduced from the ICJ's above-mentioned jurisprudence that by declaring it would continue the international obligations of the SFRY, the FRY was bound by the same international treaty obligations. As the SFRY had ratified both the Geneva Conventions of 1949 and their Additional Protocols, these treaties remained applicable to the territory of the FRY after disintegration. The Secretary-General also affirmed these findings in his report on the establishment of the ICTY:

> The parties to this conflict are bound by the four Geneva Conventions of 12 August 1949 and Additional Protocols I and II, both under State succession and by the parties' specific accession thereto. The parties are also bound by the Genocide Convention under State succession in so far as that Convention has been ratified by the former Federal Republic of Yugoslavia. The parties are bound by that Convention under *jus cogens* and customary international law. The parties are also bound under *jus cogens* and customary international law by the obligations arising under crimes against humanity, as developed in conventional and customary international law. (emphasis in the original)[55]

D. *The existence of an international or non-international armed conflict on the territory of Yugoslavia*

With regard to the actual definition of an armed conflict prevailing at the time the atrocities were committed on the territory of the former Yugoslavia, matters get even more difficult. Fenrick has illustrated the complexity of this problem adequately:

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[52] *Legality of Use of Force*, ICJ Reports 2004.

[53] *Legality of Use of Force*, ICJ Reports 2004, para. 74; the preceding findings of the ICJ were affirmed only recently in the *Srebrenica* case: *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 2007, para. 97–99.

[54] See ICRC, States party to the main treaties, at: <http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf> (last visited 11 December 2009).

[55] Report on the Commission of Experts on Graves Breaches to the Geneva Conventions and Other Violations of Humanitarian Law Committed in the Territory if the Former Yugoslavia, in: UNSG Letter dated 24 May 1994 From the Secretary General to the President of the Security-Council, UN Doc.: S/1994/674, 27 May 1994, 29, para. 108.

> [a]t various times, (a) the Socialist Federal Republic of Yugoslavia (SFRY), which was succeeded on 29 April 1992 by the Federal Republic of Yugoslavia (FRY), was engaged in armed conflict against one or more of its neighbours: Slovenia, Croatia, Bosnia and Bosnia and Herzegovina; (b) Croatia was engaged in armed conflict against the SFRY, the "Republic of Serbian Krajina", the FRY, and Bosnia- Herzegovina; (c) the latter was engaged in armed conflict against the SFRY, the FRY, the Republika Srpska, Croatia, the HVO (the Bosnian Croat entity), and the Bosnian Muslim faction controlled by Fikret Abdic; and (d) Slovenia was engaged in armed conflict with the SFRY."[56] Hence, "…simply stating that the sovereign entities in the territory of the former Yugoslavia were bound by the Geneva Conventions as a matter of treaty or custom does not resolve the issue of whether or not the grave breach provisions (sic!) were relevant.[57]

Accordingly, it is impossible to provide a blanket definition of the conflict on the territory of the former SFRY. Both the Security Council[58] and the Secretary-General[59] have refrained from such a general definition. Rather, we must come to the same conclusion like the *Tadić Interlocutory Appeal on Jurisdiction*

> that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context.[60]

It follows that a determination of the nature of an armed conflict has to be made on a case-by-case basis, depending on the individual circumstances at hand.[61]

After all, the differences concerning the conflict situations and the applicability of the Geneva Conventions and their Additional Protocols strongly influenced the Secretary-General's and the Security Council's emphasis on the source of customary international law when establishing the ICTY and the ICTR. Whereas for the ICTY customary international law is crucial for any determination of individual criminal responsibility, the ICTR focuses

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[56] *W. Fenrick* (1999) International Review of the Red Cross, No. 834, 317–329.

[57] *W. Fenrick* (1999) International Review of the Red Cross, No. 834, 317–329.

[58] SC RES 808/1993 of 22 February 1993.

[59] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704 (1993).

[60] *Tadić*, Decision on Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1-AR72, para. 77.

[61] See *Tadić* Appeals Chamber Judgment, Case No. IT-94-1-A, 15 July 1999, para. 88ff; *Čelebići*, Appeals Chamber Judgment, Case No. IT-96-21-A, 20 February 2001, para. 6ff; *Kordić and Čerkez*, Appeal Judgment, Case No. IT-95-14/2-A, 14 December 2004, para. 295ff.

more on the applicable treaty law. These preliminary observations have to be borne in mind when proceeding to the analysis of the case law of the two *ad hoc* tribunals on customary international law.

IV. THE CASE LAW OF THE ICTY AND THE ICTR ON CUSTOMARY INTERNATIONAL LAW

As regards findings on the evolution of new customary rules, one can discern some major areas of law on which the jurisprudence of the ICTR and ICTY has concentrated. They comprise the application of Article 3 of the ICTY Statute to non-international as well as to international armed conflict; the prerequisites of rape and torture as crimes against humanity, war crimes and acts of genocide; the customary international law status of these crimes; individual criminal responsibility; and the application of the principle of command responsibility in non-international armed conflict. There are of course also other areas of international criminal law where the Tribunals have affirmed the existence or absence of rules of customary international law.[62] However, the most groundbreaking decisions on the applicable customary law are to be found in the field of international criminal law. Yet, to limit the scope of this methodological investigation of the two Tribunal's case law, only those cases where the Tribunals provided some detailed examination of the relevant customary law or its development will be examined. Cases where they merely stated or restated the customary character of a norm without investigating its pedigree or development will not be assessed.

As the structure of the next section on the ICTY's and ICTR's case law may reveal, the approaches chosen by both Tribunals to define new customary international criminal law are, to a certain extent, identical to those utilised by the ICJ. Accordingly, the section's structure parallels that of the chapter concerned with the jurisprudence of the ICJ. Nevertheless, it consists of two parts, of which the former discusses the case law of the ICTY and the latter concentrates on the jurisprudence of the ICTR.

Although both tribunals focused on similar fields of law when assessing the customary international law character of a norm of international criminal law, it will be seen that the methodology they employ to discern new customary international law differs greatly. This tendency derives from a different emphasis on customary international law as a source of law which underlies their respective Statutes. It also derives from the fact that the ICTR

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[62] See *Aleksovski*, Appeals Chamber Judgment, Case No. IT-95-14/1-A, 25 March 2000, para. 23.

was established two years after the ICTY, so that it already had a significant stock of jurisprudence on customary law at hand on which it could draw for its own jurisprudence.

The Tribunals, and especially their joint Appeals Chamber, have repeatedly discussed the formation and application of customary international law against the background of the *nullum crimen sine lege* principle. This principle, which will be discussed later in the book, sets the limits of legal interpretation and the determination of customary international law in international criminal law. Although its impact on the development of customary international criminal law will be discussed in due course, it is impossible to avoid a certain overlap between the assessment of custom and an analysis of this tenet.

V. THE FINDINGS OF THE ICTY ON THE EVOLUTION OF NEW CUSTOMARY INTERNATIONAL CRIMINAL LAW

Of the two *ad hoc* tribunals established by the Security Council, the ICTY has produced and decided a far greater number of cases which concern new rules of customary international law than the ICTR. The numerical differences are certainly owing to the fact that, in the beginning, the ICTY benefited from far greater technical and financial support than the ICTR. Nevertheless, as stated previously, the legal situation behind the establishment of the two tribunals also differed greatly and thus created a varying matrix for findings on the applicable customary law. Hence, the ICTY, which discussed the evolution of new customary rules of international criminal law most intensively, will be tackled first.

A. *The 'sources based approach': international legal instruments and international jurisprudence as evidence of new customary international law*

One first method, which has been applied consistently throughout the existence of the tribunals for the former Yugoslavia and Rwanda since their establishment in 1993 and 1994, respectively, is a 'sources based' approach, which resembles the classical two-element approach identified earlier in the chapter on the ICJ's case law on customary international law. However, the tribunals do neither identify nor prove the existence of the two elements of customary international law -*opinio juris* and state practice-, they merely list the international legal instruments and the case law which serve as a evidence (or 'source') of either of these elements. This is a modification which in practice turns the classical two-element approach into a one-element one,

because the tribunals often refrain from any allocation of the international 'sources' to either element of customary international law.

Three main factors have influenced this modification: first and foremost, those 'sources' can serve as a evidence of both *opinio juris* and state practice. In international criminal law, in particular, any differentiation between the separate elements of practice and legal conviction is difficult and rather theoretical.[63]

Second, the potential sources in the field of international criminal law which support an identification of the evolution of new customary international criminal norms are somewhat limited. In their case law, the ICTY and the ICTR rely on the case law of the international tribunals for Nuremberg and Tokyo and of the military tribunals set up under Control Council Law Nr. 10, the Geneva Conventions and the ILC Draft Code of Crimes, as well as on national military manuals and a limited number of other instruments.

Third, there are a number of new international legal instruments which permit conclusions about emerging rules of customary international criminal law, which, however, have come into force just recently, i.e. since the establishment of the two *ad hoc* tribunals. In this category the Rome Statute of the International Criminal Court and the ICRC Study on Customary International Humanitarian Law are the most prominent examples. Despite their coming into force at a time when the tribunals were already up and running, both the ICTY and the ICTR consider these new rules to influence the formation of new customary law, too.

In accordance with the different sources identified by the Tribunals as being constitutive for the development of a new norm of customary international law, the following analysis concentrates on those different international 'sources' of new customary international criminal law.

1. *Nuremberg Jurisprudence and the military trials following World War II*

The trials of major war criminals in Nuremberg and Tokyo and the military trials of war criminals after World War II constitute the only case law available to the ICTY, as well as to the ICTR, which was already in existence at the time of their establishment. Though judgments of domestic courts on international criminal law issues may also indicate which rules can be considered customary in international law, a situation roughly comparable in dimension to the trials in The Hague and Arusha existed only at Nuremberg and Tokyo. Hence, both the ICTY and the ICTR have made ample refer-

[63] See also, *J.-M. Haenkaerts and L. Doswald-Beck*, Customary International Humanitarian Law, vol. I, xl.

ence to the case law of these courts in their assessment of new customary rules. Often, however, the case law of Nuremberg and Tokyo is utilised only as additional evidence when considering a rule of customary international criminal law. Few cases have exclusively referred to the post-World War II case law. For the most part, cases utilizing the Nuremberg case law as a evidence of new customary rules tackled the requirements of crimes against humanity as well as questions of individual criminal responsibility and command responsibility.

a. Commission of crimes against humanity for personal motives

Crimes against humanity form part of the 'traditional' international criminal law which received recognition in international instruments from very early on.[64] They constitute the crimes which were subject to adjudication before the International Military Tribunals of Nuremberg and the Far East,[65] and thus belong to the very core of crimes the commission of which may be persecuted internationally.[66] The crime of genocide, for example, was initially considered within the framework of crimes against humanity.[67] The essence of crimes against humanity is acts which occur during a widespread or systematic attack on any civilian population in time either of war or of peace.[68] By their very nature, crimes falling into this category pertain to international humanitarian law and international human rights law,[69] a fact which has

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[64] See 'Declaration of France, Great Britain and Russia', 24 May 1915, quoted in *E. Schwelb* (1946) 23 BYBIL, 178, 181; Commission of the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report presented to the Preliminary Peace Conference' (Versailles, March 1919) Conference of Paris, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, Annex; 'Treaty of Peace between the Allied Powers and Turkey (Treaty of Sèvres)', 10 August 1920, Articles 226, 230, reprinted in (1921) 15 AJIL 197.

[65] See Article 6 (c) Nurember Charter; Article 5 (c) Tokyo Charter, in *C. Van den Wyngaert* (International Criminal Law) 55ff, 63ff.

[66] Yet, this fact has to be differentiated from the very difficult question whether the commission of crimes against humanity may be prosecuted by any state in the world, a matter which is commonly disputed under the topic of 'universal jurisdiction'. On this matter see: *M. Cherif Bassiouni* (2001) 42 Virginia Journal of International Law, 81ff; *R. O'Keefe* 2 (2004) Journal of International Criminal Justice, 735–760; *L. Reydams* (Universal Jurisdiction); *C. Tomuschat* 71 (2005) Annuaire d' Institut de Droit international, vol. 1, 213–388.

[67] Article 6 (c) Nuremberg Charter, in C. *Van den Wyngaert* (International Criminal Law) 55ff, 63ff.

[68] See *R. Dixon* 'Crimes Against Humanity' in *O. Triffterer* (Commentary) 122, 123, para. 3.

[69] *M. Cherif Bassiouni* (Crimes 1999) 44.

sometimes caused difficulties when one defines individual offences belonging to this group.

The *Tadić* Appeals Chamber judgment is one of the few judgments which exclusively based its assessment of whether crimes against humanity can be committed for purely personal motives on case law of the post-World War II trials. Whereas the prosecution had answered the question in the affirmative, drawing on an object and purpose interpretation of Article 5 of the Statute, the defence had objected to this contention, finding that the ICTY Statute would not support it.[70] In the judgment, the Court considered several of the trials following World War II which had been adjudicated on by the Supreme Court of the British Zone and the Flensburg District Court, to assess whether there was a rule of customary international law which would support either argument.[71] The cases involved mostly denunciations of certain private persons to the Nazi authorities by their relatives or other people, resulting in their arrest and incarceration in concentration camps or prisons (*Denunciation Cases*). After consideration of this jurisprudence, the Court found that the *Denunciation Cases* were examples where crimes against humanity had been committed for personal motives alone.[72] The Court held that, considering this case law and the "spirit of international rules concerning crimes against humanity", it was clear that under customary international law crimes against humanity could be committed also for purely personal motives.[73]

In the *Tadić Case*, the ICTY applied the international instruments approach most consistently. The Tribunal deduced the existence of a customary rule merely from the relevant post World War II case law, without further alluding to any other type of state practice or *opinio juris*. One interesting aspect which is revealed by such reasoning is the thin line which separates legal interpretation and the finding of customary international law.[74] One could ask whether the findings of the military tribunals in the denunciation cases might not serve better for a historical interpretation of crimes against humanity than for the establishment of 'personal motives' as a customary element of the crime. At the time of the *Tadić* appeal judgment, the customary international law character of crimes against humanity was undisputed and had already been affirmed by the ICTY. Thus, it could be argued that any assessment of whether crimes against humanity could also be committed

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[70] *Tadić*, Appeals Chamber Judgment, Case No. 94-1-A, 15 July 1999, para. 254, 255.
[71] *Tadić* (n. 70) para. 258–262.
[72] *Tadić* (n. 70) para. 271.
[73] *Tadić* (n. 70) para. 271.
[74] *Infra* pages 86ff.

for personal motives belongs to an interpretation of the crime itself. At least, this shows the need for a clear differentiation of methods.

b. Persecution and enslavement as crimes against humanity

Two further crimes against humanity which have been addressed by the ICTY referring to the Nuremberg Trials and to the post- World War II case law are persecution and enslavement. The ICTY considered both crimes to belong to the established body of customary international law. In order to establish the customary character of persecution, the *Tadić* trial judgment cited, amongst others, the *Justice Case*,[75] the *Barbie Case*, the *Eichmann Case* and *Quinn v. Robinson*.[76] Nonetheless, it stated that previous attempts to define the customary law on persecution, which had taken place in the field of international asylum and refugee law, could not be readily transposed to the field of international criminal law. Because they did not concern individual criminal responsibility under international law, they could not serve as an example of the crime's customary nature.[77] These findings were affirmed by the Tribunal's subsequent jurisprudence.[78]

When assessing the customary nature of the crime of enslavement, the ICTY proceeded in the same manner. The *Kunarac Case*, for example, considered international treaty law[79] as well as the cases of World War II[80] to determine the customary international law status of the offence. Most importantly, however, the Chamber emphasised that the definition of the crime, which was broader than the definitions of slavery, slave trade and compulsory labour which could be found in international treaty law, was supported by the World War II case law.[81] In the view of the chamber, the 'evidentiary sources' of customary international law had to be analyzed in the light of the

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[75] *Tadić*, Trial Chamber Judgment, Case No IT-94-1-T, 7 May 1997, para. 700.

[76] *Tadić* (n. 75) para. 701.

[77] *Tadić* (n. 75) para. 694.

[78] *Kupreškić*, Trial Chamber Judgment, Case No. IT-95-16-T, 14 January 2000, paras. 600, 605 and 615; *Krnojelac*, Appeals Chamber Judgment, Case No. IT- 97-25-A, 17 September 2003, para. 184, 185; *Kvočka, Radic, Zigic*, Appeals Chamber Judgment, Case No. IT-98-30/1-A, 28 February 2005, para. 320.

[79] *Kunarac*, ICTY Trial Chamber Judgment, IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 520 (Anti-Slavery Convention, ILO Convention against Slavery, common Article 3 of the GCns, Article 4 of Additional Protocol II, as well as provisions prohibiting slavery as entailed in various international human rights treaties).

[80] *Kunarac* (n. 79) para. 520.

[81] *Kunarac* (n. 79) para. 541; These findings found approval with the Appeals Chamber (see *Kunarac*, *Kovač*, Appeals Chamber Judgment, Case No. IT-96-23& IT-96-23/1-A, 12 June 2002, para. 124).

'specific character of international humanitarian law', which – in the view of the Chamber – could not easily be equated with international human rights law or other fields of international law.[82] Interestingly, the particularities of international criminal law were to be found expressed best by the case law of the IMT's for Nuremberg and Tokyo, rather than by international conventions. Therefore, any assessment of customary international criminal law has to take account of the specific character of humanitarian law.

c. Other inhumane acts

A further crime, which gave rise to a reference to the World War II case law, is the general definition of 'other inhuman acts'. Generally speaking, there is no such crime as 'other inhumane acts' in international criminal law. Rather, this category of crimes against humanity describes particular offences which are similar in nature to "murder", "extermination" or "enslavement" and are "inhumane", and thus require the prosecution of the offender.[83] However, the international criminal *ad hoc* tribunals needed to discuss first the 'general' criminality of 'other inhumane acts' under customary international law, before referring to the actual offence falling into this category.

The one judgement which tackles the general customary criminality of 'other inhumane acts' by reference to post World War II case law is the ICTY's *Jokić* trial judgment. Amongst other things, it referred to the international legal instruments underlying the trials at Nuremberg and Tokyo, i.e. the Nuremberg and Tokyo Charters, as well as to Control Council Law No. 10, which all had laid down provisions prohibiting 'other inhumane acts' in order to prove the customary criminality of 'other inhumane acts'.[84] Furthermore, the Trial Chamber remarked that the convictions entered before the IMT at Nuremberg, before the Rwanda Tribunal and before itself on the basis of the commission of 'other inhumane acts' could serve as further evidence of the customary criminality of this category of crimes.[85]

d. Individual criminal responsibility under customary international law

The law on individual criminal responsibility is a further area of international criminal law, where the ICTY has used post World War II case law in order to prove the emergence of new customary rules. Under the subheading

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[82] *Kunarac* (n. 79) para. 541.
[83] See *M. Cherif Bassiouni* (Crimes 1992) 320.
[84] *Jokić*, Trial Chamber Judgment, Case No. IT-02-60-T, 17 January 2005, para. 624.
[85] All at: *Jokić*, Trial Chamber Judgment, Case No. IT-02-60-T, 17 January 2005, para. 624.

of individual criminal responsibility, a great variety of responsibilities may be discussed. Not just the individual responsibility of the principal, but also the responsibility of accomplices, aiders and abetters falls into the category of individual criminal accountability.[86] These different modes of criminal participation are listed in Article 7 (1) ICTY Statute, and Article 6 (1) ICTR Statute. They have to be borne in mind when considering customary international law in this field.

The *Tadić* Trial Chamber judgment is one the first judgments which discussed and affirmed the customary character of the concept of individual criminal responsibility.[87] To ascertain its customary nature, the Tribunal pointed to the findings of the Nuremberg and Tokyo judgments,[88] and the prosecutions after World War II. In addition, it stated that the concept could be found in the Torture Convention and in the Convention on the Prohibition of the Crime of Apartheid. The latter convention in particular stated that participation entailed criminal culpability.[89]

Also for its further assessment of accomplice liability, the Trial Chamber drew its findings from the judgments of the IMT in the Nuremberg Trials.[90] As the Nuremberg judgments had not adjudicated on the level of assistance required by the accomplice to establish his or her liability, the *Tadić* Trial Chamber deduced the relevant standard from the ILC Draft Code and verified its findings by comparison with the standards of the Nuremberg judgements.[91] The Tribunal then concluded that the standard so established (accomplice liability required a 'substantial contribution' to the crime) applied as a matter of customary international law.[92]

e. The applicability of the principle of command responsibility to non-international and international armed conflict

Command responsibility is another aspect of individual criminal responsibility which has been discussed intensively by both *ad hoc* tribunals. The concept and its individual requirements have the been subject of many

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[86] See *G. Werle* (Principles) 116ff, marginal no. 337ff.

[87] *Tadić*, Trial Chamber Judgment, Case No IT-94-1-T, 7 May 1997, para. 666.

[88] *Tadić* (n. 87) para. 665.

[89] *Tadić* (n. 87) para. 666.

[90] *Tadić* (n. 87) para. 681.

[91] The Trial Chamber concluded, that the accomplice must have contributed an act which constituted a 'substantial contribution' to the commission of the crime. See *Tadić* (n. 87) para. 688.

[92] *Tadić* (n. 87) para. 692.

discussions in international law.[93] It was expressly recognised as such in Article 7 (3) ICTY Statute and Article 6 (3) ICTR Statute. Earlier, the duty of commanders to "suppress and to report to competent authorities breaches of the conventions and…[AP I]" had been laid down in Article 87 AP I. As in international criminal law no one may be held accountable for acts which he has not performed,[94] command responsibility must be understood as responsibility by omission of superior authorities.[95]

The *Čelebići* judgment discussed the customary character and elements of command responsibility at a very early stage. The evidence of the principle was somewhat of an issue: it had not been applied internationally since the trials of German war criminals after the end of World War II, although in the Chamber's view, there could be no doubt that the principle by now had been "firmly placed within the corpus of international humanitarian law."[96] The Tribunal considered that this was underlined by its "clear expression in international conventional law" with the adoption of AP I.[97] What is more, the customary character of the principle was held to be evidenced by the Report of the Committee of Experts on the Establishment of the ICTY. The report had referred to the judgments of the IMTs for the Far East and of Nuremberg, which established the international criminal liability of certain leaders and military superiors for acts committed by their subordinates during World War II.[98]

Considering these findings, the Tribunal in the *Čelebići Case* chose the almost 'classic' approach to assessing the customary international law character of the principle of command responsibility: it primarily considered the judgments of the IMTs for the Far East and of Nuremberg. However, most importantly, apart from the evidence of custom gained from international treaty instruments and from international case law, the Court did not refer to individual *state* practice or *opinio juris*. Often though, the judgments of

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[93] See: *A. Ching* (1999) 25 North Carolina J.of Intl.L. and Commercial Regulation, 167ff; *M. Damaska* (2001) 49 Am. J. of Comparative Law, 455ff; *M. Feria Tinta* (2000) 47 NILR 293ff; *L. Green* (2003) 175 Military Law Review 309ff; *C. Greenwood* (2004) 2 JICJ 598ff; *T. Henquet* (2002) 15 LJIL 805ff; *M. Lippman* (2000) 13 LJIL 139ff; *A. Zahar* (2001) 14 LJIL, 591ff.

[94] Thus, command responsibility cannot constitute some vicarious liability. *See Čelebići*, Appeals Chamber Judgment, Case No. IT-96-21-A, 20 February 2001, para. 239.

[95] *A. Cassese* (International Criminal Law, 2nd ed.) 242; similarly *G. Werle* (Völkerstrafrecht), 467, marginal no. 467, who maintains that command responsibility constitutes a type of responsibility which rests in between responsibility by omission and responsibility by complicity.

[96] *Čelebići* Trial Chamber Judgment, Case No. IT-96-21-T, 26 November 1998, para. 340.

[97] *Čelebići* (n. 96) para. 340.

[98] *Čelebići* (n. 96) para. 357.

international courts and tribunals may be the only practice available in the field of international criminal law.

Later, the *Čelebići* Appeals Chamber discussed the individual customary elements of the crime of command responsibility.[99] As the prosecution had contested the findings of the Trial Chamber with regard to the *mens rea* element, the Appeals Chamber assessed the *Yamashita* case of the IMT for the Far East, the *List Case*, the *Hostage Case* and the *Pohl Case* of the Nuremberg Tribunal, as well as the US field manual, to determine its customary content. From the evidence reflected in the case law of the IMT and from the interpretation of Article 86 in the ICRC commentary to AP I,[100] the Chamber then deduced the customary nature of the *mens rea* element as it had already been outlined by the Trial Chamber.[101] Moreover, the Appeals Chamber reconsidered the judgements of the IMTs of Nuremberg and Tokyo[102] to determine the level of control to be exercised in the superior-subordinate relationship. Such an assessment led it to conclude that "customary law has specified a standard of *effective* control".[103] It consequently decided that a standard of substantial influence, which had been put forward by the prosecution, would not find any support in state practice and judicial decisions, and thus in customary international law.[104]

Such reasoning proves, once again, the ICTY's strong reliance on the post World War II case law when determining the emergence of new rules of international criminal law.

3. *Risks ensuing from utilizing the Nuremberg jurisprudence and similar case law as evidence of new customary law*

Though the case law of the tribunals established in the aftermath of World War II serves as a major source of evidence of new customary international

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[99] The prosecution had mentioned as one of the grounds of appeal that the Trial Chamber had not proven its customary international law character. See *Čelebići*, Appeals Chamber Judgment, Case No. IT-96-21-A, 20 February 2001, para. 216ff.

[100] *Čelebići*, Appeals Chamber Judgment, Case No. IT-96-21-A, 20 February 2001, para. 238.

[101] The Chamber stipulated that 'had reason to know' in the statute had to be interpreted in the light of 'had information enabling him to conclude'.The relevant information had to derive from military "reports addressed to [the superior],…the tactical situation, the level of training and instruction of subordinate officers and their troops, and their character traits".

[102] *Čelebići*, Appeals Chamber Judgment, Case No. IT-96-21-A, 20 February 2001, para. 260ff.

[103] *Čelebići* (n. 100) para. 266.

[104] *Čelebići* (n. 100) para. 266; Most recently, the *Jokić* Trial Chamber Judgment approved of these findings on the customary nature of command responsibility: *Jokić*, Trial Chamber Judgment, Case No. IT-02-60-T, 17 January 2005, para. 789.

law to the ICTY, there are also some risks ensuing from its application to new sets of facts, which have occurred fifty years after its adjudication. It is one major point of critique that the situations which the military tribunals after World War II were called upon to adjudicate, with regard to both the law and to the facts, are hardly comparable to the cases which are discussed by the trial chambers of the ICTY and ICTR on a daily basis.[105] Some of the difficulties that have unravelled concerning this issue are discussed in the following cases.

a. The 'customs of war' in Article 3 ICTY Statute/Article 4 ICTR Statute: the customary international law status of Additional Protocol I

One earlier case which discussed the evidential value of judicial decisions within the general framework of its jurisprudence is the *Kupreškić* Trial Chamber judgment. The Trial Chamber held that judicial decisions can only be a subsidiary means for the establishment of international law. Nevertheless, it also considered the decisions to contain evidentiary force for the existence of a customary rule[106] underlining, in particular, the importance of judgments of the International Military Tribunals of Nuremberg and Tokyo for any assessment of customary international law and stressing their "great value" for the ICTY. In its view, they laid down provisions which "were either declaratory of existing law or which had been gradually transformed into customary international law".[107] On these findings, the Chamber tried to establish a hierarchical order of the sources of international criminal law which had to be consulted where the Statute did not provide for an applicable norm. It held that it would be then be allowed to draw on:

> (i) rules of customary international law, (ii) general principles of international criminal law; or, lacking such principles (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice.[108]

This list constitutes an early attempt to prioritise the potential sources of international criminal law norms on which the ICTY may draw in its jurisprudence. To a certain extent it resembles Article 21 of the ICC Statute which also appears to establish a hierarchy of legal sources for the ICC. Nev-

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[105] *See*, for example, *Naletilic, Martinovic*, Case No. IT-98-34-A, 3 May 2006, dissenting opinion *Schomburg*, 214ff, para. 11.

[106] *Kupreškić* (n. 78) para. 540.

[107] *Kupreškić* (n. 78) para. 541.

[108] *Kupreškić* (n. 78) para. 591.

ertheless, the list is longer than the designation of sources of the Secretary-General's report on the establishment of the ICTY, which mentions only customary international law as a source of law for the Tribunal.[109] There are grounds for criticizing such prioritisation of sources, not so much for mentioning sources of international law which have been left out of the Secretary-General's report, but for enabling the Tribunal to resort to further sources (which do not form part of the accepted sources of international law, like the general principles of criminal law common to the major legal systems of the world or the general principles consonant with basic requirements of international justice) where the primary sources do not support the punishment of the perpetrator. Moreover, the differences between sources (ii)–(iv) do not appear to be very clear.

b. Deportation and forcible transfer of civilians

Further problems concerning the application of the Nuremberg case law by the ICTY arose in the course of its assessment of the customary character of the crime of deportation and forcible transfer of civilians. It is a rather 'new' crime in international criminal law; it was first discussed before the ICTY. In the context of its Statute, the Tribunal has referred to it as a crime against humanity and as a war crime.

As the first decision dealing with this 'new' crime, the *Krstić* Trial Chamber judgment considered the deportation and forcible transfer of civilians within the overall framework of crimes against humanity.[110] Yet the decision merely determined that these crimes were customary in character and that they were not to be understood as synonyms for one and the same crime. Following the Chamber's definition, the crime of deportation concerned the transfer of civilians beyond the borders of a state, whereas forcible transfer of a civilian population related to the displacement of civilians within the borders of a state.[111]

Subsequently, the *Milsosevic Decision on Motion for Judgement on Acquittal*[112] discussed the customary character of these two offences very extensively. To clarify their legal prerequisites under international criminal law, the Trial Chamber considered several important types of evidence which other Chambers of the Tribunal, including the Appeals Chamber, had frequently

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[109] See *supra* (n. 31).

[110] *Krstić*, Trial Chamber Judgment, Case No. IT-98-33-T, 2 August 2001.

[111] *Krstić*, Trial Chamber Judgment, Case No. IT-98-33-T, 2 August 2001, para. 521.

[112] *Milošević*, Decision on Motion for Judgment of Acquittal, Case No. IT-02-54-T, 16 June 2004.

utilised to identify a norm of customary international law: first and foremost, it assessed the case law of the IMT in Nuremberg as well as various cases of the US Military Tribunal in Nuremberg established under Control Council Law No. 10.[113] It further examined references to the crime in the Geneva Conventions[114] and in AP II to the Geneva Conventions. It also pointed to its own jurisprudence, which until then had considered the offences to constitute two distinct crimes.[115] Finally, the Chamber discussed the definition of the crime in the ICC Statute, which pointed towards the definition of a single crime.[116] In this assessment of "the foregoing strands of jurisprudence",[117] the Tribunal then found that the two crimes had a distinct meaning in customary international law. Deportation related to cross-border transfers, whereas forcible transfer concerned the displacement of a civilian population within a country's borders.[118]

Lastly, the *Naletilic and Martinovic* judgment[119] mentioned the crime of forcible transfer of civilians and of deportation for the first time as a war crime in accordance with Article 2 (g) of the ICTY Statute. But for the actual prerequisites of the crime, the Trial Chamber mainly referred to the provisions of the Geneva Conventions,[120] without discussing its particular customary content.

In the Appeals Chamber decision on this case, Judge Schomburg took the opportunity to assess the customary nature of the crime as well as the evidence which was utilised by previous Chambers of the Court to determine its customary nature and character.[121] He found, in particular, that the Nuremberg jurisprudence on the matter of deportation contained decisive differences in language and substance, so that it was difficult to use it as evidence for the crime's customary nature and particular requirements. According to his view, the judgments did not tackle the issue of whether a border was crossed when people were deported.[122] Similarly, he argued, the ILC Commentary to Article 18 of the Draft Code of Crimes against the Peace and

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[113] *Milošević* (n. 112) para. 52.
[114] *Milošević* (n. 112) para. 53.
[115] *Milošević* (n. 112) para. 61–63.
[116] *Milošević* (n. 112) para. 65.
[117] *Milošević* (n. 112) para. 68.
[118] *Milošević* (n. 112) para. 68; these findings were later affirmed by the *Jokić* Trial Chamber Judgment: See: *Jokić*, Trial Chamber Judgment, Case No. IT-02-60-T, 17 June 2005, para. 595; citing the Krnojelac Appeal Judgment, paras. 220, 222.
[119] See. *Naletilic, Martinovic*, Case No. IT-98-34-T, 31 March 2003, para. 513.
[120] Article 40, 147, 45 and 49 of the Fourth Geneva Convention.
[121] *Naletilic, Martinovic*, Case No. IT-98-34-A, 3 May 2006, dissenting opinion *Schomburg*, 214ff, para. 10ff.
[122] *Naletilic, Martinovic* (n. 121) para. 11.

Security of Mankind of 1966 was not supported by any authority.[123] Schomburg thus concluded that there was no customary definition of the crime of deportation and forcible transfer of civilians; the Court would have had to refer to the rules of interpretation to develop an adequate characterisation of the crime.[124]

c. Assessment

Whereas the *Krstić* decision merely assumed the customary character of the crimes of deportation and displacement without making any reference to evidence of state practice or *opinio juris*, the *Milosevic* and finally the *Stakić* decision were the first cases where the customary nature of those crimes was elaborated in more detail. Nonetheless, as international judicial practice and international treaty law are often the only sources available, it seems that the Court no longer refers to custom's "traditional" elements in order to prove the formation of a customary norm.

The dissenting opinion of Judge Schomburg in the *Naletilic and Martinovic* Appeals Chamber decision teaches us, however, that international case law, and in particular the jurisprudence of the Nuremberg Trials, has to be handled carefully to serve as evidence of the customary character and definition of particular crimes in international criminal law. The cases discussed before the Nuremberg Tribunal may not be comparable at all times with those adjudicated by the ICTY. Hence, if international jurisprudence is used as evidence of a crime's customary nature, attention has to be paid to the particular circumstances in which the individual judgment was delivered. Whether this has also been an issue with regard to the customary nature of aiding and abetting will be assessed in the following paragraphs.

d. Aiding and abetting

A further warning with regard to the case law of the post World War II period was given by the *Furundžija* Trial Chamber judgment when setting out the customary international law definition of aiding and abetting.[125] Although the Trial Chamber examined the London Agreement and the Charter of the IMT for the Far East, it held that it did not provide for a relevant definition. Accordingly, the Tribunal proceeded to examine relevant case law. It emphasised that the authoritative value of each case for the development

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[123] *Naletilic, Martinovic* (n. 121) para. 13.

[124] *Naletilic, Martinovic* (n. 121) para. 16.

[125] *Furundžija*, Trial Chamber Judgment, Case. No.: IT-95-17/1-T, 10 December 1998, para. 192.

of new customary international law depended on the forum in which each case was heard as well on as the law applied. Thus, great caution had to be exercised when assessing national case law in order to determine customary international law.[126] For example, concerning the case law of the different military tribunals set up after World War II, the Chamber warned that it had to be borne in mind that the tribunals' jurisdictional powers all derived from different legal instruments. Whereas American Military Courts all applied Control Council Law No. 10, the British Military Courts operated on a Royal Warrant of 14 June 1945, which provided that the rules applied by British Military Courts were those of national law. Furthermore, the German Supreme Court in the British Occupied Zone and the German courts in the French Occupied Zone both adjudicated according to Control Council Law No. 10.[127]

In relation to the foregoing decisions which referred to the crime of forcible transfer of civilians and deportation, the *Furundžija* Trial Chamber judgment constitutes a very early example of more careful consideration of the post World War II jurisprudence and law. It alludes to the important issue that the circumstances and background of the individual case and underlying law also have to be scrutinised when determining future customary crimes. Consequently, not every decision of a military court after World War II can serve as an example of *international* jurisprudence, supporting the existence of a customary norm.

This has also been noted in the *Rwamakuba* judgment of the ICTR, which held that sometimes the jurisprudence of the IMT may not adequately reflect the international criminal law applicable before the *ad hoc* Tribunals.[128] Moreover, criticism has been raised that the law at Nuremberg did not reflect the status of customary international law of the time, but exceeded it.[129] Therefore, reliance by the ICTY solely on the post World War II case law may also risk a conflict with the prohibition of retroactivity of the *nullum crimen sine lege* principle.

3. *Other international and domestic case law on matters of international humanitarian law*

Further case law, not only the cases concerning the post World War II trials, has also formed part of the ICTY's assessment of the formation of new

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[126] *Furundžija* (n. 125) para. 192.

[127] *Furundžija* (n. 125) para. 195–197.

[128] *Rwamakuba*, Appeals Chamber Decision on Interlocutory Appeal on Joint Criminal Enterprise, ICTR-98-44-AR72.4, 22 October 2004, para. 15.

[129] See *H. Quaritsch* (C. Schmitt Verbrechen des Angriffskrieges).

customary law. However, there are not many cases which have discussed the emergence of a new rule while considering just case law which emerged at international and domestic level. The *Tadić* Case is one of the rare examples.

In this case, the Trial Chamber was called upon to characterise the conflict in the former Yugoslavia within the framework of Article 2 ICTY Statute and discuss whether victims of acts falling under Article 2 qualified as protected persons under the Geneva Conventions. To assess this question, the Chamber applied the effective control test established by the ICJ in the *Nicaragua Case*. It came to the conclusion that because of the actors involved and the level of control exercised, the conflict had to be regarded as non-international in character.[130] Accordingly, Article 2 of the Statute would be inapplicable.

These findings were appealed against in the *Tadić* Appeals Chamber case. The Appeals Chamber reassessed the customary rules on the attribution of acts of private individuals to the state. But it found that the effective control test developed by the ICJ did not reflect the relevant 'state practice' in the field of international criminal law.[131] According to the decisions of national and international courts, such as in the ECtHR's *Loizidou v. Turkey* case[132] or the *Jorgic Case* of the OLG Düsseldorf, Germany,[133] a different test had to be employed, according to which a level of *overall* control of the state over a military group was sufficient for the attribution of the acts of the group to the state.[134] Following this new test, the conflict between the Bosnian Serbs and Bosnia-Herzegovina was classified as an international armed conflict.[135] The FRY had exercised a level of overall control over the armed forces of the Republika Srbska involved in the conflict.[136]

The findings of the *Tadić* Appeals Chamber on the imputability of acts of militia groups to a state are surprising, if not astonishing. The Court rejected the test employed by the ICJ in the *Nicaragua Case* and considered it inadequate for the attribution of acts of private actors to a state in international criminal law. It did so by stating that this test would have been refuted by *state practice* to the contrary. However, the evidence which the Court uses to support its findings comprises the judicial decisions of only one national

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[130] The acts of the armed forces of the Republica Srbska could not be attributed to the Yugoslav army according to this test; *Tadić* Trial Chamber Judgment, Case No. IT-94-1-T, 7 May 1997, para. 585ff.

[131] *Tadić*, Appeals Chamber Judgment, Case No. 94-1-A, 15 July 1999, para. 124ff.

[132] *Jorgic*, Higher Regional Court (Oberlandesgericht) Düsseldorf, 26 September 1997.

[133] ECtHR: *Loizidou v. Turkey*, Case No.: 15318/89, [1998] ECtHR 60, 28 July 1998.

[134] *Tadić*, Appeals Chamber Judgment, Case No. 94-1-A, 15 July 1999, 35, para. 131; the findings of the ICTY have been affirmed in subsequent judgements. See *Boskoski*, Trial Chamber Judgment, Case No. IT-04-82-T, 10 July 2008, para 193.

[135] *Tadić* (n. 131) 35, para. 162.

[136] *Tadić* (n. 131) 35, para. 162.

court and of international (arbitral) tribunals. These elements do not reflect *state* practice in a traditional understanding of that requirement. Furthermore, as no hierarchy exists between the different international courts and tribunals, it seems odd that decisions of certain courts would outweigh a decision of the ICJ. Consequently, the ICJ in the recent *Srebrenica* judgment made it clear that the reasoning of the ICTY in the *Tadić* case dealt only with the peculiarities of international criminal law, which could not be transposed to the international law on state responsibility.[137] In any case, a more detailed assessment of the relevant state practice on the issue would have been more representative of a customary rule.

4. *International humanitarian law instruments*

Another piece of evidence for new rules of customary international law, and probably the most important one, which is utilised widely throughout the case law of the ICTY,[138] is the instruments of international humanitarian law. It includes the Geneva Conventions, which form part of the accepted core of humanitarian rules governing non-international and international armed conflict. Many of those humanitarian rules have been incorporated into the military manuals of states and are applied regularly by national criminal courts and military tribunals.

a. General customary international law character of crimes against humanity

As one of the main judgements on the development of customary international criminal law, that in the *Tadić Case* pronounced extensively on the customary nature of crimes against humanity. Nonetheless, in the *Tadić Interlocutory Appeal*, the general customary international law nature of crimes against humanity was not a matter of much dispute. The Chamber concluded 'merely' that the offence had already been defined in Article 6 (2) (c) of the Nuremberg Charter and was subsequently affirmed by the UNGA in its adoption of the Nuremberg principles. After all, this seemed sufficient to state the general customary nature of the crime.[139]

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[137] *Case Concerning the Application of the Convention on Prevention and Punishment of the Crime of Genocide*, ICJ Reports 2007, para. 403, 404. An earlier affirmation of the effective control test can also be found in the *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), judgement of 16 December 2005, para 160.

[138] And throughout the case law of the ICTR, as will be seen in part VI, below.

[139] *Tadić*, Interlocutory Appeal, Case No. IT-94-1-AR72, 2 October 1995, para. 138.

