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The Role of International Criminal Courts in the Formation of Customary International Law

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Tiivistelmä/Referat – Abstract

Tässä tutkielmassa tutkitaan nykyisten kansainvälisten rikostuomioistuimien roolia kansainvälisen tapaoikeuden muodostumisessa. Tutkielma käsittelee sovellettavaa lakia ja oikeuskäytäntöä entisen Jugoslavian alueen ja Ruandan sotarikostuomioistuimissa (ICTY ja ICTR), Sierra Leonen erikoistuomioistuimessa (SCSL) sekä pysyvässä kansainvälisessä rikostuomioistuimessa (ICC). Tutkielma vastaa erityisesti kysymykseen siitä, minkälainen rooli kansainvälisellä tapaoikeudella on oikeuslähteenä edellä mainittujen tuomioistuimien oikeuskäytännössä sekä toisaalta siihen, missä määrin nämä tuomioistuimet ovat vaikuttaneet kansainvälisen tapaoikeuden muodostumiseen.

Kansainväliset rikostuomioistuimet toimivat tärkeinä tekijöinä kansainvälisen tapaoikeuden olemassaolon ja sisällön määrittäjinä. Vaikka näiden tuomioistuimien ensisijainen tehtävä on soveltaa lakia, eikä luoda sitä, niiden oikeuskäytäntö muodostaa keskeisen osan kansainvälisen tapaoikeuden muodostumisprosessia. Lainsäädäntövallan ja tuomiovallan yhdistäminen yhdeksi prosessiksi on kuitenkin omiaan tuhoamaan oikeuskäytännössä syntyneiden sääntöjen legitiimiyden. Varsinkin yksilön rikosvastuun laajentaminen lainkäyttövaiheessa tulkitsemalla rikosten tunnusmerkistöä ja määritelmiä laveasti on koettu ongelmalliseksi. Rikosoikeudellinen laillisuusperiaate kieltää nimenomaisesti taannehtivan lainkäytön ja rankaisemisen. Tämä näyttäisi kieltävän myös sen, että tuomioistuin voisi jälkikäteen laajentaa yksilön rikosvastuun alaa oikeuskäytännössään. Tästä huolimatta kansainvälisten rikostuomioistuimien laintulkinnat ovat olleet tässä suhteessa huomattavan innovatiivisia läpi kansainvälisen rikosoikeuden historian.

Tämä työ tarkastelee erityisesti kansainvälisen tapaoikeuden muodostumisprosessia kansainvälisten rikostuomioistuimien oikeuskäytännössä. Se tutkii tapaoikeuden ja oikeudellisten ratkaisujen välistä vuorovaikutusta ja selvittää, kuinka tapaoikeuden traditionaalinen ja moderni teoria suhtautuvat kansainvälisiin tuomioistuimiin tapaoikeuden muodostajina. Lopuksi työ analysoi kriittisesti sitä, kuinka nykyiset kansainväliset rikostuomioistuimet ovat identifioineet kansainvälisen tapaoikeuden sääntöjä. Tarkastelemalla oikeudellisissa ratkaisuissa käytettyjä metodeja ja argumentteja se tutkii, ovatko kansainväliset rikostuomioistuimet täyttäneet laillisuusperiaatteen asettamat vaatimukset tuomiovallan käyttäjälle.

Tutkielman pääargumentti on, että kansainväliset rikostuomioistuimet toimivat kansainvälisen tapaoikeuden muodostamisprosessin ytimessä ja osallistuvat tapaoikeuden kehittämiseen vahvasti. Näiden tuomioistuimien myötävaikutus kansainvälisen rikosoikeuden sisältöön on ollut korvaamaton. Kansainvälisessä rikosoikeudessa vallinnut juridinen luovuus näyttää kuitenkin vähenevän tulevaisuudessa, sillä lähes yksinomaan tapaoikeutta soveltaneet Jugoslavian ja Ruandan *ad hoc* -tuomioistuimet ovat lopettamassa toimintansa. Näin ollen vahvasti kirjoitettuun lakiin tukeutuva ICC saa toimia suunnannäyttäjänä tulevaisuuden kansainväliselle rikosoikeudelle.

Avainsanat – Nyckelord – Keywords

Kansainvälinen rikosoikeus, kansainvälinen oikeus, rikosoikeus, laillisuusperiaate, tapaoikeus, kansainvälinen tapaoikeus, oikeuslähteet

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Helsingin yliopiston kirjasto

Muita tietoja – Övriga uppgifter – Additional information

The Role of International Criminal Courts in the Formation of Customary International Law

Abstract:

This thesis examines the role that contemporary international criminal courts play in the formation of customary international law. It addresses applicable law and the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the (permanent) International Criminal Court (ICC). More specifically, this thesis provides answers as to the role customary law plays as a source of applicable law in these courts and further, the role these courts play in developing the content of customary law.

International criminal courts serve as important entities in discovering and interpreting existing rules of customary international law. Although these courts' primary function is to apply existing law, not to create it, their case law forms an essential part of the formation process of customary international law. But uniting the legislative and judicial processes together diminishes the legitimacy of the resulting rules. The problem comes to the fore when international criminal courts broaden the scope of individual criminal liability by expanding the definitions of international crimes. The principle of legality –inherent to criminal law– prohibits retroactive crime creation and punishment and thus seems to prohibit courts from interpreting law expansively. However, throughout the history of international criminal law international criminal courts have been remarkably productive in their interpretations.

This thesis examines the role of customary law in the practice of contemporary international criminal courts. It elaborates on the interplay between customary law and judicial decision and examines how traditional and modern approaches to custom formation deal with international courts as entities capable of forming new rules of customary law. Finally, it analyzes critically how rules of customary law have been discovered and identified in contemporary international criminal courts. By addressing the methods and arguments used in judicial reasoning it examines whether international criminal courts have fulfilled the requirements of the principle of legality in their work.

The main argument of this thesis is that international criminal courts operate in the very heart of the customary law-making process. Their contribution to the corpus of international criminal law has been indispensable. However, the judicial creativity practiced by the modern international criminal courts seems to be on the decline as the *ad hoc* Tribunals (ICTY and ICTR) are concluding their work and the ICC begins to lead the way for the future application of international criminal law.

The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.

Charles Dickens, *Bleak House*

Brief Contents

Contents

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Kokkinakis v. Greece, Application No. 14307/88, Judgment, 25 May 1993.