The *Tadić* Trial Chamber judgment dealt more comprehensively with the customary character of crimes against humanity. First, the Chamber briefly referred to the fact that the concept of crimes against humanity had existed in international law since 1915 and had been "hinted at" in the preamble to the 1907 Hague Convention.[140] However, it explained that although the concept had existed before, the category of crimes against humanity was created in the Nuremberg trials.[141] As the Chamber confirmed, at the time of their inclusion in the Nuremberg Charter, crimes against humanity had already attained customary status.[142] It further maintained that this customary international law character had also been emphasised by the Secretary General in his report on the establishment of the Tribunal.[143] Hence, it could be concluded that Article 5 of the ICTY Statute, "for the most part" would be reflective of customary international law.[144]

The foregoing reasoning provides a rather indirect analysis of the customary international law on crimes against humanity and is mainly oriented toward international legal instruments. Yet, as had been held previously, international instruments can generally serve as an affirmation of either of the elements of customary international law. From an overall perspective, it may be concluded that the *Tadić* jurisprudence has been accepted throughout as the leading argument on the general customary nature of crimes against humanity.[145] Nonetheless, it has to be borne in mind that certain requirements, which the *Tadić Interlocutory Appeal* had affirmed as customary,[146] went well beyond what was required of customary international law.[147] For example, as subsequent jurisprudence affirmed, a plan or policy element was not required for the crime under customary international law.[148]

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[140] *Tadić*, Trial Chamber Judgment, Case No. IT-94-1-T, 7 May 1997, para. 618.

[141] *Tadić* (n. 140) para. 618.

[142] *Tadić* (n. 140) para. 620.

[143] *Tadić* (n. 140) para. 622.

[144] *Tadić* (n. 140) para. 623.

[145] *Kunarac, Kovač*, Appeals Chamber Judgment, IT-96-23 & IT-96-23/1-A, 12 June 2002 para. 86–101.

[146] *Tadić* (n. 140) para. 618.

[147] *Kunarac*, Trial Chamber Judgment, IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 413.

[148] See *Nikolić*, Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-94-2-R61, 20 October 1995, para. 26; *Tadić*, Trial Chamber Judgment, Case No. IT-94-1-T, 7 May 1997, paras. 644 and 653; *Kupreškić*, Trial Chamber Judgment, Case No.: IT-95-16-T, 14 January 2001, paras. 551–552; *Blaškić*, Trial Chamber Judgment, Case No.: IT-95-14-T, 3 March 2000, paras. 203–205, 254 and 257; *Akayesu*, Trial Chamber Judgment, Case No.: ICTR-96-4-T, 2 September 1998, para. 580; *Kayishema and Ruzindana*, Trial Chamber Judgment, Case No.: ICTR- 95-1-T, 21 May 1999, para. 124.

b. Rape as a crime against humanity

The crimes of torture and rape provide the best examples of crimes which may be punished in the context of several offences before the ICTY and the ICTR. Torture as well as rape may be punishable as a war crime or a crime against humanity and may also constitute a genocidal act, when committed with the relevant intent.[149] This context is also relevant when determining the customary status of the respective crime.

The *Čelebići* Trial Chamber judgment discussed the customary international law character and criminality of the crime of rape in the context of the torture prohibition. The Tribunal maintained that there could be no doubt about the customary prohibition of rape in international humanitarian law,[150] since the crime had been outlawed by various provisions of international treaty law, such as the Geneva Conventions,[151] AP I[152] and the 1907 Hague Convention.[153] Nonetheless, for the actual definition of rape under international criminal law, the Trial Chamber merely followed the relevant findings of the ICTR's *Akayesu* judgment.[154] It maintained that that judgment, as well as national and international jurisprudence, had affirmed that rape was one of the prohibited acts of torture.[155] It struck at "the very core of human dignity and physical integrity."[156]

The conclusion we can draw from this type of reasoning is rather limited. The judgment can serve only as another example where the ICTY resorted to international humanitarian law instruments in order to determine the customary international law status of rape.

Further, in the *Čelebići* decision, the element of 'inhuman treatment' was considered by the Trial Chamber to be customary in nature. As the Chamber stated:

> The same international human rights and United Nations instruments that contain the prohibitions against torture, also proscribe inhuman treatment. On the strength of this almost universal condemnation of the practice of inhuman

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[149] See for the crime of torture: Article 2 (b) ICTY statute (torture as crime against humanity); Article 3 (if punishable as a violation of the GCns or its Additional Protocols); Article 4 (b) ICTY Statute: "causing serious bodily or mental harm".

[150] *Čelebići*, Trial Chamber Judgment, Case No. IT-96-21-T, 26 November 1998, para. 476.

[151] Article 4 (2) GC IV.

[152] Article 76 (1) AP I .

[153] Article 46.

[154] *Čelebići*, Trial Chamber Judgment, Case No. IT-96-21-T, 26 November 1998, para. 478.

[155] *Čelebići* (n. 154) para. 490.

[156] *Čelebići* (n. 154) para. 495.

> treatment, it can be said that its prohibition is a norm of customary international law.[157]

Most importantly, the ICTY found that humane treatment would be the true *leitmotif* for all the provisions of the Geneva Conventions. According to the Tribunal, this had found expression in the ICRC's commentary on Article 147 of the Geneva Conventions,[158] as well as in the relevant jurisprudence of the European Court of Human Rights.[159]

Though this reasoning of the Court resembles the 'core rights approach' which will be discussed later on, for its conclusions on the nature of humane treatment as one of the leading motives of the Geneva Conventions, it may also be cited as another example, where the ICTY focussed on provisions of international humanitarian law as evidence of the customary character of a certain crime.

5. *International human rights instruments*

There are a few crimes, for the definition of which the ICTY and the ICTR have referred to international human rights instruments. Although there is no doubt that today many human rights provisions are customary in character, this status does not indicate whether they also criminalise violations of those rights. The customary nature of the human rights provision does not necessarily parallel the provision's character as a crime incurring individual criminal responsibility under international criminal law. This important difference has to be borne in mind when considering the ICTY's and ICTR's case law on this matter.

a. War crimes-terrorisation of a civilian population

The crime of terrorisation of a civilian population belongs to the set of crimes which were not dealt with in the case law of the IMT of Nuremberg and the Far East and were first discussed by the *ad hoc* tribunals. This is why the reasoning of the ICTY on the customary nature of this crime is particularly interesting. The crime was first discussed within the context of Article 3 of the ICTY Statute by the *Jokić* judgment. The Trial Chamber held that the prohibition of the terrorisation of a population was encompassed within the right to security of the person, which, as a human right, formed part

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[157] *Čelebići* (n. 154) para. 517.
[158] *Čelebići* (n. 154) para. 518ff.
[159] *Čelebići* (n. 154) para. 534ff.

of the major human rights instruments (ICCPR and ECHR) and national jurisdictions. This was enough reason for the Chamber to conclude that terrorisation had been recognised both in customary and in treaty law.[160] Bearing in mind the fact that the customary nature of a certain human rights provision may not actually indicate the customary criminality of a violation of that right, it appears quite astonishing that the Trial Chamber did not differentiate between those two issues. It appears as if it simply assumed that the customary criminality resulted from the customary character of the prohibition.

b. The struggle of the ICTY to determine the customary character of 'other inhumane acts'

As mentioned previously, the customary character of 'other inhumane acts' has been subject to discussion in the case law of the ICTY.[161] Whereas the later *Jokić* Trial Chamber judgment of 2005 referred mostly to the Nuremberg case law when discussing the individual requirements of the crime,[162] the earlier reasoning of the *Kupreškić* Trial Chamber defined 'the parameters of interpretation' for this crime with the help of international human rights instruments like the Universal Declaration on Human Rights and the two Human Rights Covenants of 1966.[163] It held that international human rights law was able to identify "a set of basic rights appertaining to human beings", an infringement of which, in the appropriate circumstances, might amount to a crime against humanity.[164]

However, this almost deductive approach to custom, which drew heavily from the principles of international human rights law, found strong opposition in the *Stakić* Trial Chamber judgment. The *Stakić* Chamber considered human rights law to be of only limited utility for the interpretation of norms of international criminal law. Instead, it stipulated that norms of international criminal law, like "other inhumane acts", had to be considered carefully according to their meaning within the context of the Statute. In Tribunal's view, this would be required by the *nullum crimen sine lege* principle, which allowed consideration only of norms which are "beyond doubt" part of international humanitarian law.[165] As the Chamber warned:

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[160] *Jokić*, Trial Chamber Judgment, Case No. IT-02-60-T, 17 January 2005, para. 592.
[161] *Jokić* (n. 160) para. 624.
[162] *Ibid.*
[163] *Kupreškić*, Trial Chamber Judgment, Case No. IT-95-16-T, 14 January 2000, para. 566.
[164] *Ibid.*
[165] *Stakić*, Trial Chamber Judgment, Case No. IT-97-24-T, 31 July 2003, para. 721.

> A norm of criminal law must always provide a Trial Chamber with an appropriate yardstick to gauge alleged criminal conduct for the purposes of Art. 5(i) so that individuals will know what is permissible behaviour and what is not.[166]

As a consequence, the *Jokić* Trial Chamber judgment refrained from proving the customary criminality of other inhumane acts by reference to customary human rights prohibitions, as demonstrated.[167]

c. Torture and rape

They being the most prominent examples of crimes against humanity and war crimes, the customary nature of torture and of rape has become relevant in a number of cases.

The *Čelebići* Trial Chamber examined the customary character of the torture prohibition mainly in accordance with its definition contained in international conventions and human rights instruments. As the torture prohibition was contained in the grave breaches provisions of the Geneva Conventions as well as in common Article 3, the Trial Chamber held that the criminality of torture under customary as well as conventional law was undoubted.[168] Moreover, it maintained, the prohibition was contained in all major human rights instruments: amongst others, in the Universal Declaration on Human Rights, the ICCPR and the ECHR.[169] Thus, the Chamber concluded:

> It further constitutes a norm of *jus cogens*, as has been confirmed by the United Nations Special Rapporteur for Torture. It should additionally be noted that the prohibition contained in the aforementioned international instruments is absolute and non-derogable in any circumstances.[170]

For the definition of torture in customary international law the Trial Chamber considered the UNGA's Declaration on Torture, the Torture Convention and the Inter-American Convention on Human Rights, which were the only instruments which defined the elements of the crime.[171] Comparing the respective definitions contained in these instruments, it stated:

> It may, therefore, be said that the definition of torture contained in the Torture Convention includes the definitions contained in both the Declaration on Torture and the Inter-American Convention and thus reflects a consensus which

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[166] *Stakić*, Trial Chamber Judgment, Case No. IT-97-24-T, 31 July 2003, para. 721.
[167] *Jokić*, Trial Chamber Judgment, Case No. IT-02-60-T, 17 January 2005, para. 624.
[168] *Čelebići*, Trial Chamber Judgment, Case No. IT-96-21-T, 26 November 98, para. 452.
[169] *Čelebići* (n. 168) para. 452, 453.
[170] *Čelebići* (n. 168) para. 454.
[171] *Čelebići* (n. 168) para. 456–458.

> the Trial Chamber considers to be representative of customary international law.[172]

Considering these findings, the 'consensus' of states, i.e. their *opinio juris* as expressed in international treaty law instruments, seems to have influenced the Trial Chamber to conclude that the definition of torture in the Torture Convention was representative of customary international law. In a first step, the Trial Chamber did not consider any further evidence of state practice or *opinio juris*. It deduced the customary international law character of the definition solely from the existence and contents of the relevant international instruments.

In a second step, the Trial Chamber discussed the individual acts constituting torture, taking into account the jurisprudence of the ECHR as well as the ICRC Commentary to the Geneva Conventions.[173] However, it concluded that it followed from the case law of the ECHR that a particular threshold level for a determination of which acts may classify as acts of torture and which may not, could not be defined as belonging to the recognised body of customary international law.[174]

The *Furundžija* judgment of the ICTY followed a two fold argument to prove the customary character of the torture prohibition and of the individual criminal responsibility ensuing from its violation. First, the Tribunal examined the general customary character of the torture prohibition in international law. Like the previous *Čelebići* Chamber, it determined that the torture prohibition had gradually crystallised into customary international law from the various international instruments which incorporated this prohibition, *inter alia* the Lieber Code of 1863.[175] In the Chamber's view, the prohibition's customary character was further evidenced by the high number of ratifications of those international legal instruments, which included "practically all states of the world".[176] It maintained that a treaty was always indicative of a state's will to accept the international legal obligations contained therein.[177]

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[172] *Čelebići* (n. 168) para. 459.

[173] This was maintained by the defence: see *Čelebići*, Trial Chamber Judgment, Case No. IT-96-21-T, 26 November 98, para. 472.

[174] *Čelebići* (n. 168) para. 469.

[175] Amongst the further instruments cited were the Hague Conventions, the London Agreement of 1945, Control Council Law No. 10, the Geneva Conventions and their Protocols (see *Furundžija*, Trial Chamber Judgment, Case. No.: IT-95-17/1-T, 10 December 1998, para. 137).

[176] *Furundžija*, Trial Chamber Judgment, Case. No.: IT-95-17/1-T, 10 December 1998, para. 138.

[177] *Furundžija* (n. 176) para. 138.

According to the Chamber, further evidence of the customary nature of the torture prohibition would be provided by the fact that state practice had neither denied its existence nor argued for its authorisation. The Chamber also referred to the ICJ's *Nicaragua* judgement, which had explicitly affirmed that common Article 3 of the Geneva Conventions – which also contains the prohibition on torture – now belonged to "the corpus of customary international law… applicable both in international and internal armed conflicts."[178] This made it 'incontrovertible' that the prohibition on torture was now part of customary international law.[179]

In a second step, the Tribunal assessed the customary criminality of torture in international law. In the Chamber's view, individual criminal responsibility ensuing from violations of the torture prohibition resulted almost naturally from the fact that torture was so universally prohibited under customary international law.[180] Moreover, it concluded, the Statute and findings of the IMT in Nuremberg had punished torture as a war crime, a crime against humanity and genocide.[181] According to the Chamber, this was supported by the fact that state responsibility ensued if the prohibition had been violated. Lastly, the Trial Chamber pointed out that in international human rights law, the prohibition had attained the status of a peremptory norm or *jus cogens*.[182] It further deemed that the criminality of torture was finally evidenced by the extradition prohibitions which forbade the extradition of the perpetrator of a crime to a country where he or she would be subjected to torture.[183] Furthermore, the Chamber added, under international human rights conventions states had the obligation to punish individuals for the perpetration of acts of torture.[184]

Following this assessment of the customary character of the prohibition on torture as well as of its criminality, the Tribunal concluded that the quasi-universal condemnation of the crime by the members of the international community and the importance of the values which it protected had led to the result that the prohibition had attained a hierarchically higher status than international treaty law and customary international law and had evolved into a norm of *jus cogens*.[185]As the Chamber explained: "the prohibition has now become one of the most fundamental standards of the

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[178] *Furundžija* (n. 176) para. 138.
[179] *Furundžija* (n. 176) para. 139.
[180] *Furundžija* (n. 176) para. 140.
[181] *Furundžija* (n. 176) para. 141.
[182] *Furundžija* (n. 176) para. 144.
[183] *Furundžija* (n. 176) para. 144.
[184] *Furundžija* (n. 176) para. 145.
[185] *Furundžija* (n. 176) para. 147, 153.

international community".[186] Finally, the Chamber considered the prohibition to have "deterrent effect", which signalled to all members of the international community "that the prohibition of torture is an absolute value from which nobody must deviate".[187]

For the actual definition of the crime in customary international law the *Furundžija* Trial Chamber held Article 1 of the Torture Convention to be decisive.[188] It found that the definition of torture contained in the Torture Convention coincided to a large extent with the one provided in the UNGA's Declaration on Torture; which was a fact of particular importance for its customary definition. In the Chamber's view, this reflected the overall contention that no member state of the United Nations had rejected the definition contained in the various instruments. This was further supported by the fact that the same definition was contained in the Inter-American Declaration on Human Rights and had been applied by several international human rights bodies.[189]

There are two interesting aspects of the assessment of the customary character and criminality of the torture prohibition in international law in the *Furundžija Case*. First, the judgement provides a thorough analysis of the customary international law character of the torture prohibition itself. Even more detailed than the *Čelebići* Trial Chamber's decision, the *Furundžija* judgment tried to follow the more or less 'traditional' assessment of a norm of customary international human rights law, orientating itself as much as possible on the traditional elements of *opinio juris* and state practice. Accordingly, it considered the international treaty instruments on torture and the support they received in the United Nations. It then deduced the relevant *opinio juris* from the adoption of the definition of torture in the UNGA Declaration on Torture, as well as from the support that the international treaty instruments on torture received in international law.

With regard to the customary criminality of torture in international law, the reasoning in *Furundžija* is not as extensive. It appears that the Chamber deduced the customary criminality of violations of the torture prohibition from the universal condemnation of acts of torture in international law, the *jus cogens* and *erga omnes* character of the prohibition itself, from the fact that state responsibility ensues if the prohibition is violated and from the obligation to prosecute acts of torture contained in international human rights instruments. In fact, it actually resembles the Tribunal's reasoning in

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[186] *Furundžija* (n. 176) para. 154.
[187] *Ibid.*
[188] *Furundžija*, Appeals Chamber Judgment, Case No. IT-95-17/1-A, 21 July 2000, para. 111.
[189] *Furundžija* (n. 176) para. 160.

some later cases, such as in the *Kupreškić* Trial Chamber decision, where only the heinousness of the crime was invoked to establish its criminality in customary international law.

d. Shortcomings of a human rights law based definition of the customary character of torture: the *Kunarac* Trial Chamber decision

The *Kunarac* decision on torture provides a contrast to the findings in the *Čelebići* and *Furundžija Cases* and reveals some of the shortcomings of a purely human rights law based definition of the crime of torture. Although it underlines the special importance and *jus cogens* character of the crime of torture in international criminal law,[190] it considers that the customary character of the crime may not be derived from its definition as contained in international human rights law, although this had been done in the previous cases.[191] Though international humanitarian law and international human rights law could be said to have fused in certain aspects,[192] in particular concerning goals, values and terminology,[193] the Chamber held that the differences which existed between these fields of law still had to be borne in mind. According to its view, in international human rights law it was usually the state which committed violations of international human rights norms. In international humanitarian law, on the other hand, the state would play only a peripheral role. Moreover, the Tribunal considered that the responsibility of the individual for violations of international humanitarian law would not depend on the participation of the state. All actors in an international or non-international armed conflict would be bound by the provisions of the applicable law.[194]

Following these considerations, the Trial Chamber found that the *Furundžija* and *Čelebići Case*s wrongly referred to Article 1 of the Torture Convention as the relevant customary law definition of the crime of torture.[195] It stated that this was indicated very clearly by the jurisprudence of the European Court of Human Rights as well as by the provisions of international human rights instruments.[196] In the Tribunal's view, the definition of Article 1 of the Torture Convention was intended to apply mainly at an inter-state

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[190] *Kunarac*, ICTY Trial Chamber Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 466.
[191] *Kunarac* (n. 190) para. 470.
[192] *Kunarac* (n. 190) para. 467.
[193] *Ibid.*
[194] *Kunarac* (n. 190) para. 470 (i).
[195] *Kunarac* (n. 190) para. 473.
[196] *Kunarac* (n. 190) para. 482.

level and was directed at states' obligations.[197] Hence, it found that it could serve only "as an interpretational aid" and would be of limited use for a definition of torture in international humanitarian law.[198] Nevertheless, some core elements of the crime contained in the convention were undeniably part of customary international law.[199]

These conclusions have, by now, become part of the established jurisprudence of the Tribunal.[200]

e. Assessment

The reasoning of the *Kunarac* Trial Chamber on the customary international law prohibition of torture in international humanitarian law, just like the findings in the *Celibici* Trial Chamber judgment, is based on international jurisprudence and the definition of torture as provided in international human rights instruments. Yet before pronouncing on the customary character of the crime, the Chamber tried to assess first the particularities which could be attributed to the prohibition of torture in international humanitarian law and international human rights law. In this comparison, the Chamber found that marked differences existed between these two fields of international law which did not allow for a deduction of principles of international criminal law from provisions of international human rights law.

This approach avoids the all too hasty transfer of legal principles from the regime of international human rights law to the area of international criminal law. The reasoning also reveals a point which can be raised against the 'core rights' approach which will be discussed in due course: sometimes it may not be so clear where 'core rights' or universally applicable principles are derived from. The *Kunarac* Trial Chamber demonstrates that if they are

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[197] *Kunarac* (n. 190) para. 482.

[198] *Ibid.*

[199] According to the Tribunal, these were the following: "(i) Torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental.
(ii) This act or omission must be intentional.
(iii) The act must be instrumental to another purpose, in the sense that the infliction of pain must be aimed at reaching a certain goal".
See *Kunarac*, ICTY Trial Chamber Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 483.

[200] *Kunarac*, Appeals Chamber Judgment, Case No. IT-96-23& IT-96-23/1-A, 12 June 2002, para. 148; *Blaškić*, Appeals Chamber Judgment, Case No. IT-95-14-A, 29 July 2004, paras. 593–597; *Jokić*, Trial Chamber Judgment, Case No. IT-02-60-T, 17 January 2005, para. 587; *Kvočka, Radic, Zigic*, Appeals Chamber Judgment, Case No. IT-98-30/1-A, 28 February 2005, para. 284; *Limaj, Bala, Musilu*, Trial Chamber Judgment, Case No. IT-03-66-T, 30 November 2005, para. 240.

derived from human rights law alone, they may not represent 'universally' applicable principles but mere principles of international human rights law. Their very nature thus prohibits the all too easy transfer into the sphere of international criminal law. This somehow puts the true universality of these principles into perspective: their scope can also be limited to the particular area of international law they derive from.

f. Genocide

The crime of genocide probably constitutes the very core of international criminal law. It acquired its autonomous significance with the adoption of the Genocide Convention by the UNGA.[201] As early as three years after its adoption, in 1951, the ICJ affirmed the customary international law and *jus cogens* character of the prohibition of genocide.[202] Chief among following national trials is the *Eichmann* case, decided in 1961.[203] Thus, the findings of ICTY on the development of the customary international law of the prohibition of genocide are not a complete novelty. Nevertheless, concerning the individual requirements of the crime as well as the individual accountability resulting from violations of this prohibition, the reasoning of the ICTY is of particular interest here, predominantly, because it is based in the main upon the Genocide Convention, which is the most significant legal instrument determining its scope of application and individual requirements.

The *Jelisić* Trial Chamber judgment was one of the first judgments to establish the customary international law and *jus cogens* character of the crime of genocide.[204] It affirmed that "there can be absolutely no doubt" that the prohibitions of genocide as contained in Article 4 (2) of the ICTY Statute, which recites the provisions of the Genocide Convention "word for word",[205] fell under customary international law.[206] The judgment considered the Genocide Convention to reflect "incontestably" the customary international law on this crime. According to the Trial Chamber, this was underlined by an interpretation of the object and purpose of the Convention and by a consideration of its preparatory work. Additionally, the ICTR decisions

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[201] UNGA Res. 260 (III) A, of 9 December 1948. The draft Convention was approved by a UNGA plenary session with 55 votes for, none against and no abstentions. The Convention was immediately signed by 20 States.

[202] *Supra* 142ff.

[203] See *Eichmann*, District Court of Jerusalem, judgement of 12 December 1961, 36 ILR, 5-298.

[204] *Jelisić*, Trial Chamber Judgment, Case No. IT-95-10-T, 14 December 1999.

[205] *Jelisić* (n. 204) para. 60.

[206] *Ibid.*

in *Akayesu* and *Kayishema* were of particular importance to an assessment of the customary law on genocide, as they were the only cases which so far had dealt in depth with this matter.

One of the other issues discussed by the Trial Chamber was the question whether genocide could also be committed within a limited geographic zone.[207] Here, the Tribunal pointed to the object and purpose of the Genocide Convention, to the condemnation of the massacres at Sabra and Shatila by the UNGA as genocide[208] and to a similar decision of the Trial Chamber in the Review of the Indictment Pursuant to Article 61 filed in the *Nikolic Case*.[209] From the foregoing the Chamber then concluded, "that international custom admits the characterisation of genocide even when the exterminatory intent only extends to a limited geographic zone."[210]

Consequently, the Genocide Convention was considered as *the* decisive international instrument to evidence the customary character of the provisions of the ICTY Statute.

6. *The ILC Draft Code of Crimes*

In accordance with 13 (1) (a) of the UN Charter, the ILC has the task of codifying *and progressively developing* international law. The Commission receives its individual missions concerning particular questions of international law by resolution of the UNGA. As regards the Draft Code of Crimes, the UNGA commissioned the ILC as early as in 1947 to investigate the relevant rules of international law.[211] Although the Commission delivered a Draft Code to the Assembly by 1954,[212] the GA postponed its discussion and finally mandated the ILC again in 1981 to develop a draft code.[213] It took the

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[207] *Jelisić* (n. 204) para. 66, 70.

[208] These locations designate refugee camps where mostly Palestinian children, elderly and women had been victims of an attack on 16 February 1992, carried out by Lebanese militia forces. The camps were surrounded by Israeli Defence Forces throughout the incident. The degree to which the Israeli military was involved in the incident is a matter of controversy. See BBC, 'Sabra and Shatila 20 years on', at <http://news.bbc.co.uk/2/hi/middle_east/2255902.stm>, 14 September 2002 (accessed 17 July 2007).

[209] *Nikolić*, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-94-2-R61, 20 October 1995, para. 34.

[210] *Jelisić* (n. 204) para. 83.

[211] UNGA, Resolution 177 (II) of 21 November 1947.

[212] UNGA, UN Doc. (A/2693), 9th Session, Supplement No. 9.

[213] UNGA, Resolution 36/106 of 10 December 1981. The first draft code took up the Nuremberg Principles and concerned only offences containing a political element and endangering international peace and security. It did not contain any institutional suggestions for prosecuting and punishing the offences listed in the code. The UNGA mandated the ILC

experts of the commission until 1996, i.e. two years before the adoption of the Rome Statute, finally to settle upon the crimes listed in the draft code.[214] However, that does not mean that the rules adopted by the Commission are all, without doubt, of a customary nature. Following the mandate of the Commission which is *progressively to develop* international law, its reports must rather be regarded as being recommendatory or indicative in character. Hence, mere reference to its work will usually not be enough to provide evidence of an existing norm of customary international law.

One case which explicitly investigated the role of the Draft Code and its impact on the formation of a new rule of customary international law is the *Furundžija* Trial Chamber judgment.[215] A significant number of cases mentioned the code as additional evidence when discussing relevant international case law in order to prove the customary nature of a particular crime.[216]

The Trial Chamber in the *Furundžija* case referred to the code in its comprehensive analysis of the customary nature of aiding and abetting.[217] After assessing a number of British as well as American cases under Control Council Law No. 10[218] the Trial Chamber clarified the implications of the Code for the formation of new customary international law. [219] It stated that the Draft Code constituted

> an authoritative international instrument which, depending upon the specific question at issue, may (i) constitute evidence of customary law, or (ii) shed light on customary rules which are of uncertain contents or are in the process of formation, or, at the very least, (iii) be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world.[220]

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in 1981 also to remedy these omissions. Thereupon, the ILC discussed further crimes their institutional aspects as well as penalties.

[214] ILC Draft Code of Crimes against Peace and Security of Mankind (1996), in *C. Van den Wyngaert* (International Criminal Law).

[215] *Furundžija*, Trial Chamber Judgment, Case. No.: IT-95-17/1-T, 10 December 1998, para. 192.

[216] See, for example: *Aleksovski*, Trial Chamber Judgment, Case No.: IT-95-14/1-T, 23 June 1999, para. 75; *Čelebići* (n.) para. 377, 378; *Jelisić* (n. 1085) para. 61; *Jokić*, Trial Chamber Judgment, Case No. IT-02-60-T, 17 January 2005, para. 624; *Kunarac* (n.), para 541; *Tadić* (n.) para. 697; Tadić (n. 1021), para. 688.

[217] Earlier, the *Tadić* Trial Chamber judgement had proceeded similarly. See Tadić (n. 1021), para. 688.

[218] *Furundžija* (n. 215) paras. 200–205 (*Schonfeld*, *Rhode* and the Synagoge Case) (*Dachau Concentration Camp* Case, para. 213; *Einsatzgruppen* Case, para. 216; Zyclon B Cases, para. 223 of the judgement).

[219] *Furundžija* (n. 215) para. 227.

[220] *Furundžija* (n. 215) para. 227.

This has clarified the legal nature of the Code. The Chamber made clear that it must be considered as an authoritative legal instrument when determining the customary character of a rule of international criminal law. However, the Code alone may not be capable of evidencing a customary rule. It has an evidentiary nature, which must be considered on a case-by-case basis, taking into account the individual circumstances at hand, as well as the other evidence available.

7. *The influence of the Rome Statute*

The Rome Statute was adopted by the States parties to the Rome Conference on 17 July 1998. Four years later, the necessary number of states had ratified the treaty, so that it finally came into force in 2002. Although it has been argued that there was "general agreement that the definitions of crimes in the ICC Statute were to reflect existing customary international law and not to create new law",[221] strictly speaking, this may hold true only for the international criminal law as it stood in July 1998, and not for the law as it stood at the time of the establishment of the ICTY and ICTR, respectively. Hence, it is clear that in any case the Statute post-dates the Statutes of both *ad hoc* tribunals.[222] Thus, it is all the more astonishing that the tribunals have referred to it in their assessment of new customary international law.

a. The *Krstić* Case on the customary character of genocide

One of the judgements which refer to the crimes of the Rome Statute is the *Krstić* Trial Chamber judgment. It intensively discussed the customary requirements of genocide. Like the previous *Jelisić* Trial Chamber, the Trial Chamber quickly affirmed the customary nature of the prohibition of genocide citing the Genocide Convention. The Chamber also remarked that case law had elevated the prohibition to the level of a peremptory norm of general international law (*jus cogens*).[223] In addition, it outlined the importance of

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[221] *P. Kirsch*, 'Foreword' in *K. Dörrmann Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (CUP 2003) xiii; see further: Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1, Proceedings of the Preparatory Committee during March-April and August 1996, UN General Assembly Official Records, UN Doc. A/51/22, 13 September 1996, para 54.

[222] Thus, for the time being, there is no need to dwell on the difficult question of how far the Statute exceeded the existing customary international law in force at the time of its adoption.

[223] *Krstić*, Trial Chamber Judgment, Case No. IT-98-33-T, 2 August 2001, para. 541.

the Rome Statute for the customary definition of the crime of genocide: it held that this document could even serve as an indication of the *opinio juris* of states and identify the current status of customary international law on a particular crime, even though it actually post-dated the Statute of the ICTY. It declared:

> Although that document post-dates the acts involved here, it has proved helpful in assessing the state of customary international law which the Chamber itself derived from other sources. In this regard, it should be noted that all the States attending the conference, whether signatories of the Rome Statute or not, were eligible to be represented on the Preparatory Commission. From this perspective, the document is a useful key to the *opinio juris* of the States.[224]

These findings indeed constitute a far-reaching conclusion of the Tribunal. The Chamber's arguments which hold the Rome Statute to be indicative of the legal views of states disregard the fact that opinions of states expressed at international conferences may be restricted to the adoption of the rule in the treaty instrument and not to the formation of a new customary rule. They may lay down principles and rules of international law which go beyond the existing customary law in this field. The Tribunal also disregarded the *rationae temporis* scope of the Rome Statute or did not consider it to influence its conclusions. Yet, any discussion of the provisions of the Rome Statute would have merited the more careful consideration of at least these two aspects.

b. The Furundžija Trial Chamber judgment on the customary nature of aiding and abetting as element of individual criminal responsibility

Another example of a case considering the Rome Statute in its assessment of the formation of new customary crimes is the part of the *Furundžija* Trial Chamber judgment which sets out the customary international law definition of aiding and abetting.[225]

The Chamber considered the Rome Statute to be of particular importance for the formation of customary international criminal law. Since it had been adopted by a large majority, the Tribunal found it to be "indicative of legal views, i.e. *opino juris* of a great number of States."[226] Even more so, the Court held on the constitutive character of the Rome Statute for rules of customary international law:

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[224] *Krstić* (n. 223) para. 541.

[225] *Furundžija*, Trial Chamber Judgment, Case. No.: IT-95-17/1-T, 10 December 1998, para. 192.

[226] *Furundžija* (n. 225) para. 227.

> …resort may be had *cum grano salis* to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.[227]

Interestingly, the ICC Statute was yet again held to be indicative of the *opinio juris* of states, although influential nations such as Israel, Libya, Pakistan, Russia, the U.S, or Saudi Arabia have so far not ratified it.[228] Yet, contrary to the foregoing, the subsequent *Knorjelac* Appeals Chamber judgment held the Rome Statute to be reflective of *state practice* in its assessment of the international criminality of displacements.[229] Both findings deserve to be questioned. Even if it considered the ICC Statute as expressing either an *opinio juris* or state practice, the ICTY, generally, would have to prove the existence of a customary norm at the time of the commission of the relevant crimes, i.e. as of 1992 and even earlier. Hence, a rule's customary character in 2002, when the Rome Statute entered into force, is of little relevance.[230] The contrary conclusions which consider the Rome State as evidence of *opinio juri*s, as well as of state practice mirror some of the doubts just raised. Nevertheless, the findings also affirm the 'international instruments approach' of the ICTY, because one and the same piece of evidence is cited as proof of either element of customary international law. After all, it seems that the ICTY utilises more and more diverse international instruments and jurisprudence to evidence the formation of a new customary norm.

8. *The ICRC Study on Customary International Humanitarian Law and ICRC opinions*

Yet another piece of evidence, which came into existence long after the establishment of the ICTY and the ICTR, is the Study of the ICRC on Customary International Humanitarian Law. The study, which was first published in 2005, contains a concise collection of international and domestic evidence aimed at proving the existence of 161 customary rules of international humanitarian

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[227] *Furundžija* (n. 225) para. 227; The findings of, *inter alia*, the *Tadić* and *Furundžija* judgements on the customary international law of individual criminal responsibility were later affirmed by the *Aleksovski* Trial Chamber Judgment: *Aleksovski*, Trial Chamber Judgment, Case No.: IT-95-14/1-T, 23 June 1999, para. 60.

[228] For a list of ratificants and members of the Rome Statute see http://www.iccnow.org/ (last visited 17 November 2009).

[229] *Knorjelac*, Appeals Chamber Judgment, Case-No.: IT-97-25-A, 17 September 2003, para 221.

[230] The Rome Statute entered into force on 1 July 2002.

law.[231] Because not every piece of evidence post-dates the establishment of the Tribunals, it can be utilised by them as a manual and source of relevant state practice in their own assessment of the formation of new rules of international criminal law. This auxiliary character of the study is also expressed in a few judgments of the Court which discussed its evidentiary character. Most lately, judgments of the ICTY also refer to the study by merely citing it when discussing the criminality of certain behaviour.[232]

The first case referring to the work of the ICRC is the *Tadić* jurisdiction decision. As the ICTY remarked, the opinions of the ICRC could serve as 'international' practice in the customary process. The Chamber found accordingly:

> [T]he ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.[233]

The case which first mentioned the ICRC Study on Customary International Humanitarian Law is the *Hadžihasanović Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98 bis Motions on Acquittal* which assessed the customary nature of the prohibition on destroying civilian property in Article 3 (e) ICTY Statute and Articles 48 and 52 (2) AP I. Though the Chamber referred to the deductive approach in order to determine the customary character of the prohibition, it bolstered its argument once again by citing the ICRC Study on Customary International Humanitarian Law.[234]

The *Stakić* Appeals Chamber judgment also referred to the ICRC Study on Customary International Humanitarian Law in order to determine the customary character and definition of the crimes of deportation and forcible

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[231] See ICRC, *Customary International Humanitarian Law*, vol. 1. Most recently, discussions have revolved around the rules identified as customary by the ICRC. For comments on the study see *J.B. Bellinger and W.K. Haynes* 866 (2007) Int'l Rev.Red Cross, 443ff; *M. Bothe* 8 (2005) YBIHL 143ff; *A. Dieng* (2007) African YBIHL 166ff; *J.-M. Henckaerts* 38 (2008) Israel YBHR 251ff; *I. Ibrahim* (2007) African YBIHL 172ff; for an analysis of its approach to customary international law, in particular, see *I. Scobbie* in *E. Wilmshurst and S. Breau* (eds.) *Perspectives of the ICRC Study* (CUP 2008), 15–49.

[232] Compare: *Boskoški*, Trial Chamber Judgment, Case No. IT-04-82-T, 10 July 2008, para 205, n. 832-834.

[233] *Tadić*, Interlocutory Appeal, Case No. IT-94-1-AR72, 2 October 1995, para. 109.

[234] *Hadžihasanović* (n.) Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98 Bis Motions for Acquittal, Case No. IT-01-47-AR 73.3, 21 March 2005, para. 30.

transfer. Though the study was mentioned only as one of several international decisions and legal instruments, the Appeals Chamber found that the study – even though it post-dated the period relevant to the indictment- was nonetheless instructive for an assessment of the relevant customary international law in the case.[235] Accordingly, the Appeals Chamber concluded that the crime of deportation required at least displacement across a *de facto* border.[236]

B. *Deductive approach / core-rights approach*

The deductive approach, identified when we discussed the case law of the ICJ, is also utilised by ICTY and ICTR in order to establish the formation of a new rule of customary international humanitarian law. It is perhaps the only approach which applies in exactly the same manner before both the ICJ and the *ad hoc* tribunals. This is due to the fact that it applies primarily in the area of international humanitarian law: the ICJ also employed this method mainly when discussing the formation of new rules of customary international humanitarian law.

Because the approach has been applied frequently throughout the case law of the ICTY and the ICTR, the deductive method may by now be considered as a viable way of evidencing new rules of customary international humanitarian law. Nevertheless, especially in cases where the approach is not backed by other evidence, it has been argued that it risks clashing with the *nullum crimen sine lege* principle.

1. *Prerequisites for the application of Articles 2 and 3 ICTY Statute / Article 4 ICTR Statute: The* Tadić *case*

The core rights approach has been employed by the ICTY in many different contexts of material criminal law. One of those material questions which was also one of the very first issues discussed by the ICTY was whether the rules of its Statute, and particularly of the provisions concerning a violation of the laws and customs of war, applied to international and non-international armed conflict alike. Solving this problem was of major importance for the ICTY, mainly because of the uncertain character of the conflict which had spread over the territory of the former SFRY.[237]

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[235] *Stakić* Appeals Chamber Judgment, Case No. IT-97-24-A, 22 March 2006, para. 297.

[236] *Stakić* Appeals Chamber Judgment, Case No. IT-97-24-A, 22 March 2006, para. 300.

[237] However, for the ICTR, the issue was of only minor importance. Accordingly, the Rwanda Tribunal, if it refers at all to this issue, mainly quotes or acknowledges the jurisprudence of the ICTY in this regard.

The earliest decision of the Tribunal to discuss whether common Article 3 was applicable to non-international and international conflicts alike is the *Tadić Interlocutory Appeal on Jurisdiction Case*, which is also is one of the most groundbreaking and most controversial[238] decisions of the ICTY on customary international law. On a preliminary motion, the appellant Tadić had challenged the jurisdiction of the Tribunal on several counts. Above all, he argued that the Tribunal lacked subject-matter jurisdiction over some of the crimes defined in its Statute since they applied only to international armed conflict.[239] This required the ICTY to decide whether the Tribunal's Statute applied solely to international armed conflict or whether it also applied to non-international conflict.[240] The Tribunal had to discuss whether the subject-matter jurisdiction under Article 2 and 3 of its Statute (Grave Breaches of the 1949 Geneva Conventions, Violation of the Laws and Customs of War) was limited to an international armed conflict.

Concerning the applicability of Article 2 of the Statute to non-international or international armed conflict, the Tribunal observed that the *travaux préparatoires* to the Geneva Conventions[241] as well as an interpretation of the grave breaches provisions indicated that they were intended to grant protection to persons or property only in the event of an international armed conflict. Neither would the regime of common Article 3 apply to the grave breaches provisions.[242] Also the Report of the Secretary General had advocated the application of Article 2 ICTY Statute to international armed conflict alone.[243] According to the Chamber, this interpretation was the only one consistent with the Statute.

However, most importantly, the Appeals Chamber acknowledged that there had been recent trends in state practice and international human rights law which indicated that a version of customary international law might have developed which tended "to blur in many respects the traditional dichotomy between international wars and civil strife".[244] This tendency would be evidenced, for example, by several decisions of national courts.[245] Nonetheless, the Appeals Chamber held that despite these recent developments, interna-

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[238] See *G.P. Politakis* (1997) 52 Zeitschrift für öffentliches Recht, 283ff; *M.S. Zaid* (1997) 3 ILSA Journal of International & Comparative Law, 589ff; *J.E. Alvarez* (1996) 7 EJIL, 245–264; *C. Greenwood* (1996) 7 EJIL 265ff.

[239] *Tadić*, Interlocutory Appeal, Case No. IT-94-1-AR72, 2 October 1995, para. 9ff, para. 49ff, 65ff.

[240] *Tadić* (n. 239) para. 77.

[241] *Tadić* (n. 239) para. 80.

[242] *Tadić* (n. 239) para. 81.

[243] *Tadić* (n. 239) para. 82.

[244] *Tadić* (n. 239) para. 83.

[245] *Tadić* (n. 239) para. 84.

tional law as it stood at the time of the establishment of the Tribunal recognised only the application of the grave breaches provisions to international armed conflict.[246]

The Tribunal then proceeded to consider its subject-matter jurisdiction under Article 3 of the Statute. After interpreting the Statute, the Chamber concluded that Article 3 had to be understood as including all violations of international humanitarian law.[247] The Tribunal went on to assess the requirements which must be fulfilled for a violation of international humanitarian law to become subject to Article 3:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met (…);
> (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. (…)
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[248]

As this definition implied the breach of a rule of customary as well as conventional international law, the Tribunal made some general remarks on the customary international humanitarian law applicable in times of armed conflict.[249] The Chamber pointed to the limitations which a classic two-element approach to custom carried with it when applied to the field of international criminal law. It underlined that the traditional dichotomy between non-international and international armed conflict had become blurred with time.[250] Hence, it concluded that non-international armed conflicts had become more and more international, in terms both of the variety of actors involved and the territory affected. Moreover, it considered that such conflicts themselves had become more frequent, so that the traditional differentiation between two sets of legal regimes governing non-international and international armed conflicts had become obsolete.[251] Accordingly, a customary international law had crystallised which applied the same set of rules to non-international as well as to international armed conflict.[252]

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[246] *Tadić* (n. 239) para. 84.
[247] *Tadić* (n. 239) para. 87.
[248] *Tadić* (n. 239) para. 94.
[249] *Tadić* (n. 239) para. 95.
[250] *Tadić* (n. 239) para. 96.
[251] *Tadić* (n. 239) para. 97, 98.
[252] *Tadić* (n. 239) para. 98.