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MC v. Bulgaria, Application No. 39272/98, Judgment, 4 December 2003.

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Streletz, Kessler and Krenz v. Germany, Application Nos. 34044/96, 35532/97, 44801/98, Judgment, 22 March 2001.

S.W. v. United Kingdom
S.W. v. United Kingdom, Application No. 20166/92, Judgment, 22 November 1995.

INTERNATIONAL MILITARY TRIBUNAL

Nuremberg IMT Judgment
The Trial of German Major War Criminals, Judgment, 1 October 1946.

Abbreviations

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GA	General Assembly
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
UDHR	Universal Declaration of Human Rights
UN	United Nations

Introduction to the Thesis

The concept of custom has aroused a considerable amount of disagreement among scholars and publicists. No other source of international law has been subject to such an enthusiastic scholarly debate. As Koskenniemi argues, "modern legal argument lacks a determinate, coherent concept of custom. Anything can be argued so as to be included within it as well as so as to be excluded from it."[1]

The basic idea of custom is straightforward: "A customary international law norm arises when states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain conduct" and they act upon it.[2] Customary norms traditionally form through consistent and uniform State practice supported by a general belief that such practice amounts to law and is binding (*opinio juris*). But how can this "general belief" be constituted, and what acts should be counted as State practice? Increasing uncertainty prevails over the content, respective emphasis, and even the whole necessity of these two elements of custom. In addition, there is no consensus over who has the authority to say whether there is enough support for a new rule of customary law to emerge.

Some scholars propose that rules based on customary international law cannot have the same importance in international criminal law (ICL) as they have in public international law.[3] In practice, however, customary law has served as a primary source of ICL. For instance, the subject-matter jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY) is restricted to rules which are beyond any doubt part of customary international law. This limitation of applicable law was necessary at the time the Court was established, but it has caused substantial difficulty for the judges of the ICTY in their work. Their major problem was operating on a body of law that was still in its adolescence knowing that their contribution to its content was vital for the Court to succeed.

Although some precedents in ICL may be found prior to the First World War, the Second World War and its war crime tribunals truly marked the beginning of ICL. But developments

[1] Koskenniemi 2005, p. 409.
[2] Lepard 2010, p. 8. Admittedly, Lepard's point of view is quite forward looking and relies almost completely on *opinio juris*. Thus, it may be rejected by strict positivists.
[3] See, e.g., Degan 2005, p. 51.

in ICL since the aftermath of the WWII and during the Cold War have been modest. The establishment of the ICTY marked the beginning of the renaissance of ICL. Since many of the ICL's rules did not have a solid ground on customary international law (or in treaties) when the crimes within the ICTY's jurisdiction were committed, the Court had to operate in the midst of the rules' transformation from *lex ferenda* to *lex lata*. Under the pressure of providing justice for the victims and proving the efficiency of the enterprise of international criminal justice, the judges of the ICTY were forced to participate in developing the corpus of ICL. This called for a flexible evaluation on the methods of discovering customary international law.

International courts serve as important entities in discovering and interpreting existing customary law. Courts' primary function is to apply existing law, not to create it, but sometimes the borderline between *lex lata* and *lex ferenda* may seem indeterminate. As Boyle and Chinkin write, it is hard to identify when law in the making has evolved into law in action and this is the point on which States and international lawyers often disagree.[4] In ICL, the most controversial issue has been the problem of *non liquet*: can judges in international criminal proceedings create new rules of customary law in order to fill in gaps or cure the imperfections of ICL? Several scholars answer in the negative and believe that judicial creativity violates a fundamental aspect of criminal law, the principle of legality. But at first glance this seems to be exactly what the ICTY has done. Paradoxically, Mettraux admits that "international criminal law may owe more to judges than any other part of international law".[5]

The Purpose and Arguments of this Thesis

Customary international law contains so many "conceptual and practical enigmas", as Lepard puts it, that it is impossible to deal with all of them here.[6] Instead, this thesis looks at some of those enigmas through the lenses of criminal law. Following the mainstream positivist theory of sources this thesis examines the role of customary law in international criminal proceedings.[7] This thesis focuses on describing how the process has changed during the modern era of ICL, rather than providing a new theory of custom formation.

[4] Boyle & Chinkin 2007, p. 212.
[5] Mettraux 2005, p. 14.
[6] For an inclusive overview about the main issues of customary international law, see Lepard 2010, pp. 14-47.
[7] Even though several writings favoring process-based or critical approaches are referred to in this thesis, the approach to the sources of law is mainly positivistic. Confrontations arise particularly in respect of the principle

The main purpose of this thesis is to examine the role of international criminal courts and tribunals in today's customary law-making process. It critically analyzes how international criminal judges have discovered and identified rules of customary international law. The analysis concentrates specifically on the legitimacy of the resulting rules and whether they have managed to provide justice without derogating too much from the principle of legality. In addition, this thesis clarifies, inter alia, how the modernized view of custom works in the context of ICL. This includes addressing if and how the principle of legality, inherent to criminal law, reconciles with the modern law-making process.

The progressive development of ICL through court decisions is a problematic issue that has solicited substantial discussion among scholars. There is certainly a thin line between evolutive interpretation and judicial creation. At first glance, dissenting opinions on the matter may seem like only verbiage and rhetoric but upon deeper reflection they are the very heart of this thesis. In the light of recent publications, the case law of the ICTY and the European Court of Human Rights (ECtHR) is evaluated with great emphasis. Extending the analysis beyond the outcomes of these courts' jurisprudence, this thesis elaborates on the arguments used in judicial reasoning concerning the foreseeability of the law. It reveals how judges in international criminal proceedings are perpetually maintaining the delicate balance between justice and legality.

This thesis focuses on the following courts: the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the (permanent) International Criminal Court (ICC). The three UN Tribunals are considered because of their international organization status.[8] The primary focus is the case law of the ICTY and ICTR (hereinafter referred as the *ad hoc* Tribunals) because these courts were the first post-Cold War criminal tribunals –referred to as the first *modern* international tribunals by some–[9] that had the opportunity to serve as forerunners in the era of progressive development of ICL. The case law of the ICTY, in particular, is remarkable in this respect. However, as the *ad hoc* Tribunals are concluding their work, the ICC will become

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of legality. If international law is seen, for instance, merely as a process of decision making the principle of legality loses its sole purpose. See, e.g. *Erdemović* Appeal Judgment, Separate and Dissenting Opinion of Judge Cassese, para. 11.