However, although the Tribunal remarked that it would be difficult to assess the actual development of customary international humanitarian law according to the classic two-element approach to customary international law, it still referred to the presence of state practice as well as of *opinio juris* for evidence of this new custom. But it found that some "caution on the law-making process in the law of armed conflict" had to be exercised: not every practice qualified for the assessment of customary law.[253] According to the Chamber, the conduct of troops in the field, in particular, could not count as state practice since it was often inspired by military tactics rather than by considerations of its legal consequences:

> When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.[254]

The Chamber explained that it was the greater picture which contributed to the emergence of a new rule. Various situations provided evidence that some 'core rules' existed for international humanitarian law which were applicable to international as well as to non-international armed conflict. To support this contention, the Tribunal referred to the practice of states in the Spanish Civil War, to resolutions of the League of Nations or the judgment of the ICJ in the *Nicaragua Case*, which had emphasised 'elementary considerations of humanity'.[255] Hence, a customary rule had developed which required the application of common Article 3 of the Geneva Conventions in international as well as in non-international armed conflict. As a result of the Chamber's findings of the Chamber, the concept of the 'elementary considerations of humanity' lying at the heart of humanitarian provisions had also found recognition in resolutions of the UNGA and the Council of Europe, which had emphasised its application in international as well as in non-international

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[253] *Tadić* (n. 239) para. 99.

[254] *Ibid.*

[255] *Tadić* (n. 239) para. 102.

armed conflict. In the Appeals Chamber's view, the 'considerations of humanity' presupposed the application of a 'core' of humanitarian provisions which applied regardless of the character of the conflict.[256] According to the Chamber, these considerations could also be deduced directly from the 'elementary considerations of humanity':

> Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.[257]

Thus, the customary international law status of common Article 3 was confirmed by the Chamber.[258]

Having found that this minimum core of humanitarian provisions applying to international as well as to non-international armed conflict existed, the Chamber had no doubt about the international criminal responsibility which followed from a violation of these rights:

> we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.[259]

After all, just like the ICJ, the ICTY employed the 'elementary considerations of humanity' to prove the consequence of individual criminal responsibility for breaches of common Article 3. However, it also highlighted that various resolutions of the Security Council had affirmed the same legal consequence.[260] According to the Chamber, those Security Council resolutions further proved the existence of a relevant *opinio juris* supporting the customary character of such individual responsibility.[261]

2. *Conclusions on the* Tadić Interlocutory Appeal

As the first decision of the newly established ICTY, the *Tadić Interlocutory Appeal* presents an innovative concept of customary international law. In

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[256] *Tadić* (n. 239) para. 116.
[257] *Tadić* (n. 239) para. 119.
[258] *Tadić* (n. 239) para. 127.
[259] *Tadić* (n. 239) para. 129.
[260] *Tadić* (n. 239) para. 133.
[261] *Ibid.*

order to arrive at the customary applicability of common Article 3 to non-international and international armed conflict, the decision combines the traditional two-element approach with deductive reasoning. The customary evidence employed by the Court serves only to support the general considerations arrived at by way of the deductive method.

Regarding this actual additional evidence, applied by the Court to support its deductive findings, the judgment tells us, too, that the Tribunal did not have much evidence at hand which would have supported its findings on the customary nature of common Article 3. State practice pertaining to the Spanish Civil War and the *Nicaragua* judgment of the ICJ was the principal example emphasised by the Appeals Chamber. But as a decision of an international court, at least the *Nicaragua* judgement can serve only as an indirect example of state practice. Moreover, the ICTY mentioned several resolutions of the UNGA and the Council of Europe which had previously emphasised the applicability of common Article 3 to non-international and international armed conflict. As underlined by the ICJ in the *Nicaragua Case*, these resolutions may indeed be invoked as evidence of relevant *opinio juris* towards the existence of a customary norm. Nonetheless, the *Nicaragua Case* also outlined that they still have to be supported by accompanying state practice.[262]

After all, the deductive approach constituted the main part of the ICTY's reasoning on the customary nature of the application of common Article 3. The 'elementary considerations of humanity' invoked by the ICTY also serve as the main evidence for the customary character of the individual criminal responsibility which ensues when common Article 3 is infringed. As Tomuschat has showed, one needs "no prophetic gifts" to encounter the considerations of the Martens Clause behind this reasoning.[263]

The assessment of the ICJ's case law has already demonstrated that the humanitarian considerations of the Martens clause can form the underlying basis for a deductive approach to custom formation. In the *Tadić Interlocutory Appeal*, the ICTY has now affirmed this method, even though it could have employed those principles, which delineate the fundamental ideas underlying the GCns and hence their main object and purpose, also for a teleological *interpretation* of its Statute or the Geneva Conventions.

Judge Sidwha approved of the findings of the Chamber on the customary nature of common Article 3 in his dissenting opinion.[264] He argued that usually customary international law would be comprised of state practice which developed over a longer period of time and was accepted by states as legally

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[262] *Nicaragua Case*, ICJ Reports, 1986, para. 188.
[263] See *C. Tomuschat* (1999) RdC, vol. 281, 356.
[264] *Tadić* (n. 239) separate opinion *Sidhwa*.

obligatory or binding.[265] However, in his view, in particular in the field of international human rights law, there had been spontaneous developments of customary international law, which deviated from its "normal" formation.[266] Thus, he considered this new, rather spontaneously created customary law to be part of the customs of war, as found in common Article 3.

3. *Affirmation of the findings of the* Tadić Interlocutory Appeal *judgment: the* Martic *Case, the* Čelebići *Case and subsequent judgments*

Very soon after the *Tadić Interlocutory Appeal*, the *Martic* Trial Chamber Decision[267] drew heavily on the *Tadić Interlocutory Appeal's* reasoning. Just like the Appeals Chamber in the *Tadić* case, the Trial Chamber in *Martic* referred to the Martens Clause in order to illustrate the object and purpose behind common Article 3, and argued that its customary international law character could be derived from the fact that "the elementary considerations of humanity which constitute the foundation of the entire body of international humanitarian law applicable to all armed conflicts" were reflected in the rules of that Article.[268]

The later *Tadić* Trial Chamber judgment highlighted that the regime of common Article 3 was a "reflection of elementary considerations of humanity",…applicable to armed conflicts in general", whether international or national.[269] Accordingly, like the Appeals Chamber, it considered the deductive approach to custom formation a viable way to discern rules of customary international criminal law.

The *Čelebići* Trial Chamber judgment further elaborated on the deductive findings of the *Tadić Interlocutory Appeal*. First and foremost, the Trial Chamber illustrated the difficulty of providing evidence for the Article's customary status of the elements of *opinio juris* and state practice, if a parallel treaty provision existed:

> The evidence of State practice *outside* of the treaty, providing evidence of separate customary norms or the passage of the conventional norms into the realms of custom, is rendered increasingly elusive, for it would appear that only the practice of non-parties to the treaty can be considered as relevant. Such is the

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[265] *Tadić* (n. 239) separate opinion *Sidhwa*, para. 115.

[266] *Tadić* (n. 239) separate opinion *Sidhwa*, para. 114.

[267] *Martic*, Decision on the Issuance of an International Arrest Warrant, Transcript of Oral Proceedings, 8 March 1996.

[268] *Martic*, Decision on the Issuance of an International Arrest Warrant, Transcript of Oral Proceedings, 8 March 1996, 135, 136.

[269] *Tadić*, Trial Chamber Judgment, Case No. IT-94-1-T, 7 May 1997, para. 609, 639.

> position of the four Geneva Conventions, which have been ratified or acceded to by most States.[270]

In addition, the Chamber pointed to the findings of the ICJ in the *Nicaragua* Case, which had affirmed the individual standing of a customary norm paralleling an international treaty provision with the same content. Accordingly, it maintained that there could be no further doubt about the customary international law character of common Article 3.[271]

Since the appellants had, amongst others, argued that the first *Tadić* judgment had not properly considered the customary international law status of common Article 3, the *Čelebići* Appeals judgment examined this issue once again. Unlike the appellants, the prosecution, in particular, argued that elementary considerations of humanity demanded that common Article 3 had acquired customary international law status.[272] Accordingly, the Court elaborated on the findings of the *Tadić Case* and held that common Article 3 constituted the minimum core of international humanitarian rules underlying both non-international and international armed conflict. It argued that the rules contained therein reflected fundamental humanitarian principles the object of which is the protection and respect of the dignity of the human person:

> It is indisputable that common Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and on which the Geneva Conventions in their entirety are based. These principles, the object of which is the respect for the dignity of the human person, developed as a result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognised humanitarian principles. These principles were codified in common Article 3 to constitute the minimum core applicable to internal conflicts, but are so fundamental that they are regarded as governing both internal and international conflicts. In the words of the ICRC, the purpose of common Article 3 was to "ensur(e) respect for the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances and as being above and outside war itself". These rules may thus be considered as the "quintessence" of the humanitarian rules found in the Geneva Conventions as a whole.[273]

Besides, the *Čelebići* Appeals Chamber stressed that even the ICJ in the *Nicaragua Case* had emphasised the application of fundamental principles of

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[270] *Čelebići*, Trial Chamber Judgment, Case No. IT-96-21-T, 26 November 1998, para. 302.
[271] *Čelebići* (n. 270) para. 306.
[272] *Čelebići*, Appeals Chamber Judgment, Case No. IT-96-21-A, 20 February 2001, para. 142.
[273] *Čelebići* (n. 272) para. 143.

humanitarian law.[274] It maintained that the applicability of common Article 3 to international and non-international armed conflict was further supported by the ICRC commentary on this provision, which provided that the Article was intended to apply to the Geneva Conventions in their entirety.[275] Hence, the Chamber concluded in favour of the customary status and content of this rule:

> Common Article 3 may thus be considered as the "minimum yardstick" of rules of international humanitarian law of similar substance applicable to both internal and international conflicts. It should be noted that the rules applicable to international conflicts are not limited to the minimum rules set out in common Article 3, as international conflicts are governed by more detailed rules. The rules contained in common Article 3 are considered as applicable to international conflicts because they constitute the core of the rules applicable to such conflicts. There can be no doubt that the acts enumerated in *inter alia* subparagraphs (a), violence to life, and (c), outrages upon personal dignity, are heinous acts "which the world public opinion finds particularly revolting".[276]

The Appeals Chamber thus followed and further illustrated the deductive approach which the *Tadić Interlocutory Appeal* had initiated in full. The Chamber pointed out that the rules and values laid down in common Article 3 were of such fundamental character that this had also found expression in the international human rights regime. It opined that international humanitarian law and international human rights law both had at their centre of consideration the concern for human dignity. Accordingly, it held that this basic understanding formed the "basis of fundamental minimum standards of humanity",[277] a notion which had already been used by the ICRC in its comments on the Additional Protocols. Consequently it considered the universal and regional human rights instruments and the Geneva Conventions to be sharing a common "core" of fundamental standards which were applicable at all times, in all circumstances and to all parties, and from which no derogation was permitted.[278] Furthermore, it held that both regimes had a common object, namely, the "protection of the human person from certain heinous acts considered as unacceptable by all civilised nations in all circumstances".[279]

These findings of the Appeals Chamber reveal the basic underpinnings of the methodological approach of the Appeals Chamber concerning the cus-

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[274] *Čelebići* (n. 272) para. 144.
[275] *Čelebići* (n. 272) para. 145.
[276] *Čelebići* (n. 272) para. 147.
[277] *Čelebići* (n. 272) para. 149.
[278] *Ibid.*
[279] *Ibid.*

tomary nature of common Article 3. The Court first established that some 'fundamental considerations of humanity' underlay the humanitarian rules of the Geneva Conventions and their Additional Protocols and international human rights law. In a second step, the Chamber affirmed that 'fundamental considerations of humanity' formed the basis of a 'common core' of humanitarian and human rights rules, which were applicable at all times in an armed conflict. In a third step, the Court deduced the application of common Article 3 to international armed conflict from this core. It argued that the rules set out in the Article reflected these very 'fundamental considerations of humanity' and that they therefore applied as this 'common core' to international and non-international armed conflict alike. This is why the ICTY's deductive approach to customary international law should be called the 'core rights' approach.

The *Čelebići Appeals Chamber* also affirmed the findings of the *Tadić* judgment on the customary nature of individual criminal responsibility incurred for violations of common Article 3.[280] However, the Chamber held that criminality for violations of common Article 3 did not follow from Article 3 itself but from Article 1 of the Geneva Conventions, which imposed on states parties the obligation to prosecute any violations of the Geneva Conventions.[281] Additionally, appellants in their own domestic law had provisions prosecuting violations of common Article 3.[282] Finally, the Chamber referred to the criminality of those violations in the ICTR Statute, which was "merely a restatement of the law applicable at that time".[283] Finding otherwise, the Chamber concluded, would "ignore the very purpose of the Geneva Conventions which is to protect the dignity of the human person".[284] In this argument we again find a reflection of the Tribunal's 'core rights' approach. However this time, 'core rights' reasoning was employed only further to underline the customary character of the criminality of violations of common Article 3.

In the next paragraphs, the judgment elaborated on the implications of the 'core rights' approach for the *nullum crimen sine lege* principle. Above all, the Chamber referred to the findings of the Trial Chamber in the *Aleksovski Case*, which had held that the application of the *nullum crimen* principle in a certain case cannot prevent the Court from interpreting and clarifying the elements of a particular crime.[285] Thus, the Chamber found, the acts listed in common Article 3 were wrongful and shocked the conscience of civilised

[280] *Čelebići* (n. 272) para. 154.
[281] *Čelebići* (n. 272) para. 166.
[282] *Čelebići* (n. 272) para. 167.
[283] *Čelebići* (n. 272) para. 170, 178.
[284] *Čelebići* (n. 272) para. 172.
[285] *Infra* 312ff.

people. As Article 15 (2) of the ICCPR Statute put it, they had to be considered "criminal according to the general principles of law recognised by civilised nations".[286] These findings also clearly reflect the 'core rights' approach. It establishes the criminality of acts enumerated in common Article 3 almost exclusively by reference to the wrongfulness of the act and its gravity, which shock 'the conscience of civilised people'. Further evidence of the customary character of the prohibition was not put forward or considered by the Court.

After *Čelebići*, the *Tadić* findings on common Article 3 were approved by many other judgments of the ICTY, which all reaffirmed the influence of the 'elementary considerations of humanity' on the development of its customary nature.[287] Even most recent judgments have underscored the cogent character of the provisions of common Article 3. For example, the *Halilović* Trial Chamber determined that common Article 3, as well as "the universal and regional human rights instruments share a common "core" of fundamental standards, which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted."[288] Thus, by now, the customary international law nature of common Article 3 is firmly established by the case law of the ICTY.[289]

4. *The 'customs of war' in Article 3 ICTY Statute / Article 4 ICTR Statute: the* Kupreškić *Trial Chamber judgment and subsequent decisions*

The concept of war crimes was brought into international criminal law with the prosecutions of war criminals following World War II and the adoption of AP I to the Geneva Conventions in 1949. As the *Tadić Interlocutory*

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[286] *Čelebići* (n. 272) para. 173.

[287] *Aleksovski*, Trial Chamber Judgment, Case No.: IT-95-14/1-T, 23 June 1999, para. 50; *Blaškić*, Trial Chamber Judgment, Case No.: IT-95-14-A, 3 March 2000, para. 163ff; *Kunarac*, Trial Chamber Judgment, Case No.: IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 406, 408; *Kunarac, Kovač et al.*, Appeals Chamber Judgment, 12 June 2002, Case. No. IT-96-23 & 96-23/1-A, para. 68; *Jokić*, Trial Chamber Judgment, Case No. IT-02-60-T, 17 January 2005, para. 539; *S. Halilović*, Trial Chamber Judgment, Case No. ICTY-01-48-T, 16 November 2005, para. 25; *Haradinaj*, Trial Chamber Judgment, Case No. IT-04-84T, 3 April 2008, para 34f; *Milutinović*, Trial Chamber Judgment, Case No. ICTY- 05-87, 26 February 2009, vol. 3, para 129.

[288] *S. Halilović*, Trial Chamber Judgment, Case No. ICTY-01-48-T, 16 November 2005, para. 25; similarly: *Milutinović*, Trial Chamber Judgment, Case No. ICTY- 05-87, 26 February 2009, vol. 3, para 129.

[289] See *Limaj, Bala, Musilu*, Trial Chamber Judgment, Case No. IT-03-66-T, 30 November 2005, para. 176; *Boskoski et al.*, Trial Chamber Judgment, Case No. IT-04-82-T, 10 July 2008, para 299.

Appeal decision clarified, there are at least three requirements which a rule of customary international law must fulfil to serve as a violation of the customs of war. To quote again from the judgment:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met (…);
> (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. (…)
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[290]

In various judgments, it has thus been the task of the ICTY to determine whether a particular rule of international humanitarian law had already become a norm of customary international law, so that its breach could be regarded as a violation of the customs of war. Hence, a determination of the relevant customary rules by the Tribunals is inevitable.

The *Kupreškić* Trial Chamber judgment[291] in many aspects complements the findings of the Appeals Chamber in the *Tadić Interlocutory Appeal* and some of the ICJ judgments analysed earlier in this book. It also draws on the "elementary considerations of humanity" which had already served the ICTY to determine the customary nature of common Article 3 and carries this doctrine further to ascertain the customary nature of certain provisions of international humanitarian law, constituting the 'customs of war' of this Article. Although the *Kupreškić* Trial Chamber decision was overturned by the Appeals Chamber, [292] its legal findings were not appealed against, and thus remain important for our assessment of the methodology on customary international law.

The *Kupreškić* Trial Chamber decision first tackled the customary character of Articles 57 and 58 of AP I to the Geneva Conventions. The Trial Chamber reasoned that these Articles had gained the status of customary international law because they specified and fleshed out pre-existing norms and because there was no state practice which proved the contrary.[293] However, the Chamber found that the prohibitions of Articles 57 and 58 of AP I to the Geneva Conventions left a great margin of discretion to the belligerent parties, and accordingly did not provide for specific prohibitions of international criminal law. Hence, it was left to the Tribunal to interpret the norms

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[290] *Tadić*, Interlocutory Appeal, Case No. IT-94-1-AR72, 2 October 1995, para. 94.
[291] *Kupreškić*, Trial Chamber Judgment, Case No. IT-95-16-T, 14 January 2000.
[292] *Kupreškić*, Appeals Chamber Judgment, Case No.: IT-95-16-A, 23 October 2001.
[293] *Kupreškić* (n. 291) para. 524.

according to the principles of international law. Amongst the principles to be considered, it argued, were the "elementary considerations of humanity" which had been referred to by the ICJ on several occasions.[294]

Although 'elementary considerations of humanity' had found their expression in the Martens Clause, the ICTY found that this did not mean that 'principles of humanity' and 'dictates of public conscience' had been elevated to the status of a source of law. Rather, the Court determined, they would provide guidelines when rules of humanitarian law were not sufficiently precise and needed further interpretation. Hence, Articles 57 and 58 of AP I had to be "interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians."[295] Accordingly, the Chamber held attacks against military objectives contrary to Articles 57, 58 AP I if they excessively jeopardised the lives and assets of civilians, "contrary to the demands of humanity".[296]

The Tribunal subsequently assessed the customary international law nature of Articles 51 (2) and 52 (6) AP I. It found that these provisions had attained the status of customary international law, although the Protocol had not yet been ratified by several influential states, such as the US, France, India, Indonesia, Israel, Japan, Pakistan and Turkey. Evidence of the element of state practice supporting the customary nature of these provisions was thus difficult to obtain. However, in this respect the Chamber also claimed to have been influenced by the Martens Clause. It maintained that acknowledgment of the clause by various courts and states showed that

> principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent.[297]

Most notably, the Tribunal explained that in the process of custom formation, the element of *opino juris* "crystallising as a result of the imperatives or public conscience"[298] might turn out to be the decisive element in the emergence of a customary rule of international humanitarian law.

According to these findings, it is clear that the Trial Chamber ascribes more importance to the 'dictates of public conscience' and 'elementary considerations of humanity': in its view, they do not just have a mere auxiliary character and support the interpretation and application of existing norms of

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[294] *Kupreškić* (n. 291) para. 524.
[295] *Kupreškić* (n. 291) para. 525.
[296] *Kupreškić* (n. 291) para. 526.
[297] *Kupreškić* (n. 291) para. 527.
[298] *Ibid.*

international law but play an important part in the actual formation of new customary international law. Such reasoning reveals that the Trial Chamber follows a new way of custom formation, which focuses mainly on the element of *opinio juris* alone, supported by 'considerations of humanity' of the Martens Clause. According to the Chamber, this approach has replaced the traditional approach of Article 38 (1) (b) ICJ Statute as main approach utilized by the Tribunal.

The Trial Chamber ascribed this development to a general transformation of humanitarian law, the 'humanization of armed conflict', a trend which it also considered as confirmed by the ILC's work on state responsibility.

> It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred. As a result belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts. This trend towards the humanisation of armed conflict is amongst other things confirmed by the works of the United Nations International Law Commission on State Responsibiliy.[299]

Previously, the Trial Chamber had referred to this trend by pointing to the *erga omnes* character of obligations of international humanitarian law[300] and to the *jus cogens* character of the prohibitions of genocide and crimes against humanity.[301] As the Chamber explained, those norms did not have merely a reciprocal character but served the interests of the international community as a whole.[302] It continued that these developments had also fostered the emergence of a new customary international law prohibiting reprisals against civilians under the "pressure exerted by the requirements of humanity and the dictates of public conscience".[303] In the Tribunal's view, this new customary international law could also bind the states which had not yet ratified the AP I.

Nevertheless, the existence of a corresponding *opinio juris sive necessitatis* prohibiting reprisals against civilians still had to be proven.[304] To this end, the Trial Chamber referred to the military manuals for the US and Dutch armed forces which, albeit indirectly, mentioned the prohibition of reprisals against civilians. However, other military manuals of the same period had taken a different stance.[305] Quite surprisingly, the Tribunal nevertheless concluded that a widespread '*opinio necessitatis*' would be 'discernible

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[299] *Kupreškić* (n. 291) para. 529.
[300] *Kupreškić* (n. 291) para. 519.
[301] *Kupreškić* (n. 291) para. 520.
[302] *Kupreškić* (n. 291) para. 519.
[303] *Kupreškić* (n. 291) para. 531.
[304] *Ibid.*
[305] *Kupreškić* (n. 291) para. 532.

in international dealings'[306] which supported the existence of a customary prohibition of reprisals against civilians. Moreover, the ICTY considered the fact that states abstained from claiming that they had a right to exercise reprisals on civilians as more evidence of an *opinio juris* proving such a customary provision.[307] Further evidence of the customary character of a prohibition of reprisals against civilians was drawn, amongst others, from a UNGA resolution, and, more interestingly, from a memorandum of the ICRC issued during of the Iran-Iraq war.[308] In the view of the Court, all this supported the contention that an *opinio juris* supporting the development of a new customary rule had emerged:

> …the demands of humanity and the dictates of public conscience, as manifested in *opinio necessitates*, have by now brought about the formation of a customary rule also binding upon these few states that at some state did not intend to exclude the abstract legal possibility of resorting to the reprisals under discussion.[309]

The Trial Chamber further supported its findings with the work of the ILC on state responsibility, which in its draft rules (now Article 50) and commentary had contended that reprisals against the civilian population were prohibited under common Article 3. Although the Trial Chamber subscribed to these findings, it held that they had to be supplemented by the proposition that common Article 3 contained "fundamental legal standards of overarching value applicable both in international and internal armed conflicts."[310]

5. *Assessment of the findings of the* Kupreškić *Trial Chamber*

As regards the development of customary international criminal law, the *Kupreškić* judgment contains one of the most detailed findings on this matter. But the issues discussed and the suggestions made by the Chamber have to be treated cautiously.

The findings of the Chamber concerning the customary prohibition of reprisals against the civilian population in particular merit some close scrutiny. First, the Court still orientates a main part of its reasoning on *opinio juris* and state practice as expressed by the acts and statements of states. An analysis of this very conduct by states, however, reveals that there is evidence both ways, buttressing either the existence or absence of this rule. The exam-

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[306] *Kupreškić* (n. 291) para. 532.
[307] *Kupreškić* (n. 291) para. 533.
[308] *Ibid.*
[309] *Ibid.*
[310] *Kupreškić* (n. 291) para. 534.

ples of *opinio juris* cited by the Tribunal, i.e. Dutch and US military manuals, represent the views of only two states on this issue. Their evidentiary value is diminished by two further factors: first, even the US expressed doubts on the workability of such a prohibition in a government representative statement[311] and second, there are other military manuals which explicitly allow reprisals against civilians.[312] Thus, there is quite a bit of evidence against the formation of an *opinio juris* prohibiting reprisals against the civilian population. Nevertheless, the Tribunal concludes that 'elements of a widespread *opinio juris sive necessitatis* are discernible in international dealings'.[313] This assessment of *opinio juris* is almost ironic.

Moreover, the customary international law character of the prohibition of reprisals against civilians is further diminished by the fact that important states have not ratified AP I.[314] Despite all of this, the Chamber contends that such a prohibition has emerged in customary international law, due to 'elementary considerations of humanity', supported by the views of the UNGA and the ILC as well as the ICRC. Hence, the 'core rights' approach which was identified previously again seems to determine the Courts findings on the customary nature of the provisions of AP I prohibiting reprisals. But, this time, the approach appears even more radical, more or less ignoring the relevant practice of states and orientating itself mostly towards the legal views of the ILC, the ICRC and the UNGA.

The *Kupreškić* Trial Chamber judgement permits another observation on the importance of the 'elementary considerations of humanity' for the process of formation of customary international law. As the Trial Chamber established, these 'considerations of humanity' have two effects: a) they influence the interpretation of existing humanitarian norms which need to be more clearly specified to find application in international criminal law. b) supported by *opinio juris*, they contribute to the formation of customary international criminal law. The *Kupreškić* judgment thus elevates the principles enshrined in the Martens Clause (the 'dictates of public conscience' and 'elementary considerations of humanity') to the status of a 'general principle of international law' which dominates and determines the field of international humanitarian law and its formation.

At first sight this seems to be quite a welcoming development. Notwithstanding these findings, some of its risks have also to be considered: relying almost entirely on 'elementary considerations of humanity' for the formation

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311 *Kupreškić* (n. 291) para. 532.
312 *Ibid.*
313 *Ibid.*
314 *Kupreškić* (n. 291) para. 527.

of a customary norm with a virtual disregard for existing state practice and *opinio juris* expressed by states in military manuals or otherwise seems to amount to an attempt to find justice *de lege ferenda* and not *de lege lata*. This jeopardises the credibility and reliability of customary international law as a true source of international law and increases the likelihood of clashes with the principle of *nullum crimen sine lege* in international criminal law.

Thus, instead of trying to narrow down the meaning of Articles 57 and 58 of AP I according to their respective customary content, the Tribunal would have been better served by interpreting those Articles according to their object and purpose.[315] In addition, the Court has been criticised for failing to take into account the classic requirements of international criminal law. Neither has it favoured an approach which delivers some "margin of appreciation for those who have to render decisions during times of war".[316]

6. *The prohibition on destroying civilian property*

Another interlocutory appeal, which affirms the 'core rights' argument developed so extensively by the Tribunal in the *Kupreškić* case, is the *Hadžihasanović* Decision of 11 March 2005.[317] It assessed the customary nature of the prohibition on destroying civilian property in Article 3 (e) ICTY Statute and Articles 48 and 52 (2) AP I. Amongst others, the Chamber concluded that the protection of civilian property belonged to the 'fundamental principles of humanitarian law'. It further stated that they had been described by the ICJ as "cardinal principles" of international humanitarian law and "intransgressible principles" of customary international humanitarian law.[318]

These findings yet again highlight the 'core rights' approach of the Tribunal identified earlier. It is striking that the Chamber exclusively referred to the 'cardinal importance' of the crimes, rather than to the supporting evidence of either *opinio juris* or state practice, when assessing the customary nature of certain provisions of AP I and of Article 3 (d) of the Court's Statute.[319]

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[315] See also *R. Dolzer* in *A. Wall* (Kosovo Campaign) 357. *Dolzer*, however, suggested an interpretation of the Articles according to the principle of military necessity.

[316] *R. Dolzer* in *A. Wall* (Kosovo Campaign) 358.

[317] *Hadžihasanović*, Appeals Chamber Judgment, Interlocutory Appeal on Rule 98 bis, Case No. IT-01-47-AR73.3, 11 March 2005.

[318] *Hadžihasanović* (n. 317) para. 28.

[319] *Hadžihasanović* (n. 317) para. 46.

7. *Murder*

The core-rights reasoning on the customary nature of common Article 3 and its individual prerequisites was appraised in the recent *Milutinovic* Trial Chamber judgment, where the Chamber discussed the customary notion of a 'civilian population' as a requirement of a crime against humanity.[320] It determined that "in order to give full effect to the object and purpose of crimes against humanity it is necessary to adopt a broad definition of the key terms that extends as much protection as possible".[321] This is hardly differentiable from reasoning focussing on an interpretation of a humanitarian rule, based on the object and purpose of the Geneva Conventions. Yet, this reasoning illustrates once more that the humanitarian considerations behind particular rules of international criminal law have an important influence on the assessment of the customary law in this field. The Chamber argued similarly when proving the customary criminality of murder under common Article 3.[322] It held that murder 'breaches a rule protecting important values and involving grave consequences for the victim'.[323]

8. *Outrages upon personal dignity*

As Article 3 of the ICTY Statute provides a non-exhaustive list of violations of the customs of war, the crime of outrages upon personal dignity has been identified by the ICTY as one of the violations included in this Article.[324] The *Čelebići* Trial Chamber judgment notably pronounced first on the customary international law character of outrages upon personal dignity within the overall framework of common Article 3.[325] Its importance for our study is that the Trial Chamber used the very same concept as the Chamber in the *Kupreškić* case, i.e. the particular heinousness of the crime (it found that "outrages upon personal dignity…are heinous acts which the world public opinion finds particularly revolting")[326] to establish its customary international law character. Similarly, the Appeals Chamber stated that "the principle of humane treatment constitutes the fundamental basis underlying

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[320] *Milutinović*, Trial Chamber Judgment, Case No. ICTY- 05-87, 26 February 2009, vol. 3, para 145f.
[321] *Milutinović* (n. 320) para. 147.
[322] *Milutinović* (n. 320) para. 133.
[323] *Ibid.*, citing from the *Strugar* Trial Chamber Judgment, para 219.
[324] Article 3 provides: "Such violations shall include, but not be limited to:…".
[325] *Čelebići*, Appeals Chamber Judgment, Case No. IT-96-21-A, 20 February 2001, para. 147.
[326] *Ibid.*

common Article 3 of the Geneva Conventions",[327] also criminalising outrages upon personal dignity.[328] Hence, it yet again deduced the crime's customary character from the 'fundamental principle of humane treatment'.

Further to the *Čelebići Case*, the *Aleksovski* Trial Chamber judgment also made some important findings on the customary international law definition of "outrages upon personal dignity". Of special interest here is not the Court's definition of the crime as "an act which is animated by contempt for the human dignity of another person",[329] but the general outline of its character. The Trial Chamber considered crimes against humanity which reflect outrages upon personal dignity to safeguard an important value on which the entire construction of international humanitarian law and international human rights was founded:

> It is unquestionable that the prohibition of acts constituting outrages upon personal dignity safeguards an important value. Indeed, it is difficult to conceive of a more important value than that of respect for the human personality. It can be said that the entire edifice of international human rights law, and of the evolution of international humanitarian law, rests on this founding principle. Protection of the individual from inhuman treatment certainly is a basic principle referred to in the Universal Declaration of Human Rights of 1948 (Article 5), and also finds expression in prohibitions contained in regional and international human rights instruments, culminating in the General Assembly's adoption by consensus of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 10 December 1984.[330]

Interestingly, the Court refers in this passage to the close connection between international humanitarian law and international human rights law. This strongly supports the contention that both systems aim at the protection of common values. Subsequently, the general concept of humanity was emphasised by various other judgments of the Court.[331]

9. *Terrorisation of a civilian population: the* Galić *appeal judgment*

An important and also recent case which dealt with the issue of the infliction of terror on a civilian population is the *Galić* appeal judgment.[332] The appel-

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[327] *Čelebići*, Trial Chamber Judgment, Case No. IT-96-21-T, 16 November 1998, para. 532.
[328] *Ibid.*
[329] *Aleksovski*, Trial Chamber Judgment, Case No. IT-95-14/1-T, 23 June 1999, para. 56.
[330] *Aleksovski* (n. 329) para. 54.
[331] *Aleksovski*, Appeals Chamber Judgment, Case No. IT-95-14/1-A, 24 March 2000, para. 25; *Kunarac*, Trial Chamber Judgment, IT-96-23-T& IT-96-23/1-T, 22 February 2001 para. 500.
[332] *Galić*, Trial Chamber Judgment, Case No. IT-98-29-T, 5 December 2003; Appeals Chamber Judgment, IT-98-29-A, 30 November 2006.

lant *Galić* had challenged the findings of the Trial Chamber, claiming that there was no crime of terror in international law and that the Trial Chamber had accordingly been violating the *nullum crimen sine lege* principle.[333] Dismissing his arguments, the Appeals Chamber, with judge Schomburg dissenting, chose the deductive approach to prove the customary character of the prohibition on attacks on civilians of Articles 51 (2) of Additional Protocol I and 13 (2) of Additional Protocol II. The Chamber argued that this prohibition could be deduced from the principles of distinction and protection, which had a "long-standing history in international humanitarian law."[334] It stated:

> These principles incontrovertibly form the basic foundation of international humanitarian law and constitute intransgressible principles of international customary law. As the Appeals Chamber has held in previous decisions the international prohibition on attack on civilians contained in Articles 51 of Additional Protocol I and 13 of Additional Protocol II constitutes customary international law.[335]

In his separate opinion annexed to the judgement, judge Meron further explained the Chamber's deductive reasoning. He argued that the customary prohibition on inflicting terror upon a civilian population followed "logically from the ban, at least from the Fourth Hague Convention on the Laws and Customs of War that 'no quarter will be given' ".[336] Like the majority in the case, he thus considered the customary proscription of 'no quarter will be given' as the basic underlying principle, from which the prohibition of terror could be inferred by way of deduction.

Nonetheless, the Chamber did not base its reasoning on deductive methodology alone. As evidence of the customary nature of the prohibition of attacks on civilians the Chamber cited, amongst others: the 1938 Draft Convention for the Protection of Civilian Populations against New Engines of War, Article 33 of the Fourth Geneva Convention, Article 6 of the 1956 New Delhi Draft Rules for the Protection of Civilians, the 1990 Turku Declaration of Minimum Humanitarian Standards and the high number of states which had by 1992 become parties to Additional Protocols I and II to the Geneva Conventions by 1992.[337] Further evidence provided were the official pronouncements of states on the prohibitions expressed in Article 51 (2)

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[333] *Galić*, Appeals Chamber Judgment, Case No. IT-98-29-A, 30 November 2006, para. 79.
[334] *Galić* (n. 333) para. 87.
[335] *Ibid.*
[336] *Galić* (n. 333) separate and partially dissenting opinion *Meron*, para. 2.
[337] *Galić* (n. 333) para. 89.

and 13 (2) of Additional Protocol I and II and their military manuals, in particular of the US.

Further attempting to prove the customary character of the prohibition on inflicting terror the Appeals Chamber referred to the 1919 Report of the Commission on Responsibilities created by the Peace Conference of Paris and Australia's War Crimes Act, which refers to the work of the 1919 Commission,[338] the criminalisation of breaches of the Geneva Convention and their Protocols as well as of the infliction of terror itself by "numerous" national penal codes.[339] Finally, a conviction of the Split Court in Croatia was cited, which had sentenced a culprit for violations of Article 51 (2) and 13 (2) of Additional Protocols I and II by inflicting terror upon civilians.[340]

Yet despite the evidence quoted by the Chamber to prove the customary character of the individual responsibility resulting from the infliction of terror upon a civilian population, judge Schomburg unmasked some of it as misleading and not in support of a customary rule with that content.[341] Amongst others, he pointed out that only the Penal Codes of Côte d'Ivoire, Czechoslovakia, Ethiopia, the Netherlands, Norway and Switzerland contained prohibitions on the crime of terrorising of a civilian population. In his view, this was an almost negligibly small number of states for proving a relevant customary norm. He added that several states had chosen not to criminalise attacks on a civilian population, although they had included its customary prohibition in their legislation.[342]

Finally, Schomburg commented that the deductive reasoning put forward by judge Meron in order to establish the individual criminality of the infliction of terror under customary international law

> appears to be incorrect, since it could be made in any context in relation to any and every violation of international humanitarian law. While the act of declaring that no quarter will be given is undoubtedly penalized under international customary law (and was so during the indictment period) it is nevertheless distinct from terrorization against a civilian population.[343]

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[338] *Galić* (n. 333) para. 93.

[339] *Galić* (n. 333) para. 94, 95.

[340] *Galić* (n. 333) para. 97.

[341] *Schomburg* cites the Penal Codes of Ireland and Bangladesh, which did not specifically criminalize the prohibition on inflicting terror on a civilian population, but violations of Additional Protocols I and II to the Geneva Conventions. See *Galić*, Appeals Chamber Judgment, Case No. IT-98-29-A, 30 November 2006, separate and partially dissenting opinion *Schomburg*, para. 9.

[342] *Galić*, Appeals Chamber Judgment, Case No. IT-98-29-A, 30 November 2006, separate and partially dissenting opinion *Schomburg*, para. 11.

[343] *Galić* (n. 342) para. 17.

As Schomburg argued, although the ban on 'no quarter will be given' was similar to the prohibition of the terrorisation of a civilian population, the Court was "under the obligation to define what is a crime under our statute *with precision* in order to avoid any violation of the fundamental principle of *nullum crimen sine lege certa*." (emphasis in the original).[344] He concluded that even the Rome Statute did not contain an explicit prohibition on the infliction of terror on a civilian population and stated:

> If indeed this crime was beyond doubt part of customary international law in 1998 (!), States would undoubtedly have included it in the relevant provisions of the Statute or in their domestic legislation implementing the Statute.[345]

10. *Assessment*

Judge Schomburg's criticism of judge Schomburg in the *Galić* case exposes some of the current problems which arise in relation to the deductive approach to customary international law, applied in international criminal proceedings.

On the one hand, the approach seems to contravene the dictates of the *nullum crimen* principle, i.e. the rule of certainty, which is an accepted part of the principle. On the other hand, Schomburg's critique shows that there are still many unanswered questions regarding the relationship of customary international law and the *nullum crimen* principle in international criminal law. It still needs to be clarified what the exact propositions of the principle are with regard to customary international law. If a criminal rule is evidenced by applying the deductive approach, is it sufficient to evidence the customary character of the general principle which served as the underlying basis for the new rule? Or is it necessary to prove the customary character of the particular crime which has been deduced from the general rule? This had been attempted – and not very successfully – by the Appeals Chamber in the *Galić* case. As previous judgments have shown, the implications of the *nullum crimen* principle in international criminal proceedings seem to call for the second proposition, i.e. for a strict standard of proof. These questions need to be kept in mind when one assesses the implications of the *nullum crimen* principle for the formation of customary rules later.[346]

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[344] *Galić* (n. 342) para. 17.

[345] *Galić* (n. 342) para. 20.

[346] Nevertheless, the findings in *Galić* were affirmed by subsequent judgements of the ICTY without further discussion. Compare: *Milošević, Dragomir*, Trial Chamber Judgment, Case No. ICTY-98-29-1, 12 December 2007, para 874.

11. *Rape*

Whereas the great number of cases assessing the customary nature of rape have already been mentioned in the section discussing the international legal instrument approach, there is one judgment, which – albeit evidenceing the resort by the ICTY to a broad range of international instruments when considering the customary nature of rape- also counts as another example of the deductive approach. It is the Trial Chamber decision in the *Furundžija* case.[347] Concerning the prohibition of rape, the Trial Chamber stressed relatively quickly that this crime had 'gradually crystallised as customary international law'. It found that its customary character could be derived from the Lieber Code and from Article 46 of the Hague Convention of 1907 and its Annexes, "read in conjunction with the 'Martens clause' ".[348] Furthermore, it held that the prohibition of rape and other forms of serious sexual assault had also been classified as a crime against humanity in the *Toyoda* and *Matusi* judgements of the IMT in Tokyo and in the *Yamashita* judgement of the US Military Commission. In the Chamber's view, the findings of these post-World War II trials:

> along with the ripening of the fundamental prohibition of "outrages upon personal dignity" laid down in common article 3 into customary international law, has contributed to the evolution of universally accepted norms of international law prohibiting rape as well as serious sexual assault. These norms are applicable in any armed conflict.[349]

Finally, the Trial Chamber remarked that the prohibition of rape was laid down in those international human rights instruments which aim at safeguarding physical integrity. In its opinion, this right constituted one of the fundamental human rights; hence, it had also attained the character of customary international law.[350]

Although the Chamber in the *Furundžija Case* referred to a great number of international instruments which proved the customary character of rape, one element of the Chamber's reasoning remains essential: it is its emphasis on the fact that the sources which evidenced the customary character of the crime had to be read in conjunction with the humanitarian principles of the Martens clause.

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[347] *Furundžija*, Trial Chamber Judgment, Case. No.: IT-95-17/1-T, 10 December 1998.

[348] *Furundžija*, Trial Chamber Judgment, Case. No.: IT-95-17/1-T, 10 December 1998, para. 168.

[349] *Ibid.*

[350] *Furundžija* (n. 347) para. 170.

12. *The* Hadžihasanović *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility and subsequent case law*

As regards the development of customary international criminal law in general and of command responsibility in particular, the *Hadžihasanović* decision[351] is certainly another of the most groundbreaking judgments of the ICTY. The first question dealt with in the decision, which tackled the application of the principle of command responsibility in non-international armed conflict, is of particular interest when investigating the Tribunal's methodological approaches to the finding of new customary law.

As regards the law of command responsibility the Chamber found that the application of the principle in non-international armed conflict followed from the customary application of common Article 3 of the Geneva Conventions to non-international and international armed conflict. It stated that common Article 3, which customarily applied to non-international as well as to international armed conflict, entailed individual criminal responsibility for serious violations. In the view of the Tribunal, this would be 'supplemented by other general principles and rules on the protection of victims in internal armed conflict'. Since command responsibility determined the individual criminal responsibility of military and civilian superiors in international law, the Chamber decided that this principle could also apply to non-international armed conflict. In its opinion, common Article 3 provided the same criminal responsibility for international as well as for non-international armed conflict:

> Likewise, at all times material to this case, customary international law included the concept of command responsibility in relation to war crimes committed in the course of an international armed conflict. Thus, the concept would have applied to war crimes corresponding to the prohibitions listed in common Article 3 when committed in the course of an international armed conflict. It is difficult to see why the concept would not equally apply to breaches of the same prohibitions when committed in the course of an internal armed conflict.[352]

According to the ICTY, this also followed from the principle of responsible command. The principle constituted an inherent part of an armed conflict and had been anticipated in the Geneva law on non-international armed conflict: both AP II and common Article 3 assumed the existence of an

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[351] *Hadžihasanović*, Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Case No.: IT-01-47-AR72, 16 July 2003.

[352] *Hadžihasanović* (n. 351) para. 13.

armed force and thus the existence of some kind of chain of command.[353] The Chamber thus deduced the application of the principle of command responsibility from the general principle of responsible command underlying the concept of common Article 3 and its customary application to non-international armed conflict. It held:

> …wherever customary international law recognizes that a war crime can be committed by a member of an organised military force, it also recognizes that a commander can be penally sanctioned if he knew or had reason to know that his subordinate was about to commit a prohibited act or had done so and the commander failed to take the necessary and reasonable measures to prevent such an act or to punish the subordinate. Customary international law recognizes that some war crimes can be committed by a member of an organised military force in the course of an internal armed conflict; it therefore also recognizes that there can be command responsibility in respect of such crimes.[354]

The Court further affirmed that the principle of command responsibility had acquired a customary character even before AP I was adopted. Moreover, it found that the fact that the principle had not been reiterated in AP II did not contradict its customary international law character.[355] Finally, the Court declared that any finding which denied the responsibility of a commander in a non-international armed conflict would be contrary to its findings in its *Tadić* Jurisdiction Decision, the *Čelebići* Appeal Judgement, or the Trial Chamber judgment in the *Aleksovski Case*.[356]

After all, regarding the application of the customary international law principle of command responsibility the Court clearly employed a deductive approach. It deduced its application in non-international armed conflict from its application in international armed conflict. Furthermore, although the Court could have referred to the method of interpretation alone when trying to assess the scope of the principle, it emphasised its customary international law character. Therefore, the *Hadžihasanović* decision can serve as one more example of a departure in the jurisprudence of the ICTY from the traditional methods of finding justice in the field of customary international law.

However, the Court's discussion of the second question raised in the appeal may be worth mentioning as well. It concerned the application of the principle of command responsibility prior to the commander's assumption of command. Although the legal issue had been answered before in

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[353] *Hadžihasanović* (n. 351) para. 16.
[354] *Hadžihasanović* (n. 351) para. 18.
[355] *Hadžihasanović* (n. 351) para. 29.
[356] *Hadžihasanović* (n. 351) para. 30.

the positive in an *obiter dictum* in the *Kordić Case*[357] the Appeals Chamber now dealt with the matter extensively. Regarding this question, the Chamber did not refer back to the deductive approach which it had employed to answer the first question. It rather followed the traditional two-fold concept of state practice and *opinio juris*. It found that there was neither state practice nor supporting *opinio juris* leading to the assumption that the principle of command responsibility applied to a situation prior to the assumption of command.[358] The Appeals Chamber proved the absence of such a customary norm by reference to Article 28 Rome Statute, Article 86 (2) AP I, the ILC Draft Code of Crimes against Peace and Security of Mankind, and the *Kuntze Case* before the Nuremberg Tribunal.[359] This evidence of customary international law did not contain a principle which invoked the responsibility of the commander prior to his assumption of command.[360]

The Appeals Chamber further admonished the dissenting Judges Shahabuddeen and Hunt for their reasoning concerning the application of the principle prior to the commander's command. According to its view, the judges had failed to cite a single item of state practice or *opinio juris* out of the "abundant" literature on command responsibility to prove the existence of the customary international law principle of command responsibility applying to situations prior to the assumption of command by the superior.[361] As the Chamber explained, it was "quite a different matter… to stretch an existing customary principle to establish criminal responsibility for conduct falling beyond the established principle."[362]

This reasoning on the second extension of the principle stands in great contrast to the deductive method employed to answer the first question. The two dissenting judges had tried to reason for the application of command responsibility in the second case with the help of the deductive method employed by the Tribunal on the first issue. In particular, Judge Hunt criticised the majority judgment for this adoption of a "pick and choose" mentality when assessing the customary law on two questions arising in the context of one and the same principle.

> The majority has instead looked first for the existence of State practice in relation to the very circumscribed factual situation to which the principle is sought to be applied, rather than whether that particular factual situation reasonably fell within the principle. This is a completely different approach to that

[357] *Kordić, Čerkez*, Trial Chamber Judgment, Case No. IT-95-14/2-T, 26 February 2001, para. 446.
[358] *Hadžihasanović* (n. 351) para. 45.
[359] *Hadžihasanović* (n. 351) para. 46–50.
[360] *Hadžihasanović* (n. 351) para. 51.
[361] *Hadžihasanović* (n. 351) para. 53, 55.
[362] *Hadžihasanović* (n. 351) para. 52.

> unanimously adopted in relation to the first issue. The approach unanimously adopted in relation to whether command responsibility exists in an internal armed conflict necessarily ignored the existence of State practice in relation to that particular factual situation.[363]

Hunt found that there was no difference between the two issues assessed by the Appeals Chamber. If a situation reasonably fell within the scope of a certain principle, the requirement of supporting state practice would be irrelevant.[364] Undeniably, this argument tries to extend the application of the methodology adopted by the majority for the first issue to the second question, albeit without seeking any further support in either conventional or customary international law. The majority argument, however, referred to the customary principle of responsive command, mentioned in common Article 3 of the Geneva Conventions. This made it possible to deduce from it the application of the principle of command responsibility in non-international armed conflict. From a methodological point of view, the minority opinion is indeed flawed, as it does not assess whether the broader principle of responsive command supports its contentions.

On the other hand, the majority held that an expansive reading of international treaty law texts could jeopardise the principle of *nullum crimen sine lege*, which would be of a fundamental character for both international human rights law and international criminal law.[365] Nonetheless, even the majority did not mention state practice when arguing for the customary application of the principle of command responsibility to non-international armed conflict. However, reference to state practice can be regarded once again as the outer limit of the deductive approach. As the majority opinion demonstrated, if some deduction extends the relevant state practice on a certain issue, it can no longer be regarded as applicable customary law.

Most recently, the deductive approach to command responsibility employed by the *Hadžihasanović* appeal was reaffirmed by the Trial Chamber in the *Halilović Case*[366] as well as in later judgments.[367] In *Halilović*, the Trial Chamber explained that the principle of command responsibility derived from the "basic principles of international humanitarian law aiming at ensuring protection for protected categories of persons and objects during armed conflicts."[368] Furthermore, the Chamber held the principle to be "at the

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[363] *Hadžihasanović* (n. 351) separate and partially dissenting opinion *Hunt*, para. 10.
[364] *Hadžihasanović* (n. 351) separate and partially dissenting opinion *Hunt*, para. 13.
[365] *Hadžihasanović* (n. 351) para. 55.
[366] *Halilović*, Trial Chamber Judgment, Case No. ICTY-01-48-T, 16 November 2005.
[367] *Milutinović*, Trial Chamber Judgment, Case No. ICTY- 05-87, 26 February 2009, vol. 3, para 113.
[368] *Halilović* (n. 366) para. 39.

very heart of international humanitarian law."[369] Just like the *Hadžihasanović* Appeals Chamber, the *Halilović* Trial Chamber emphasised that the elements of the crime derived from the principle of responsible command.[370] Nevertheless, the Chamber still considered the evolution of the principle in national legislation, the different trials in the aftermath of World War II,[371] and the ILC commentary on the Draft Code of Crimes.[372] Only thereafter did it conclude that the principle of command responsibility and its applicability in non-international as well as in international armed conflict[373] by now was an established principle of customary international law.[374]

13. *Drawbacks to the deductive approach: the* Ojdanić Interlocutory Appeal on Joint Criminal Enterprise *Liability and further judgments*

As a new concept of individual criminal responsibility, which had not been identified under this heading prior to the establishment of the ICTY, the customary concept of joint criminal enterprise liability deserves particular scrutiny. The principle describes a situation in which several individuals have agreed to commit a certain crime, as well as their taking of action in furtherance of that agreement.[375]

Though the principle had already been acknowledged by the *Tadić Interlocutory Appeal*, the Appeals Chamber in the *Ojdanić Interlocutory Appeal on Joint Criminal Enterprise*[376] considered that the customary character of the principle still needed to be established.[377] Yet the Court pointed out that the source of customary international law set some limitations of its own on the establishment of international criminal responsibility. It decided: "customary law is not always as represented as written law and it accessibility may not always be as straightforward as would be the case had there been

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[369] *Ibid.*

[370] *Halilović* (n. 366) para. 40.

[371] *Halilović* (n. 366) para. 43, 44ff.

[372] *Halilović* (n. 366) para. 52.

[373] *Halilović* (n. 366) FN 132.

[374] *Halilović* (n. 366) para. 55; this has become the established jurisprudence of the Court ever since, see *Naser Oric*, Trial Chamber Judgment, Case No. ICTY-03-68-T, 30 June 2006, para. 291; *Boskovski et al.*, Trial Chamber Judgment, Case No. ICTY-04-82-T, 10 July 2008, para 404.

[375] *Ojdanić*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Appeals Chamber Decision Case No.: IT-99-37-AR72, 21 May 2003, para 23; further *A. Cassese* (International Criminal Law, 2nd ed) 191.

[376] *Ojdanić*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Appeals Chamber Decision Case No.: IT-99-37-AR72, 21 May 2003.

[377] *Ojdanić* (n. 376) para. 20.

an international criminal code."[378] However, it found that in the case at hand the customary criminality of the commission of an international crime by engaging in a joint criminal enterprise was clearly indicated by international judicial decisions, international instruments and domestic legislation.[379]

Despite this clear evidence pointing toward the customary character of the prohibition, the Chamber highlighted a development in the Tribunal's jurisprudence on customary international law which it considered to be a matter for concern: this was the tendency to rely on the immorality or appalling character of an act to establish its criminality in customary international law. The Court rejected the idea that the heinous character of an act constituted a "sufficient factor to warrant its criminalisation under customary international law."[380] The only implication this effect had on the crime was that it refuted claims of the defence that the accused had not known the criminal nature of the act.[381]

The *Ojdanić Case* reveals a certain criticism by the Appeals Chamber of previous reasoning in the *Tadić*, the *Hadžihasanović* and *Čelebići Cases*, concerning, for example, the criminality of torture under customary international law. Its findings point to an issue which will also be addressed below when we consider the impact of the *nullum crimen* principle on the formation of customary international law: one has to be aware of the fact that the forseeability and clarity of an international crime may be at stake if reasoning on its customary character is driven solely by the gravity of the crime from a moral perspective. This constitutes one of the severest criticisms with which a so-called 'core rights' approach to customary international (criminal) law has to cope. Yet it also establishes some limitations on this method and provides some guidelines which have to be taken into account when considering the development of a new customary norm. Nonetheless, the criminality of joint criminal enterprise liability under customary international law was affirmed in subsequent judgments of the ICTY.[382]

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[378] *Ojdanić* (n. 376) para. 41.

[379] *Ojdanić* (n. 376) para. 41.

[380] The tribunal quoted the *Tadić* decision as an example of the employment of such a technique for the finding of customary international law; See *Ojdanić* (n. 376) para. 42.

[381] *Ojdanić*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Appeals Chamber Decision Case No.: IT-99-37-AR72, 21 May 2003, para. 42.

[382] *Šešelj*, Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, Trial Chamber II, Case No. IT-03-67-PT, 26 April 2004; *Jadranko Prlić, Slobodan Praljak Milivoj Petkovic*, Decision to Dismiss the Preliminary Objections Against the Tribunal's Jurisdiction, Trial Chamber Judgment, Case No. IT-04-74-PT, 26 September 2005, para. 17; *Rahim Ademi and Mirko Norac*, Decision of Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11Bis, Trial Chamber Decision of 14 September 2005, para. 37; *Tolimir*, Decision on Preliminary Motions on the Indictment Pursuant to

Another more recent judgment, which shows a more careful approach towards previous findings of the ICTY on the criminality of war crimes is the *Hadžihasanović* Trial Chamber judgment. The Chamber reassessed the criminality of war crimes under customary international law and concluded that international law as such did not impose an obligation on states to prosecute war crimes.[383] It argued that there was neither state practice nor *opinio juris* available to prove the existence of a rule of customary international law which affirmed the existence of an obligation on states to prosecute grave breaches of international humanitarian law, solely as a matter of international law.[384] The Chamber also found that the ICRC study was silent on this point.[385] Such reasoning shows that the ICTY has retreated somewhat from the very broad line argument provided by the 'core rights' approach. Instead of further developing this method to ascertain new customary norms, the ICTY seems to orientate its argument back to the two-element theory of customary international law.

C. *Mixed methodologies*

There are a number of cases where the methodologies chosen by the ICTY to determine new rules of customary international criminal law are not clearly distinguishable from methods concerning the application of existing rules of international law to new factual situations. The tribunal mixes methods that serve to identify either general principles of international law or the methods of interpretation with those that apply to the identification of new customary international law. The tribunal has also employed reasoning which resembles conclusions by analogy in discussions on the emergence of new customary rules.

Yet there is a primordial difference between methods concerning the emergence of new customary law and the methods of interpretation and analogy: whereas the former concern the identification of truly new law, the latter concern existing rules of international law and their application to new sets of facts, originally not seen to belong to the rules' scope of application. It will be seen whether this difference has also found recognition in the case law of the Court.

Rule 72 of the Rules, Case No.: IT-05-88/2PT, 14 December 2007, para 53; *Haradinaj*, Trial Chamber Judgment, Case No. IT-04-84T, 3 April 2008, para 135; *Milutinović*, Trial Chamber Judgment, Case No. ICTY- 05-87, 26 February 2009, vol. 3, para 96.

[383] *Hadžihasanović*, Trial Chamber Judgment, Case No. IT-01-47-T, 15 March 2006, para. 260.

[384] *Hadžihasanović* (n. 283) para. 264.

[385] *Hadžihasanović* (n. 283) para. 253.

1. *Blurring of different sources of international law (general principles of international law and customary international law)*

The *Furundžija* Trial Chamber judgment provides some interesting findings by the ICTY on the customary *definition* of rape and other serious sexual assaults; in particular in comparison with its previous findings on the customary *prohibition* of the crime, discussed earlier.

Regarding the crime's definition, the Chamber concluded that there was still no conventional or customary international law definition of its individual elements.[386] Therefore, the Tribunal declared that it would assess the elements of rape according to the "criminal law common to major legal systems of the world".[387] The Trial Chamber remarked that such an assessment had to be carried out cautiously; international criminal law contained a number of features which made it distinct from national criminal proceedings.[388]

Although the Trial Chamber eventually arrived at a working definition of rape,[389] it had to assess in addition whether this definition included forced oral penetration as an act of rape. To answer this question, the Chamber resorted to 'the general principles of international criminal law or to the general principles of international law'.[390] Interestingly, the reasoning of the Court falling into this category does not differ at all from the reasoning which the Court employed in previous judgments in order to ascertain the customary international law of a particular crime. It deduced the criminality of this conduct from the principle of the 'protection of human dignity', which it considered to constitute a core principle of international law and international humanitarian law in particular. In the Tribunal's view, it formed the basis and *raison d'être* of the whole corpus of international human rights law and international humanitarian law.[391] The Trial Chamber declared:

> indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person.[392]

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[386] *Furundžija*, Trial Chamber Judgment, Case. No.: IT-95-17/1-T, 10 December 1998, para. 177.
[387] *Furundžija* (n. 386) para. 177.
[388] *Furundžija* (n. 386) para. 178.
[389] *Furundžija* (n. 386) para. 181.
[390] *Furundžija* (n. 386) para. 182.
[391] *Furundžija* (n. 386) para. 183.
[392] *Ibid.*

These findings were affirmed in subsequent judgments of the Tribunal.[393] They have also had an important influence on the later designation of rape as a war crime in the Rome Statute.[394]

It is interesting that in one and the same case the Trial Chamber employed different methodologies to 1. determine the customary criminality of rape and 2. determine the crime's individual elements. It is obvious that the Chamber did not resort to deductive methodology when determining the individual elements of the crime of rape. Instead, it declared that it derived the definition of rape from reference to the 'general principles of international criminal law and international law'.

The Court further employed the 'general principles of international criminal law' in order to establish the criminality of forced oral penetration as rape under international criminal law. It considered 'the protection of the human dignity of every person' as belonging to this category of principles, but did not refer to any evidence which proved that this principle existed *de facto* in national legal systems of the world. This permits us to conclude that the Court seems to follow the view which presupposes the existence of general principles of international law deriving from international law alone. That there are certain drawbacks to such an approach has been shown previously.[395]

In any case, reasoning which refers to the 'general principles of international law' alone in order to prove the criminality of forced oral penetration as an act of rape is difficult, in particular with regard to the *nullum crimen sine lege* principle. This is underlined by the fact that there was indeed contrary evidence available from national jurisdictions, which classified this conduct merely as sexual assault.[396] Nevertheless, the Court did not consider this problematic. In its view, even if categorised as sexual assault, the act of forced oral penetration would still be punishable as a crime against humanity under the ICTY Statute.[397] Thus the perpetrator was not adversely affected by the categorisation of this act as an act of rape.[398] The Trial Chamber found:

> …any such concern is amply outweighed by the fundamental principle of protecting human dignity, a principle *which favours broadening the definition of rape*. (emphasis added)[399]

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[393] *Furundžija*, Appeals Chamber Judgment, Case No. IT-95-17/1-A, 21 July 2000, para. 210.

[394] See Article 8 (2) b) xxii of the Rome Statute.

[395] *Supra* 132.

[396] *Furundžija* (n. 386) para. 184.

[397] Pursuant to Article 24 and Rule 101 of the Rules.

[398] *Furundžija* (n. 386) para. 184.

[399] *Ibid.*

However, these considerations of the ICTY do not quite reflect the requirements of the *nullum crimen sine lege* principle. The principle demands that there be a particular law in existence punishing the particular criminal act (prohibition of non-retroactivity); it does not require the impugned act to be criminal under international law *in any case*.[400] Thus, the law has to determine the individual elements which establish individual criminal responsibility.[401] Meron has also remarked that the reasoning of the *Furundžija* Trial Chamber on the crime of rape "certainly has a somewhat emotive, *de lege ferenda* quality".[402] Following our analysis, these findings can only be supported. In this case, as well as in others, the Tribunal without doubt allowed itself to be guided by the degree of offensiveness of certain acts to human dignity. In Meron's words: "the more heinous the act, the more the Tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law."[403]

The *Kunarac* Trial Chamber judgment subsequently affirmed the customary international law character of the crime of rape within the framework of common Article 3 of the Geneva Conventions.[404] In the Chamber's view, the customary nature of common Article 3 made it unnecessary to consider any further requirements for the imposition of rape charges based on treaty law, since common Article 3 itself would provide sufficient basis for a charge of rape.[405] Furthermore, the Trial Chamber determined that the *Furundžija* Trial Chamber had defined the elements of the crime more narrowly than required by international law.[406] It considered that the scope of the crime in international law would entail any non-consensual, involuntary penetration.[407] It further reaffirmed that in the absence of customary or conventional international law, reference to the general principles of the major legal systems of the world could support the determination of the applicable law on a particular subject. The Chamber illustrated that national rules could define 'common denominators' which embodied principles "which must be adopted in the international context."[408] To determine these common denominators on the international law of rape, the *Kunarac* Trial Chamber assessed the law of

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[400] See *S. Lamb* in *A. Cassese et al.* (Rome Statute Commentary) 734, 751.
[401] *Infra*, 296ff.
[402] *T. Meron* (1987) 81 AJIL 348, at 361.
[403] See *T. Meron* (1987) 81 AJIL 348, at 361.
[404] *Kunarac*, ICTY Trial Chamber Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 406.
[405] *Kunarac* (n. 404) para. 406.
[406] *Kunarac* (n. 404) para. 438.
[407] *Ibid.*
[408] *Kunarac* (n. 404) para. 439.

various national jurisdictions.[409] This reasoning on the customary law of rape has been approved by subsequent jurisprudence of the ICTY.[410]

In the *Kunarac* Trial Chamber findings, we find the classic methodological approach envisaged for the finding of general principles of international law in accordance with Article 38 (c) of the ICJ Statute: a general principle is deduced from the national laws of the major systems of the world. The application of such an approach, to a great extent, contrasts with the findings of the Trial Chamber in the *Furundžija Case*, where the Court instead appeared to utilise the 'core rights' approach to determine the criminality of rape according to the general principles of international law.[411]

2. *The need for a differentiation between methodologies: the case law of the ICTY on the customary criminality of co-perpetratorship*

There has been some discussion within the ICTY on whether the different types of perpetratorship so far identified are the only ones to exist in international criminal law or whether there are other forms under customary international law. A judgment of the ICTY discussing this issue is the *Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-perpetration*,[412] in which the ICTY Appeals Chamber had to decide whether there was a customary type of "indirect co-perpetratorship" defining individual responsibility under its Statute. Interestingly enough, it continues the recent, more critical trend in the case law of the Tribunal, which tries to formulate its findings on matters of customary international law more along the lines of the traditional approach to custom. It determined, in particular, that the evolution of a new customary rule required evidence of the existence of both an *opinio juris sive necessitatis* and a settled state practice.[413] This two-element approach to custom, the Chamber concluded, was also supported by the ICTY's own case law in the *Hadžihasanović* and *Rwamakuba* Appeal decisions.[414]

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[409] *Kunarac* (n. 404) para. 443 (amongst others, Korean, German, Brasilian, Spanish, Danish, and American laws were considered).

[410] *Čelebići*, Appeals Chamber Judgment, Case No. IT-96-21-A, 20 February 2001, para. 30ff.

[411] *See infra* 242.

[412] *Ojdanić*, Decision on Ojdanić's Motion Challenging Juridiciton: Indirect Co-Perpetration, Case Nr. IT-05-87-PT, 22 March 2006.

[413] *Ojdanić* (n. 412) para. 32.

[414] See *Hadžihasanović*, Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Case No.: IT-01-47-AR72, 16 July 2003, para. 12; *Rwamakuba*, Appeals Chamber Decision on Interlocutory Appeal on Joint Criminal Enterprise, Case No.: ICTR-98-44-AR72.4, 22 October 2004, para. 14.

However, most importantly, the Chamber pointed out that although indirect perpetration and co-perpetration had been recognised as forms of individual criminal responsibility by judicial authorities in several legal systems of the world, this did not lead to the conclusion that such forms of perpetration were already part of customary international criminal law at the time relevant to the judgment.[415] As the Tribunal emphasised, it was required to adjudicate the case not upon the basis of the general principles of law, but upon customary law as it existed at that time.[416] It continued that there was neither *state practice* nor *opinio juris* which supported the existence of a form of responsibility as described in the indictment.[417]

This last pronouncement clearly indicates that, slowly but steadily, the Tribunal seems to recognise that it has to draw a distinction between the evidence provided for the general principles of law and that for the formation of a norm of customary international law. And indeed, it demonstrates that only customary international law may serve as a basis for criminal convictions under its jurisdiction.[418]

3. *Blurring of customary international law and interpretation*

Just as the Tribunals have often not differentiated properly between the two sources of international law, custom and the general principles of international law, they have also not clearly distinguished the methods of interpretation from the methods employed for the finding of a new rule of customary international law. Hence, there are several cases in which the reasoning

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[415] *Ojdanić* (n. 412) para. 39.

[416] *Ibid.*, which reads: "39. The Trial Chamber acknowledges the possibility that some species of co-perpetration and indirect perpetration can be found in various legal systems throughout the world. Nevertheless, as mandated by the Appeals Chamber, [FN117] the task before the Trial Chamber is not to determine whether co-perpetration or indirect perpetration are general principles of law, but instead to determine whether the form of responsibility alleged in paragraph 22 of the Proposed Amended Joinder Indictment existed in customary international law at the relevant time. Consequently, even if Roxin or other authorities did provide clear evidence that the very specific definition of co-perpetration in paragraphs 440 and 442 of *Stakić* exists in German or other national law, such evidence would not support a conclusion that there is state practice and *opinio juris* demonstrating the existence of the *Stakić* definition in customary international law. Neither *Stakić* nor the Prosecution has cited any authority that convincingly establishes state practice or opinio juris for the *Stakić* definition."

[417] *Ibid.*

[418] This is a conclusion also drawn by Judge Shahabuddeen in his separate opinion of 7 July 2006 in the *Gacumbitsi* Appeal Chamber decision of the ICTR: *Gacumbitsi*, Appeals Chamber decision, Case No.: ICTR-2001-64-A, 7 July 2006, Separate Opinion Shahabuddeen, at para. 48.

employed in order to prove the customary character of a crime under the jurisdiction of the Tribunal factually belongs either to the field of interpretation or -*vice versa*- to the finding of a new customary rule, but is utilised in the context of interpretation. A proper differentiation is important, however, because the two methods are entirely different. Interpretation is used when new sets of facts are applied to an old rule designed for a specific situation. Methods of discerning customary international law, on the other hand, are concerned with the finding of an entirely new rule of international law.

a. The discriminatory intent requirement of crimes against humanity

It has frequently been debated by the ICTY whether crimes against humanity have to be committed with discriminatory intent. The *ad hoc* Tribunals have considered the existence of such a requirement in customary international law, thus providing us with further evidence of the methods applied in this assessment.

In the case law of the ICTY, the question whether discriminatory intent was needed for the commission of crimes against humanity was first discussed by the *Tadić* Trial Chamber. It simply found that discriminatory intent is required for all crimes against humanity, as it was an element of crimes against humanity mentioned in the report of the Secretary General on the establishment of the Tribunal.[419] Diametrically opposed to these findings, the Appeals Chamber judgment, however, followed an interpretation of Article 5 according to its ordinary meaning, and considered that this crime did not require a discriminatory intent. [420] It maintained that the assumption of such intent would rather frustrate the object and purpose of Article 5.[421] Treaty practice also supported this interpretation. Furthermore, the Chamber considered the London Agreement of 8 August 1945 to distinguish between two different categories of crimes against humanity, of which only one required discriminatory intent. It observed that similar regulations were contained in the Statute of the Tokyo Tribunal and Control Council Law No. 10.[422]

Accordingly, the Chamber concluded that the customary prohibition of crimes against humanity did not contain a discriminatory intent requirement. Any development of such a requirement in customary international law would have to be supported by 'uncontroverted evidence', i.e. both by "judicial practice and possibly evidence of consistent state practice, including

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[419] *Tadić*, Trial Chamber Judgment, Case No. IT-94-1-T, 7 May 1997, para. 702.
[420] *Tadić* (n. 131) para. 283.
[421] *Tadić* (n. 131) para. 285.
[422] *Tadić* (n. 131) 289.

national legislation".[423] Since such practice was lacking, the Chamber concluded, the customary law on crimes against humanity could not be considered as requiring commission with discriminatory intent. Finally, it held, despite the fact that the Security Council and the Secretary General could establish the jurisdiction of the ICTY under premises other than existing customary international law, that the international criminal norms contained in the Statute had to be considered as a reflection of customary international law, unless contrary state practice proved otherwise.[424]

This assessment of the *Tadić* Trial Chamber judgement clearly demonstrates that there seem to be different methods or at least a different emphasis on methods applied by the Chamber for determining the customary law on the intent requirement of crimes against humanity. First, the Trial Chamber merely drew on interpretation for its conclusion that this prerequisite did not exist. However, the Chamber also looked for relevant customary international law to support its findings. Yet again, practice in this field was relatively scant and 'only' international treaty provisions of the post-World War II period provided some guidance. Nevertheless, the Tribunal held that findings refuting the customary lack of such a requirement had to be supported by 'judicial practice and evidence of state practice', i.e. evidence which it had not cited itself to establish the customary scope of crimes against humanity. Hence, the Chamber set a stricter benchmark for evidence that a custom did not exist than for its establishment.

b. The in whole or in part requirement of genocide

Another occasion which allowed the ICTY recourse to the method of interpretation is the discussion of the requirement 'in whole on in part' of the crime of genocide in the *Krstić* case. It is particularly striking that the trial chamber merely referred to the method of interpretation when assessing the objective of the requirement in the light of the object and purpose of the Tribunal's statute.[425] In particular, it took into account the evidence which it usually considered for an assessment of the applicable customary law. Consequently, it referred to the ILC Draft Code, the *Kayishema and Ruzindana* judgment of the ICTR and the final report of the Commission of Experts on the establishment of the ICTY Statute. Other sources considered were, for example, resolutions of the UNGA and the *Jorgic Case* of the German

[423] *Tadić* (n. 131) para. 290.
[424] *Tadić* (n. 131) para. 296.
[425] *Krstić* (n. 110) para. 590.

Federal Constitutional Court.[426] The Chamber thus concluded that destruction in part meant destruction of a distinct part of the group as opposed to an accumulation of individuals within it.[427] These findings, together with the elaborations of the *Jelisić* case on the customary international law content and character of the prohibition of genocide, have been followed by further trial chambers of the ICTY, such as in the *Sikirika*[428] and the *Jokić* cases.[429]

It is noteworthy that the methodology applied by the Chamber for the interpretation of the 'in whole or in part' requirement does not differ at all from that employed for an assessment of the applicable customary international law. Thus, the question remains: which criteria differentiate an interpretation of the existing law from the finding of (new) customary international law? On a cursory look at the 'evidence' considered, no objective differentiation between the methods seems possible. Further assessment will have to verify whether the case law of the ICTY will be able to shed some light on these uncertainties.

c. Articles 51 and 52 of AP I

The *Strugar* Trial Chamber judgment, as well as the *Strugar Decision on Defence Preliminary Motion Challenging Jurisdiction*[430] on the customary nature of Article 13 AP II and of Articles 51 and 52 of AP I, may be cited as another example of the international legal instrument approach explored earlier.[431] However, it is not easy to ascertain the methods applied by the *Strugar* trial chamber in order to prove the customary character of those provisions. On the contrary, the line of argument rather resembled the method of

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[426] *Krstić* (n. 110) para. 589.

[427] *Krstić* (n. 110) para. 590.

[428] *Sikirica*, Trial Chamber Judgment Case No.: IT-95-8-T, 3 September 2001, para. 55; compare further: *Krstić*, Appeals Chamber Judgment, Case No. IT-98-33-A, 19 April 2004, para. 224.

[429] *Jokić*, Trial Chamber Judgment, Case No. IT-02-60-T, 17 January 2005, para. 639; See para. 657 on the element 'to destroy' of the definition of genocide.

[430] *Strugar*, Decision on Defence Preliminary Motion Challenging Jurisdiction, Case No. IT 01-42-PT, 7 June 2002.

[431] The *Strugar* decision considered Articles 51 and 52 AP I to recite earlier codes, like the Hague Conventions of 1907 the prohibitions of which on attacks on civilians had been approved as early as in 1938 by a resolution of the League of Nations and thus qualified as customary international law. Further to that, it maintained that the UNGA in its resolution 2444 had also considered the rules to constitute general humanitarian principles, a view which had been confirmed by the ICJ in the *Nicaragua Case*. In the Court's view, the majority of states considered these principles to belong to the body of customary international law, at the time of negotiation. See *Strugar* (n. 430) para. 17-19.

interpretation. The chamber examined, in particular, the drafting history of APs I and II to the Geneva Conventions, which becomes obvious when one reads the final conclusion on the customary nature of the provisions. In the Court's view, the majority of states considered these principles to belong to the body of customary international law, *at the time of negotiation*.[432] Moreover, especially the conclusion that there was an *opinio juris* of states which made the provisions of Articles 51 and 52 customary in nature is an interpretation of the provisions of AP I following their object and purpose:

> The drafting history of the Additional Protocols also clearly indicates the *opinio juris* of the States. It leaves no doubt that Article 51 of Additional Protocol I entitled "Protection of the Civilian Population" and comprised of eight paragraphs provides for a customary principle of protection of civilians against armed conflict in its first paragraph.[433]

These findings were acknowledged by the Appeals Chamber in the *Strugar Decision on Interlocutory Appeal* of 22 November 2002.[434] Subsequently, the Trial Chamber in the *Galić* case proceeded in a similar manner when discussing the customary criminality of the terrorisation of a civilian population under the premises of Article 3 of the Court's Statute. Amongst others, it held that the *travaux préparatoires* relevant to Article 51 (2) of AP I to the Geneva Conventions provided a sufficient basis for proving its customary criminality.[435] However, the methods applied, including the reference to the drafting history of the provisions, as well as the assessment of their contextual meaning within the framework of the agreement, rather belong to the process of interpretation of legal norms.[436]

4. No differentiation between customary international law and analogy

The method of analogy, as stated earlier in this book, is, like interpretation, a method of expanding the scope of a certain legal rule to a different set of facts, initially not seen to be covered by the rule's requirements. However, contrary to any method concerned with the finding of new customary law, analogy requires an existing legal provision. Analogy and the methods

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[432] *Strugar* (n. 430) para. 19.

[433] *Ibid.*

[434] *Strugar*, Decision on Interlocutory Appeal, Case No. IT-01-42-AR-72, 22 November 2002, para. 10; the Appeals Chamber judgement of 17 July 2008, Case No. IT-01-42-A, did not discuss this issue any further.

[435] See *Galić*, Trial Chamber Judgment, Case No. IT-98-29-T, 5 December 2003, para. 93, 96, 103, 104.

[436] Nevertheless, the *Galić* findings were affirmed by subsequent case law of the ICTY. *See Milošević, Dragomir*, Trial Chamber Judgment, Case No. ICTY-98-29-1, 12 December 2007, para 944.

of investigating the formation of new customary law thus have some decisive differences. Sometimes, to the ICTY, these differences have not been so obvious.

Although the *Hadžihasanović Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility* has been mentioned in the context of the deductive method,[437] it is also relevant with regard to the method of analogy. Above all, the Appeals Chamber appeared to refer to this particular kind of reasoning when discussing whether the principle of command responsibility was applicable both to non-international and international armed conflict. Concerning the aforementioned question, the Appeals Chamber clarified that, for a certain principle to be part of customary international law, it had to be satisfied that the principle was supported by an *opinio juris*.[438] The customary law applicable to international armed conflict did not automatically extend to non-international armed conflict. Most importantly, however, the Chamber stated that a customary international law principle may apply to a particular situation if that "reasonably falls within the application of the principle."[439]

Here, in the midst of an assessment of the applicable customary law, the Court utilised legal reasoning, which resembles that of the method of analogy, by stating that an existing principle may also apply to a new factual situation if the situation 'reasonably' falls within the scope of the principle. Quite clearly, we are not dealing here with the Court's traditional method of custom assessment, which takes into account state practice and *opinio juris*.

VI. THE CASE LAW OF THE ICTR

In many ways, the jurisprudence of the ICTR on new customary international law resembles and complements the case law of the ICTY discussed in the preceding paragraphs. Nevertheless, there are certain peculiarities and differences in the approaches of the two tribunals towards the finding of new customary international law, which make it worthwhile to consider the case law of the ICTR in a different part of this book.

A. *International legal instruments approach*

One approach of the ICTR, which is certainly identical to one used by ICTY, is the 'international legal instruments approach'. In most cases, the ICTR

[437] *See* 220.
[438] *Hadžihasanović* (n. 414) para. 12.
[439] *Ibid.*

also refrained from differentiating the two elements of custom, *opinio juris* and state practice. Instead, it focussed in its assessment on the individual items of evidence of new customary rules available to it.

1. *Crimes against humanity and the fair trial principle*

One first area in which this international legal instruments approach has been applied is the law on crimes against humanity. The first ICTR judgement to rule on the evolution of crimes against humanity was the *Akayesu* Trial Chamber judgment, which depicted in great detail the history of the crime.[440] Its findings have subsequently been approved of in the *Kayishema and Ruzindana* Trial Chamber judgment.[441] Although they serve to underline the customary nature of crimes against humanity, both judgments do not explicitly declare the customary international law status of the crime.

Another judgment which drew on international legal instruments is the *Kajijeli* Appeals judgment. It referred, amongst others, to the International Covenant on Civil and Political Rights as 'persuasive authrotiy and evidence of international custom'.[442]

2. *Widespread and systematic attack*

The ICTR discussed quite extensively the criterion of a widespread and systematic attack as part of a crime against humanity and the question of its customary character.[443] The whole reason behind all arguments exchanged on this matter is two different wordings of the ICTR Statute. As the *Kamuhanda* Trial Chamber judgment explained, the French version of the Statute speaks of the requirement for a widespread *and* systematic attack, whereas the English version requires a widespread *or* systematic attack. [444] While earlier judgments of the Court, like the *Akayesu* judgment, merely stated that the attack need not be systematic and widespread,[445] later judgments tried

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[440] *Akayesu*, Trial Chamber Judgment, Case No.: ICTR-96-4-T, 2 September 1998, para. 565.

[441] *Kayishema and Ruzindana*, Trial Chamber Judgment, Case No.: ICTR- 95-1-T, 21 May 1999, para. 121.

[442] *Kajijeli*, Appeals Chamber Judgment, Case No.: ICTR-98-44-A, 23 May 2005, para 209.

[443] Although the *Blaškić* Trial Chamber Judgment considered the customary character of the element of a widespread and systematic attack as well (See *Blaškić*, Trial Chamber Judgment, Case No.: IT-95-14-A, 3 March 2000, para. 201), the Trial Chamber approved of the findings of the ICTR only in *Akayesu* and *Kayishema and Ruzindana*.

[444] *Kamuhanda*, Trial Chamber Judgment, ICTR-95-54A-T, 22 January 2004, para. 662.

[445] *Akayesu*, Trial Chamber Judgment, Case No.: ICTR-96-4-T, 2 September 1998, para. 579.

to support this finding by consulting the requirements of crimes against humanity in customary international law.

The first judgment which assessed the customary character of 'widespread and systematic' was the *Kayishema and Ruzindana* Trial Chamber judgment. In this case the Court argued that customary international law required that crimes against humanity were committed pursuant to an action or policy of a state.[446] The ICTR derived this from the law as laid down in the ILC Draft Code of Crimes, which stated that crimes against humanity were inhumane acts "instigated or directed by a Government or by any organisation or group".[447] The Court also referred to the work of the ILC, which had held that the plan was an inherent element of crimes against humanity and that all the events where a private person acted on his own initiative would not fall into the scope of the crime.[448]

Subsequent case law of the ICTR affirmed these findings.[449] Amongst others, reference was made to the findings of the ICTY in the *Tadić Case*, which had held that the requirement of a widespread or systematic attack was an element of crimes against humanity in customary international law.[450]

This rather short overview of the methodology used by the ICTR paints a generic picture of the overall approach of the Tribunal to the assessment of customary international law. The ICTR does not provide us with a detailed analysis of the available evidence to prove the existence of a customary norm. Rather, it supports its arguments by referring to the existing case law of the ICTY.

Moreover, as in the present case, the reflection of norms of customary international law in the ILC Draft Code of Crimes seemed to suffice regarding a certain norm as established in customary international law. However, was shown earlier, the work of the ILC has to be considered cautiously. According to Article 13 (1) (a) of the UN Charter, the Commission has the task of codifying *and developing* existing customary international law. Hence, mere reference to its work will usually not be enough to provide evidence of an existing norm of customary international law.

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[446] *Kayishema and Ruzindana*, Trial Chamber Judgment, Case No.: ICTR- 95-1-T, 21 May 1999, para. 125.

[447] ILC Draft Code of Crimes against Peace and Security of Mankind (1996), Article 18, in *C. Van den Wyngaert* (International Criminal Law) 215ff.

[448] *Kayishema and Ruzindana*, Trial Chamber Judgment, Case No.: ICTR- 95-1-T, 21 May 1999, para. 125; ILC Draft Code of Crimes against Peace and Security of Mankind, Commentary, Art. 18, para. 5.

[449] *Rutaganda*, Trial Chamber Judgment, Case No. ICTR-96-3-T, 6 December 1999, paras. 68; *Musema*, Trial Chamber Judgment, Case No. ICTR-96-13, 27 January 2000, para. 203.

[450] *Semanza*, Trial Chamber Judgment, ICTR-97-20-T, 15 March 2003, para. 328.

B. *Blurring of interpretation and custom*

1. *Discriminatory intent requirement*

Judgments of the ICTR concerning the discriminatory intent requirement mainly revolved around the question whether this prerequisite actually existed in customary international law, or whether it was stipulated only by the Statute of the Court. With reference to that matter, the *Akayesu* Appeals Chamber judgment pointed to some important differences which have to be borne in mind when considering the case law of the ICTR and the ICTY. It stated that the Statutes of ICTY and ICTR differed with regard to the requirement of discriminatory grounds underlying the commission of crimes against humanity. Therefore, the Chamber held, judgments of the ICTY could not be consulted to determine the prerequisites of crimes against humanity under the ICTR Statute.[451] It went on to determine that the ICTR Statute had to be interpreted "according to the intent of the lawmaker", i.e. the Security Council,[452] which had decided to restrict jurisdiction of the ICTR over crimes against humanity "to cases where they were committed on discriminatory grounds."[453] Accordingly, the Tribunal's jurisdiction was limited to a particular group of crimes against humanity which was narrower than current customary international law.[454] However, the Chamber concluded that apart from this restriction, customary international law on crimes against humanity did not require them to be committed with discriminatory intent. Only the case of prosecution was an exception to this rule.[455]

These findings have become an accepted part of the Tribunal's jurisprudence.[456] They seem to rest on a literal and teleological interpretation of the Statute according to the will of its 'lawmaker', the Security Council. As the cases reflect, the Security Council provided for the Tribunal's jurisdiction to be narrower than existing customary law on this crime. Yet, the customary scope of the crime was only stipulated, without providing evidence of either *opinio juris* or state practice.