[8] The ICTY and ICTR are subsidiary organs of the UN and they are created by the UN Security Council. The SCSL is created by agreement between the UN and Sierra Leone, so it is an international organization *ipso facto*.

[9] See, e.g., Gallant 2009, p. 304.

increasingly significant as it forges the future of ICL.[10] This thesis aims to show how the *ad hoc* Tribunals and the ICC differ in their approaches to the sources of international law.

The main argument of this thesis contends that international criminal courts operate in the very heart of the customary law-making process. Their contribution to the corpus of ICL has been indispensable. Consequentially, the significance of the strict recourse to the principle of legality has been down played. Indeed, international criminal courts, specifically the *ad hoc* Tribunals, have applied a somewhat loose definition of the principle of legality, particularly in terms of the requirement of specificity, by emphasizing the criminal nature of an act rather than the exact definition of a crime in identifying international crimes.

However, the judicial creativity practiced in the modern international criminal courts may be a phenomenon of the *ad hoc* Tribunals alone.[11] This thesis evaluates how the ICC affects the readings of the principle of legality in future and whether the era of judicial creativity is coming to an end.

The Structure of this Thesis

Part I (Sections 1-4) analyzes the sources of ICL contemporary international criminal courts draw on in international criminal proceedings. The purpose of this section is to define the limits within which these courts operate as well as identify the tools with which they work. These limits and tools are not the same for all courts. A brief analysis on the applicable law of the *ad hoc* Tribunals and the ICC is provided in order to highlight these differences. Part I also functions as an introduction for part II, which addresses the way courts have used these tools in their jurisprudence and whether they have remained within the given limits.

Part II forms the cornerstone of this thesis and deals with the customary law-making process. It begins with the assumption that the formation of customary norms requires both basic elements of customary law, State practice and *opinio juris*.[12] Section 5 evaluates the traditional and modern theories of customary law. Section 6 deals with the initial question of whether international criminal courts are able to form new customary rules in the first place. Focusing on the practice of the UN Tribunals, particularly the ICTY, Section 7 examines

[10] The primary focus is on the subject-matter jurisdiction, i.e., jurisdiction ratione materiae, of these courts: the application of the law of war crimes, crimes against humanity, and genocide. Leaving the actual changes in the law aside, the thesis appraises the methods used by international criminal courts to identify and develop customary norms.

[11] The focus is on contemporary international criminal courts, so the creativity practiced at the WWII trials is appraised here only limitedly.

[12] For an alternative view see, e.g., Lepard 2010.

whether contemporary international criminal courts have adopted the modern approach in identifying rules of customary international law. Finally, Section 8 examines whether these courts have fully applied the principle of legality in developing law by progressive interpretations. In other words, has the law of the UN Tribunals been foreseeable and accessible to individuals?

Part III looks at some future perspectives of customary law in the context of ICL. It also functions as a concluding chapter for the whole thesis. Section 10 consists of concluding remarks.

The distribution of the subject matter under several headings is artificial and only made for the purposes of this thesis. Some issues and cases are approached from various perspectives and therefore may come to the fore several times in different contexts. Some sections may overlap and all the sections are strongly intertwined.

Few Notes from the Author

The Scope of International Criminal Law

A word needs to be said about the scope of ICL. This work deals with international crimes in the strict sense, i.e., crimes against international law, or the international community,[13] sometimes referred as the "core crimes of international law" or "international crimes proper".[14] These are to be distinguished from so-called transnational crimes, which are simply crimes that involve transcending national boundaries. Essentially, the difference is that the former crimes are subject to international criminalization while the latter ones are criminalized in national laws. The core crimes cover war crimes, crimes against humanity and genocide (and perhaps the crime of aggression).[15]

The Fragmentation of ICL

Both national and international courts participate in developing ICL. This is bound to cause fragmentation since national courts interpret international regulations in the context of their own domestic legal systems and apply their own principles of law alongside the international

[13] Some crimes, such as piracy, are deemed to be crimes against States (compared to crimes against the international community) and therefore not really international crimes *per se*. See Cassese 2008.
[14] See, e.g., Lee 2010.
[15] The Rome Statute provides for "conditional" jurisdiction over the crime of aggression depending on the agreement over the definition of the offence. See Rome Statute art. 5. On 11 June 2010, the Review Conference held in Kampala adopted amendments to the Rome Statute and decided that the Court will not be able to exercise its jurisdiction over the crime until 2017 when State parties should decide to activate the jurisdiction.

ones.[16] ICL is thus influenced by several domestic legal systems. In addition, the jurisprudence of different international criminal courts is not particularly uniform. Although the establishment of the contemporary international criminal courts has solidified and clarified ICL to some extent, the Rome Statute diverges in some cases from the practice of the *ad hoc* Tribunals.[17] In fact, the Rome Statute clearly differentiates itself from the residual ICL.[18] In the absence of a decisive international criminal court, there is no author that would have the last word upon the unclear issues of ICL.[19]

Therefore, we are distinguishing between multiple sets of ICL, that of the ICC regime, those of regional criminal tribunals, and those based on States' cooperation.[20] Since this thesis addresses customary law of international criminal courts, particularly custom created at the UN Tribunals, the impact of domestic jurisprudence is appraised only limitedly. However, one should bear in mind this possible distinction since it is likely to undermine overall statements about the content of ICL. The problem of fragmentation is considered throughout this thesis and addressed more closely in Section 9.

The Principle of Legality

In respect of to the principle of legality, this thesis addresses only its prohibition of retroactive crime creation (*nullum crimen sine lege*) and leaves the issues concerning sentencing (*nulla poena sine lege*) aside.

[16] Haveman sees that through the praxis of international criminal tribunals a new field of law, supranational criminal law, is developing. This can be separated from "traditional" international (interstate) criminal law. Compared to this traditional ICL, where States work together and which is implemented through national judicial systems, supranational criminal law goes beyond States and is maintained by international tribunals. This field of law, with humanitarian law as its subject matter, is still in its adolescence and without precedent. Haveman 2003 (A), pp. 3-5.