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[451] *Akayesu*, Appeals Chamber Judgment, Case No. ICTR-96-4-A, 1 June 2001, para. 462.
[452] *Akayesu* (n. 451) para. 463.
[453] *Akayesu* (n. 451) para. 464.
[454] *Akayesu* (n. 451) para. 465.
[455] *Akayesu* (n. 451) para. 467.
[456] *Musema*, Trial Chamber Judgment, Case No. ICTR-96-13-A 27 January 2000, para. 211; *Bagilishema*, Trial Chamber Judgment ICTR-95-1A-T, 7 June 2001, para. 81; *Kamuhanda*, Trial Chamber Judgment, ICTR-95-54A-T, 22 January 2004, para. 672.

2. *Murder*

As with the debate on the widespread and systematic requirement of crimes against humanity, discussion in the chambers of the ICTR – and the ICTY – on the elements of murder found its basis in deviations between the various language versions of the ICTR Statute. Whereas the French version described "assassinat" as a crime against humanity, the English translation regarded "murder" as the relevant crime. Yet, as the ICTR pointed out, the French term 'assassinat' generally describes a specific form of murder requiring premeditation, which is more precise than the English reference to murder, which can include premeditated as well as unintentional killings.[457]

The *Akayesu* judgment stipulated accordingly – although without referring to further evidence in this matter – that there must be an error in translation.[458] It held: "customary international law dictates that it is the act of "murder" which constitutes a crime against humanity and not "assassinat".[459] The ICTY Trial Chamber in the *Jelisić Case* merely confirmed these findings, without discussing the differences in the ICTR Statute any further.[460] From then on, the case law of the ICTY has constantly reinforced the individual criminality ensuing from acts of murder and cruel treatment.[461]

Nonetheless, the question was taken up once again by the ICTR in *Kayishema and Ruzindana*, in which it concluded that the higher standard of 'assassinat' had to be determinative for the elements of the crime.[462] It held that this followed from an interpretation of the will of the drafters of the Statute.

Faced with the divergent views expressed in the *Kayishema and Ruzindana* judgment and the *Akayesu Case*, the *Semanza* Trial Chamber had to reassess the different language versions of 'murder' and 'assassinat'. The Chamber interpreted the ICTR Statute according to its ordinary meaning. It pointed out that this principle of interpretation could be applied to the case as it had already been laid down in Article 33 (4) VCT. [463] The Chamber finally concluded that "in the absence of express authority in the Statute or in customary international law, international criminal liability should be ascribed only

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[457] *Semanza*, Trial Chamber Judgment, ICTR-97-20-T, 15 March 2003, para. 337.
[458] *Akayesu*, Trial Chamber Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 588.
[459] *Ibid.*
[460] *Jelisić*, Trial Chamber Judgment, Case No. IT-95-10-T, 14 December 1999, para. 51.
[461] For a recent example see *Oric*, Trial Chamber Judgment, 30 June 2006, Case No. ICTY IT-03-68-T, para. 261.
[462] *Kayishema and Ruzindana*, Case No. ICTR-95-1-T, 21 May 1999, para. 138.
[463] *Semanza*, Trial Chamber Judgment, ICTR-97-20-T, 15 March 2003, para. 336.

on the basis of intentional conduct."[464] Thus, 'assassinat' had to be considered as decisive for a killing to constitute a crime against humanity.[465]

The discussion of murder as a crime against humanity represents a case which clearly shows the deficiencies which arise if the elements of a crime are too quickly determined according to the alleged dictates of customary international law. Whereas the *Akayesu* judgment – without further consideration or assessment of its development – merely stated that 'customary international law' required the application of the requirements for the English 'murder', the *Semanza* Trial Chamber judgment utilised the full means of treaty interpretation to arrive at the contrary conclusion – and without having to consult customary international law. Simple logic teaches us that the *Semanza* judgment went the right way: it dealt with the problem where it had occurred, namely in treaty interpretation. The two conflicting translations of a treaty, i.e. the Statute of the ICTR, required to be reconciled. Nothing is more basic than to interpret a text according to its ordinary meaning. Even worse, customary international law, if it exists on the issue at hand, may still differ from the will of the drafter of the Statute. Moreover, as has indeed frequently been emphasised with regard to the Statutes of the ICTY and the ICTR, custom may also provide a narrower interpretation of the text than was originally intended.[466]

3. *Rape*

Although the ICTR in its *Akayesu* judgment provided the definition of rape which was later relied on by the ICTY, the Trial Chamber did not discuss or define the crime under customary international law. The Chamber first discussed rape in the context of the crime of genocide.[467] It held that acts of rape can amount to genocide to the same extent as any other act of genocide.[468] Within the context of crimes against humanity, the *Akayesu* Trial Chamber assessed rape by comparing its gravity to acts of torture; an approach which the Tribunal considered "more useful in the context of international law".[469] The following description has become a prominent definition of the nature of the crime:[470]

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[464] *Semanza* (n. 457) para. 341.
[465] *Semanza* (n. 457) para. 337.
[466] See *Kayishema and Ruzindana*, Trial Chamber Judgment, Case No. ICTR-95-1-T, 21 May 1999, para. 138.
[467] *Akayesu*, Trial Chamber Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 731.
[468] *Akayesu* (n. 467) para. 731.
[469] *Akayesu* (n. 467) para. 687.
[470] See *I. Bantekas* (International Criminal Law) 366.

> Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[471]

However, this description of the crime's nature as well as its subsequent definition in paragraph 598 of the judgment does not rely at all on customary international law. Rather, it seems to have been derived from an interpretation of the Statute according to its object and purpose, as the Tribunal did not refer to any evidentiary sources which could have proven its customary definition.

The findings of the *Akayesu* Trial Chamber judgment were affirmed by all subsequent judgments of the ICTR dealing with the crime of rape.[472] Nonetheless, the *Musema* Trial Chamber, for example, pointed to the case law of the ICTY which led it to conclude that a conceptual definition of the crime would be more adequate, "[i]n light of the dynamic ongoing evolution of the understanding of rape and the incorporation of this understanding into principles of international law."[473] The *Kamuhanda* Trial Chamber proceeded similarly.[474]

4. *Complicity in genocide*

The *Akayesu* Trial Chamber judgment discussed the criminality and prerequisites of complicity in genocide using arguments similar to those employed when defining rape. Nonetheless, although the Trial Chamber and also subsequent judgments[475] referred to the same evidence from which the ICTY frequently deduced the customary international law character of a certain norm, it seemed to use this evidence to interpret the particular norm in question rather than to prove its customary character. Accordingly, it considered the Nuremberg judgments to prove the criminality of complicity in genocide[476] and assessed individual elements of acts of complicity by considering their definition in Common Law or in Civil Law systems.[477] Moreover,

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[471] *Akayesu*, Trial Chamber Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 687.

[472] See *Musema*, Trial Chamber Judgment, Case No. ICTR-96-13-A, 27 January 2000, para. 228; *Semanza*, Trial Chamber Judgment, ICTR-97-20-T, 15 March 2003, para. 344; *Kamuhanda*, Trial Chamber Judgment, ICTR-95-54A-T, 22 January 2004, para. 707.

[473] *Musema*, Trial Chamber Judgment, Case No. ICTR-96-13-A, 27 January 2000, para. 228.

[474] *Kamuhanda*, Trial Chamber Judgment,ICTR-95-54A-T, 22 January 2004, para. 707.

[475] *Musema*, Trial Chamber Judgment, Case No. ICTR-96-13-A, 27 January 2000, paras. 186, 187.

[476] *Akayesu*, Trial Chamber Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 525.

[477] *Akayesu* (n. 476) para. 535.

the Trial Chamber considered the case law of the IMT in Nuremberg[478] and the ILC Draft Code of Crimes to define its individual elements.[479]

5. *Command responsibility*

Although the definition of superior responsibility in Article 6 (3) of the ICTR Statute would have been the classic example of the application of the principle in non-international armed conflict, the case law of the ICTY referred neither to this provision nor to the corresponding case law of the ICTR. The ICTR, on the other hand, indeed cited some of the ICTY decisions on command responsibility and took the Tribunal's findings as guidelines for its own jurisdiction.

One of the judgments representative of this approach is the *Kayishema and Ruzindana* judgment. It considered the principle of command responsibility to be "firmly established" in customary international law, since it had been delineated by several judgments of the ICTY.[480] With respect to its application to the conflict in Rwanda, the Trial Chamber explained that 'a doctrine which pierces the veils of formalism'[481] had to be applied. Thus, following its view, both the factual and *de jure* command of the accused had to be considered.[482] According to the Chamber, these findings were supported by the latest codification of the principle in Article 28 of the ICC Statute, which held that 'all other superiors shall be criminally responsible for acts 'committed by subordinates under his or her effective control'.[483]

The *Musema* judgement also discussed the evolution of superior responsibility. It pointed to the development of this principle in the Nuremberg judgments[484] and acknowledged that the principle had been recognised in the commentaries of the ICRC on the Geneva Conventions and their Additional Protocols. In this respect, the Court explained that the ICRC commentaries had to be understood as legal opinion setting out existing standards in international law.[485] The recent *Muvunyi* Trial Chamber judgment argued

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[478] *Akayesu* (n. 476) para. 553.
[479] *Akayesu* (n. 476) para. 556.
[480] *Čelebići*, Trial Chamber Judgment, Case No. IT-96-21-T, 26 November 1998, paras. 333–343.
[481] *Kayishema and Ruzindana*, Case No. ICTR-95-1-T, 21 May 1999, para. 217, 218.
[482] *Ibid.*
[483] *Kayishema and Ruzindana* (n. 481) para. 221.
[484] *Musema*, Trial Chamber Judgment, Case No. ICTR-96-13-A, 27 January 2000, para. 128.
[485] *Musema* (n. 484) para. 130.

similarly, combining the ICTR's arguments in both the *Kayishema and Ruzindana* and the *Musema* judgments.[486]

Moreover, the *Musema* Trial Chamber judgment considered the responsibility of civilian superiors. It pointed out that the *Muto* judgment of the IMT in Tokyo had already defined the criterion for the responsibility of civilian superiors, namely the exercise of *de facto* authority.[487] In its view, further evidence for the responsibility of civilian superiors could be derived from the codification of the principle of command responsibility in Article 86 (2) AP I and from the commentary of the ICRC on that Article.[488] These findings were reaffirmed and upheld in subsequent judgments of the Tribunal.[489]

Although the case law of the ICTR acknowledges the customary character of the principle of command responsibility, it is not directed towards a scrutiny of the principle's gradual crystallisation as a *customary* rule: most of the time, it takes the case law of the ICTY on this issue as its major point of reference and adds certain evidence in order to support this contention. For example, concerning the responsibility of civilian superiors, which cannot be derived directly from Article 6 (1) of the ICTR Statute, the *Musema* Trial Chamber did not classify the principles found as belonging to customary international law. Nevertheless, it referred to the very same evidence which, before the ICTY, had served to determine the character of a norm of customary international law. Hence, there is no accurate distinction between the method of interpretation and methods related to the finding of new customary rules.

C. *Common sense approach*

As regards the identification of new customary rules of international criminal law, the ICTR has adopted a particularly pragmatic approach. It is not so much concerned with complying with the demands of methodology, but with coping with the peculiarities which have arisen in cases before it. This is why the approach, particularly adapted to the specialities of each individual case before the Tribunal, has been named a 'common sense approach'. Though it very much resembles the interpretative approach described before,

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[486] *Muvunyi*, Trial Chamber Judgment, Case No. ICTR-00-55A-T, 12 September 2006, para. 473.

[487] *Musema* (n. 484) paras. 141–143.

[488] *Musema* (n. 484) para. 145, note 16.

[489] *Bagilishema*, Trial Chamber Judgment, Case No. ICTR-95-1A-T, 7 June 2001, para. 144; *Kamuhanda*, Trial Chamber Judgment, Case No. ICTR-95-54A-T, 22 January 2004, para. 601.

it is the 'case-by-case' basis which best characterises the proceedings of the ICTR with regard to the identification of new customary norms in its jurisdiction.

1. *Extermination*

The first case which reveals the particular pragmatism of the ICTR is the *Akayesu* Trial Chamber judgment, which offered a first definition of the crime of extermination. However, the judgment did not explicitly refer to the customary character of the crime. Neither did it explicitly refer to the source of custom when defining its individual elements.[490] Nonetheless, with regard to the criminality of extermination under international law, the Trial Chamber cited Article 7 (2) (b) of the ICC Statute, obviously considering it to be representative of legal views.[491] Subsequent judgments of the ICTR, like the *Kayishema and Ruzindana* judgment, merely adopted the definition of the *Akayesu* Trial Chamber without further examining the customary definition or character of the crime. In the *Kayishema and Ruzindana* case, the Trial Chamber just quoted Bassiouni, who had provided a similar definition of extermination to that contained in the *Akayesu* judgement.[492] Bassiouni had characterised extermination as follows:

> [E]xtermination implies both intentional and unintentional killing. The reason for the latter is that mass killing of a group of people involves planning and implementation by a number of persons who, though knowing and wanting the intended result, may not necessarily know their victims. Furthermore, such persons may not necessarily perform the *actus reus* which produced the deaths, nor have specific intent toward a particular victim.[493]

The *Bagilishema* Trial Chamber judgment, on the other hand, remarked that there was little case law which determined the essential elements of the crime of extermination.[494] Nevertheless, it suggested an assessment of the individual requirements of extermination "on a case-by-case basis using a common-sense approach."[495] This 'common-sense approach' towards acts of extermination has been repeatedly referred to, even in more recent judge-

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[490] *Akayesu*, Trial Chamber Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 592.
[491] *Kayishema and Ruzindana*, Trial Chamber Judgment, Case No. ICTR-95-1-T, 21 May 1999, Para. 143.
[492] *Ibid.*
[493] *M. Cherif Bassiouni* (Crimes 1999) 291.
[494] *Bagilishema*, Trial Chamber Judgment ICTR-95-1A-T, 7 June 2001, para. 86, 87.
[495] *Ibid.*

ments of the Tribunal.[496] The subsequent *Semanza* Trial Chamber judgment finally admitted that *no* "express authority" on extermination existed "in the Statute or in customary international law".[497] It thus held that in the absence of customary guidelines only intentional conduct could qualify as extermination. However, this was not taken up in the subsequent case law of the Tribunal.[498]

As the case law examined demonstrates quite clearly, customary international law on the law of extermination is almost non-existent. Nevertheless, it is interesting to note the explicitly pragmatic approach of the Tribunal to the crime's definition. The *Kamuhanda* and *Bagilishema* Trial Chambers stated the need to apply a 'common-sense approach' when dealing with the prerequisites of extermination. As will be seen from further case law of the ICTR, this may adequately characterise the whole methodological approach of this Tribunal towards customary international law.

2. *Other inhumane acts*

The case law of the ICTR on other inhumane acts also obviously reflects the methodological pragmatism of this tribunal. On a general level, it may be said that the Tribunal simply reiterated its suggestion that the individual content of an international crime be determined on a 'case-by-case' basis. At least, this procedure has been suggested for the determination of the individual acts which qualify as other inhumane acts.[499]

The crime had first been discussed in the *Kayishema and Ruzindana* Trial Chamber judgments, which reaffirmed once again that this category of crimes against humanity had already been in existence since the Nuremberg judgment.[500] Furthermore, it held that the ILC commentary on its Draft Code of Crimes had mentioned other inhumane acts in crimes against humanity. In addition to this, the *Musema* Trial Chamber judgment determined that certain individual acts may be considered punishable as crimes against humanity according to their definition in the ICC Statute.[501]

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[496] *Kamuhanda*, Trial Chamber Judgment, ICTR-95-54A-T, 22 January 2004, para. 692.

[497] *Semanza*, Trial Chamber Judgment, ICTR-97-20-T, 15 March 2003, para. 341.

[498] *Kamuhanda*, Trial Chamber Judgment, ICTR-95-54A-T, 22 January 2004, para. 695, referring to the *Bagilishema*, Kayishema and Ruzindana cases.

[499] See *Kayishema and Ruzindana*, Case No. ICTR-95-1-T, 21 May 1999, para. 151; *Musema*, Trial Chamber Judgment, Case No. ICTR-96-13-A, 27 January 2000, para. 233; *Bagilishema*, Trial Chamber Judgment ICTR-95-1A-T, 7 June 2001, para. 91.

[500] *Kayishema and Ruzindana*, Case No. ICTR-95-1-T, 21 May 1999, para. 149.

[501] See Article 7 (1) (k) Rome Statute for an International Criminal Court, *Musema*, Trial Chamber Judgment, Case No. ICTR-96-13-A 27 January 2000, para. 233.

Following these findings, it may further be concluded that the ICTR – from an overall perspective – follows a rather interpretative approach with regard to the definition of particular crimes within the scope of its Statute. Hence the reference to the historical evolution of this category of crimes, as well as to its definition in the ICC Statute.

D. *Deductive approach*

Despite the pragmatism prevailing in the case law of the ICTR, there are also some cases where the Tribunal adopted the deductive approach, which has already been identified as a regular approach both of the ICJ and the ICTY to identifying the emergence of new customary rules of international humanitarian law. They will be discussed in the following paragraphs.

1. *The customary international law character of the prohibition of genocide, acts of complicity and public incitement to genocide*

The crime of genocide clearly plays the central role in the case law of the ICTR. However, the findings of the Tribunal in this field concentrate on a definition of its substantive elements, rather than on an assessment of its customary character. For example, the *Akayesu* judgment merely affirmed the customary nature of the prohibition of genocide as contained in the Genocide Convention.[502] To this end, it referred back to the ICJ's *Genocide Advisory Opinion* and to the report of the Security Council establishing the ICTY.[503] It noted that Rwanda had ratified the Genocide Convention long before 1994; hence its provisions could apply as a matter of treaty law.[504]

The ICTR's *Serushago* judgment is one of the few judgments which reflect some tendency of the ICTR to adopt the 'core rights' approach of the ICTY in cases tackling particularly severe international crimes. Thus, to underline the particular heinousness of these crimes, it emphasised that genocide and crimes against humanity "particularly shock the collective conscience".[505] The *Kayishema and Ruzindana* decision and subsequent judgments also stressed the wide acceptance of the Genocide Convention as an "international human rights instrument" and the *jus cogens* character of the prohibition.[506]

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[502] *Akayesu*, Trial Chamber Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 495.
[503] *Ibid.*
[504] *Akayesu* (n. 502) para. 496.
[505] *Serushago*, Sentencing Judgment, Case No.: ICTR 98-39-S, 5 February 1999, para. 14.
[506] *Kayishema and Ruzindana*, Case No. ICTR-95-1-T, 21 May 1999, para. 88; *E. & G. Ntakirutimana*, Judgment and Sentence, Case No.: ICTR-96-10, ICTR-96-17-T, 21 Febru-

Later on, the *Rwamakuba* Trial and Appeals Chamber judgments[507] underlined that the customary nature of the prohibition had to be derived from the recognition of the crime of genocide in the UNGA Declaration on the Punishment of Genocide. The Appeals Chamber held:

> The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition of genocide as an international crime is persuasive evidence of the fact.[508]

To date, the findings of the *Serushago*, *Kayishema and Ruzindana* and *Rwamakuba* cases on the customary international law character of the crime of genocide are possibly the most explicit in the jurisprudence of the ICTR. They are characterised by two approaches: on the one hand, they underline the particular importance and heinousness of the crime of genocide, which has contributed to its international condemnation and acceptance as an international crime, thus underlining the so-called 'core rights' approach of the Tribunal. On the other hand, they emphasise the important aspect that at the time of the Nuremberg judgments the crime of genocide did not exist as a separate offence; at least it did not contain the same prerequisites which were later accepted in the Genocide Convention. Hence, the Chamber concluded correctly that evidence of its customary character could not be derived from the Nuremberg trials alone.[509]

2. *Individual criminal responsibility*

In contrast to the ample case law of the ICTY concerning the matter of individual criminal responsibility, the case law of the ICTR is relatively scanty on that issue. Until September 2006, only the *Bagilishema* Trial Chamber judgment had provided a few findings on its customary character.[510] Nonetheless, the recent *Muvunyi* Trial Chamber decision explicitly affirmed that "the principle of individual responsibility for serious violations of international law, affirmed in Article 6 (1) of the Statute, is reflective of customary international law."[511] Referring to the ICTY's *Čelebići* Trial Chamber judgment,

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ary 2003, para. 858; *Kamuhanda*, Trial Chamber Judgment, ICTR-95-54A-T, 22 January 2004, para. 621.

[507] *Rwamakuba*, Appeals Chamber Decision on Interlocutory Appeal on Joint Criminal Enterprise, Case No.: ICTR-98-44-AR72.4, 22 October 2004, FN 37.

[508] *Ibid.*

[509] *Rwamakuba* (n. 507) para. 15.

[510] *Bagilishema*, Trial Chamber Judgment, Case No.: ICTR-95-1A-T, 7 June 2001, para. 142.

[511] *Muvunyi*, Trial Chamber Judgment, Case No.: ICTR-00-55A-T, 12 September 2006, para. 459.

the Versailles Treaty and the judgements of Nuremberg and Tokyo, the Chamber stated that only by making individuals directly responsible under international law, "can the fundamental values of international law have meaning and efficacy."[512] Such reasoning demonstrates, yet again, that the 'core rights' approach to the formation of new customary rules remains influential, even in the case law of the ICTR.

3. *Joint criminal enterprise liability*

Despite the foregoing findings, one further focal point of the Tribunal clearly lies on joint criminal enterprise liability. The discussion of this principle constitutes another area of law where the ICTR assessed the development of customary norms in greater detail.

The *Karemera et al.*, Trial Chamber decision is the first ICTR judgment which focused intently on the customary international law character of joint criminal enterprise liability.[513] As its criminality had already been confirmed by the findings of the ICTY in the *Čelebići Case*,[514] the Chamber focused mainly upon the application of this principle to non-international armed conflict. Thus, after an assessment of the object and purpose of the ICTR Statute, as well as of the general structure of international crimes,[515] the Trial Chamber found that it was "uncontested" that "customary international law imposed individual criminal responsibility for serious violations of international humanitarian law committed in the course of internal armed conflicts."[516] In the Chamber's view, the application of joint criminal enterprise liability to non-international armed conflict was further evidenced by the particular gravity of the crime. It stated that the crime was the same, whether committed in a non-international or an international armed conflict.[517] The Tribunal further cited the *Tadić Case*, which had deduced the applicability of

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[512] *Muvunyi*, Trial Chamber Judgment, Case No.: ICTR-00-55A-T, 12 September 2006, para. 459.

[513] Before, only the *Kayishema and Ruzindana* Judgment had affirmed the criminality of this type of individual criminal responsibility. See *Kayishema and Ruzindana*, Case No. ICTR-95-1-T, 21 May 1999, para. 193; further: *Karemera et. al.*, Decision on the Preliminary Motions by the Defence of Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera, André Rwamakuba, Challenging Jurisdiction in Relation to Joint Criminal Enterprise, Case No.ICTR-98-44-T, 11 May 2004, para. 140.

[514] *Supra* 226ff.

[515] *Karemera et. al.*, Decision on the Preliminary Motions by the Defence of Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera, André Rwamakuba, Challenging Jurisdiction in Relation to Joint Criminal Enterprise, Case No. ICTR-98-44-T, 11 May 2004, para. 36.

[516] *Karemera et al.* (n. 515) para. 35.

[517] *Karemera et al.* (n. 515) para. 36.

joint criminal enterprise liability from the structure of international crimes.[518] It also contended that the *Hadžihasanović* Appeal decision had determined that a principle of international law could be extended to a new situation if that situation reasonably fell within the principle's scope.[519] Thus, after all, the Chamber felt sufficiently confident to conclude that joint criminal enterprise liability applied to non-international and international armed conflict alike as a matter of customary international law.[520]

The *Rwamakuba Interlocutory Appeal*, on the other hand, assessed the customary character of the principle of joint criminal enterprise liability only. Following the reasoning of the *Tadić Appeals Chamber* judgment,[521] it considered the customary principle of joint criminal enterprise liability to be evidenced by "the recognition of that mode of liability in prosecutions for crimes against humanity and war crimes following World War II."[522] Finally, it maintained that the *travaux préparatoires* to the Genocide Convention affirmed the customary character of this principle.[523]

This judgment is probably the only ICTR decision which explicitly assessed the formation of a principle of customary international law within the scope of its jurisdiction. However, it referred mainly to judgments of the ICTY which had dealt with the same issue and to the trials of German war criminals after World War II. Consequently, it underlines and supports the ICTY's general approach to custom, which tries to evidence the formation of a principle mainly by relying on international instruments and international case law.

VII. CONCLUSIONS ON THE JURISPRUDENCE OF THE ICTY AND THE ICTR ON CUSTOMARY INTERNATIONAL LAW

A. *Determining agencies*

Our assessment of the case law of the ICTY and the ICTR has revealed that both tribunals referred to a multitude of determining agencies evidencing the formation of a new rule of customary international law. They constitute

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[518] *Karemera et al.* (n. 515) para. 36.
[519] *Karemera et al.* (n. 515) para. 37.
[520] *Karemera et al.* (n. 515) para. 38.
[521] *Rwamakuba*, Appeals Chamber Decision on Interlocutory Appeal on Joint Criminal Enterprise, ICTR-98-44-AR72.4, 22 October 2004, para. 14.
[522] *Rwamakuba* (n. 521) para. 14.
[523] *Rwamakuba* (n. 521) para. 28.

the ingredients of any assessment of new customary law. Amongst the indicia mentioned by the ICTY and ICTR are the trials of major war criminals at Nuremberg and Tokyo, the trials of military tribunals established under Control Council Law No. 10 by the occupying powers in Germany in their respective zones, national case law concerning the prosecution of international crimes, such as the *Eichmann* and the *Jorgic* cases, the case law of international human rights courts, the ILC Draft Code of Crimes, international treaties, and in particular, the Rome Statute, the case-law of the ICTY and ICTR and the military practice of states as described in their military manuals. Yet this evidence lists a number of sources which, following a classical conception of the constituent elements of customary international law,[524] can hardly serve as evidence of a customary rule.

1. *The Nuremberg trials, the case law of the ICJ, and the case law of the ICTY and ICTR*

Neither the judgments delivered at Nuremberg nor those of the ICJ, ICTY and the ICTR can count as evidence of state practice or *opinio juris* proper. They are judgments of international courts, and not of the states which consented in their establishment. This applies to the ICTY and ICTR as well as to the International Military Tribunals for Nuremberg and Tokyo. The Tribunals sitting at Nuremberg and Tokyo were international courts established by the Allied powers on the basis of the Moscow Declaration of 1943, and the London Agreement of 8. August 1945.[525] Their statutes found recognition in the Nuremberg principles adopted in 1950 by the ILC and the UNGA.[526] Hence, there can be no doubt about their international legitimacy. The international character of the ICJ, ICTY and ICTR is evident. Yet the judgments delivered at Nuremberg, Tokyo and by the three courts at the Hague express the views of their members, only. By virtue of the independence given to

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[524] Such a classical conception of customary international law is reflected in the two-element approach, or in one element approaches which are based on a positivist conception of customary international law, or any other positivist approach.

[525] Joint Four Nation Declaration, Moscow, October 1943 at: http://avalon.law.yale.edu/wwii/moscow.asp; Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Crininals of the European Axis (London Agreement), 8. August 1945 http://avalon.law.yale.edu/imt/imtchart.asp (both last visited 17 November 2009).

[526] See: UNGA, Resolution 95 (I) 11 December 1946; UNGA, Resolution 177 (II), 21 November 1947; ILC, Report of the International Law Commission covering its Second Session, 5 June – 29 July 1950, Document A/1316.

them, the judges express their own view on the law applicable to the case before them and not the view of the states which established the court they are sitting in, of which they are national.

Hence, international judgments provide only an indirect indication of the formation of new customary rules. This has also been recognised by the ICRC in its study on customary international humanitarian law, where it argued that 'a finding by an international court that a rule of customary international law exists constitues 'persuasive evidence to that effect'.[527]

2. *The case law of the military tribunals established after World War II and national case law concerning international crimes*

Strictly speaking, it is also difficult to attribute the case law of the trials of the military tribunals established after World War II, as well as of national courts punishing major international crimes, to a particular state. One major reason is that court judgments belong to the judiciary of a state and not to their executive. Acts or views of a state which are relevant at international level, however, are mostly executed or expressed through its executive. If the principle of separation of powers is effective, the judiciary is independent from the other powers and may thus give individual opinions which may not reflect the internationally relevant *opinio juris* of the state proper.

3. *The ILC Draft Code of Crimes*

In the course of the analysis of the case law of the ICTY, it has already been pointed out that the ILC Draft Code may not be referred to as an international legal instrument indicative of the legal views of states. Rather, it is an instrument which is indicative of the views of eminent scholars of international law. The recommendatory nature of the work of the ILC is also reflected in its mission, which is progressively to develop international law, and not just to state the current status of international law.

4. *International treaties and UNGA resolutions*

International treaties as well as resolutions of the UNGA or other international organisations, on the other hand, may well set out the practice, as well as/or the *opinio juris* of states.[528] However, they may not evidence the

[527] *ICRC, Customary International Humanitarian Law*, vol. 1, xxxiv.
[528] *Nicaragua Case* (chapter 4, n. 156) para. 188, 189.

customary character of a rule of the treaty on their own. Usually, additional evidence is needed in order to prove whether a particular rule has already become part of the accepted canon of international rules.[529] Consequently, resolutions of international organisations constitute the same type of persuasive evidence as international court judgments.[530]

5. *Military manuals*

Military manuals, by contrast, are one of the most important pieces of evidence of state practice and opinio juris when establishing the customary character of rules of international humanitarian law.[531]

6. *ICRC opinions*

It is particularly striking that among the evidence considered for the formation of a new norm of customary international law were the opinions expressed by the ICRC. Despite being the most important non-governmental organisation in the field of international humanitarian law with recognised status under the Geneva Conventions,[532] it still remains a so-called non-state actor. Hence, following a classical conception, its views may not be considered to evidence either element of custom. Nevertheless, as was outlined earlier, its writings and findings were regarded as 'international practice' in the customary process by the *Tadić* Interlocutory Appeals decision[533] and have been referred to in various other judgements of ICTY and ICTR.[534]

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[529] *Nicaragua Case*, Jurisdiction of the Court and Admissibility of the Application, ICJ Reports 1984, 424, para. 73.

[530] *M. Bothe*, 5 (2008) YBIHL, 159.

[531] *Tadić*, Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995 para. 99.

[532] Article 125 GC III. On the functions and tasks of the ICRC within the framework of the Geneva Conventions see Articles 3 (2), 9, 10, 11, 22 GCI, Articles 3 (2), 9, 10, 11 GC II; Articles 3 (2), 9, 10, 11, 56, 72, 73, 75, 79, 81, 123, 125, 126 GCIII; Articles 3 (2), 10, 11, 14, 30, 59, 61, 76, 96, 102, 104, 108, 109, 111, 140, 142 GC IV; Articles 5 (3), (4), 6 (3), 33 (3), 78 (3), 81 (1), 97, 98 AP I.

[533] *Tadić* (n. 531) para. 109.

[534] *Čelebići*, Appeals Chamber Judgment, Case No. IT-96-21-A, 20 February 2001, para. 143, 145; *Akayesu*, Appeals Chamber Judgment, Case No. ICTR-96-4-A, 1 June 2001, para. 442; Kayishema and Ruzindana, Trial Chamber Judgment, Case No. ICTR-95-1-T, 21 May 1999, para. 165.

7. *Assessment*

The assessment above shows that-at least from a classical viewpoint on customary international law-some paradigm shift has taken place in the investigation of the formation of a new norm of customary international law by the ICTY and ICTR. This shift has affected the evidentiary sources of a rule of customary international law.[535] A strict understanding of the elements of state practice and *opinio juris* which is geared to the acts and omissions of states as the main subjects of international law can hardly explain why truly international practice like judgments of international courts may count as direct evidence of a new rule of customary international law. The traditional view would be that this international practice can only indicate, but never directly evidence, what is reflected in the practice and *opinio juris* of states.[536] The tribunals, however, appear to think otherwise. At least, they do not reconfirm by an additional assessment of the practice and *opinio juris* of states whether international case law has adequately labelled the norm in question as customary. They consider it sufficient evidence of a customary norm. Only in cases of doubt, or concerning most controversial points of view have the ICTY and ICTR actually carried out a full scale assessment of state practice proper.[537]

Accordingly, compared to the classical understanding of customary international law, it seems that the ICTR and the ICTY have moved from a state centred approach to a more international one. The two *ad hoc* tribunals refer to evidence of a classical understanding only when international sources do not yield any findings on the applicable law or produce doubtful results. This leaves international evidence in a kind of *prima facie* position in comparison to classical evidence: findings based on international evidence and reflecting

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[535] See also *L. Gradoni's* assessment of the case-law of the ICTY in *M. Delmas-Marty et al.* (Sources) 41-51; further: *M. Bothe* 8 (2005) YBIHL 154ff, for an analysis of those types of evidence which were also considered by the ICRC's study. At 178 he concludes that the ICRC's study depicts a development of customary international law as adherence to common values, which is promoted by the development of procedures implementing this value system.

[536] Supra Chapter 1, V.H, 115f ; compare *L. Gradoni* in *M. Delmas-Marty et al.* (Sources) who contends that this international practice and conventional practice, in particular, reflects a *opinio juris gentium* (at 45).

[537] The *Tadić Interlocutory Appeal* already referred to the need to evidence supporting state practice and *opinio juris* when using the deductive approach. *Tadić* (n. 531) para. 99; Further: *Galic*, Appeals Chamber Judgment, Case No. IT-98-29-A, 30 November 2006, separate and partially dissenting opinion *Schomburg*, para. 17; *Hadžihasanović* (n. 414) para. 45; *Ojdanić* (n. 375) para. 20; *Hadžihasanović* (n. 383) para. 264.

international principles take thus precedence over evidence derived from national jurisdictions.[538]

In comparison to the approaches employed by the ICJ, that of the ICTY and the ICTR reveals an even more radical application of international instruments and case law. As discovered previously, hitherto the ICJ has not cited international case law as evidence of a new rule of customary international law. Neither has it referred to particular instruments post-dating the period of the assessment.

B. *A hierarchy of determining agencies for customary international criminal law?*

Another important question arising out of an assessment of the case law of the ICTY and the ICTR on customary international law is whether the tribunals have developed or established any hierarchy between the different determining agencies for customary international criminal law. As they utilize mostly international sources when assessing the formation of new customary rules, it would be interesting to know whether the tribunals prefer a certain evidentiary source over another or whether they have developed a certain evaluation scheme.

There are only a few cases in which the ICTY and ICTR have identified a particular way in which the different international and national evidentiary sources should be evaluated by its Chambers. The first example of this is the *Kupreškić* Trial Chamber judgment. It defined a hierarchical order of the sources of international criminal law where the ICTY Statute did not provide for an applicable norm,[539] but did not refer to the determining agencies themselves. The *Furundžija* Trial Chamber Judgment, on the other hand, discussed only the evidentiary character of the ILC Draft Code. It stated that the Code though being an "authoritative international instrument", could be used only as a subsidiary means of customary interpretation.[540]

Finally, the *Krstić* judgment delivers probably the most detailed description of the deliberations of a chamber of the ICTY on the applicable law before it, and thus constitutes a most elaborate assessment of international and national evidence of a customary rule.[541] The Trial Chamber's main point of reference were the provisions of the Genocide Convention, because the ICTY

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[538] This result is also reflected in the quantitative assessment by *L. Gradoni* in *M. Delmas-Marty et al.* (Sources) 41-51.

[539] *Kupreškić* (n. 291) para. 591.

[540] *Furundžija* (n. 225) para. 227.

[541] *Krstić* (n. 223) para 541.

Statute had adopted its provisions *verbatim*. After discussing and interpreting the provisions of the Convention, the Chamber discussed, in the order of appearance, international case law, the ILC Report on the Draft Code of Crimes, the work of international committees on the crime of genocide, including the Rome Statute and the discussions in the Preparatory Committee, and the legislation and practice of individual states.[542] This description certainly reveals, once again, the ICTY's focus on international conventional practice. It becomes evident that the tribunal considers conventions the most appropriate evidence of a customary rule. The description mentions the legislation and further practice of states only in second place. Yet the case of genocide is specific, because it has become internationally accepted that the Genocide Convention constitutes *the* leading international document on the law of genocide.[543]

So we must conclude that the chambers of the ICTY and ICTR all proceed similiarly in their assessment of the formation of new customary rules: they focus predominantly on the customary rules reflected in international instruments and conventions and refer to additional evidence as needed in the particular case. Nonetheless, what further kind of evidence is consulted remains not so clear cut. This appears to be an individual decision, made on a case-by-case basis. Accordingly, the evidentiary value of a particular determining agency of customary international law may vary depending on the facts of the case. As yet, the Tribunals have not established any hierarchical order of the evidentiary sources of a customary provision.

C. *The methodologies applied when identifying new customary international law*

The foregoing paragraphs focused on the individual ingredients that form a customary rule, considered to be relevant by the ICTY and the ICTR. Now, let us look at the actual recipe for the identification of a new customary rule.

Our assessment of the case law of the ICTY and ICTR has already shown that the two tribunals do not provide us with a single method of categorising a new rule of customary international criminal law. Instead, the *ad hoc*

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[542] *Krstić, ibid.*

[543] *Reservations to the UN Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, at 23, 24; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 2007, para. 161; *Case concerning Armed Activities on the Territory of the Congo (New Application 2002)*, ICJ Reports 2006, para. 64.

tribunals apply various techniques, beginning with the rather conservative way of assessing empirical evidence to prove the two elements of *opinio juris* and state practice to trying to evidence *opinio juris* by deducing it from 'general' or 'core' principles of humanitarian law. There also seems to be a lack of differentiation between the methodology employed for treaty interpretation and for the formation of general principles of international law.

1. *Different approaches to custom*

The following four approaches of the Tribunals towards the assessment of customary norms can be identified. First and foremost, there is the 'international instruments' approach. It seems to be a more modern version of the ICJ's *opinio juris* based approach to customary international law, because it is based only on the evidence available to the courts, rather than on the individual element of customary international law this evidence depicts. The tribunals seldom allocate a particular determining agency to either the element of state practice or the *opinio juris*. This approach is the one most frequently resorted to by the tribunals.[544]

Second, there is the deductive approach, which infers norms of customary international law from 'core principles' of international law. It has also been employed by the ICJ, as demonstrated. Yet the ICTY in particular, has referred to it even more frequently than the World Court, making this approach the second most utilised methodology for asessing a new customary rule.[545] Here, it is mostly the humanitarian considerations of the *Martens Clause* ('elementary considerations of humanity') which influence the Tribunal's decisions.[546]

Third, we find the 'traditional' approach to customary international law, which tries to evidence new customary norms empirically by reference to both *opinio juris* and state practice. Yet this is not the predominant approach the Tribunals use. It is invoked only seldom, and mostly in cases of doubt, where evidence of a customary rule is not available or where the international instruments approach or the deductive approach does not yield definite results.[547]

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[544] The ICTY alone has applied this approach in more than 27 cases.

[545] The ICTY alone has resorted to this method in about 14 cases.

[546] See *Tadić*, Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 129; *Tadić*, Trial Chamber Judgment, Case No. IT-94-1-T, 7 May 1997, para. 609; *Aleksovski*, Trial Chamber Judgment, Case No.: IT-95-14/1-T, 23 June 1999, para. 50; *Kupreškić*, Trial Chamber Judgment, Case No. IT-95-16-T, 14 January 2000, para. 524; *Čelebići*, Appeals Chamber Judgment, Case No. IT-96-21-A, 20 February 2001, para. 142; *Akayesu*, Appeals Chamber Judgment, Case No. ICTR-96-4-A, 1 June 2001, para. 442.

[547] In fact, the ICTY has referred to this approach in only two cases.

The fourth method which may be identified from the case law of ICTR, in particular, is an object and purpose approach. It resembles more an interpretation of the existing customary law according to the historical and factual evidence available to the Tribunal than a true assessment of the customary nature of a particular norm. The ICTR has emphasised the common-sense solution which had to be sought on several occasions.[548] On other occasions, the Tribunals have rejected or affirmed customary norms on the basis of interpretations derived from international human rights law.[549]

2. *Relationship between the four approaches*

As has already been revealed by this identification of four different approaches, the two *ad hoc* criminal Tribunals do not employ one coherent method of the identification of custom. For example, it is difficult to prove that the Tribunal has been guided by 'considerations of humanity' in most of its decisions on customary international criminal law. The ICTY employed the international legal instruments approach twice more than the deductive method.

Moreover, the *Ojdanić*[550] and the *Kordić/Čerkez* Appeals Chamber decisions[551] reveal some of the downsides of too broad an application of this approach. Similarly, in some cases, considerations of the ICTY in particular seem to have been motivated by *de lege ferenda* alone. The findings of the *Kupreškić* judgment, for example, were influenced more by considerations of which customary norm was desirable than by a mere assessment of hard evidence available to support the existence of an *opinio juris* or state practice. The ICRC in its Study on Customary International Humanitarian Law identified this as a trend not just in the case law of the *ad hoc* international criminal tribunals:

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[548] *Tadić*, Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 119; *Bagilishema*, Trial Chamber Judgment 7 June 2001, Case No.: ICTR-95-1A-T, para. 86, 87; *Kamuhanda*, Trial Chamber Judgment, Case No.: ICTR-95-54A-T, 22 January 2004, para. 692.

[549] See *Kupreškić*, Trial Chamber Judgment, Case No. IT-95-16-T, 14 January 2000, para. 566; contrast: *Stakić*, Trial Chamber Judgment, Case No. IT-97-24-T, 31 July 2003, para. 721; further *Kunarac*, Trial Chamber Judgment, IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 466; *Furundžija*, Trial Chamber Judgment, Case. No.: IT-95-17/1-T, 10 December 1998, para. 170.

[550] *Ojdanić*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Appeals Chamber Decision Case No.: IT-99-37-AR72, 21 May 2003, para. 42.

[551] *Kordić, Čerkez*, Appeals Chamber Judgment, Case. No. IT-95-14/2-A, 17 December 2004, para. 45.

> international courts and tribunals on occasion conclude that a rule of customary international law exists when that rule is a desirable one for international peace and security or for the protection of the human person, provided that there is no important contrary *opinio juris*.[552]

Nevertheless, there is one principal determinant which influences the application of a particular method of identification of new customary law in the individual case: it is the existence of sufficient evidence of the evolution of a particular customary rule. This is evidenced by the fact that the international instrument approach has been employed twice as often as the core-rights approach, for example. Thus, if evidence to prove the customary character of a certain rule does not yield a definite answer, the Tribunals will refer to the approach which takes into account the overall objectives of international humanitarian law, that is to say the 'fundamental principles of humanity' expressed in the *Martens Clause*, as well as to international human rights treaties, and thus employ the 'core-rights approach'. However, the outer limits of this deductive or core-rights approach are defined by the very same 'traditional' elements of custom, *opinio juris* and state practice, and by the object and purpose of the 'core principle'.[553]

Moreover, regarding the actual application of this core-rights approach to the individual case, a court would not necessarily be required actively to prove the existence of a certain customary norm by supporting evidence of *opinio juris* or state practice. It would have to establish only that there is no contrary evidence of state practice or *opinio juris* which disprove the existence of the norm developed by the 'core-rights' approach. The presumptions drawn from broader humanitarian principles thus seem to serve as *prima facie* evidence for applicable customary international law. They may be rebutted by either doubts arising out of a breach of the *nullum crimen sine lege* principle,[554] or a lack of traditional state practice or *opinio juris*. Very similar reasoning has also been employed by the ICJ in some of its judgments.[555]

The above findings correspond with the findings concerning the items of evidence chosen by the *ad hoc* tribunals for their assessment of customary

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[552] *J.-M. Haenkaerts and L. Doswald-Beck* (Customary International Humanitarian Law), vol. 1, xlii.

[553] See *Hadžihasanović*, Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Case No.: IT-01-47-AR72, 16 July 2003.

[554] Also *P. Hauck* 21 (2008) Humanitäres Völkerrecht, at 64f states that the *nullum crimen sine lege principle* is able to constrain customary international criminal law-making.

[555] PCIJ, Ser. A., Judgment No. 9, The Case of the S.S. "Lotus", (1927), 8.

rules. As we have just seen, international evidence of a new customary rule is applied in some *prima facie* manner, too.[556]

D. *Merging of different methods and sources of international (criminal) law*

In addition to the diverse approaches to custom identification, there appears to be a visible tendency by the ICTY and the ICTR to merge the categories of customary international law and general principles of international law. Considering just the decisions of national tribunals and the judgments of military courts established in Germany after World War II, for example, the ICTY and the ICTR do not seem to differentiate precisely between the formation of a rule of custom and a general principle of international law following the principles derived from national laws. In this regard, the threshold between custom formation and the formation of general principles has become blurred. In the field of international criminal law, this development is somewhat problematic. Here, the *nullum crimen* principle and its requirement of legal certainty might prohibit the conviction of a perpetrator according to a criminal norm derived from a general principle of international law alone. Nevertheless, the trend to intermingle custom with the general principles of law seems to have been taken up in Article 21 of the ICC Statute. Without any reference to custom or to the 'general principles of law', Article 21 (1) (b) of the ICC Statute determines merely that the ICC may apply the 'principles and rules of international law'.

As indicated above, when discussing the deductive approach to custom, it may be concluded, too, that the findings of both the ICTY and the ICTR see hardly any difference between treaty interpretation and norms of customary international law. If an assessment of new customary law is based predominantly upon the case law of the IMTs of Nuremberg and Tokyo or the reports of the Secretary General on the establishment of the ICTY or ICTY, it does not seem to differ significantly from any assessment which would be carried out for an interpretation of the existing rules contained in the Statutes of the ICTY and ICTR. Any interpretation would have to consider the same sources just mentioned to interpret the rules of the Statutes according to their object and purpose, ordinary meaning or historical evolution.

Moreover, as noted from the *Hadžihasanović* decision, the application of a deductive approach sometimes appears barely differentiable from analogous reasoning. If norms of customary international law are invoked merely to avoid allegations of a breach of the principle of *nullum crimen sine lege* by

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[556] See at 281ff.

applying by analogy norms of international criminal law, this puts the concept of custom in international criminal law on uncertain ground.

The preceding findings are supported by Nollkaemper.[557] In his study on the consideration by the ICTY of the case law of national courts, he found that the Tribunal applied judgments of national criminal courts in three ways: to support the interpretation of international treaties,[558] to support the interpretation and formation of customary international criminal law, and as an independent authority for the interpretation of rules of international law.[559] Furthermore, Nollkaemper suggested that national case law seemed to be employed by the ICTY as an independent source of international law. It seemed to be

> generally accepted that the rigid distinction between sources in paragraphs 38 (1) (b) and 38 (1) (c) [of the ICJ Statute], on the one hand, and subsidiary means in paragraph 38 (1) (d) is overstated. In the interests of certainty and stability, the ICJ as well as other international courts tend to follow what in previous cases they have considered good law, unless there are cogent reasons to do otherwise. More generally, the distinctions between the application, interpretation and development of law are thin. In some respects, application will involve interpretation and in that respect development[560]

Although this last supposition is certainly supported by the findings of this study, it is doubtful whether it leads to the acceptance of national case law as a 'new' source of international criminal law. Interests deriving from the *nullum crimen sine lege* principle clearly denounce any rapid adoption of new authorities in international criminal law. The introduction of new sources of law or of new authorities cannot replace the fulfilment of necessary requirements of the existing sources of international law.

Kolb has also examined the ICTY's case law on customary international law. Yet, more harshly, he accused the Court of not carrying out "any real analysis of the elements of custom".[561] The Tribunal's case law on customary international law revealed "an excessive blurring and blending of conventional and customary law" which tended to produce "unwelcome side-effects" and weakened "the proper mechanisms of treaty law."[562]

Finally, several other authors also criticised the inconsistent handling of methodology and the finding of law by the ICTY. As outlined earlier, Simma warned against the adoption of general principles of international law

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[557] *A. Nollkaemper* in *G. Boas and W. Schabas* (International Criminal Law) 278–296.
[558] *A. Nollkaemper* (n. 557) 280.
[559] *A. Nollkaemper* (n. 557) 294.
[560] *A. Nollkaemper* (n. 557) 291.
[561] *R. Kolb* (2001) 71 BYBIL, 262, 263.
[562] *Ibid.*

within the sphere of case law of the ICTY.[563] Moreover, in a discussion of the *Erdemovic* judgement, Oellers-Frahm and Specht emphasised that neither the particular importance of international criminal law nor its incompleteness could lead to the result that the accused did not receive a fair trial, simply because of the particular severity of the crimes of which he had been accused. International criminal law in particular had to comply to an even greater extent than other fields of law with the principles of regularity, predictability and plausibility of the trial.[564] They emphasise that for the finding of law of the ICTY

> Als internationals Gericht hat das Jugoslawiengericht die ihm im Statut übertragenen Kompetenzen im Lichte des Völkerrechts, nicht des nationalen Rechts, auszulegen und gegebenenfalls auszufüllen. Entgegen der Mehrheitsmeinung der Berufungskammer, wie sie sich im Sondervotum McDonald / Vorah ausdrückt, ist zu hoffen, das sich das Gericht den dort zitierten und gerügten Ausführungen des Internationalen Gerichtshofs im Südwestafrika-Fall wieder annähert, in dem so treffend festgestellt wurde, dass "law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own dicipline".[565]

VIII. THE APPROACHES OF THE ICTY AND THE ICTR COMPARED

As this analysis has revealed, there seems to be a marked emphasis on the source of customary international law in the case law of the ICTY. The ICTR, on the other hand, barely employs customary international law to support its findings on a particular issue of law.

Instead, it seems to direct its findings towards an interpretation of its Statute according to its object and purpose, also taking into account its *travaux préparatoires*. Almost the only time the ICTR does refer to customary international law seems to be when quoting from the findings of the ICTY on a certain issue.

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[563] *B. Simma and A.Paulus* in *H. Ascensio* (Droit International Pénal) 62.

[564] *K. Oellers-Frahm and B. Specht* (1998) 58 ZaöRV, 412.

[565] The translation reads: "As an international court, the International Criminal Tribunal for the Former Yugoslavia has to interpret and fill in the competences rendered to it by its Statute in the light of international, not national law. Against the majority vote of the Appeals Chamber expressed in the separate opinion of Judges McDonald and Vorah, it is hoped that the Tribunal, in its future jurisprudence, will realign itself with the reasoning of the International Court of Justice, which had concluded so aptly: 'law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline'."

Although the ICTY at times also cites from the findings of the ICTR, this is much more infrequent and, it seems, not to be preferred. One outstanding example of this is the *Hadžihasanović* interlocutory appeal before the ICTY Appeals Chamber. In this judgment, the Tribunal could easiliy have supported its findings by referring to the criminality of superior responsibility in the Statute of the ICTR, which expressly deals with a non-international armed conflict.

Finally, in the few situations in which the ICTR has had to assess the customary international law character of a certain norm of international criminal law, the Court seemed to orient itself to the approach of the ICTY. This is clearly reflected in the findings of the ICTR on the customary nature of common Article 3 and on the criminality of participation in a joint criminal enterprise.

All in all, assessment of the case law of the ICTR on customary international law seems to support the trend in Article 21 of the ICC Statute to move away from the traditional finding of customary international law. It seems further to underline this shift towards a definition of the applicable international criminal law according to general principles and other evidentiary means.

However, too much should not be read into the findings of the ICTR on the development of customary international law. As outlined at the beginning of this chapter, the ICTR, due to the fact that Rwanda had been a party to the Geneva Conventions as well as to its Additional Protocols at the time of its establishment, had no need to refer extensively to the source of customary international law.

Chapter Six

Evolution of New Customary International Criminal Law: Further Implications

I. INTRODUCTION

The Rome Statute of the International Criminal Court may be cited as probably the latest milestone in the relatively young history of International Criminal Law.[1] Its adoption at the Rome Conference on the Establishment of an International Criminal Court on 17 July 1998 and its coming into effect with its 60th ratification on 1 July 2002[2] mark the most recent development of the law in this field and thus provide an important indicator for the direction into which it may eventually evolve.[3] Most certainly, the experience of the two international *ad hoc* criminal tribunals has contributed a great deal to the codification of the law as it was finally accepted at the Rome Conference. This has been summarised more than aptly by Booth, who found:

> The Rwanda and Yugoslav Tribunals provided the strongest support for the idea that a permanent international criminal court was desirable and practical. The Statutes of the ICTY and the ICTR influenced the emerging Draft Statute that the ILC was drawing up under Professor Crawford's direction. And, by the time delegates convened in Rome in June 1998 to draft a Statute for a permanent international criminal court, the Tribunals provided a working model of what might be possible. In addition, the jurisprudence of the Hague Tribunals – for example, the progressive view that crimes against humanity could be committed in peace-time, and the decision that war crimes could be committed in

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[1] See *G. Werle* (Principles) 21, marginal no. 55.

[2] On 11 April 2002, Bosnia and Herzegovina, Bulgaria, Cambodia, the Democratic Republic of Congo, Ireland, Jordan, Mongolia, Niger, Rumania, and Slovakia ratified the Rome Statute and thus completed the necessary number of 60 ratifications in accordance with to Article 126 of the Rome Statute for it to enter into effect two months later.

[3] For an early assessment of some of the flaws of the Rome Statute see *C. Tomuschat* (1998) 73 Die Friedens-Warte, 335, 339, 340f; there is an abundant literature on the Statute, from which the following works may be picked out: *A. Cassese et al.* (Rome Statute Commentary); *W. Schabas* (Introduction); *O. Triffterer* (Commentary); *G. Werle* (Principles).

an internal armed conflict – contributed to the debates in Rome and eventually came to be reflected in the Rome Statute.[4]

Thus, in order to enable us to point to a direction into which customary international law may evolve in the field of international criminal law, a survey of the sources of law described in the Rome Statute is inevitable.

Nonetheless, it is equally true that when examining the Statute, it must be kept in mind that despite these considerations, the Statute is still an international treaty instrument, which may not yet be regarded as a reflection of the *opinio juris* of states or a codification of the existent customary international criminal law in every respect.[5]

II. ARTICLE 21 (1) (B) OF THE ICC STATUTE: FURTHER DEVELOPMENT OF CUSTOMARY INTERNATIONAL CRIMINAL LAW?

Although jurisprudence from the Court on Article 21 of the ICC Statute is not yet available,[6] an indication of the further development of customary international criminal law may be provided by an examination of Article 21 of the Rome Statute. The Article reads as follows:

Art. 21
Applicable Law

1. The Court shall apply:
   (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
   (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
   (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.

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[4] *C. Booth* in *P. Sands* (Nuremberg to the Hague) 159.

[5] But see ICTY: *Furundžija*, Trial Chamber Judgment, Case. No.: IT-95-17/1-T, 10 December 1998, para. 227.

[6] Investigations have begun in three cases: Uganda, Democratic Republic of Congo and Sudan. See http://www.icc-cpi.int/cases.html and http://www.icc-cpi.int/press/pressreleases/114.html (last visted 28 April 2007).

> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.[7]

It has been held that this Article, which may indeed be "*la configuration du droit international pénal de demain*",[8] listed the sources of international criminal law applicable in proceedings before the ICC, just as Article 38 of the ICJ Statute did.[9] However, in contrast to Article 38, Article 21 establishes a *hierarchy* of applicable law for the ICC Judges to apply in adjudicating on cases.[10] Furthermore, international scholars have argued that Article 21 modifies the approach of the ICJ Statute to fit the context of international criminal law.[11] According to such an understanding, Article 21 of the ICC Statute constitutes one of the first sources to be assessed when trying to point to the further development of the sources of customary international criminal law.

A. *Preliminary issues*

However, equating Article 21 of the ICC Statute with Article 38 of the ICJ Statute causes some difficulty. First and foremost, Article 38 of the ICJ Statute does not establish any hierarchy between the different sources of international law. This has been demonstrated. Moreover, it is important to understand Article 21 within the overall framework of the Rome Statute. The Statute, first of all, is an international treaty in which the crimes within the Court's jurisdiction represent a "*minimum* amount of consent" achieved between the different states at the Rome Conference.[12] Thus, the Statute remains as the overriding and most important source of law applicable to the Court. This has found expression in its Article 21 (1) (a).

Another delimitation of the applicable law before the Court is set by Article 10 of the ICC Statute which sets out the relationship between the norms of the Statute and their customary status. It can be understood as a kind of

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[7] Rome Statute for the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, UNDoc. (A/Conf. 183/9, 1998).

[8] *L. Burgorgue-Larsen* in *M. Delmas-Marty et al.* (Sources) 381.

[9] *M. McAuliffe de Guzman*, 'Art. 21', in *O. Triffterer* (Commentary) 436, para. 1.

[10] *Ibid.*

[11] *Ibid.*

[12] *O. Triffterer*, 'Art. 10' in *id.* (Commentary) 317, para. 7.

reservation clause. It makes clear that "all articles in Part 2 are limited to the purpose of building an agreement between the States Parties and shall have no binding effect going beyond the subject matter and the scope of the Statute and the Party's agreements".[13]

Article 10 of the ICC Statute spells out two issues. On the one hand, it establishes that the Statute and the definition of the crimes within it do not prejudice the definition of those crimes under customary international law. They remain applicable outside the framework of the Statute. On the other hand, Article 10 also presupposes permissible interpretation (which is also mentioned in Article 9) and prescribes with regard to all Articles *in Part 2* (in about the middle of which Article 10 appears) that their interpretation shall have no "limiting or prejudicing effect on international law outside the Statute".[14] Yet it follows from the overall conception of the Statute that the general assertion behind Article 10 – the overall predominance of the law as contained in the Statute – extends not just across Part 2, but across the Statute *as a whole*.[15] This is also supported by Article 22 (3) of the ICC Statute, which provides that conduct which is not criminal according to the statute, may still be punishable according to the rules of general international law.[16]

Hence, the ICC Statute and its definition of the applicable law have to be understood in a more restricted manner. Although "the development of changes in humanitarian law, for instance, defining new crimes against humanity – not yet falling within the jurisdiction of the Court – cannot be blocked by the Statute",[17] customary international law will usually remain outside its scope.[18] Nonetheless, both Articles 10 and 22 (3) of the ICC Statute recognise and affirm Article 10's individual source character in the field of international criminal law.[19] From this assessment of Articles 10 and 22 (3), it thus follows that Article 21 cannot be understood in the same way as Article 38 of the ICJ Statute. Instead, this Article seems to specify the rules on which the Court can draw in its interpretation of the Statute.

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[13] *O. Triffterer* (n. 12) para. 6.

[14] *O. Triffterer* (n. 12) para. 9.

[15] *O. Triffterer* (n. 12) para. 18.

[16] Article 22 (3) reads: "This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute."

[17] *O. Triffterer*, 'Art. 10' in *id.* (Commentary) 320, para. 13.

[18] But see Article 31 (3) "Grounds for excluding criminal responsibility" which expressly authorises the Court to "consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in Article 21."

[19] See also *M. Bennouna* in *A. Cassese et al.* (Rome Statute Commentary) vol. 2, 1105.

B. *Article 21 (1) (b) ICC Statute: controversies*

As has just been made clear, even taking this restrictive approach to Article 21 of the ICC Statute, there does not seem to be any reason why customary international law cannot constitute one of the sources which the Court can draw upon for its findings. However, Article 21 (1) (b) speaks of "the principles and rules of international law, including the established principles of the international law of armed conflict". This open wording might lead to the impression that international criminal law has recently turned towards a more principled approach and drifted away from the traditional concept of customary international criminal law.

There are two main controversies which revolve around the formulation of Article 21 in general and its paragraph (1) (b) in particular. Probably the main issue behind the wording of Article 21 is the level of discretion to be afforded to the judges of the ICC in determining the applicable law. It was already subject to substantial debate at the Preparatory Committee meetings prior to the Rome Conference. On the one hand, a minority of states took the position that the principle of legality, which is contained in the *nullum crimen sine lege* principle, required the virtual elimination of judicial discretion in the context of international criminal law; "the court should not be empowered to legislate principles of criminal law"[20] It was thus suggested that doubts about the applicability of certain provisions of the Statute should be resolved by direct application of the appropriate domestic law.[21] The majority of states, on the other hand, held that the unique nature of the international legal order should be taken into account. Hence the judges should be allowed to identify and take into account general principles of international law.[22]

The criticism revolving around Article 21 (b) continued even after the Rome conference.[23] Public international lawyers, in particular, have criticised the wording of this paragraph and the hierarchy established between the different sources listed in Article 21.[24] Pellet, for example, calls the wording of Article 21 a 'sibylline drafting' which uses indirect expressions where a simple reference to custom or the general principles of international law

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[20] PrepCom, Report, UN Doc. GAOR 51st Sess, Supp. No 22, UN Doc. A/51/22 (1996), vol. 2, at 105, in *M. Cherif Bassiouni* (Statute) 497.

[21] *Ibid.*

[22] See *M. McAuliffe deGuzman*, 'Article 21', in *O. Triffterer* (Commentary) 436, para. 2.

[23] For a strong criticism see: *A. Pellet* in *A. Cassese et al.* (Rome Statute Commentary) vol. 2, 1051ff; contrast: *M. McAuliffe deGuzman*, 'Article 21', in O. Triffterer, 'Art. 10' in *O. Triffterer* (Commentary) 436.

[24] See *A. Pellet* in *A. Cassese et al.* (Rome Statute Commentary) vol. 2, 1053ff, 1067ff.

would have sufficed.[25] He further views the main reason for the lack of an explicit reference to custom to be the increased influence of criminal lawyers during the drafting of the Statute, who opposed the inclusion of custom "in an erroneous conception of the principle of legality".[26] MacAucliffe de Guzman also wondered why the drafters of the Statute "eschewed use of the word "custom" in identifying the applicable law."[27]

Proponents of the list of sources in Article 21, on the other hand, have emphasised the importance of the *nullum crimen sine lege* principle in international criminal law and the problem that offences arising under the so-called 'general' law – which in this case is equivalent to 'customary' international law– were often too vague.[28] Moreover, they argue that the codification of the sources of international criminal law as carried out in Article 21 reflected current practice before the international *ad hoc* criminal tribunals. As the basis for their jurisdiction, they assert, the Tribunals had frequently referred to their own Statute and rules of procedure, and only secondly instance to customary international law.[29]

However, even though the Statute does not refer explicitly to custom as a source of international criminal law, it seems to be established that it is included at least implicitly.[30] This conclusion is derived from the fact that in accordance with Article 21 (1) (b), the Court is called upon to apply "rules of international law".[31] It is widely agreed in literature that the phrase "rules of international law" must be interpreted as encompassing customary rules."[32] Similarly, the previous source, "principles of international law", should also entail a reference to customary rules. The Statute differentiates this source from the general principles of law derived from national laws.[33] This clearly indicates that the drafters of the Statute were of the view that 'principles

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[25] *A. Pellet* (n. 24), 1070.

[26] *A. Pellet* (n. 24), 1071.

[27] *M. McAuliffe deGuzman*, Article 21, in *O. Triffterer* (Commentary), para. 14, 442.

[28] *C.L. Blakesley* (1996) International Review of Penal Law, 146; *M. Bassiouni and C.L. Blakesley* (1992) 25 Vanderbilt J. of Transnational Law, 175–176; *M. McAuliffe deGuzman*, 'Article 21', in *O. Triffterer* (Commentary) 436, 438, 439, para. 7; contrast: *L. Condorelli* in *H. Ascensio* (Droit International Pénal) 246.

[29] *M. McAuliffe deGuzman*, 'Article 21', in *O. Triffterer* (Commentary) 438, margin No. 6.

[30] *J. Verhoeven*, 33 (2002) NYIL 9.

[31] *M. McAuliffe deGuzman* (n. 27) para. 14, 441, 442.

[32] *M. McAuliffe deGuzman* (n. 27) para. 14, 442; *M. Bennouna* in *A. Cassese et al.* (Rome Statute Commentary) vol. 2, 1105; *A. Pellet* in *A. Cassese et al.* (Rome Statute Commentary) vol. 2, 1072; *K. Ambos* (Allgemeiner Teil) 41; further: *G. Werle* (Völkerstrafrecht) para. 4, 68, 74, who argues that customary international law may even be considered beyond the scope of the definitions of international crimes set out in the ICC Statute.

[33] Article 21 (1) (c) ICC Statute.

of international law' may be ascertained in the absence of any connection to national laws.[34] However, as demonstrated in the second chapter of this book, general principles of international law cannot, by themselves, qualify as a true source of international law. Accordingly, custom remains the prevailing source of these principles.

C. *Travaux préparatoires*

Regarding the controversies, which have evolved around Article 21, it seems worthwhile to assess further the *travaux préparatoires* to this Article. These are intended to shed more light on its structure and meaning and on its implications for the source of customary law.

The draft texts of the Rome Statute, as well as earlier drafts elaborated by the ILC as early as 1951, did not contain formulations which listed the sources of international criminal law in the way to which we are accustomed from Article 38 of the ICJ Statute. The ILC's first proposal of 1951 and a revised version of 1954 merely suggested: "The Court shall apply international law, including international criminal law, and where appropriate, national law"[35] Later, in 1994, the ILC submitted a draft article which already then resembled the version ultimately agreed upon in the negotiations of the Rome Statute. Among other points, it defined the applicable law to be comprised of: "(b) applicable treaties and the principles and rules of general international law."[36] This wording strongly indicated that the Article should also embrace rules of customary international law. At least, it referred to rules of '*general* international law', an expression which is frequently used as an equivalent to customary international law.[37]

On the other hand, in the discussions of the *Ad hoc* Committee on the Establishment of an International Criminal Court, members debated a determination of the applicable law according to the rules of private international

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[34] See *M. McAuliffe de Guzman* (n. 27) para. 12, 441.

[35] Draft Statute for an International Criminal Court (Annex to the Report of the Committee on International Criminal Jurisdiction on its Session from 1 to 31 August 1951) in *M. Cherif Bassiouni* (Statute) 741; Revised Draft Statute for an International Criminal Court, Annex to the Report of the 1953 Committee on International Criminal Jurisdiction on its Session held from 27 July to 20 August 1953, in *ibid*., 749.

[36] ILC, Report of the ILC on its Forty-sixth Session, Draft Statute for an International Criminal Court, 2 May–22 July, 1994 (G.A. 49th Session., Supp. No. 10, A/49/10, 1994.) in *M. Cherif Bassiouni* (Statute) 665.

[37] *A. D'Amato* (Concept); *ILA, Committee on Formation of Customary (General) International Law* (n. 31).

law (conflict of laws).[38] Hence, there did not seem to be unanimity on the fundamental question whether international criminal law should be determined by the rules of public or private international law. Nonetheless, there were some suggestions that an explicit reference should be made in the draft to customary international law or the sources of Article 38 of the ICJ Statute as a whole; however, they did not find their way into the final draft.[39]

The ILC draft article on the applicable law was taken up, without further alterations, in the Report of the Preparatory Committee on the Establishment of an International Criminal Court.[40] In the ensuing consultations, the source character of customary international law in international law was then discussed for the first time.[41] Delegates expressed doubts whether the punishment of an individual according to customary international law could be reconciled with the principle of legality. Moreover, concerns were raised whether customary international law covered the issue of punishment in relation to individuals held responsible for their acts or omissions.[42] Nevertheless, the definition of the applicable law as contained in the ILC report was further upheld: the Report of the inter-Sessional Meeting from 19 to 30 January 1998 still contained the same definition.[43] The Preparatory Committee had also prepared several other proposals for the Article, all of which, to varying degrees, strictly upheld the order of sources as suggested in the ILC Draft and later in the Rome Statute itself.[44]

The suggestion which was finally accepted for entry into the Draft Statute for an International Criminal Court negotiated at the Rome Conference read: *"(b)* If necessary, applicable treaties and the principles and rules of general international law [including the established principles of the law of armed conflict];"[45] This version had also been approved by the preparatory

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[38] ILC, Report of the ILC on its Forty-sixth Session, Draft Statute for an International Criminal Court, 2 May–22 July, 1994 (G.A. 49th Session., Supp. No. 10, A/49/10, 1994.) in *M. Cherif Bassiouni* (Statute) 623.

[39] See ILC, Report of the ILC on its Forty-sixth Session, Draft Statute for an International Criminal Court, 2 May–22 July, 1994 (G.A. 49th Session., Supp. No. 10, A/49/10, 1994.) in *M. Cherif Bassiouni* (Statute) 623, 624.

[40] PrepCom, Report, vol. 2 (Compilation of Proposals) GA, 51st session, supp. No. 22 A/51/22 1996, in *M. Cherif Bassiouni* (Statute) 497.

[41] PrepCom, Report, vol. 1 (Proceedings of the Preparatory Committee during March-April and August 1996), in *M. Cherif Bassiouni* (Statute) 415.

[42] PrepCom, Report, vol. 1 (Proceedings of the Preparatory Committee during March-April and August 1996), in *M. Cherif Bassiouni* (Statute) 414.

[43] Report of the Inter-Sessional Meeting from 19 to 30 January 1998 held in Zutphen, The Netherlands, (A/AC.249/1998/L. 13, 1998), in *M. Cherif Bassiouni* (Statute) 243.

[44] All contained in A/51/22, vol. 2. in *M. Cherif Bassiouni* (Statute) 441ff.

[45] At: A/CONF.183/13 (vol. 2), 30.

committee.[46] Although there were several modification proposals regarding this part of the Article,[47] states did not raise objections to the necessity of including a further reference to customary international law.[48] Yet, as can be seen from a comparison with the text finally adopted at the Rome Conference, the word 'general' ultimately disappeared during the negotiations, and, with it, any explicit reference to customary international law.

D. *Conclusion*

From this survey of the drafting history of Article 21 it becomes clear that the Rome Statute reflects the indecisiveness of international lawyers in deducing the sources of international criminal law from the sources of general international law. However, it was made clear that the adoption of Article 21 did not constitute a general shift towards a more principled approach to international criminal law which deliberately omitted any reference to the sources of public international law. The drafting committee simply took up the formulation of the ILC which had referred to customary international law in more general terms. Ultimately, this connection – unintentional, it appears – seems to have become lost during the discussions at the Rome Conference. It resulted in the adoption of an article which, at first sight and simply through the omission of the word 'general', appears to be as a completely new approach to the sources of international (criminal) law.

Examination of the *travaux préparatoires* to Article 21 has also shown that the article does not include an exhaustive list of the sources of law to be used by the Court. In accordance with Article 21 (1) (b), the Court may also apply "rules of international law", which is unilaterally held to encompass also rules of customary international law. Neither does the ICC Statute abolish customary international law as a source of international criminal law. On the contrary, it recognises its role as a source of international criminal law. Yet it is of greater importance outside the normative frame of the Statute. Following the hierarchical order of sources of Article 21, the ICC Statute remains the overriding source of law to be applied by the Court, to which other sources and also customary international law are merely subsidiary.

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[46] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, UN Doc. A/Conf. 183/13, vol. 2, 222.

[47] UN ICC Conference (n. 46) vol. 3, 222, 250.

[48] UN ICC Conference (n. 46) vol. 2.

III. CLASH OF CUSTOM WITH ASPECTS OF LEGALITY? – THE *NULLUM CRIMEN SINE LEGE* PRINCIPLE AND ITS IMPLICATIONS FOR THE FORMATION OF NEW CUSTOMARY INTERNATIONAL CRIMINAL LAW

This part of the book will examine the implications and restrictions the *nullum crimen sine lege* principle imposes on the formation of new customary international criminal law. As outlined before, the principle can be an issue when evidence of a customary norm is insufficient, when reasoning on a rule's customary nature is thin or when a charge or conviction is based on such a customary rule.

In the following paragraphs, only the restrictions of the *nullum crimen sine lege* principle regarding the formation of new customary international law will be discussed. As shown above, the principle gained particular importance in the context of the establishment of the international *ad hoc* criminal tribunals. The report of the Secretary General on the establishment of the ICTY had determined that the Tribunal would apply only the norms of international law which had "beyond doubt" attained the status of customary international law.[49]

The *nullum crimen sine lege* principle is usually addressed within the general framework of the principle of legality, including its various aspects, such as the prohibition of retroactivity, the prohibition of *nulla poena sine lege*, and the requirement of legal clarity or foreseeability of the particular crime.[50] However, some sources also explain the principle the other way around, asserting that it has further aspects (of legality and legal clarity etc.).[51] This depends on the different national backgrounds (either of Common Law or Civil Law) of the writers and will be assessed in more detail below. Nevertheless, aspects of the principle which fall under the prohibition of *nulla poena sine lege / nullum crimen sine poena* and its further implications will not be discussed. Here, only the existence of a relevant 'lex' is of concern.

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[49] Report of the Secretary-General to the UNSC on the Establishment of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/25704 (1993), 9, para. 34.

[50] *M. Cherif Bassiouni* (Crimes 1992) 88.

[51] *B. Broomhall*, Art. 22, *Nullum crimen sine lege* in *O. Triffterer* (Commentary) para. 3, 448.

A. *The principle* nullum crimen sine lege *in national and international law: overview*

The *nullum crimen sine lege* principle[52] exists in all legal systems of the world, whether with a Common Law, or Civil Law background.[53] Its origins date back to Roman times.[54] However, the principle's actual Latin phrasing, *nullum crimen sine lege*' is usually attributed to Anselm Feuerbach who for the first time, in his book *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts,*[55] mentioned the principles "*nulla poena sine lege*", "*nulla poena sine crimine*", and "*nullum crimen sine poena legale*" as the fundamental bases for every criminal law.[56] The principle plays a constitutional role in maintaining the separation of powers. It constrains the law-makers and protects subjects of law from executive interference.[57]

In its narrowest interpretation, the *nullum crimen sine lege* principle is comprised of the prohibition of criminal prosecution without an underlying legal basis (prohibition of retroactivity). Nevertheless, further implications of the prohibition at the national level differ depending on their systemic background. Broadly speaking, this is conditional on what each system regards as relevant 'law': whereas Civil Law jurisdictions in a strictly positivistic manner conceive as 'lex' only the written law, Common Law systems consider custom as well as statutory law to comprise the relevant 'lex'.[58] This leads to a much broader interpretation of the principle in Common Law jurisdictions. It is viewed as an informal principle of legality, the individual application of which orients itself to the particular circumstances of the individual case.[59] US courts, for example, have emphasised the requirement of legal clarity contained in the principle, which holds as criminal only conduct for which there was a clear, plain and fair meaning of the offence.[60]

At international level, the principle for the first time found major application in the Nuremberg Trials, where it was presented by the defence as

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[52] For an in-depth analysis of the *nullum crimen sine lege* principle in international criminal law see: *M. Boot* (Nullum crimen sine lege) 127ff; contrast: *B. Krivec* (Versailles).

[53] See *H. Quaritsch* (C. Schmitt Verbrechen des Angriffskrieges) 20–22.

[54] See *O. Triffterer* (Dogmatische Untersuchungen) 93.

[55] *A. Feuerbach* (Lehrbuch) paras. 20, 21.

[56] *Feuerbach* deduced these principles from the – in his view – highest principle of criminal law "Jede rechtliche Strafe im Staat ist die rechtliche Folge eines, durch die Nothwendigkeit der Erhaltung äusserer Rechte begründeten, und eine Rechtsverletzung mit einem sinnlichen Übel bedrohenden, Gesetzes." (See *A. Feuerbach* (Lehrbuch) para. 19, 21).

[57] See *B. Broomhall*, 'Art. 22' in *O. Triffterer* (Commentary) 451, para. 10.

[58] See *H. Quaritsch* (C. Schmitt Verbrechen des Angriffskrieges) 20.

[59] *K. Ambos* (Allgemeiner Teil) 251.

[60] See the analysis by *M. Boot* (Nullum crimen sine lege) 117ff.

a challenge to the *ratione materiae* jurisdiction of the Tribunal, above all against 'crimes against humanity', a notion established for the first time in Article 6 (c) of the Nuremberg Charter.[61] The Tribunal affirmed the character of the principle as "a principle of justice".[62] However, it rejected the defence's arguments by finding that Article 6 (c) merely crystallised a nascent rule of general international law prohibiting crimes against humanity.[63] The principle was also employed to contest subject-matter jurisdiction by defence lawyers in cases before the military Tribunals established under Control Council Law No. 10.[64] Its applicability in the Nuremberg and Tokyo trials as well as in subsequent World War II trials has been hotly debated ever since.[65]

Interestingly, the principle was not referred to directly in the Nuremberg Charter. Instead, as can be seen from the above, it has been applied since the beginning of the Nuremberg and Tokyo trials as a general principle of international law in the sense of Article 38 (1) (c) of the ICJ Statute to govern international criminal proceedings.[66] Bassiouni states on that:

> Questions of whether and in what way "principles of legality" apply to international criminal legislation never arose before the Charter. Regrettably, since then, these questions have not been dealt with in international criminal law other than by reference to post-World War II crimes and their prosecutions. The reason may well be that international criminal law has thus far developed with a view to its indirect application, as opposed to the direct application that was the case with respect to the London Charter, the Tokyo Charter and under Control Council Law No. 10, even though the Allies deemed such law to be domestic (…).[67]

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[61] *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, Nuremberg 30th September and 1st October 1946, (London, H.M.S.O., 1946), 38.

[62] *Judgment of the IMT Nuremberg* (n. 61) 39.

[63] *Judgment of the IMT Nuremberg* (n. 61) at 38; compare 40, 41 (for the crime of aggression); *Tokyo Judgment*, vol. 1, 28, which concurred with the findings of the Nuremberg Tribunal on this matter.

[64] See, for example, *Ohlendorf and Others Case* (Einsatzgruppen Case) 15 Ann. Digest 656, 657–658, (1948), Case No. 217, *Alstötter and Others Case* (Justice Case) 14 Ann. Digest 278, 285 (1947), Case No. 126, *The Krupp Case*, judgement of 30 July 1948, Trial of German War Criminals (TWC), vol. 9, at 1331.

[65] In favour were: *H. Quaritsch* in *id.* (C. Schmitt Verbrechen des Angriffskrieges) 153ff; *R. Woetzel* (Nuremberg Trials) 111–112; against were: *H. Ehard* (1949) 43 AJIL 223; *A. F. Mignonge* (1979) 25 Tex. L. Rev. 475–490, *G. Ireland* (1947) 21 Temple L. Q. 27; *W. Jaspers* (1946) 22 Notre Dame Law Rev. 150; *G. Schwarzenberger* (1947) 21 Tul. L. Rev. 329; For a very recent discussion see: *M. Boot* (Nullum crimen sine lege) 179ff.

[66] *M. Cherif Bassiouni* (Crimes 1992) 90.

[67] *Ibid.*

After Nuremberg, the principle found recognition in all major human rights instruments, namely in the Universal Declaration of Human Rights (UDHR),[68] the European Convention on Human Rights (ECHR),[69] the 1966 Covenant on Civil and Political Rights (ICCPR),[70] the ILC Draft Code of Crimes,[71] the American Convention on Human Rights,[72] and, finally, also in the Charter on Human and Peoples Rights of the Organization for African Unity.[73] The universal recognition and application of the principle thus appear to be without doubt. Nonetheless, its particular content still needs further clarification. It will be assessed in the following paragraphs.

B. *Scope of the principle in international law*

The actual scope and content of the principle in international law differ from those established in national jurisdictions. Whereas national jurisdictions, such as Germany and the US, have defined a relatively clear frame for the principle,[74] these implications do not seem to be readily transferrable to the international level. Nevertheless, codification and interpretation of the principle at the international level are influenced by the national (Common or Civil Law) background of drafters, interpreters and other lawyers applying it.[75]

As stated above, during the Nuremberg trials the *nullum crimen sine lege* principle was understood in a very broad sense. It was considered as having its roots in the general concept of justice. As Judge Biddle remarked, "The question then was not whether it was *lawful* but whether it was *just*…"[76] (emphasis in the original). Generally, it seems that the Tribunal followed the opening statement of the British Chief Prosecutor, Sir Hartley Shawcross, who had contended:

> There is no… substantial retroactivity in the provisions of the Charter. It merely fixes the responsibility for a crime already clearly established as such by positive law upon its actual perpetrators. It fills a gap in international criminal

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[68] Article 11 (2) UDHR.
[69] Article 7 (1) ECHR.
[70] Article 15 (2) ICCPR.
[71] Article 10 ILC Draft Code of Crimes against Peace and Security of Mankind (1996).
[72] Article 9 Pact of San Jose, of 22 November 1969.
[73] Banjul Charter, Article 7 (2), 26 June 1986.
[74] See *M. Boot* (Nullum crimen sine lege) 81–126 for those jurisdictions; for the German interpretation of the principle see: *H. Eser*, '§ 1' in *A. Schönke and H. Schröder and T. Lenckner* (Strafgesetzbuch, Commentary) paras. 17ff.
[75] See *G. Endo* (2002) 15 Revue Québécoise de Droit International, 207.
[76] Cited in ILC, *Thiam*, Fourth Report (1986/88), (1986) YBILC, vol. 2, 55ff, para. 161.

> procedure. There is all the difference between saying to a man: "You will now be punished for what is not a crime at all at the time you committed it" and in saying to him, "You will now pay the penalty for conduct which was contrary to law and a crime when you executed it, although, owing to the imperfection of the international machinery, there was at that time no court competent to pronounce judgement against you." It is that latter course we adopt, and if that be retroactivity, we proclaim it to be most fully consistent with that higher justice which, in the practice of civilized states, has set a definite limit to the retroactive operation of laws… [T]he world's sense of justice… would be outraged if the crime of war… were to remain unpunished.[77]

Control Council Law No. 10 cases, on the other hand, primarily relied on the argument that sovereign legislative power had passed to the four Allied Powers with the unconditional surrender of the Third Reich, and therefore, the applicable law, i.e. Control Council Law No. 10, was valid.[78] Generally, this wide interpretation was also followed by the later formulations of the principle contained in international human rights instruments.

1. *International human rights instruments: Article 11 UDHR*

Article 11 of the UDHR determines very generally that

> No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.[79]

This codification of the principle in the UDHR has to be interpreted rather broadly. Raimo Lahti has commented that this paragraph, according to Common Law countries, codified procedural due process, whereas for Civil Law jurisdictions it codified the principles of the "'constitutionally governed State' (*Rechtstaatlichkeit*) and 'legal security' (*Rechtssicherheit*),… which restrain the legislative and judicial organs from misusing their repressive powers."[80]

During the negotiations of Article 11 of the UDHR, the application of the *nullum crimen* principle in the Nuremberg and Tokyo Trials was subjected to some debate. It was discussed whether the legality of those trials should be affirmed in a second paragraph to Article 11. This should prevent the use of the prohibition of retroactivity to support the argument that the trials of German war criminals, in particular at Nuremberg and Tokyo, had been

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[77] *Trial of the Major War Criminals*, 'Twelfth Day, Tuesday, 12/4/1945, Part 06', Proceedings, 01.12.1945–14.12.1945, vol. 3, (International Military Tribunal, Nuremberg, 1947), 106.

[78] See *S. Lamb* in *A. Cassese et al.* (Rome Statute Commentary) vol. 2, 739.

[79] Article 11 (2).