[17] Many national judicial systems have followed the provisions of the Rome Statute that differ from those of the *ad hoc* Tribunals (definitions of war crimes would be a good example of this). This has also growth the fragmentation of ICL. For example, the ICC's provisions concerning aiding and abetting and command responsibility differ from the case law of the ICTY. For aiding and abetting see Rome Statute art. 25(3)(c) and *Furundžija*; For command responsibility see Rome Statute art. 28; See also Heikkilä 2011, pp. 920, 925, fn. 68.

[18] See articles 10 and 22(3) of the Rome Statute.

[19] Cassese 2008, pp. 42-43. The Rome Statute has clarified certain concepts of ICL, but the restricted jurisdiction of the ICC as well as its hierarchical equivalence with other international courts set limits to the international influence of the Rome Statute.

[20] ICC works alongside *inter alia* the *ad hoc* Tribunals established by the UN Security Council (ICTY and ICTR), hybrid *ad hoc* tribunals (the courts of Cambodia, Lebanon, and Sierra Leone), and national courts that have international judges appointed by UN (the Special Panel for East Timor, Bosnia's war crime chamber and Kosovo's courts). ICL can also be seen as a hybrid model that does not separate ICL from domestic laws but operates simultaneously on both. For a distinction between different types of ICL see Greenawalt 2011.

PART I

CUSTOMARY LAW IN CONTEMPORARY INTERNATIONAL CRIMINAL COURTS

1. Sources of International Criminal Law

The approach to the sources of ICL differs to some extent from that of public (general) international law. For instance, the principle of legality sets out certain requirements in respect of individual criminal liability. Moreover, international criminal procedure differs profoundly from usual international court processes since it is not a dispute between sovereign States but a trial of accusation concerning individual persons. This sets out certain requirements for the foreseeability and accessibility of the law.

It is evident that the sources of law in international criminal proceedings are not the same as in national criminal proceedings, but it is not clear whether they can be exactly the same as in public international law proceedings either, given the demands of the principle of legality. It is safe to say that applicable law in international criminal proceedings emanates from the sources of public international law, but the question remains whether this set of sources is directly applicable in ICL, and if not, what are the differences? Furthermore, is there a hierarchy between the sources? As Nollkaemper puts it, "[t]he formal sources of international law do not provide a full account of the methods of judicial determination and interpretation of the law as evidenced in the practice of the [ICTY] Tribunal."[21] In this paper, I aim to demonstrate the differences between the sources of public international law and the sources of ICL as well as the reasons behind these differences.

1.1 Sources of International Law

Since ICL is a subcategory of public international law, it is necessary to elaborate on the sources of the latter in order to understand the former. It is not reasonable to view any part of

[21] Nollkaemper 2003, p. 295.

international law in isolation from the whole system.[22] Article 38(1) of the ICJ Statute represents still the most authoritative provision on the sources of international law. Although the ICJ Statute is a treaty in itself, it is generally agreed to have achieved a status of customary international law. The provision reads as follows:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
>   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>   b. international custom, as evidence of a general practice accepted as law;
>   c. the general principles of law recognized by civilized nations;
>   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Although it seems that the sources are listed in a hierarchical order, it is generally agreed that article 38(1) does not assign any source priority between the three main sources indicated in subparagraphs (a)-(c). In practice, however, international lawyers usually turn first to any applicable treaty regulations, then custom, and last to the general principles of law. The sources indicated in subparagraph (d) are of a subsidiary nature compared to the three main sources.[23]

Since treaties bind only States which are parties to them, custom can be regarded as "the fundamental source of international law".[24] Some academic even argue that there exist only two main sources, custom and treaty, and all other norms derive their pedigree from these.[25] But the general principles of law are still applied as an autonomous source when they are not transformed into customary law.[26] However, there exists continuous interplay between the three main sources. In this respect, they can all be seen as bidirectional. For instance, customary rules can be used to pinpoint the general principles of law or to clarify the content of treaties, but they can also emerge themselves through the evidence that general principles or treaties provide.[27] Additionally, judicial decisions play also an important role in international law despite their subsidiary character. This is partly because much of the rules

[22] Boyle & Chinkin 2007, p. 211.
[23] See, e.g., Degan 2005, p. 50; Lepard 2010, p. 270.
[24] Kelly 2000, p. 452; Degan 2005.
[25] See Schabas (2006), pp. 75-76.
[26] Degan 2005, p.50; Schabas 2010, p. 385.
[27] There are three ways in which treaties may have an effect on customary law. A treaty can reflect existing law as a codification of customary law, the negotiation process of a treaty may crystallize the customary rule in question, or the treaty can subsequently become accepted as a part of customary law. *North Sea Continental Shelf Cases*, paras 60-82; See also Cryer 2006, p. 242.

of international law are unwritten; the determination of the content of law is often left to judges.

1.2 Sources of International Criminal Law

Since ICL is a subset of public international law, it can be said that its sources are those of international law, i.e., those enumerated in the ICJ Statute.[28] However, due to the nature of criminal proceedings, certain requirements characteristic to criminal law only must be taken account. The Rome Statute contains a slightly different set of sources for the ICC to apply. Article 21 of the Rome Statute indicating applicable law of the Court reads as follows:

> 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.
>
> 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.[29]

This provision offers an alternative list of sources for the authoritative article 38(1) of the ICJ Statute. This is remarkable since there are no other lists of sources of international law that would be commonly agreed upon. Although article 38(1) of the ICJ Statute indicates the sources of public international law, it cannot be disregarded in the field of ICL, and the Rome

[28] See, e.g., Cryer et al. 2010, p. 9; Cassese 2008, p. 14; Akande 2009, p. 41.
[29] Articles 31(3) and 66(1) also refer to applicable law. According to article 31(3), criminal responsibility may be excluded by other grounds than those of article 21. Article 66(1) includes the presumption of innocence: "Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law."

Statute provision follows up this provision by and large. The Rome Statute is remarkable also because it represents the only international written instrument that provides both the "general part" of ICL and the definitions of crimes.