[80] *R. Lahti*, 'Art. 11', in *A. Eide and G. Alfredsson* (UDHR Commentary) 175.

illegal.[81] However, a supplementary paragraph to Article 11 suggested by the drafting commission, which stated that the prohibition of retroactivity of criminal law should not "prejudice the trial and punishment of any person for the commission of any act which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations",[82] was not adopted for the UDHR.

2. *Article 7 (1) ECHR and Article 15 (1) ICCPR*

The wording of the *nullum crimen* provision in Article 7 (1) ECHR and Article 15 (1) ICCPR is almost identical to the prohibition in Article 11 UDHR.[83] According to Article 7 (1) ECHR, the offence has to be criminal either according to national or according to international law. This includes written treaty law as well as customary international law. Following the list of sources of international law in Article 38 (1) ICJ Statute, general principles of law would also be included.[84] Nevertheless, as will be seen from the assessment of the drafting history of Article 7 (2), it was predominantly customary international law which the drafters had in mind as constituting a source of international criminal law.

The case law of the ECTHR has developed the *nullum crimen* provision into a wider concept of legality, which is divided into four rules.[85] They are the prohibition of retroactive criminal law, the statutory nature of the punishment of offences (*nulla poena sine lege*), the non-application of criminal law *in malam partem* by analogy and the requirement of certainty.

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[81] UN Doc. 3 UNGA Official Records I, Third Committee, SR 115–116, 266, 270.

[82] UN Doc. E/600, Annex A, Article 7, as cited in *R. Lahti*, 'Art. 11', in *A. Eide and G. Alfredsson* (UDHR Commentary) 177.

[83] Article 7 (1) ECHR reads: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

Article 15 (1) ICCPR reads:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

[84] See *O. Triffterer* in *G. Hankel and G. Stuby* (Strafgerichte) 173.

[85] See ECtHR: *Kokkinakis v. Greece*, Series A, vol. 260-A, , 25 May 1993, 22 para. 52; *S.W. and C.R. v. UK*, Judgment of 22 November 1995, ECtHR, Series B, vol. 335-B, para. 35 and ECtHR Series C, vol. 335-C, para. 33; most recently: *Puhk v. Estonia*, App. No. 4577/99, Judgment of 21 January 2003, 531.

Only recently was the requirement of certainty discussed by the Court in the *Streletz, Keßler, Krenz v Germany* and *K.-H.W. v Germany* cases.[86] According to this judgment, the requirement of certainty consists of the accessibility and foreseeability of the crime for the accused.[87] The requirement of accessibility contains the proposition that criminal rules must not entail hidden or secret provisions and that anyone must be able to inform himself of the content of a criminal rule. The requirement of foreseeability, on the other hand, pertains to the criminality of a particular act in question. According to the case law of the ECtHR, it requires the wording of a criminal rule to be clearly established so that individuals are able to determine the legal consequences of their conduct under the law.[88] In the recent *Streletz, Keßler, Krenz v Germany Case*s, the ECtHR held that the question whether a crime was foreseeable for the accused must be determined from the accused's subjective viewpoint.[89]

The ECTHR's case law has also commented upon the differentiation between permissible interpretation and illegal analogy. It established in *S.W. v the United Kingdom* that interpretation of a criminal rule was not generally in violation of the *nullum crimen sine lege* principle. The Court pointed out that "[h]owever clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances".[90] Earlier, the Commission had found that a particular interpretation was permissible if it had been established long before the trial of the accused.[91] In addition, it has been argued that it will be decisive whether a particular interpretation is able to express what an ordinary layperson reasonably regards as criminal within the scope of a particular norm.[92]

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[86] *Streletz, Keßler, Krenz v. Germany*, 22 March 2001, Applications Nos. 34044/96, 35532/97 and 44801/98, (2001) EuGRZ, 210ff; *K.-H.W. v. Germany*, 22 March 2001, Application No. 37201/97 (2001) EuGRZ, 219ff; discussed in *Arnold, J.* (2001) 1 Neue Justiz, 561ff, 566ff.

[87] *Streletz, Keßler, Krenz v. Germany*, 22 March 2001, Applications Nos. 34044/96, 35532/97 and 44801/98, para. 89; See *J. Arnold* (2001) 55 Neue Justiz, 567.

[88] See ECtHR: *Kokkinakis v. Greece*, Series A, vol. 260-A, 25 May 1993, 22 para. 52; *Streletz, Keßler, Krenz v. Germany*, 22 March 2001, Applications Nos. 34044/96, 35532/97 and 44801/98, para. 77ff; see *J. Arnold* (2001) 55 Neue Justiz, 567.

[89] *Streletz, Keßler, Krenz v. Germany*, 22 March 2001, Applications Nos. 34044/96, 35532/97 and 44801/98, para. 78.

[90] *S.W. v. the United Kingdom*, 22 November 1995, Series A no. 335-B, para. 36.

[91] *X v. Austria*, E 8490/79, Admissibility, 12 March 1981, 140; see *Ofner v. Austria*, Application No. 524/59, Admissibility, Yearbook 3, 322, 344.

[92] *J. A. Frowein*, 'Art. 7, *Nulla poena sine lege'* in *J. A. Frowein and W. Peukert* (EMRK) 324, para. 4, where the Commission established that the criminal acts in question had to be legally classified.

The prohibition of retroactivity contained in Article 15 (1) ICCPR refers to national as well as international law. The *travaux préparatoires* relating to this Article reveal that 'international law' was meant to include international treaty law and customary international law.[93] Reference to 'international law' further includes the guarantee that the individual is protected against the retroactive application of international criminal norms.[94] Moreover, Nowak and Joseph/Schulz/Castan have explained that the *nullum crimen* principle of Article 15 (1) ICCPR should not be interpreted narrowly to comprise only the prohibition of retroactive criminal laws. According to the authors, the precepts of legal certainty and the prohibition of analogy should also be included.[95] However, this has not been supported by the case law of the Human Rights Committee. So far, communications of the Committee on Article 15 (1) ICCPR have more often assessed the prohibition of retroactive criminal laws.[96]

3. *Article 7 (2) ECHR and Article 15 (2) ICCPR*

The exceptions to the *nullum crimen* principle in Article 7 (2) ECHR and Article 15 (2) ICCPR are almost identical in wording. Both state, as expressed in the words of Article 15 (2) ICCPR:

> Nothing in this article shall prejudice the trial and punishment of any 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 the community of nations.[97]

In a very similar way to the discussions on the insertion of a similar paragraph into Article 11 UDHR, the adoption of Article 15 (2) ICCPR was

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[93] See *M. Bossuyt* (Guide) 324, 325; note that the general principles of international law of Article 38 (1) (c) ICJ Statute are not listed here.

[94] See *M. Nowak*, 'Art. 15', in *id.* (CCPR Commentary) 276, para. 6.

[95] See *M. Nowak*, 'Art. 15', in *id.* (CCPR Commentary) 275, 276, para. 4; *S. Joseph and J. Schultz and M. Castan* (CCPR Materials and Commentary) 462.

[96] See Communications *A.R.S. v. Canada* (91/81), 28 October 1981, U.N. Doc. CCPR/C/OP/1 at 29 (1984); *Van Duzen v. Canada* (50/79) U.N. Doc. Supp. No. 40 (A/37/40) at 150 (1982); *MacIsaac v. Canada* (55/79) U.N. Doc. Supp. No. 40 (A/38/40) at 111 (1983). Most recently, the *Baumgarten v. Germany*, 960/00 U.N. Doc. CCPR/C/78/D/960/2000 (2003) communication also referred to the general principles of international law for the criminality of certain behaviour (prohibition of arbitrary killings).

[97] Article 15 (2) ICCPR; see Article 7 (2) ECHR: "This Article shall not prejudice the trial and punishment of any 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."

disputed during the discussions on the negotiation of the Covenant.[98] Reasons behind the inclusion of a second paragraph in Article 7 ECHR as well as in Article 15 ICCPR were, yet again, founded on an intention to affirm the legality of the Nuremberg trials.[99] The Covenants should acknowledge that the principles of international law recognised in the Nuremberg Charter had been unanimously affirmed by the UNGA.[100]

However, since Article 15 (1) ICCPR and Article 7 (1) ECHR include the requirement that the particular act has to be criminal under 'international law' – which in both cases includes customary international law – the legal significance of these provisions is rather 'dubious'.[101] As was rightly explained by Nowak, the exceptional nature of Article 15 (2) ICCPR and of Article 7 (2) ECHR respectively

> relates solely to the prohibition of retroactivity of a national criminal law when the act or omission in question was criminal under customary international law at the time it was committed. This means that war crimes, crimes against peace and humanity, and similar violations of international law, such as slavery and torture, may be punished by the States Parties to the Covenant with retroactive domestic laws.[102]

Article 15 (2) ICCPR and Article 7 (2) ECHR have been criticised for restricting the *nullum crimen* principle further, since they also refer to the general principles of law.[103] However, with respect to our assessment of the implications of the *nullum crimen* principle for the source of customary international criminal law, Article 15 (2) ICCPR and Article 7 (2) ECHR only affirm that custom can generally serve as a source of international criminal law.[104] It has to adhere to the principle like any other law.

Article 15 (2) ICCPR in particular was recently affirmed by the *Baumgarten v Germany* communication of the Human Rights Committee, which also dealt with the shootings at the FRG-GDR frontier.[105] Taking a similar

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[98] See *M. Bossuyt* (Guide) 330ff.

[99] *J. A. Frowein*, Art. 7 *Nulla poena sine lege'* in *J. A. Frowein and W. Peukert* (EMRK) para. 8, 327.

[100] See *M. Nowak*, 'Art. 15', in *id.* (CCPR Commentary) 281, para. 18; *J. Frowein*, 'Artikel 7 *Nulla poena sine lege'* in *J. A. Frowein and W. Peukert* (EMRK) 327, para. 8.

[101] *M. Nowak*, 'Art. 15', in *id.* (CCPR Commentary) 281, para. 19.

[102] *Ibid.*

[103] *H. Quaritsch* in *id.* (C. Schmitt Verbrechen des Angriffskrieges) 207.

[104] *M. Nowak*, 'Art. 15', in *id.* (CCPR Commentary) 281, para. 19; on the contrary see: *B. Krivec* (Versailles) 29, who wants to allow only written customary international law as a source of international criminal law, yet without providing further evidence to support his argument.

[105] See *Baumgarten v. Germany*, 960/00 U.N. Doc. CCPR/C/78/D/960/2000 (2003).

position to the ECtHR, the Committee upheld the interpretation of the German courts, which had decided that the shootings had already been criminal under GDR law at the relevant time. Hence, it concluded that the issue of Article 15 did not arise.[106] Yet, most importantly, though strictly speaking in an *obiter dictum*, the Committee affirmed that this violation of Article 6 must also be considered criminal according to the general principles of law recognised by the community of nations, even at the time of the commission of the acts.[107]

4. *Other provisions*

Examples of the *nullum crimen sine lege principle* in other human rights instruments are not as clearly formulated as Articles 15 and 7 of the ICCPR and the ECHR respectively. The American Convention of Human Rights, for example, determines that "no one shall be convicted of any act or omission that does not constitute a criminal offence under the *applicable* law".[108] This reference to the *applicable* law, at least according to some authors, leaves it open whether anything other than national law is meant here.[109] Furthermore, the Article does not contain a reference to the 'general principles of law'. However, in international criminal law, the criminality of an act is often determined directly by an international provision. Hence, there seems to be no reason why the 'applicable law' may not comprise international law as well.[110]

5. *The ILC Draft Code against Peace and Security of Mankind and the interpretation of* nullum crimen sine lege *in international legal scholarship*

The interpretation of the *nullum crimen* principle put forward by most international human rights instruments has been taken up by the ILC in its formulations of the Draft Code against Peace and Security of Mankind. Its Article 13 on non-retroactivity reads:

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[106] *Baumgarten v. Germany* (n. 105) 9.5.

[107] *Baumgarten v. Germany* (n. 105) 9.4.

[108] Article 9, Pact of San José, emphasis added.

[109] See *J. Frowein*, 'Art. 7 (*Nulla poena sine lege*)', in *J. A. Frowein and W. Peukert* (EMRK) 326, para. 6.

[110] Contrast *M. Boot* (Nullum crimen sine lege) 222, who maintains that because of the lack of reference to the 'general principles of law', it would be doubtful whether general principles as defined in Article 38 (1) (c) ICJ Statute could serve as a basis for a definition of an international crime.

1. No one shall be convicted under the present Code for acts committed before its entry into force.
2. Nothing in this Article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.[111]

The ILC itself has stressed that this definition of the principle builds on those definitions entailed in the UN Human Rights Covenants and the jurisprudence of the International Military Tribunals of Nuremberg and Tokyo.[112] In addition, Special Rapporteur Thiam declared for the international scope of the principle that "the word "law" must be understood in its broadest sense to include not only conventional law, but also custom and the general principles of law".[113] He maintained that such a conclusion was supported by French Civil Law as well as the Common Law tradition and the Nuremberg trials.[114] Although such a broad definition of 'law' was discussed critically by the members of the Commission,[115] it was the solution which was eventually entered into the final draft.[116] Members further agreed that the criminality of an act under international criminal law had to be determined according to "international law or domestic law".[117]

Such a wide interpretation of the *nullum crimen sine lege* principle is also favoured by international legal scholarship.[118] Glasner, for example, maintained that a broad interpretation of the principle corresponds to the general nature of international law as a customary law, which does not permit a definition as strict as the one contained in national legal systems.[119] In the same vein, Bassiouni outlined that the demands of international law set their own requirements for the *nullum crimen* principle:

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[111] Article 13, Non-Retroactivity, text adopted by the Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as a part of the Commission's report (A/48/10) covering the work of that session. At: <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf> (last visited 10 December 2009).

[112] See ILC, Commentary to Art. 13, Draft Code against Peace and Security of Mankind, 1996.

[113] ILC, *D. Thiam*, 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind', UN Doc. A/CN.4/398, YBILC 1986 II; 72, 163.

[114] At: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf.

[115] See YBILC, 1986 I, 122, para. 37, 140, para. 41, 148, para. 46, 150, para. 1–5, 154, para. 40, 156, para. 2, 161, para. 45, 164, para. 72, 177, 36, id., 1986 II 2, 50; id., 1988 II, 70.

[116] Article 13, 'Non-Retroactivity'; text adopted by the Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as a part of the Commission's report (A/48/10) covering the work of that session.

[117] YBILC, 1986 II 2, 50; 1987 I, 16. 28, 39.

[118] See *S. Glaser* (1976) 76 Zeitschrift für die gesamte Strafrechtswissenschaft, 516; *G. Dahm* (Problematik des Völkerrstrafrechts) 315ff; *M. Cherif Bassiouni* (Crimes 1992) 87ff.

[119] *S. Glaser* (1976) 76 Zeitschrift für die gesamte Strafrechtswissenschaft, 174, 514–192.

> the "principles of legality" in international criminal law are different from their counterparts in the national legal systems which respect to their standards and application. They are necessarily *sui generis* because they must balance between the preservation of justice and fairness for the accused and the preservation of world order, taking into account the nature of international law, the absence of international legislative policies and standards, the *ad hoc* processes of technical drafting and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various states.[120]

Ambos, on the other hand, found that the development of the principle at the international level is characterised by its *Entformalisierung* ("deformalization") or the fact that the principle had become normatively charged, which had turned it into a principle of material justice which permitted convictions if they were dictated by considerations of justice alone.[121] However, first, a wide interpretation of the principle relates to the definition of the relevant 'law'. Hence, it permits the derivation of prohibitions of criminal conduct at the international level from the sources which are international treaty law and customary international law, as well as from the general principles of international law.

Various authors have pointed out that the international scope of the principle includes the requirement of sufficient clarity and specificity of the norm, the prohibition of non-retroactivity, and the prohibition or limitation of analogy in judicial interpretation.[122] Earlier writings, however, defined its scope in a more limited way. Triffterer, for example, found that only the prohibition of non-retroactivity applied at international level.[123]

All in all, interpretation of the available international law on the *nullum crimen sine lege* prohibition seems to point to a more open interpretation of the principle at the international level than at the national one. However, it does not seem fully established whether the principle contains all the individual prohibitions which scholars attribute to it (prohibition of retroactivity, legal clarity, prohibition of analogy).

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[120] *M. Cherif Bassiouni* (Crimes 1992) 112.

[121] *K. Ambos* (Allgemeiner Teil) 42, 251; *id.* (Internationales Strafrecht), 81, para. 6.

[122] *M. Cherif Bassiouni* (Crimes 1992) 88; *M. Nowak* 'Art. 15' in *id.* (CCPR Commentary) 275, 276, para. 4; *S. Joseph and J. Schultz and M. Castan* (CCPR Materials and Commentary) 462; *M. Bossuyt* (Guide) 326 -329.

[123] See *O. Triffterer* in *G. Hankel and G. Stuby* (Strafgerichte) 219; similarly: *S. Glaser* (1976) 76 Zeitschrift für die gesamte Strafrechtswissenschaft, 174, 514–192 174, 178, even though he supported a broader understanding of the principle with regard to international law.

C. *The* nullum crimen sine lege *principle in the case law of the international* ad hoc *criminal tribunals*

As we have seen before, in the context of the international *ad hoc* criminal tribunals the *nullum crimen sine lege* principle attains major relevance when a determination of the scope of their jurisdiction is at stake. In the course of the establishment of the ICTY, the principle was particularly important since the treaty-law situation regarding the conflict on the territory of the former SFRY was extremely unclear. Hence, the Secretary General in his report on the establishment of the Tribunal laid particular emphasis on it being respected.[124] Moreover, he underlined that the ICTY should apply existing customary international humanitarian law;[125] it was not called upon to "legislate" the law.[126] Although the principle also plays a major part in the subject-matter jurisdiction of the ICTR, due to the unproblematic situation concerning the applicable treaty law, no particular emphasis was laid on its application before that Tribunal.

1. Nullum crimen *as a principle of justice: the* Tadić Interlocutory Appeal

Since the principle is of such major importance for the subject-matter jurisdiction of the ICTY, it is not surprising that its application, and in particular its relationship to customary international law, has been discussed in several cases before that Tribunal. An examination of those judgments may thus provide us with important insights into the relationship between custom and the *nullum crimen* principle.

The principle was discussed for the first time in the *Tadić Interlocutory Appeal*. As was demonstrated earlier, in this case the appellant had contested the rightful establishment of the Tribunal under due process and fair trial guarantees of the international human rights instruments. Countering that, the ICTY maintained that the expression 'established by law' had to be understood on the international level as implying 'in accordance with the rule of law'.[127] The Tribunal further affirmed the Secretary General's definition of the scope of its jurisdiction and held that it encompassed only provi-

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[124] Report of the Secretary-General to the UNSC on the Establishment of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/25704 (1993), 9, para. 34.

[125] *Ibid.*

[126] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704 (1993), 8, para. 29.

[127] *Tadić*, Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 42–48, at 46.

sions of law which are beyond doubt part of customary international law.[128] Hence, according to the Court, the *nullum crimen sine lege* principle must be perceived as a principle of justice which, though applicable at the national level, "cannot be fully reproduced at the international level".[129] This confirmed that the principle had a much wider scope at the international level than at the national level.

2. *Individual requirements of the principle of legality: the* Čelebići *Trial Chamber judgement*

One of the landmark decisions which explored in great detail the implications of the principle of legality for the development of new international criminal law is the *Čelebići* Trial Chamber judgement.[130] The defendants had contested the Tribunal's jurisdiction on the applicability of common Article 3 of the Geneva Conventions to non-international as well as international armed conflict on the basis of the *nullum crimen sine lege* principle.[131] However, the Trial Chamber argued that the acts with which the defendants had been charged before the Tribunal – murder, torture, rape and inhuman treatment – would have been criminal in any case under the national criminal laws of Bosnia and Herzegovina.[132] Furthermore, it maintained that Article 15 (2) ICCPR supported the prosecution of those crimes before an international Tribunal. In to the Court's view, Article 15 (2) ICCPR had been inserted into the Covenant in the light of the proceedings before the IMTs of Nuremberg and Tokyo. It held:

> These Tribunals had applied the norms of the 1929 Geneva Conventions and 1907 Hague Conventions, among others, despite the fact that these instruments contained no reference to the possibility of their criminal sanction.[133]

Consequently, the Tribunal determined that the the acts in question were criminal under international law according to the "general principles of law" recognised by all legal systems.[134] It thus concluded that with the implications

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[128] *Tadić*, Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 143.

[129] *Blaškić*, Appeals Chamber Judgment, IT-95-14-A, 29 July 2004, para. 141, 78, 86; for the *nulla poena sine lege* principle compare: *S. Zappalà* (Human Rights) 195.

[130] *Čelebići*, Trial Chamber Judgment, Case No. IT-96-21-T, of 26 November 1998, para. 401ff.

[131] *Čelebići* (n. 130) para. 312.

[132] *Ibid.*

[133] *Čelebići* (n. 130) para. 313.

[134] *Ibid.*

of Article 15 (2) ICCP in mind, the *nullum crimen sine lege* provision had thus not been violated.

Later, the Chamber explained that the *nullum crimen sine lege* and, *nulla poena sine lege* principles, the requirement of specificity and the prohibition of ambiguity in criminal legislation constituted elements of the principle of legality which were recognised in all the world's major criminal justice systems.[135] Nonetheless, due to the different nature of the international criminal justice system, it considered these principles not to be readily applicable in the international sphere. Instead, before transferring them to the international level, states had to take into account some decisive factors:

> the nature of international law; the absence of international legislative policies and standards; the *ad hoc* processes of technical drafting; and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States.[136]

The Chamber thus concluded that the internationally accepted content of the principle of legality comprised the rule of strict construction and the prohibition of retroactive penal laws:

> To put the meaning of the principle of legality beyond doubt, two important corollaries must be accepted. The first of these is that penal statutes must be strictly construed, this being a general rule which has stood the test of time. Secondly, they must not be given retroactive effect.[137]

According to the Tribunal, the rule of strict construction required that all the elements of a crime of which a particular person was accused had to be included in the corresponding statute.[138] At the same time, it re-emphasised that it had always been a task of the courts to fill *lacunae* in statutes, if accidental, by interpretation according to the legislative intent.[139] However, the Chamber stressed that in international law the rule of strict construction had to be adapted to the particularities of the sources of international law and, in particular, to the source of customary international law. It held that custom, by its very nature, did not provide for law as hard as written or statutory law. Taking into account the condition of applying only existing customary international law set up by the Secretary General on the establishment of the Tribunal, in particular, the Chamber reiterated that the Security Council had not been authorised to *create* the offences which were punishable before it.[140]

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[135] *Čelebići* (n. 130) para. 402, 403.
[136] *Čelebići* (n. 130) para. 405.
[137] *Čelebići* (n. 130) para. 408.
[138] *Čelebići* (n. 130) para. 411.
[139] *Čelebići* (n. 130) para. 412.
[140] *Čelebići* (n. 130) para. 416f.

3. *Assessment*

The *Čelebići Case* demonstrates some interesting aspects of the international application of the *nullum crimen sine lege* principle. The Trial Chamber affirmed all four aspects of the principle under international law: the prohibition of retroactivity of international criminal laws, the principle of *nulla poena sine lege*, the principle of specificity and the prohibition of ambiguity (analogy). Nonetheless, the Chamber considered them under a different heading: it decided that they were part of the greater principle of legality. Most importantly, the Tribunal referred to the particular factors which must be taken into account when considering the principle of legality in international criminal law. The *ad hoc* nature of the Tribunals and the fact that international law knew no legislator and that many of its rules were also contained in national jurisdictions were considered important determinants which gave the *nullum crimen* principle a different meaning from that in national jurisdictions. Finally, the Court affirmed that the rule of strict construction was not violated by the sheer customary nature of certain prohibitions of international criminal law.

Despite these findings, however, with respect to common Article 3 the Trial Chamber disregarded these very implications of the *nullum crimen* principle: it tried to establish the criminality of violations of the Article simply by referring to the fact that they had been criminalised in any case under national law.[141] With regard to the principle of legal clarity, this seems a difficult result. Nonetheless, the findings of the *Čelebići* Trial Chamber on the elements of the *nullum crimen sine lege* principle have been affirmed by subsequent jurisprudence of the Court ever since.[142] Hence, the definition of the principle as spelled out by this decision can now be deemed to be firmly established by the case law of the Tribunal.

4. *The* Hadžihasanović *Interlocutory Appeal decision*

In this context one decision merits further consideration.[143] The *Hadžihasanović Interlocutory Appeal* debated the *nullum crimen* principle when discussing the customary character of the principle of command responsibility. It

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[141] *Čelebići* (n. 1576) para. 314.

[142] *Hadžihasanović*, Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Case No.: IT-01-47-AR72, 16 July 2003, para. 44; *Knorjelac*, Appeals Chamber Judgment, Case No. IT-97-25-A, 17 September 2003, paras. 220–223; *Milutinović*, Appeals Chamber Decision, Case No. IT-99-37-AR72, 8 June 2004, para. 9.

[143] See also the discussion in *T. Meron* (2003) RdC, vol. 301, 130, 131.

affirmed that in case of doubt, criminal responsibility could not be held to exist. Full respect had to be paid to the principle of legality:

> it has always been the approach of the Tribunal not to rely merely on a construction of the Statute to establish the applicable law on criminal responsibility, but to ascertain the state of customary law in force at the time the crimes were alleged to have been committed.[144]

Yet, considering these findings, one needs to keep in mind that the Appeals Chamber did not discuss the implications of the *nullum crimen* principle when debating the issue of whether the principle of command responsibility applied to international and non-international armed conflict alike. Certainly, this would have been the more interesting aspect of the judgment. At least, it appears that from a general perspective the deductive approach chosen by the Chamber to answer this first question seems to be most prone to clashing with the principle's preconceptions of foreseeability and clarity.

5. *No creation of new law: the* Aleksovski *Appeals Chamber judgment*

The *Aleksovski* Appeals Chamber judgment also had to examine allegations by the defence that the Trial Chamber had violated the *nullum crimen sine lege* principle by basing its decision solely on previous findings of the Court.[145] With regard to these arguments, the Court distinguished between the interpretation and clarification of customary law on the one hand, which was permissible under the principle of legality, and the creation of new law, which would violate the *ex post facto* prohibition, on the other. Accordingly it stated:

> [T]he principle of *nullum crimen sine lege*… does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime.[146]

These findings of the Appeals Chamber were later confirmed by several other judgments of the Court.[147]

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[144] *Hadžihasanović*, Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Case No.: IT-01-47-AR72, 16 July 2003, para. 44.

[145] *Aleksovski*, Appeals Chamber Judgment, IT-95-14/1-A, 24 March 2000, para. 126.

[146] *Aleksovski*, Appeals Chamber Judgment, IT-95-14/1-A, 24 March 2000, para. 127.

[147] *Čelebići*, Appeals Chamber Judgment, IT-96-21-A, 20 February 2001, paras. 160, 173–174; *Šešelj*, Decision on Motion by Voijslav Šešelj Challenging Jurisdiction and Form of Indictment, Trial Chamber II, Case No. IT-03-67-PT, 26 April 2004, para. 16.

6. *Limitations on the methodology of customary international criminal law: The* Vasiljevic *Trial Chamber judgment and the* Ojdanić *Appeals Chamber decision*

Two more recent judgments of the ICTY have already dealt with the tension which ensues when the demands of legal clarity and security of the *nullum crimen sine lege* principle clash with the broad conception of customary international law.

The *Vasiljevic* Trial Chamber was asked to determine whether the charge 'violence to life or person' contained in common Article 3 already belonged to the existing body of customary international law. First, the Court determined that a conviction under customary international law had to comply with the rule of strict construction, enshrined in the *nullum crimen* principle. That is, it had to be sufficiently precise and accessible under international law:

> From the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either *insufficiently precise* to determine conduct and distinguish the criminal from the permissible, or was not *sufficiently accessible* at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it *sufficiently clear* what act or omission could engage his criminal responsibility.[148] (emphasis added)

Secondly, the Chamber confirmed the Secretary General's conclusions on the establishment of the Tribunal. It thus determined that its jurisdiction had to be based on the firm ground of existing customary international law. Nonetheless, following the findings of the *Aleksovski Case*, the Chamber further decided that the *nullum crimen sine lege* principle did not prevent it from interpreting and clarifying the elements of a particular crime.[149] In the light of these implications of the principle, the Tribunal considered that there was insufficient ground to affirm the customary international law nature of 'violence to life or person'. It had been unable to identify any corresponding state practice which would establish the customary character of the crime. In particular, the Chamber concluded, the ILC Draft Code of Crimes could serve only as subsidiary evidence of rules of customary international law. The rules enshrined in the code

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[148] *Vasiljevic*, Trial Chamber Judgment, Case No. IT-98-32-T, 29 November 2002, para. 193.
[149] *Vasiljevic* (n. 148) para. 196–198.

> may reflect legal considerations largely shared by the international community, and they may expertly identify rules of international law, but they do *not* constitute state practice relevant to the determination of a rule of customary international law.[150]

The Tribunal reiterated that any findings of the Court on the customary international law status of a particular crime had to comply with the implications of the *nullum crimen sine lege* principle, and in particular with its rule of strict construction. The crime had to be reasonably foreseeable and accessible:

> Once it is satisfied that a certain act or set of acts is indeed criminal under customary international law, the Trial Chamber must satisfy itself that this offence with which the accused is charged was defined with sufficient clarity *under customary international law* for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible. When making that assessment, the Trial Chamber takes into account the, specificity of international law, in particular that of customary international law. The requirement of sufficient clarity of the definition of a criminal offence is in fact part of the *nullum crimen sine lege* requirement, and it must be assessed in that context.[151]

This decision is one of the few ICTY cases where a chamber actually quashed a conviction based upon a crime with an alleged customary character. As such, it indicates the limitations which the *nullum crime sine lege* principle imposes on the finding of new norms of customary international law. The following core conclusions can be inferred from the judgement. First, the customary norm has to be sufficiently clear. This means that it has to have been accessible and reasonably foreseeable for the accused. Secondly, the ILC Draft Code of Crimes cannot serve as the sole evidence of existing customary international law.

Using an argument similar to that in the *Vasiljevic Case*, the most recent *Stakić* Appeals Chamber decision denied that the customary crime of deportation encompassed transfers across constantly changing frontlines. The Appeals Chamber criticised the Trial Chamber for not having provided sufficient evidence (of either state practice or *opinio juris*) to assume such a position, and thus reaffirmed the requirements of clarity and foreseeability established in the *Vasiljevic Case*.[152]

The subsequent *Ojdanić* judgment further elaborated on the individual elements of the *nullum crimen* principle set out in the *Vasiljevic* decision. First, it outlined that the principle required that a norm *existed* at the time of

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[150] *Vasiljevic* (n. 148) para. 200.

[151] *Vasiljevic* (n. 148) para. 201.

[152] *Stakić*, Appeals Chamber Judgment, Case No. IT-97-24-A, 22 March 2006, para. 302.

the commission of the offence under international law. Secondly, it reiterated that the law providing for such liability must have been sufficiently accessible at the relevant time as well as foreseeable for the accused:

> in order to come within the Tribunal's jurisdiction *ratione personae*, any form of liability must satisfy three pre-conditions: (i) it must be provided for in the Statute, explicitly or implicitly, (ii) it must have existed under customary international law at the relevant time (iii) the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way; and (iv) such person must have been able to foresee that he could be hold criminally liable for his actions if apprehended.[153]

What is more, the Chamber stated that the application of the principle would not bar any interpretation of the elements of a particular crime, yet it would prevent the Tribunal from "creating new law beyond the reasonable limits of interpretation."[154] This once again reaffirms the findings of the *Aleksovski* judgment. The Chamber further pointed out that customary international law itself created some difficulty for the establishment of individual criminal liability in international law. It was not always represented as written law and was not always easily accessible either.[155] Notwithstanding these issues, however, the Tribunal observed that customary rules provided guidelines for international criminal liability.[156]

In the Chamber's view, these shortcomings, however, ought not to lead to a dilution of the requirements of the *nullum crimen* principle. The gravity of an international crime or its particular heinousness, it held, was not sufficient to establish its customary international law nature.[157] According to its view, only if supported by extensive state practice and the fact that it had been criminal under Yugoslav national law could sufficient foreseeability of the crime be considered to be established.[158]

The *Ojdanić Case* clearly reveals that the Appeals Chamber does not approve of some of the Court's previous pronouncements on the customary international law nature of certain crimes within its jurisdiction. Following the Chamber's findings, the *nullum crimen* principle required sufficient

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[153] *Ojdanić*, Decision on Joint Criminal Enterprise, Appeals Chamber Decision, IT-99-37-AR72, 21 May 2003, para. 21.

[154] *Ojdanić* (n. 153) para. 38.

[155] *Ojdanić* (n. 153) para. 41.

[156] *Ibid.*

[157] The tribunal quoted the *Tadić* decision as an example of the employment of such a technique for the finding of customary international law: see *Ojdanić*, Decision on Joint Criminal Enterprise, Appeals Chamber Decision, IT-99-37-AR72, 21 May 2003, para. 42.

[158] The most recent *Krajišnik* judgment affirmed these findings. See *Krajišnik*, Appeal Judgment, Case No. IT-00-39A, 17 March 2009, para 670.

clarity of the crime, as well as its foreseeability. Hence, mere reference to the heinousness of the act, without further support from state practice or evidence of *opinio juris*, does not fulfil *nullum crimen* requirements. To some extent, such findings certainly fly right in the face of the 'core rights' approach identified above.[159] They demonstrate that reliance on the particular heinousness of the act may not serve as the sole evidence for the customary character of a certain rule of international law. Further proof of *opinio juris* or state practice will still be necessary.

7. *Custom, interpretation and the* nullum crimen *principle: the* Stakić *Trial Chamber judgment*

Succeeding the *Ojdanić* case, the *Stakić* judgment pointed to the difficult relationship between interpretation, the finding of customary international law and the limitations which the *nullum crimen sine lege* principle set on these methods. The Tribunal pointed out that for a determination of the applicable law, cautious interpretation of international criminal and international humanitarian law was needed. Otherwise, it found, the *nullum crimen sine lege* principle might be violated:

> [T]he Trial Chamber… has therefore been very cautious in interpreting the relevant rules and has assessed carefully whether the law constituted applicable law at the time the alleged crimes were committed. To do otherwise might lead to a violation of the fundamental principle of non-retroactive application of substantive criminal law.[160]

Such findings reveal the proximity between mere 'interpretation' and finding of new customary international law. They demonstrate that the implications of the *nullum crimen* principle further extend to methods below the level of the formation of new law.

8. *ICTR Cases*

The *nullum crimen* principle found a different emphasis in the case law of the ICTR. As the *Rutaganda* Trial Chamber judgment pointed out:

> In establishing the ICTY, the Secretary-General dealt with this issue by asserting that in the application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law. However, in the case of this Tribunal, it was incumbent on the Chambers to decide whether or not the said

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[159] *Supra* on page 80.

[160] *Stakić*, Trial Chamber Judgment, Case No. IT-97-24-T, 31 July 2003, para. 412.

> principle had been adhered to, and whether individuals incurred individual criminal responsibility for violations of these international instruments.[161]

The more recent *Karemera* Trial Chamber decision,[162] on the other hand, confirmed that the principle required the existence of a particular norm at the time of the commission of the relevant acts, its foreseeability and accessibility by the accused, and so followed the findings of the ICTY on this issue.[163]

D. *Conclusions on the interpretation of the* nullum crimen *principle by the ICTY and ICTR*

As the case law of the ICTY and the ICTR on the *nullum crimen* principle reveals, the requirements of the principle for the finding of new customary international criminal law are relatively clear. The Tribunals established that aspects of legal clarity and reasonable foreseeability and accessibility in particular have to be observed when assessing new customary norms. Of course, the prohibition of retroactivity also belongs to the canon of the principle.

As shown by the *Vasiljevic* and *Ojdanić* judgments, the establishment of customary international criminal law fails if these requirements are not fulfilled. In particular, mere reliance upon morality to support the customary character of a crime will not fulfil the requirements of legality. Moreover, as outlined in *Vasiljevic*, adequate evidence has to be provided to ascertain the customary character of a norm. For example, quoting only the ILC Draft Code of Crimes would not be sufficient to establish the customary international law nature of a particular prohibition of international criminal law.

In comparison with the ICTY, the ICTR does not seem to consider it necessary to expand as extensively as the ICTY on the implications of the *nullum crimen sine lege* principle. Yet, as may be inferred from the *Karemera* Trial Chamber judgment, the Tribunal regarded the same aspects of the principle to be relevant for its case law as previously elaborated by the ICTY.

However, certain discrepancies arise if one compares the relatively straightforward jurisprudence of the Tribunals on the *nullum crimen* principle to their actual findings on the customary nature of international criminal norms. The law as applied by the ICTY does not always meet the criteria of

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[161] *Rutaganda*, Trial Chamber Judgment, Case No.: ICTR 96-3-T, 6 December 1999, para. 86.

[162] *Karemera, Ngirumpatse, Nzirorera, Rwamakuba and Ngirumpatse*, Decision Challenging Jurisdiction in Relation to Joint Criminal Enterprise, ICTR-98-44-T, 11 May 2004.

[163] *Karemera, Ngirumpatse, Nzirorera, Rwamakuba and Ngirumpatse*, Decision Challenging Jurisdiction in Relation to Joint Criminal Enterprise, ICTR-98-44-T, 11 May 2004, para. 39.

accessibility, foreseeability or "fair warning".[164] As demonstrated above, cases like the *Kupreškić* Trial or the *Čelebići* Trial and Appeals Chamber decisions are doubtful with regard to the finding of customary international law, and the Chamber's findings do not comply fully with the aspects of legal clarity, foreseeability and the prohibition of retroactivity as contained in the *nullum crimen* principle.[165] In particular, the interpretation of the provisions of the Hague and Geneva Conventions in the light of humanitarian aims created the impression that the Tribunals delivered arbitrary justice.[166] The case law of the ICTY and ICTR thus revealed a tension between humanitarian objectives and strict construction.

E. *Further development of* nullum crimen sine lege – *Article 22 of the ICC Statute*

An assessment of the codification of the *nullum crimen sine lege* principle in the Rome Statute may provide certain indicators of how the foregoing tensions might be solved in future decisions of international criminal courts. It may also reveal how the principle may further develop in international criminal law. Article 22 reads:

> *Art. 22*
> *Nullum crimen sine lege*
> 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
> 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
> 3. This Article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.[167]

Within the system of the Statute, Article 22 belongs to Part Three on the 'General Principles of Criminal Law'. As Triffterer has aptly remarked, they describe the indispensable legal rules which have to be observed both by

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[164] *M. Boot* (Nullum crimen sine lege) 305; For an assessment of the impact of the *nullum crimen* principle on the findings of the ICTY on the *mens rea* requirement of command responsibility and a criticism of the court's assessment of the applicable customary international law see *I. Josipović*, The ICTY's Approach to Customary Law in *T. Kruessmann* (ed.) (ICTY) 77ff, at 92.

[165] Contrast *M. Shahabuddeen* (2004) 2.4 Journal of International Criminal Justice, 1107, 1013.

[166] See also *M. Boot* (Nullum crimen sine lege) 308.

[167] U.N. Doc. A/CONF.183/9.

the Court and the prosecutor in their endeavour "to establish a case beyond reasonable doubt and according to the rule of law."[168]

Generally, even from a quick glance at Article 22 ICC Statute, it must be noted that the Article has further developed the principle, compared to its previous interpretation in international human rights instruments and in the case law of the ICTY and the ICTR.[169] In its first two paragraphs, the Article elaborates the individual elements of the principle in quite some detail (prohibition of non-retroactivity, rule of strict construction, prohibition of analogy, no interpretation *in malam partem*), leading to the conclusion that its interpretation now tends more towards a stricter, Civil Law understanding. This, in particular, is affirmed by the inclusion in the Article of the prohibition of analogy.

1. *The prohibition of retroactivity*

The prohibition of retroactivity of Article 22 (1) ICC Statute appeared in the drafts of the Statute right from the beginning.[170] However, from the decisions taken by the Preparatory Committee at its session held from 11 to 21 February 1997 onwards, delegations favoured the inclusion in the Statute of an article on retroactivity which applied to the *ratione personae* jurisdiction of the Tribunal.[171] This aspect of the prohibition of retroactivity later became Article 24 (1) ICC Statute. Though the prohibition of Article 22 (1) bears a close resemblance to Article 24 (1), the articles may be distinguished quite easily. Article 24 (1) predominantly deals with the condition that any determination of criminal responsibility under the Statute is dependent on its prior entry into force. Given that Article 11 also limits the *ratione temporis* jurisdiction of the Court to cases which arise after the coming into effect of the Statute, Article 24 (1) seems to be a rather superfluous provision.[172]

2. *The rule of strict construction and prohibition of interpretation* in malam partem

However, the first rule mentioned in Article 22 (2) of the ICC Statute is the one of strict construction. It aims at the protection of the defendant by ensuring that the potential infringement of his/her liberty is the result

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[168] *O. Triffterer* in *id.* (Gedächtnisschrift Theo Vogler) 215.
[169] *Supra* pages 504ff.
[170] See *M. Cherif Bassiouni* (History) 188.
[171] See *M. Cherif Bassiouni* (History) 189–191.
[172] See also *S. Lamb* in *A. Cassese et al.* (Rome Statute Commentary) vol. 2, 752, Note 72; *B. Broomhall*, 'Art. 22', in *O. Triffterer* (Commentary) 460, para. 51.

only of crimes which are legislatively and not judicially defined (*lex scripta*).[173] Nonetheless, Triffterer, for example, maintains that the rule does not entail a restriction solely on the *lex scripta*, as determined by most Civil Law jurisdictions. He finds that customary international law must also be considered as one of the sources of international criminal law, as long as these laws are "strictly construed".[174] However, if the Statute is understood as a rather closed concept, in which customary international criminal norms support only an interpretation of its provisions, the opposite view may also be taken. Following this concept, the scope of the rule of strict construction would be restricted to the law contained in the Statute.[175] Nonetheless, these questions will only be solved ultimately only by an interpretation through the ICC.