But the rules of the Rome Statute are applicable to the ICC alone. As all international criminal courts are bound to apply their own statutes, there is no universal "international criminal code" for the courts to apply. However, the Rome Statute holds some importance outside the ICC as well since it clarifies several points of ICL. Other international courts have cited the Statute in their jurisprudence and some of its provisions may already be held as codifications of customary international law. But since the Statute is not a codification of ICL *per se*, several of its provisions go beyond customary law. Yet even these provisions may achieve customary law status later if they are largely accepted and applied by other entities.[30] Thus, the Rome Statute does not represent the final word in the field of ICL. Although some have argued that it represents something close to definitive, even where it is controversial,[31] article 10 of the Rome Statute indicates clearly that the law outside the Statute may continue to develop in the other direction.[32]

What comes to the hierarchy of the sources, each international criminal court must apply the regulations of its own statute in the first place. If such regulations are lacking or contain gaps, customary law, applicable treaties, and the general principles of law are to be applied. As in public international law, there exists no hierarchy between treaties and customary law, except that customary law is usually referred as the main source of law whereas treaties can be regarded as *lex specialis*.[33] Thus, the need to rely upon customary rules emerges usually when there is no treaty provision to use or the content of applicable provisions is unclear. The third primary source, the general principles of law, is more complex to categorize since in some cases it forms its own independent source of law, while in other cases it forms a unity with the two other main sources. In practice, general principles are often used to fill in gabs when customary law and treaties are silent, but they cannot be said to be subsidiary in relation to the two other main sources.

The way I see it, is that the sources of ICL derive from the sources of public international law but there are some differences to be found, in particular what comes to their respective

[30] Cassese 2008, pp. 13-14.
[31] Cryer 2006, pp. 257-262.
[32] See also article 22(3) of the Rome Statute.
[33] Degan 2005, p. 50. Kelly 2000, p. 452; Boyle & Chinkin 2007, p. 252.

emphasis and hierarchical order (this is demonstrated in the following sections). First of all, customary law holds a great importance in ICL because the main addressees of ICL are individuals (instead of States) and there are not many treaties that are directly applicable to individuals. Moreover, each international criminal court has its own regulations provided in its statute. For this reason it is important to identify the organ which task is to apply ICL. However, some common features can be drawn from the statutes and practices of these courts. This is not only useful but vital for international criminal proceedings since the statutes of these courts, with the exception of the Rome Statute, do not offer an exhaustive list of sources for the courts to apply. In addition, prosecutions for international crimes may take place in national courts or in hybrid tribunals, which also may have to rely on the sources ICL.

When addressing the sources of law applicable to a specific international criminal court, it is important to acknowledge when the court was established and take account the state of evolution of ICL at the time. Given the lack of regulations in ICL in the 20th century, the first international criminal tribunals have not been able to apply the sources of international law directly as they are set out in the ICJ Statute. As ICL continues to develop, future courts may have better possibilities to comply with the Statute.

2. Applicable Law in Contemporary International Criminal Courts

The approach to the sources of law differs between the UN Tribunals and the ICC. This is mainly due that the UN Tribunals are *ex post facto* courts whereas the ICC is established *ex ante*. The statutes of the UN Tribunals are retrospective and thus not law themselves; they merely point to law existing at the time of the alleged offences. In contrast, the Rome Statute offers a prospective penal code for the ICC to apply in future cases. As Degan writes, "we are now faced with two tracks in international criminal proceedings."[34] The UN Tribunals have rather deficient statutes supported by rich judicial practice and frequently amended RPE. In contrast, the Rome Statute offers a much more elaborated and nearly exhaustive text together with the Elements of Crimes and very detailed RPE. The only thing missing is the practice of the ICC, i.e., the application and interpretation of these complex rules. The following section is centered upon the subject-matter jurisdiction of these international criminal courts.

[34] Degan 2005, p. 46.

2.1 Subject-Matter Jurisdiction of the UN Tribunals

The international criminal tribunals of the UN are mix ups of two legal systems, national law and international law. At international level, the Tribunals are dealing with international humanitarian law, international criminal law, and international human rights law. The possibility to apply national criminal law (of the State where the crime was committed) is authorized in all three statutes.[35] When the applicable law instruments of their statutes do not offer a solution, the Tribunals draw upon national laws. However, the Tribunals are independent institutions of international law and bound only by international legal norms.[36] In respect of international norms, the ICTY has acknowledged article 38(1) of the ICJ Statute as "a complete statement of the sources of international law".[37]

As noted, the primary legal instruments of the UN Tribunals are their statutes.[38] The statutes of the ICTY and ICTR are Security Council's resolutions adopted pursuant to Chapter VII of the UN Charter.[39] The *ad hoc* Tribunals themselves are subsidiary organs of the Security Council, established pursuant to article 29 of the Charter. The Statute of the SCSL differs from these in that it is an agreement between the Government of Sierra Leone and the United Nations; it is based on an international treaty between a sovereign State and an intergovernmental organization.[40] The SCSL Statute binds only the two parties, so it has no provision on State cooperation with the Court, as the *ad hoc* Tribunals have.[41] The statutes of the *ad hoc* Tribunals are binding on all member States by virtue of article 25 of the UN Charter.

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[35] ICTY Statute, art. 24(1); ICTR Statute, art. 23(1); SCSL Statute, art. 14(2). National law has more prominent role in the SCSL than in the two *ad hoc* Tribunals. The SCSL Statute gives a distinct role to Sierra Leone's criminal procedural law in relation to some specific crimes, and some offences have been incorporated to the Statute from national law. See SCSL Statute, art. 5.

[36] As Judge Cassese argued: "This International Tribunal is called upon to apply international law, in particular our Statute and principles and rules of international humanitarian law and international criminal law. Our International Tribunal is a court of law; it is bound only by international law." See *Erdemović* Appeal Judgment, para. 11(II), Separate and dissenting Opinion of Judge Cassese.

[37] *Aleksovski* Appeal Judgment, fn. 364.

[38] The statutes will generally prevail over other sources of law. However, in *Tadić*, the Appeals Chamber held that it was competent to examine whether the tribunal had been validly established. This meant an appraisal of the Statute. Since the Tribunal is established by the Security Council, its Statute has to be consistent with the UN Charter according to article 24(2) of the Charter. Hence, the provisions of the Charter should prevail over inconsistencies of the ICTY Statute. The Appeals Chamber also considered whether general principles of human rights prevail over the Statute. *Tadić* Jurisdiction Appeal, paras. 14-40.

[39] UN Doc. S/RES/827 (1993), annex; UN Doc. S/RES/955 (1994), annex.

[40] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone.

[41] See ICTY Statute, art. 29(1); ICTR Statute, art. 28(1).

The subject-matter jurisdiction of the UN Tribunals consists of "serious violations of international humanitarian law".[42] However, all three tribunals have also jurisdiction over offences that were committed during peacetime, so they are not merely "war crime tribunals" as often misleadingly referred.[43] Two types of crimes are common to all three tribunals, war crimes and crimes against humanity, albeit the definitions may differ from one statute to another. In addition, all tribunals have created provisions concerning the contempt of court[44] and perjury,[45] over which they have jurisdiction due to their "inherent powers".[46] The SCSL differs from the *ad hoc* Tribunals in that it has no jurisdiction over genocide, but does have jurisdiction over certain crimes under Sierra Leonean law.[47]

Of the three UN Tribunals, the SCSL has the closest relationship to national laws. Some provisions concerning sexual offences against children are incorporated from Sierra Leonean criminal law to the SCSL Statute.[48] The judges are also guided by procedural rules of Sierra Leone when amending the RPE. Moreover, they are always guided by the decisions of the Supreme Court of Sierra Leone in the interpretation and application of the national laws of Sierra Leone.[49] The subject-matter jurisdiction of the *ad hoc* Tribunals is elaborated more closely in the following chapters.[50]

2.1.1 The ICTY

There is no exact provision dealing with applicable law in the ICTY Statute but this can be derived from articles 2-5, which indicate the crimes under the Court's jurisdiction. Article 2 refers to grave breaches of the 1949 Geneva Conventions, article 3 to violations of laws or customs of war, article 4 to genocide, and article 5 to crimes against humanity. The UN Secretary-General famously held that the ICTY "should apply rules of international humanitarian law which are beyond any doubt part of customary law" and continued that the part of conventional international humanitarian law which is beyond doubt part of customary

[42] See art 1 of each of the statutes.
[43] Note made by Schabas 2006, pp. 152-153. In legal literature, the term "international humanitarian law" is generally used to cover crime of genocide, crimes against humanity, and war crimes.
[44] See Rule 77 of each of the RPE.
[45] See Rule 91 of each of the RPE.
[46] See *Tadić* Appeal Judgment on Allegations of Contempt, para. 13.
[47] SCSL Statute, art. 5.
[48] Id.
[49] SCSL Statute, art. 14(2) and 20(3).
[50] Given the purpose of my paper, there is no need to elaborate on the applicable law of the SCSL. One should, however, acknowledge that it follows largely the approach of the *ad hoc* Tribunals in this respect. My focus here is on the ICTY and ICTR since they can be regarded as more "internationalized" than the SCSL.

law includes the 1949 Geneva Conventions, the 1907 Hague Convention (IV) with annexed regulations, the Genocide Convention, and the IMT Charter.[51] Articles 2-5 of the ICTY Statute were drafted according to the provisions of these conventions. Following the statement of the Security-General, the Appeals Chamber has held that the criminal liability is to be grounded "on firm foundations of customary law".[52]

Therefore, it seems that the ICTY has no jurisdiction over offences of national law or treaty law unless they have become part of customary international law.[53] Contradictory, the Appeals Chamber has implied in several *obiter dicta* that the Court would have jurisdiction over violations of treaty law as long as the requirements of the principle of legality are met.[54] However, the Appeals Chamber has never actually acted upon it. Instead, it has consistently relied upon customary international law in its rulings.[55] To make an exception, a Trial Chamber has once resorted to treaty law as a sole basis of criminal conduct within its jurisdiction. In *Galić*, the crimes of "terror" and "attacks on civilians" were based on Additional Protocol I of the Geneva Convention without indicating whether it represented customary international law.[56] By this ruling the Trial Chamber ignored the direction of the Secretary-General as well as the precedent of the Appeals Chamber requiring its jurisdiction to be grounded "on firm foundations of customary law".[57]

Although the Secretary-General declared that the Geneva Conventions are beyond any doubt part of customary law, this does not mean that all (or any) of their provisions indicate individual criminal responsibility. Several provisions of the four Geneva Conventions and

[51] Report of the UN Secretary-General (S/25704), paras. 34 and 35. This report, according to article 32 of the 1969 Vienna Convention, can be (and in practice has been) considered as *travaux préparatoires* of the ICTY Statute. In addition, the ECtHR in its fairly recent ruling cited the Nuremberg Principles as authority for the content of customary law. *Kononov v. Latvia*, paras. 122, 207.
[52] *Hadžihasanović* Decision on Command Responsibility, para. 55.
[53] The argument that ICTY is to apply rules which are "beyond any doubt part of customary law" is rather problematic. As Zahar and Sluiter writes, the Secretary General gave the Tribunal via IMT Charter jurisdiction over "crime of aggression" (crimes against peace). Yet, even to this day the international community has been unable to agree upon the definition of this crime and, as we have seen, the Rome Statute "draws blank at this point". In this respect, it is certainly odd how crimes against peace could have been beyond doubt part of international customary law since 1946. Zahar & Sluiter 2008, pp. 84-85. In addition, it is strange how the *ex post facto* tribunals are able to cite the 1998 Rome Statute in order to identify customary norms existing *at the time of alleged crimes*. Ibid. p. 87.
[54] Most famously, in *Tadić* the Appeals Chamber held that "the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law." *Tadić* Appeal Decision on Jurisdiction, para. 143. See also para. 94.
[55] Mettraux 2005, pp. 7-9.
[56] *Galić* Trial Judgment, paras. 63 et seq.
[57] Mettraux 2005, pp. 6-7.

their Additional Protocols have subsequently proved to provide for criminal liability under customary international law, but this differs from the Trial Chamber's point of view in *Galić* that the treaty itself may serve as a basis for criminal liability. According to Mettraux, the Geneva Conventions are binding *qua* treaty law only upon signatory States, not upon individuals.[58]

It is not excluded that a treaty could provide for individual criminal responsibility, but the Geneva Conventions were never meant to do this; they are international treaties between and binding only upon the signatory States, not individuals. Moreover, the Secretary-General's proclamation indicates clearly that the jurisdictional scope of the ICTY is restricted to customary international law. In other words, crimes within the jurisdiction of the ICTY have to be binding upon individuals *qua* customary law, not treaties.[59] In this light, the *Galić* judgment cannot be held as a guiding precedent. Mettraux notes that it is only Trial Chamber level judgment and represents merely a deplorable exception of the rule confirming that the subject-matter jurisdiction of the ICTY is based firmly on customary international law.[60]