The second rule covered by Article 22 (2) of the ICC Statute is the one according to which ambiguities must be read in favour of the accused. It is an accepted consequence of the rule on strict construction.[176] This rule is generally regarded as "the final step in an interpretative sequence".[177] In most cases, all the methods of interpretation will have to be exhausted before one resorts to the ambiguities rule to dispel remaining uncertainties.

3. *The prohibition of analogy*

The prohibition of the use of analogy was introduced relatively late into the negotiations on Article 22. It appeared for the first time as a bracketed proposal in the Decisions taken by the Preparatory Committee at its Session in February 1997.[178] From then on, it reappeared in each draft of the Statute and, without further discussion, was finally adopted as a part of Article 22 (2) at the Rome Conference.

Since discussion on the prohibition of analogy seems to have been nonexistent, the precise scope of this prohibition is unclear. Analogy can take numerous different forms and Article 22 (2) does not specify which of these forms are permitted.[179] Broomhall, for example, wants to restrict the use of permissible analogy to interpretation.[180] He maintains that analogy must be understood as an interpretative technique which is the last in a series of steps

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[173] *B. Broomhall*, 'Art. 22' in *O. Triffterer* (Commentary) 456, para. 35.
[174] *O. Triffterer* in *id.* (Gedächtnisschrift Theo Vogler) 213ff, 220.
[175] *W. Schabas* (Introduction) 75.
[176] *B. Broomhall*, 'Art. 22' in *O. Triffterer* (Commentary) 458, para. 45.
[177] *B. Broomhall*, 'Art. 22' in *O. Triffterer* (Commentary) 459, para. 46.
[178] See Decisions taken by the Preparatory Committee at its Session Held 11 February 1997, Art. A, *Nullum crimen sine lege* in *M. Cherif Bassiouni* (History) vol. 2, 183.
[179] *S. Lamb* in *A. Cassese et al.* (Rome Statute Commentary) vol. 2, 752.
[180] *B. Broomhall*, 'Art. 22' in *O. Triffterer* (Commentary) 458, para. 43.

that a judge undertakes in order to ascertain the applicable law in a particular situation.[181] Furthermore, Broomhall advocates that the prohibition of analogy must be restricted to the definitions of crimes. Its application in other cases would ultimately depend on the applicable law and principles to be applied in a given case.

However, interpretation of the prohibition of analogy in Article 22 is only in its first stage. It remains to be seen how the ICC will deal with this element of the *nullum crimen sine lege* principle. In any case, the application of the prohibition of analogy in the Rome Statute will be easier for the self-contained regime of the Rome Statute than it is for the whole of international criminal law.[182]

4. *Article 22 (3) ICC Statute*

As indicated in our discussion of Article 21 of the ICC Statute, Article 22 (3) serves two purposes. First, it reaffirms the primacy of the Statute in the canon of sources of international criminal law applicable before the ICC. Secondly, it acknowledges the source character of customary international law in international criminal law – outside the Statute. As Triffterer remarked, this provision may seem superfluous at first sight.[183] However, several delegations at the Rome Conference had been aware of the fact that whatever definition of crimes could be agreed upon in Rome, no agreement would be possible on whether the crimes contained in the Statute corresponded precisely to the current state of customary international law as understood by the delegations.[184] Thus, Paragraph 3 was included as a safeguard for the independent

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[181] *B. Broomhall*, 'Art. 22' in *O. Triffterer* (Commentary) 458, para. 43.

[182] *Bassiouni*, for example, supports a broader notion of permissible analogy than is put forward by Art. 22 of the Rome Statute "International criminal law as it is now… requires the existence of a legal prohibition arising under conventional or customary international law, which is deemed to have primacy over national law, and which defines a certain conduct as criminal, punishable or prosecutable, or violative of international law. This minimum standard of legality permits the resort to the rule *ejusdem generis* [permitting analogy] which respect to analogous conduct, and also permits the application of penalies by analogy.…" (see *M. Cherif Bassiouni* (Crimes 1992) 112).

[183] See *O. Triffterer* in *id.* (Gedächtnisschrift Theo Vogler) 221: "The essence of Article 22 paragraph 3 is that with regard to crimes punishable directly under international criminal law the principle of certainty may not only be guaranteed by defining crimes through "legislative acts", which corresponds in international law with treaties and convention, but also by establishing criminal responsibility though customary international law as long as definitions given by this source are by themselves or with the help of a non criminal provision, in a sufficient way 'strictly construed'."

[184] See *P. Saaland* in *R. Lee* (Making of the Rome Statute) 195.

evolution of customary international law.[185] It emphasises that although the *nullum crimen* principle is one of international law, the effects of its embodiment in Article 22 are limited to the Statute.[186]

F. *Conclusion on the* nullum crimen *principle in Article 22 ICC Statute*

The assessment of the content of the *nullum crimen* principle in Article 22 permits some interesting conclusions. First, it affirms the source character of customary international law in the field of international criminal law. Nonetheless, within the realm of the Statute and of Article 22 in particular, it may be invoked only indirectly, providing interpretative assistance for the application of the norms of the Statute.

Secondly, our analysis of Article 22 of the ICC Statute has revealed some uncertainties revolving around the prohibition of analogy and its relation to the application of rules of customary international law. Within the framework of the Rome Statute, customary rules can be invoked at least to interpret individual crimes punishable before the Court. In this regard, the codification of the elements of the *nullum crimen* principle in the Rome Statute did not pay sufficient attention to the specificities of international criminal law.

All in all, it may be concluded that Article 22 of the ICC Statute has further developed the *nullum crimen* principle. Since its scope in previous instruments was disputed, Article 22 seems to have taken up most of the implications identified by international human rights instruments and by the case law of the ICTY and the ICTR.

IV. OVERALL CONCLUSION ON THE IMPACT OF THE *NULLUM CRIMEN SINE LEGE* PRINCIPLE ON THE FINDING OF NEW CUSTOMARY INTERNATIONAL LAW

From an assessment of the *nullum crimen sine lege* principle in major international human rights instruments, the case law of the ICTY and the ICTR and from its further development in the Rome Statute, the following elements of the principle can be regarded as established:

- the prohibition of retroactivity,
- the rule of strict construction, entailing the specificity and foreseeability of the crime for the accused.

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[185] See *S. Lamb* in in *A. Cassese et al.* (Rome Statute Commentary) vol. 2, 754; *B. Broomhall*, 'Art. 22' in *O. Triffterer* (Commentary) 460, para. 50.

[186] See *B. Broomhall*, 'Art. 22' in *O. Triffterer* (Commentary) 459, para. 49.

However, since the prohibition of analogy was introduced only in Article 22 of the Rome Statute, it cannot yet be considered as accepted in international criminal law. It remains to be seen how it can be reconciled with the particular challenges it faces through the specificities of international law and its different sources. Triffterer has rightly concluded that it always remains

> a challenge for the respective system to develop its scope and notion of *nullum crimen*, *nulla poena sine lege* in order to give the best guarantees for the protection of fundamental rights to those, subject to its inherent legal system and jurisdiction.[187]

Furthermore, it has become clear from the case law of the ICTY and the ICTR that the principle also extends to the finding of new customary international law. Hence, the Courts' reasoning on the customary character of certain norms of international criminal law has to pay due regard to the aspects of non-retroactivity, foreseeability and clarity. Generally, it can be seen that the *nullum crimen* principle has to be observed independently of the method employed by the Court for the finding of new customary international law.[188] It is clear, however, that these aspects of the principle must pay due regard to the nature of customary international criminal law. With respect to the latter, Hauck aptly characterized the nature of the principle and its relation to customary international law as an imperative for improvement.[189]

Nevertheless, as the critique of the ICTY on its very jurisprudence has revealed, reasoning along the lines of a 'core rights' approach is particularly prone to conflict with the principle's aspects of clarity and foreseeability. Likewise, reasoning will remain problematic with regard to the rule of strict construction if based solely on a deductive approach. The sole invocation of a deductive approach, if not supported by further arguments, evidence of *opinio juris* or state practice, may pose a challenge to the *nullum crimen sine lege* principle. Thus, the 'classic elements' of customary international law remain of importance, even in the field of international criminal law.

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[187] *O. Triffterer* in *id.* (Gedächtnisschrift Theo Vogler) 222.

[188] See *P. Hauck* 21 (2008) *Humanitäres Völkerrecht: Informationsschriften*, at 64f; yet, he does not refer to the ICTY's and ICTR's case law on customary international criminal law.

[189] *P. Hauck* (n. 188) at 61.

Chapter Seven

Developments in Customary International (Criminal) Law: Implications from the Case Law of the ICJ, the ICTY and the ICTR

I. INTRODUCTION

Close to the end of this study of the development of customary international law and customary international criminal law, it is time to put things in perspective. So far, we have analysed and identified theoretical conceptions of methods of recognition of new customary rules. We then compared the methods of customary law identification with that of other sources of international law and the methods of interpretation and analogy. Thereafter, we demonstrated by an analysis of the case law of the ICJ as well as of the two *ad hoc* international criminal tribunals which of the methods and rules identified were in fact applied in practice. This analysis of the case law also revealed some of the flaws and disadvantages of the particular theories and methods addressed at the beginning of this study.

However, as this is a study of the *development* of customary rules, the most important issue has hitherto been missing: a delineation of the *direction* into which custom as a source of international (criminal) law will most probably evolve or of the *perspective* that may be drawn for the development of the source of customary international (criminal) law.[1]

II. THE CONCLUSIONS FROM THE CASE LAW OF THE ICJ, THE ICTY AND THE ICTR

The results obtained from our examination of the case law of the ICJ, the ICTY and the ICTR may help to determine the ultimate direction in which custom may develop. There are a few hints which, at first sight, can lead us

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[1] This question has also been posed by *K. Kress* in *A. Zimmermann* (International Criminal Law) 78. He asked: "The crucial question remains what the recent evolution of international criminal law tells us about the process of the formation of general international law".

to conclude that customary international criminal law may indeed evolve into a source of its own, thus evidencing the 'fragmentation' of international law. One often cited example which supports this conclusion is the contradictory findings of the ICJ and the ICTY on the level of control needed for the attribution to a state of acts of non-state actors.[2] In particular in the recent *Srebrenica* judgment, the ICJ emphasised that the ICTY's findings in the *Tadić* case could not be elevated to the level of general international law, and argued that they had to be considered as a rule of *lex specialis* which applied only in international criminal law.[3] There is another aspect which was revealed in our analysis of the case law of the ICJ, ICTY and ICTR which may lead to the same conclusion: the deductive approach was applied by all three courts predominantly in the field of international humanitarian law. It can thus be regarded as an approach to customary international law, which is special to this area of international law and applies as a *lex specialis* approach to this area.

However, this is just one example from the case law of the ICJ, the ICTY and the ICTR. Whether their findings really evidence the growing fragmentation of international law or a trend which approves of certain fundamental values dominating international law-making processes will be examined below. In this regard, the results obtained from our examination of the formation of customary international law in the case law of the ICJ, the ICTY and the ICTR will provide the main evidence.

A. *Lessons from the ICJ's case law*

1. *Concerning the evidence of new customary international law*

One element which may be indicative of the growing fragmentation or constitutionalisation of international law is the evidence utilised by the three courts in their assessment of the formation of a new rule of customary international law. The actual selection of a particular piece of evidence by the courts and its consideration in the process of the formation of a new rule of customary international law can point to the normative weight and importance of this individual piece of evidence. For instance, if the courts prefer

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[2] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) ICJ, 27 February 2007, para. 401.

[3] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) ICJ, 27 February 2007, para. 403–406.

a particular type of evidence (A) to another (B), this shows that the courts believe evidence A has greater normative weight than evidence B. Of course there may be various other factors which influence such a choice, like the non-existence of further available evidence or the fact that the evidence just fits or does not fit the underlying set of facts. Yet the selection of a particular piece of evidence alone indicates that the courts believe it has at least *a* normative value, after all.

Considering only the evidence to which the ICJ referred in its assessment of the formation of new customary law, the case law of the World Court reveals certain tendencies which points towards a more 'modern', constitutionalist, understanding of the source of customary international law. For example, the Court introduced new, international evidence to prove the existence of a novel norm of customary international law. This evidence is generated at the international level and by international agents or organs, which - sometimes- even act independently of om the individual will of states. The first 'new' evidence introduced by the Court was the resolutions of the UNGA. In the *Nuclear Weapons Advisory Opinion*, the ICJ ended the long scholarly debate on whether UNGA resolutions might be capable of proving the *opinio juris* of states and affirmed this supposition.[4] Similarly, the ICJ held in the *Nicaragua case* that multilateral conventions bore witness to the *opinio juris* of states. Yet for the formation of a new customary rule, this *opinio juris* still needed to be supported by additional state practice.[5] Though UNGA resolutions and international conventions still come into existence through the practice of states, i.e. through their respective accessions to the convention or their voting practice, they are also evidence of the concerted international will and action of states. The mere fact of its creation by common action at the international level distinguishes this evidence from evidence that generated by a state's unilateral expression of its legal views. Moreover, the Court determined in the *Wall case* that opinions of the ICRC could also indicate the customary character of a rule of international humanitarian law.[6] These findings, too, are a complete novelty, which only the ICTY and ICTR had previously agreed upon[7] and which clearly indicate that even the ICJ does no longer follow a strictly traditional approach to the finding of new customary law. The ICRC is no international organ, in which states participate through their voting practice or in any other way. On the contrary, it is entirely

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[4] *Legality of the Threat of Nuclear Weapons*, ICJ Reports 1996, para. 70.

[5] *Ibid.*

[6] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, para. 97.

[7] See above, Chap. 5, V.A.8, 218ff.

independent of the legal views of states and composed of individuals with distinguished expertise in international humanitarian law.

2. *The different methods of determining new customary international law*

Like the evidence utilised by the courts to prove the evolution of a new rule of customary international law, the methods employed for the actual assessment can also indicate a certain tendency of the court or tribunal to be convinced that the underlying norms belong to a specialised area of international law (proving the growing fragmentation of international law) or may be derived from overarching principles which apply to international law as a whole (thus supporting the constitutionalisation of international law).

Yet, the specific methods employed by the ICJ in its investigation of new customary rules do not indicate a growing trend towards the constitutionalisation of international law, which resulted when we assessed the evidence utilised by the ICJ. On the contrary, the findings of the ICJ remain slightly ambiguous and, in consequence, rather affirm a trend towards the growing fragmentation of customary international law. As illustrated, the ICJ has not applied a single methodological approach when assessing the source of customary international law. Instead, it has employed various concepts, depending on the evidence before it and the subject matter of the underlying dispute.

One of the concepts identified, which can support both 'constitutionalist' and 'fragmentationalist' trends is the 'core rights' or deductive approach. The method was chosen by the World Court only in cases which – in one way or another – concerned international humanitarian law. The Court referred to the core rights approach in the *Corfu Channel Case*,[8] the *Genocide Advisory Opinion*,[9] the *Barcelona Traction Case*[10] and the *Genocide Case*,[11] the *Gulf of Maine Case*[12] and the *Nicaragua Case*.[13] Recently, it returned to elementary considerations of humanity in the *Wall Advisory Opinion*[14] as well as in the *Srebenica* Judgment.[15] Because the core rights approach itself builds on the 'elementary considerations of humanity' enshrined in the Martens Clause, its link to international humanitarian law is intrinsic. Even the *Arrest Warrant*

[8] See above Chap. 4, IV.1, page 140.
[9] See above Chap. 4, IV.2, page 142.
[10] See above Chap. 4, IV.3, pages 146ff.
[11] *Ibid.*
[12] See above Chap. 4, VI, pages 150ff.
[13] See above Chap. 4, VII, page 151.
[14] See above Chap. 4, IX.A, page 164.
[15] See above Chap. 4, IX.B, page 167.

Case,[16] where the ICJ also applied deductive reasoning, relates to international humanitarian law – albeit rather remotely. It tackled the immunity of a Minister for Foreign Affairs in a case of serious violations of international human rights and humanitarian law.

On the other hand, the application of traditional method may actually evidence the growing fragmentation of international law: the ICJ invoked 'traditional' concepts of customary international law which build on the two elements of custom, *opinio juris* and state practice, when examining the development of custom in fields of international law other than international humanitarian law, in particular in cases of maritime delimitation, as evidenced by the *North Sea Continental Shelf Cases* and the *Continental Shelf Cases*.[17] Thus, it appears that particular approaches to custom appear to have evolved for special areas of international law: the 'core rights' approach to customary international law, as well as deductive reasoning, applies especially in the field of customary international humanitarian law,[18] whereas the two-element approach, for example, applies in the field of maritime delimitation. Nevertheless, this conclusion is doubtful. As the *South-West-Africa* judgment illustrates,[19] the Court did not want to establish the 'core rights' approach to customary international law as an approach which operates entirely outside the traditional concept of custom. In that case, the Court emphasised that humanitarian considerations alone could not lead to the development of a new norm of customary international law.

B. *Lessons from the case law of the ICTY and the ICTR*

1. *Considering the relevant evidence of a new customary rule*

As was the case when we examined the evidence utilized by the ICJ, the case law of the *ad hoc* tribunals also affirms a certain 'constitutionalist' trend away from 'traditional' approaches. Even more frequently than the ICJ, the *ad hoc* tribunals refer to truly international evidence when assessing the customary character of a particular rule of international humanitarian law. Concerning the actual evidence utilised by the Tribunals, the tribunals seem even more radical in relying on new evidentiary items. They often turn to international case law alone, either that of the trials at Nuremberg or Tokyo or of the ECtHR or other human rights bodies. Yet, the evidence most frequently

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[16] See above, Chap. 4, VIII, page 157.
[17] See above, Chap. 4, III.2ff, pages 123ff.
[18] See *T. Meron* (2003) RdC, vol. 301, 378.
[19] See above, Chap. 4, V, page 147.

referred to is international conventions.[20] Moreover, the ICTY cited certain modern items of evidence the conclusive force of which – at least in the case of the Rome Statute – controversial. It is another aspect of a more modern and constitutionalist understanding of the formation of custom that the ICTY, like the ICJ, assessed items of evidence which do not reflect state practice proper, but the views of non-state actors; albeit of the most important ones in the field of general international law and of international humanitarian law: the Tribunal referred to the ILC Draft Code of Crimes and to the opinion of the ICRC, expressed in its Study on Customary International Humanitarian Law. Also the fact that the *ad hoc* tribunals do not establish the existence of each element of custom individually but often accumulate the evidence to prove both the element of *opinio juris* and state practice without further differentiation indicates a trend towards consitutionalisation. It demonstrates that the tribunals regard it as relevant *that* a particular rule has become recognized as customary, but not *how*. Accordingly, the centre of attention has moved from the state to the international level.

However, these particularities also reveal a certain pragmatism in dealing with customary international law: the tribunals have resorted to all the evidence available, regardless of whether it may be regarded as state practice or *opinio juris* in a traditional understanding, or whether it fits both notions only following most modern theoretical conceptions. Thus it appears that the correct view is that the stated differences show that the *ad hoc* tribunals mastered applying the source of customary international law within the limits of custom's own discipline.[21]

2. *Considering the methodologies applied*

When one considers the methodological approaches applied in the 'specialised area' of international criminal law, their classification following the criteria of fragmentation or constitutionalisation becomes even more difficult. The assessment of the case law of the ICJ prompted the conclusion that there is only one approach which applies in international criminal law, namely the 'core rights' or deductive approach, and that it is the *lex specialis* approach to customary international criminal law. However, as the assessment of the case law of the ICTY and the ICTR revealed, there are at least three different approaches: one a 'sources based' approach, which itself may be subdivided according to the particular evidence involved. The two other methods utilised

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[20] For a quantitative assessment compare *L. Gradoni* in *M. Delmas-Marty et al.* (Sources) 25ff.

[21] *H. Ruiz-Fabri* in *M. Delmas-Marty et al.* (Sources) 387.

are the deductive or 'core rights' approach and the traditional, two-element concept of customary international law.[22] Thus, the methods applied remain as diverse as they were in the case law of the ICJ.

Yet, if we compare the ICJ's approaches utilised, with those employed by the ICTY and the ICTR, the *ad hoc* tribunals do not refer to entirely different methods. All three courts turn to the same traditional concept of custom formation, the core rights approach, as well as to one element conceptions. Moreover, all three international courts concur that the 'core rights' approach may be rebutted by contrary evidence of either state practice or *opino juris*. The ICJ arrived at this conclusion in the *Yerodia* decision.[23] As regards the ICTY, the *Hadžihasanović Interlocutory Appeal* provides a good example. In this decision, the ICTY abstained from the deductive method and determined that there was insufficient evidence of *opinio juris* and state practice to support the customary applicability of the principle of command responsibility prior to the commander's assumption of command.[24] There are several other cases in which the ICTY explicitly refrained from applying a deductive or 'core rights' approach, stating that it could not be employed as the only method of determining the formation of new customary international criminal law.[25]

The actual scope of the different approaches of the ICJ, ICTY and ICTR varies. In many cases in the *ad hoc* tribunals, more 'modern' concepts of custom formation like the 'core rights' approach or deductive approach, are employed side by side with the traditional, two-element approach. As before the ICJ, reference to diverse approaches to custom formation is often made in one and the same judgment. Again, the *Hadžihasanović Interlocutory Appeal* decision is a good example of this. In that decision the Appeals Chamber of the ICTY referred to the deductive approach as well as to the traditional two-element concept of custom formation, just as the ICJ had done in the *Nicaragua* case.[26] Sometimes the 'core character' of a 'core right' can vary, too. The *Kunarac* Trial Chamber judgment, for example, doubted that the definition of the torture prohibition given in international human

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[22] See above, Chap. 5, VII.C.1, page 280f.

[23] *Arrest Warrant Case*, ICJ Reports 2002, para. 58.

[24] See above, Chap. 5, V.B.12, page 243.

[25] See *Ojdanić*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Appeals Chamber, Case No. IT-99-37-AR72, 21 May 2003, para. 42; *Vasiljevic*, Trial Chamber Judgment, Case No. IT-98-32-T, 29 November 2002, para. 193; *Stakić*, Trial Chamber Judgment, Case No. IT-97-24-T, 31 July 2003, para. 412.

[26] See above, Chap. 5, V.B.12, page 243.

rights instruments actually mirrored the definition of the crime of torture applicable in international criminal law.[27]

Yet, it appears as if the ICTY and the ICTR further developed the approaches applied by the ICJ. First, they modified the methodology of the World Court which focused on the element of *opinio juris* alone. Instead, they established the 'sources based' approach which allows them to leave open which of the items of evidence cited actually stands for the element of *opinio juris* and which for the element of state practice. Second, there is a decisive difference regarding the application of the 'traditional' two-element approach by the ICTY and the ICTR. Before the two tribunals, the traditional method has actually changed its position. It has moved from the playing field to the subs bench, now remaining in a reserve rebuttal position. It is applied only if there is contrary evidence supporting the existence of an *opinio juris* or state practice to rebut either the results of the 'sources based' approach or conclusions drawn with the help of the 'core rights' approach. This is an effect which should not be underestimated. It demonstrates that the traditional approach has lost some of its cutting edge in the field of international criminal law. Nonetheless, the continuing need for the traditional approach should not be underestimated either. This is due to the fact that the identification of new norms of customary international criminal law still have to comply with the requirements of legal clarity and foreseeability of the *nullum crimen sine lege* principle.

It is difficult to assume that the use of the same methods by the ICJ, ICTY and ICTR, or the modfication of the methods of finding new customary international law by the *ad hoc* tribunals, can evidence the growing fragmentation of international law, because the same methods are still used by all three courts. Yet, the case law of the Tribunals is not evidence of a trend towards the humanisation of international humanitarian law or even a trend towards the constitutionalisation of international law, either. There is certainly no doubt about the great influence of the Martens Clause and similar provisions on the interpretation and application of legal rules in the field of international criminal law. Nonetheless, the core rights approach is only one of the methods applied by the ICTY and the ICTR. Thus, it appears – once more – more apt to conclude that the players in the field have changed positions to meet the special requirements of the customary international criminal law game.

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[27] *Kunarac*, ICTY Trial Chamber Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 470.

C. *Implications for the theory of international law*

From an overall perspective, there are several conclusions which can be drawn from our assessment of the case law of the ICJ and the *ad hoc* tribunals which impact on the theory of customary international law. First, our investigation has revealed that it is difficult to assume that there is only one *right* approach to customary international law. In fact, there are five different approaches which exist side-by-side. Before the ICTY and the ICTR, we find the international instruments approach, the core rights approach, as well as the traditional two-element approach and a more pragmatic, case-by-case approach. The ICJ, on the other hand has applied an *opinio juris* based approach, the traditional two-element approach, as well as the deductive/core rights approach.

Second, concerning the frequency and circumstances of application of the cited methods before the ICTY and the ICTR, at least in international criminal law, some approaches seem to have prevailed over others. To stay with the sports image employed before, there appears to be a certain order of play in the investigation of new customary rules game. A) As outlined in the previous paragraph, the traditional two element approach has moved from the field to the reserve position on the subs bench. B) The international instruments approach prevails over the other approaches identified: it acts as a striker. C) The core rights approach has taken the midfielder position. It receives a pass if the international legal instruments approach is not in a position to take the best shot and will be employed if the international legal instruments approach does not yield definite results or no results at all.

This conclusion is supported by the case law of the ICJ. Like the ICTY and the ICTR, the ICJ employs the core rights approach, or a deductive method, less frequently than the 'traditional' method of assessing the formation of a new rule of customary international law and mostly in cases concerning international humanitarian norms.[28] Cases which concerned universally accepted rules contained in international conventions, like the *Srebrenica* Case or the *2002 Congo* Case which both discussed the prohibition of genocide, employed deductive reasoning only to reaffirm and underline the particular importance and character of that provision, but not to establish the customary character of the rules of the international convention.[29]

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[28] In total, 14 judgments of the ICJ examined in this book referred to the traditional method, eight judgments relied on deductive reasoning, and four referred to the core rights approach, underlining the importance of the 'elementary considerations of humanity'.

[29] *Supra* Chap. 4, IX.B, 167ff.

Third, the fact that it needs more than one approach to deal with the source of customary international law reveals that to date, there has simply been no *single* method which can adequately tackle all the practical problems which arise with regard to customary international criminal law. The case law of the *ad hoc* tribunals as well as of the ICJ showed that a more flexible approach to custom is necessary. The required flexibility will be arrived best if a variety of methods is applied and included in this approach. And, in fact, the ICJ and the international *ad hoc* criminal tribunals have been more creative in developing such a variable approach than most of the theories on custom assessed in this book. Sometimes, it may thus be wise of theory to listen to what practice has to say about the development and requirements of customary international law.

Fourth, concerning the development of customary international law, our analysis of the different approaches of the ICJ and the *ad hoc* tribunals has proven neither clear 'constitutionalist' nor 'fragmentationalist' tendencies. It confirmed that there are good reasons which support both trends. Thus, as always, the answer appears to lie somewhere in between. The assessment carried out so far suggests a call for what can be expressed best by the phrase 'unity in diversity'.

This conclusion includes several suppositions: On the one hand, it includes the acknowledgement of the fact that the current state of customary international law is, to some extent, 'fragmented'.[30] The methods of identifying new customary international criminal law indeed differ from those which apply in general international law. In international criminal law, the diverse methods of identification of a new customary rule are held together by a certain playing order. In this order the international instruments approach ranks first, and only in cases of doubt will the core rights approach be invoked. The traditional two-element concept of custom acts as a final element of control. This is a consequence of the application of the *nullum crimen sine lege principle*, which dominates all reasoning in international criminal law. By contrast, in general international law there is no clear hierarchy between the different methods of identification of new customary rules. The traditional two element approach can still be the first method referred to when assessing the development of a new customary rule. Accordingly, it applies unconditionally in the area of maritime delimitation, for example.[31]

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[30] See also ILC, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 13 April 2006, UN Doc. A/CN.4/L.682, 11, para. 7–15.

[31] Whether this particular aspect may also be interpreted as a speciality of the law on maritime delimitation needs no further investigation here.

The fragmentation of international law, however, is not a 'bad' concept or development in international law. It does not automatically lead to the decline of the sources concept of international law which is still universal. Even in specialised areas of international law, we refer to the same sources as in general international law. In international criminal law, custom is still the most important source of law. The evolution of diverse approaches to customary international law in the case law of the ICJ, the ICTY and the ICTR has also not weakened the concept of custom. It has rather adjusted to the special circumstances posed by the evolution of international criminal law as a specialised area of international law.

On the other hand, the unifying character of certain concepts of international criminal law, like the Martens clause and the *nullum crimen sine lege* principle, can be viewed as evidence of the constitutionalisation of international law. Moreover, it provides the solution to international law's fragmentation.[32] The principles can supply the 'toolbox' and solution for some of the problems which arise in the relationship between general international law and the specialized area and between conflicting rules within the specialized area.[33] They influence and delimit the formation of new international law – either only in the specialized field, or in general international law, too – and can thus bridge the gaps which arise when certain specialised areas of international law separate from general international law. Accordingly, some of the limitations which the *nullum crimen sine lege* principle places on the development of customary international criminal law can also contribute to discussions on the formation of general customary international law. The principle constitutes only a particular expression of the principle of legality, which prevails in all international proceedings. It may therefore delineate the formation of new general customary international law, too.

D. *Conclusions*

As the above findings revealed, neither the theories which utilise custom formation in international criminal law in order to emphasise certain fundamental values dominating present-day international society, nor those which invoke the same processes to prove the 'fragmentation' of international law are entirely correct in their findings. They are right in that customary international criminal law has developed away from the traditional concept of

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[32] ILC, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 13 April 2006, UN Doc. A/CN.4/L.682, 15, para. 222, 487.

[33] ILC (n. 30) 15, para. 222.

custom, oriented solely towards state practice and *opinio juris*. At present, there seems to be a variety of methods – rather than *one* deductive, *opinio juris*-based or other approach to custom – which can all be utilised to determine the formation of a new customary norm.[34] In general international law, the approaches apply side by side. In international criminal law, the variety of methods has developed a certain order of application: the international legal instruments approach takes the lead of proving the evolution of a new customary rule. In the event of its failure, the core rights approach jumps in; and the two-element approach provides the final checks and balances. Accordingly, even in international criminal law, the traditional elements of custom still play an important part in limiting the other, modern approaches to customary international law. Those methods provide only *prima facie* evidence of a customary norm. They may be rebutted by contrary evidence of a relevant *opinion juris* and state practice. This is due to the influence of the *nullum crimen sine lege* principle.

Hence, it seems that international law has reacted even more flexibly to new challenges than predicted by those theories which foresaw the fragmentation and constitutionalisation of customary international law. The above assessment has shown that those theories describe only some part of the current development of custom. Yet they neither delineate the whole picture, nor provide an answer to the question on how the issue of fragmentation, for example, is to be overcome. The case law of the *ad hoc* tribunals, as well as of the ICJ, revealed that the methods ultimately applied and the rules governing their interplay are more complex. All three courts seem to already to have overcome problems of fragmentation by further developing the methods currently available to identify new customary rules. The methodology of customary law has thus advanced even further than described by the most visionary literature.[35]

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[34] This conclusion has also been reached by Petersen, who found that depending on the underlying type of customary norms, different methodological approaches apply to their identification. See *N. Petersen* (Rational Choice or Deliberation?) 12.

[35] Schabas compares this development in customary law practice to the 'judge-made rules of the English common law.' See *W. Schabas*, Customary Law or Judge-Made Law in *J. Doria and H.-P. Gasser and M.C. Bassiouni* (eds.) (Legal Regime), at 100.

III. AN EVALUATION SCHEME FOR THE DETERMINATION OF NEW CUSTOMARY INTERNATIONAL (CRIMINAL) LAW

A. *Introduction*

After determining the current status of customary international law, we can actually describe in more detail what an evaluation scheme for new rules of customary international law could look like. Some general aspects of it have already been delineated in the previous paragraphs. The following paragraphs will develop the results further and provide their own approach to the identification of new customary international law and customary international criminal law.

As we have seen, international criminal law has already advanced some of the methods which apply at the level of general international law. Hence, a distinction should be made between the criteria which are relevant for the finding of general customary international law and those relevant for customary international criminal law. As the description of the relationship between international criminal law and general international law may best be characterised by the concepts of *lex specialis* and *lex generalis*, there are thus some *lex specialis* issues which must be observed when identifying new international criminal law.

Nevertheless, we have also observed that the concepts and methods of identifying new customary international law do not differ greatly in the two areas of international law. After all, the universal concept of customary international law applies in both areas of international law. In comparison to general international law, the identification of new rules of international criminal law appears merely more fine-tuned and adapted to the particular circumstances which prevail in this field.

The following paragraphs will thus describe a general methodology for identifying new customary international law, which can apply both in general international law and in international criminal law. The particular circumstances which influence the formation of new customary international criminal law have been considered. Sometimes, they may add a further criterion to the identification process which is not needed at the level of general international law. This will be identified in the scheme. The order of the paragraphs, as well as their numbering, indicates the order or scheme that should be followed in the course of such an assessment.

The scheme is based on a positivist concept of international law. It presupposes that the law is derived from the facts which arise in a particular situation at the international level. Nonetheless, the scheme has several aspects, which were supported also by other, non-positivist theories of international

law. It acknowledges the universal acceptance of international rules in international law-making processes, as, for example, in the UNGA, or other international conferences. It does not deny the indicative character of evidence generated by other subjects of international law, like the ICRC or the ILC. Finally, it accepts that there may be certain overarching principles which dominate particular areas of international law and influence the evolution of new customary law in these fields. For the most part, those overarching principles have been recognized in international conventions, or can be derived from the national laws of states, so that they have attained the status of a general principle of international law. There is hardly any need to conclude that their origins are based on natural law.

B. *Evaluation scheme for discovering new customary international (criminal) law*

1. *Preliminary considerations – the importance of interpretation*

One preliminary aspect of any assessment of the formation of a new rule of customary international law should be the careful identification, consideration and interpretation of the applicable law as it stands at the time of the assessment. This applies both to general international law and to international criminal law, because interpretation usually yields quicker and more concrete results than any assessment of what could be the applicable customary law. Interpretation builds on and further develops the existing principles and rules of international law and does not attempt to find new ones. Hence it is often a far more effective way of discerning the applicable law. In any event, the interpretation of a particular legal rule will be guided by its conventional framework, its evolution history, its object and purpose, as well as by the principle of effectiveness or even existing customary rules.[36]

2. *The classical two element approach to customary international law*

The classical two element approach to custom formation applies both at the level of general international law and in international criminal law. Yet its order of appearance in our evaluation scheme of customary international law

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[36] For further means of interpretation see Chap. 2, IV.B.5, 586ff. The importance of interpretation has also been emphasised by *W. Schabas*, Customary Law or Judge-Made Law in *J. Doria and H.-P. Gasser and M.C. Bassiouni* (eds.) (Legal Regime), 93 who supports an interpretive approach to customary international criminal law.

varies according to the nature of the customary rule which is at the heart of the assessment. In general international law, the approach will be the first to be referred to when discussing the evolution of new customary rules in those ancestral areas of international law which have not been subjected to many changes. Thus, the approach will apply in cases concerning delimitation issues, such as maritime delimitation or frontier disputes. Those areas of law still provide for the classical state practice initially envisaged to fit the requirement of Article 38 of the ICJ Statute, i.e. statements of state officials and acts of the executive of a particular state. However, if more recent areas of general international law are concerned, the classical approach will be employed side by side with other approaches like the international instruments approach (which will be discussed below), and none will take precedence over the other. This can apply to the field of diplomatic protection or to the law on the use of force, for example.

Contrary to its leading position in general international law, the traditional approach holds a fall back position in international criminal law and ranks behind the international legal instruments and even the core rights approaches, which will also be discussed in the following paragraphs. In international criminal law, both the international legal instruments approach and the core rights approach apply *prima facie*. That is, only if neither the international instruments nor the core rights approach can identify the appropriate rule of customary international law can the traditional approach provide the ultimate guideline, rebut, correct or affirm presumptions created by way of the core rights approach. This different position of the traditional approach pays due regard to the different circumstances surrounding the formation of a new customary rule which prevail in the area of international criminal law. In that area, classical evidence of state practice and *opinio juris* is hardly ever found.

3. *Application of the international legal instruments approach*

If consideration of the method of interpretation and the classic approach to custom formation has not yielded concrete results, it is time to consider the international legal instruments which apply to the case at hand. In general international law, but particularly in international criminal law, the international legal instruments approach should be one of the first methods to be considered. Irrespective of the area of international law to which they apply, international legal instruments can indicate both the *opinio juris* and practice of states; they reflect a state's voting and accession practice and, at the same time, its agreement with the material terms of the instrument. Strictly speaking, however, the customary character of a certain rule contained in an international instrument still needs to be established by additional state practice

and relevant *opinio juris*, because a state's accession to a certain convention does not reflect its conviction that the rules of the convention have already acquired a customary character.

In international criminal law, international instruments are often the only evidence of custom at hand. Accordingly, the instrument itself may be considered sufficient evidence of a new customary rule if it is accompanied by further evidence or other indicia contained either in international instruments or in international or national case law, which confirm this supposition. As regards international criminal law, the approach can include but is not limited to an assessment of the following indicia: the case law of the IMT of Nuremberg and Tokyo, the case law of further international courts and tribunals, international treaty law, the ILC Draft Code of Crimes as well as the ICRC Study on Customary International Humanitarian Law, the Rome Statute, the protocols of the Preparatory Committee to the Rome conference, the judgments of national courts and national military practice.

Some of the instruments mentioned, like ILC Draft Code, the protocols of the preparatory committee to the Rome conference and the Rome Statute itself, however, merely provide indicia of the formation of a new customary rule but no actual evidence. This is because the approval of a particular rule by either the ILC or a conference committee may not necessarily reflect the legal opinion of the members of the international community. Hence, additional evidence is required if, for example, the ILC Draft Code is invoked to support the birth of a new rule of customary international criminal law. If the international instruments approach fails, it is time to consider the core rights approach.

4. *The core rights approach*

Both in general international law and in international criminal law the core rights approach will step in if international evidence is scant or if an assessment of international legal instruments has unearthed nothing conclusive about the applicable customary international law. Although the approach has been employed to date only in the humanitarian law context, it is not far-fetched to extend it also to other areas of international law.[37]

In the field of international humanitarian law, the approach requires a four-step investigation. First, the international humanitarian principles which may apply to the underlying set of facts need to be identified. Those

[37] Tomuschat, for example has mentioned the non-use of force, international environmental law and the law on the use of nuclear weapons as further examples. See *C. Tomuschat* (1993) RdC, vol. 241, 293–303.

principles have found entry, for example, into the preambles to international conventions or are reflected by certain rules contained in international humanitarian conventions. The second step marks the actual deduction of a new rule of customary international law from the existing principle of international humanitarian law. Third, the freshly deduced rule needs to be reaffirmed. This is done by assessing of whether the results gained by the deductive approach are reflected in or not contradicted by examples of international or state practice and *opinio juris*. Verification is carried out by way of the classical two-element approach to customary international law. Fourth, a cross-check with the *nullum crimen sine lege principle* ensures that the principle does not conflict with this rule, either. In this regard, the classical method can be of help, too, and indicate possible conflicts.

If the core rights approach does not lead to a particular result, the assessment of whether a new rule of customary international criminal law has developed ends here. Further appraisal of the applicable law may carried out only by using other methods. Yet, even their application has to be considered carefully. Some methods which apply at the level of general international law cannot apply in international criminal law, due to the influence of the *nullum crimen sine lege* principle.

5. *Analogy*

In principle, the application of analogy is a recognised concept for determining the law applicable to a particular set of facts, at least at the level of general international law.[38] Nevertheless, at the level of material international criminal law, application of the principle conflicts with the *nullum crime sine lege* concept and should not be supported. This is why analogy has also been prohibited by Article 22 (2) of the Rome Statute. Accordingly, application of analogy may become relevant only at the level of general international law.

6. *General Principles of Law*

The general principles of law are another source of international law which may merely indicate, but not evidence, the applicable law in a particular field of international law. Yet, as shown in Chapter 2 of this book, in comparison to that of customary international law, the function of the general principles is more limited and may best be described as 'auxiliary' in the quest to discover a new rule of international law. This applies, first and foremost, at the level of general international law. The situation is identical in international

[38] *Infra* Chap. 2, E., 108.

criminal law. Here, general principles may provide further indicia as to the applicable law.[39] But our discussion of the general principles of law as a source of international criminal law revealed that the *nullum crimen sine lege* principle forbids the involvement of the general principles as an individual source of material international criminal law.

C. *Conclusion*

Finally, it must be said that a concept of identification of new international (criminal) law must be based, first, on an interpretation of the existing rules of international (criminal) law. The assessment of the formation of a new rule of customary international law comes only second. This assessment of the formation of new customary law, however, is best based on the classic approach, where ancestral rules of international law are concerned. In other areas of international law, like international criminal law, it should be based on the international instruments available. Where the evidence of international instruments is scant or non-existent, the core rights approach may be employed to retrieve the applicable legal rule. This approach, however, needs reconfirmation by further classical evidence of state practice or *opinio juris*.

Concerning the level of general international law, there are two further possibilities for retrieving the applicable law if the assessment of customary law has failed following the evaluation scheme set out hitherto. The first is the application of the method of analogy, and the second is an assessment of the principles entailed in the national legal systems of states to verify the possible existence of a general principle of international law. Yet, though these two methods may be employed at the level of general international law, there is no possibility of invoking them at the level of international criminal law. In the applicable material criminal law, those methods clearly conflict with the *nullum crimen sine lege* principle, so that they may not serve as stand-alone sources of new international criminal rules. Whether this prohibition also applies when only procedural rules are at stake was not the subject of our assessment and can thus be left open for further scholarly debate.

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[39] As discussed in Chapter 5 of this book, the ICTY, in particular, determined in the *Kupreškić* Trial Chamber judgment that the tribunal may draw on the general principles of international criminal law, or the general principles of criminal law common to the major systems of the world, or the general principles of law, 'consonant with the basic requirements of international justice' alongside customary international law in its assessment of the applicable material criminal law. See *Kupreškić*, Trial Chamber Judgment, Case No. IT-95-16-7, 14 January 2000, para. 591.

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