Mettraux's point of view suggests that those provisions of the Geneva Conventions that have proved to provide for individual criminal responsibility in the jurisprudence of the ICTY have done this *qua* customary law. This is in line with the Secretary-General's proclamation as well as the Appeals Chamber's aforementioned alignment that criminal liability should be grounded on customary law. Having said this, it is striking that the Appeals Chamber afterwards rejected Galić's argument that the Tribunal's jurisdiction for crimes under article 3 of the Statute can only be based on customary international law. On the face of it, this statement seems to be contrary to the alignment taken in the jurisprudence of the ICTY. However, the Court still did not entirely let lose its grasp on customary law. After declaring that treaty provisions may provide basis for the Tribunal's jurisdiction *ratione materiae*, it held that "in practice the International Tribunal always ascertains that the treaty provision in question is also declaratory of custom."[61]

The so called "battle over sources" has resulted in the emergence of two schools at the ICTY, one arguing that the Tribunal may apply treaty provisions (binding on the parties to a conflict)

[58] Id., pp. 7-9. Mettraux sees that the Trial Chamber has mixed up illegality with criminality. Indeed, not every breach of international law entail individual criminal responsibility.
[59] Id.
[60] Id., p. 9.
[61] *Galić* Appeal Judgment, paras. 81-85.

irrespective of their customary law status, the other resorting solely on customary law.[62] Moreover, there exist differing opinions on whether international criminal tribunals in general should apply treaty crimes that have not yet been accepted as part of customary international law.[63] Hardly anyone suggests that treaty provisions could not provide for criminal liability at all. On the contrary, the Rome Statute offers a perfect example of this. However, in the ICTY's practice this has not been the case. Even though treaties play an important role in its jurisprudence, they seem to work only as evidencing the customary law status of certain norms.

Several treaties create criminal responsibility, but in order to do this they must include provisions that clearly indicate crimes and are directly binding on individuals. Some treaty provisions such as the Genocide Convention and grave breaches provisions do this while several other provisions, particularly those of international humanitarian law, do not usually indicate individual criminal responsibility. Akande argues that only in the latter provisions the transformation from Sate responsibility to individual responsibility takes place under customary international law. Hence, these rules are not applied *qua* treaty law but *qua* customary law that is based on treaty provisions.[64]

Both of the statutes of the *ad hoc* Tribunals have been criticized as poorly drafted since a number of *lacunae* have been revealed in their regulations.[65] For instance, the statutes do not provide any regulations concerning general principles. Even though the judges are authorized to adopt their own RPE and "other appropriate matters"[66], the statutes are silent on general principles. In their practice, however, the Tribunals have frequently resorted to this source of law. In the absence of written rules the ICTY Trial Chamber has declared that:

> any time the Statute does not regulate a specific matter, and the Report of the Secretary-General does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (i) rules of customary international law or (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.[67]

[62] Zahar & Sluiter 2008, pp. 88-91.
[63] See, e.g., Akande 2009, pp. 48-49; Mettraux 2005, pp. 7-9; Cryer et al. 2010, pp. 9-10; Zahar & Sluiter 2008, p. 91.
[64] Akande 2009, p. 48.
[65] See, e.g., Degan 2005.
[66] See ICTY Statute, art. 15; ICTR Statute, art.14.
[67] Kupreškić Trial Judgment, para. 591.

One peculiar case concerning the jurisdiction of the ICTY tribunal is the case of contempt. The ICTY has convicted persons of contempt of the Tribunal even though it has failed to provide customary law basis for this. Instead, the Appeals Chamber has held that it has inherent powers, derived from the general principles of law, to punish persons for contempt.[68]

Notwithstanding the discrepancy in the ICTY's jurisprudence, customary law has maintained its leading status in the battle over the sources of law. The Appeals Chamber's argument in *Galić* does not deprive the fact that in practice the subject-matter jurisdiction of the ICTY consists of crimes based on customary international law. It is understandable that there exist different opinions on this even within the Court itself since customary law contains uncertainties that are unfamiliar to written laws. Even the drafters of the ICTY and ICTR statutes had different approaches to this question as the violations of Additional Protocol II were included within the jurisdiction of the ITCR even though the Protocol was not accepted as part of customary international law at the time.

2.1.2 The ICTR

The subject-matter jurisdiction of the ICTR is almost identical with the ICTY what comes to crimes against humanity and genocide, but war crimes form an exception. In this respect the subject-matter jurisdiction of the ICTR is narrower. It is limited to concern only violations of article 3 of the Geneva Conventions (and Additional Protocol II), whereas the ICTY Statute includes the grave breaches of the Conventions in their entirety as well as "violations of the laws or customs of war". The more limited jurisdiction can be explained by the internal nature of the Rwandan conflict. In addition, except for some provisions of the Additional Protocol II the violations of Hague law are not covered by the ICTR Statute. Both the ICTY and the ICTR statutes include the open-ended definition of war crimes: "These violations shall include, but shall not be limited to…"[69] However, in its practice the ICTR has limited its war crimes to those expressly stated in the Statute, unlike the ICTY.[70]

On one point, the jurisdictional scope of the ICTR is defined more broadly than in the ICTY. As noted, article 4 of the ICTR Statute includes violations of Additional Protocol II of the Geneva Convention even though the protocol was not deemed to be a part of customary

[68] *Tadić* Appeal Judgment on Allegations of Contempt, paras. 14- 15 and 19-24.
[69] ICTY Statute, art. 3; ICTR Statute, art. 4.
[70] Mettraux 2005, pp. 23-28.

international law at the time.[71] This seems to broaden the subject-matter jurisdiction of the ICTR to include certain violations of treaties. However, the practice of the ICTR indicates that it actually applies customary law in respect of its subject-matter jurisdiction. The Appeals Chamber has noted that the Security Council "was not creating new law but was *inter alia* codifying existing customary rules for the purposes of the jurisdiction for the ICTR" when the ICTR Statute was drafted.[72]

Thus, although the Security Council has authorized the ICTR to apply conventional humanitarian law instruments, the ICTR has refused to grasp on this opportunity. The line taken by the ICTR demonstrates an appropriate discretion on behalf of the Court as well as the importance it gives to customary international law as a source of ICL. Indeed, Mettraux points out several reasons why the ICTR should also apply only customary law. First, if the ICTR relies upon conventional law it still has to establish that the violation of a given treaty provision entails individual criminal responsibility. Secondly, recourse to customary law allows judges to take account the possible evolution of norms after their pronouncement. Thirdly, the ICTR has to turn to customary law in any case since treaties do not cover all the crimes within the jurisdiction of the Court. Resorting to only one source of law guarantees some conformity in its rulings and gives them particular authority even outside the ICTR's jurisprudence. In this way, the ICTR may also participate in developing ICL through its jurisprudence, even though this is not its primary purpose.[73]

2.2 Subject-Matter Jurisdiction of the ICC

The Rome Statute is the first international criminal court statute that provides a provision dealing with applicable law. The aforementioned article 21 provision is an important innovation for several reasons. As noted, it offers an alternative list of sources alongside the ICJ Statute. Secondly, judges of the ICC cannot determine themselves the sources of law they would draw upon, as has been the case with the *ad hoc* Tribunals to some extent. Thirdly, there is a clear hierarchy of sources in article 21(1). Only the case law of the Court (paragraph 2) is left without any reference to the hierarchy. The final paragraph 3 refers to the

[71] See, Report of the UN Secretary-General (S/1995/134), para. 12.
[72] *Čelebići* Appeal Judgment, para. 170.
[73] Mettraux 2005, pp. 11-12.

whole article making it subject to "internationally recognized human rights".[74] As mentioned, article 38(1) of the ICJ Statute does not assign any hierarchy between the main sources of public international law, even though it makes a distinction between them and the subsidiary means for determining legal rules.

Besides the hierarchical layout of the subparagraphs (a)-(c), there is also a hierarchy between the three primary sources (the Statute, the Elements of Crimes, and the Rules of Procedure and Evidence). Even though article 21(1)(a) in itself does not seem to indicate any hierarchy between them, articles 9(3) and 51(5) make clear that the Statute prevails over inconsistencies of the other two instruments.[75]

Most importantly, the crimes within the Court's jurisdiction are defined extensively. This is apt to prevent the problem of *non liquet*. However, the definitions are not fully exhaustive and this leaves some discretion to the judges. It is exactly for this purpose that the Elements of Crimes are appended to the Statute. According to article 9 they "shall assist the Court in the interpretation and application of articles 6, 7 and 8" which contain the definitions of crimes.[76]

As a secondary source the Court shall apply applicable treaties as well as the principles and rules of international law.[77] There is no hierarchy between them. The term "international law" refers to public international law.[78] The wording "principles and rules of international law" of article 21(1)(b) suggests recourse to the three principal sources enumerated in article 38 of the ICJ Statute, namely treaties, custom, and general principles.[79] Thus, the Court is authorized to apply customary international law as well. Degan criticizes the vague wording of the provisions since it does not distinguish between the three main sources and therefore relieves the Court from the difficult task of proving the customary status of "principles and

[74] It seems to be commonly accepted that human right norms should prevail over the provisions of the Statute in case of inconsistencies, even though article 21(3) does not explicitly indicate this. However, article 21(3) fails to determine what is meant by "internationally recognized human rights". See, e.g., Akande 2009, p. 47.
[75] According to article 9(1), the Elements of Crimes are only designed to assist the Court in the interpretation and application of the articles 6, 7, and 8 that indicate the crimes under Court's jurisdiction. Article 51(5) also addresses the matter: "In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail." Hence, the Elements of Crimes and The Rules of Procedure and Evidence are subject to the provisions of the Statute.
[76] Degan 2005, p. 80.
[77] Article 21(1)(b) of the Rome Statute.
[78] Schabas 2010, p. 390 fn. 61. There are applicable treaties to which the Court itself is a party, such as the Negotiated Relationship Agreement with the United Nations. Moreover, Schabas reminds that the UN Charter is a "paramount instrument" of the international system within which the Court operates. Therefore, the Charter is binding law pursuant to article 21(1)(b) of the Statute. If the Court detects a conflict between the Charter and the Statute, the Court is obliged to give primacy for the obligations of the Charter. Article 103 of the UN Charter.
[79] Schabas 2010, p. 391 fn. 67.

rules" it wishes to apply.[80] However, the Court's recourse to general international law as a normative source has been modest.[81]

The principles and rules of international law include also "the established principles of the international law of armed conflict".[82] This body of law is complex, but largely codified in the fourth Hague Convention of 1907,[83] the four Geneva Conventions of 1949,[84] and their Additional Protocols, adopted in 1977.[85] But since there are still many provisions that can be found from customary law only the Court may have to recourse to this source of law when dealing with armed conflicts. Then, for instance, the customary law study conducted by the ICRC may prove to be highly relevance.[86]

Finally, the Court may apply the general principles of law derived from national legal systems. Schabas suggests that this source of law should be distinguished from the "general principles of law" as meant in article 38(1) of the ICJ Statute. According to him, article 21(1)(c) should not be used to determine the content of public international law, but to form subsidiary source of norms through a comparative criminal law survey.[87] So far, the Court has not been very keen to draw from national practice as a source for general principles.[88]

The Court is free to use all the sources of article 21(1) as an aid for the interpretation of the Statute.[89] The hierarchy emerges when these are used as independent sources. In *Bashir* the Pre-Trial Chamber I held that "those other sources of law provided for in paragraphs (l)(b) and (l)(c) of article 21 of the Statute, can only be applied when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria

[80] Degan 2005, p. 80.
[81] Schabas 2010, p. 392.
[82] Article 21(1)(b) of the Rome Statute.
[83] Convention (IV) Respecting the Laws and Customs of War by Land, (1910) UKTS 9, annex.
[84] Convention for the amelioration for the Condition of the Wounded and Sick in Armed Forces in the Field, (1950) 75 UNTS 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, (1950) 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War, (1950) 75 UNTS 135; Convention Relative to the Protection of Civilian Persons In Time of War, (1950) 75 UNTS 287.
[85] Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts, (1979) 1125 UNTS 3; Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts, (1979) 1125 UNTS 609.
[86] Henckaerts & Doswald-Beck 2005; Schabas 2010, pp. 392-393.
[87] The problem may arouse if the subparagraphs (b) and (c) of article 21(1) are mixed up. The "principles and rules of international law" as indicated in subparagraph (b) refer to general principles of law as meant in article 38(1) of the ICJ Statute. The wording of subparagraph (c) can be quite misleading. This distinction is important due to the hierarchical relationship between the two subparagraphs. See Schabas 2010, pp. 391-393.
[88] Id., p. 394.
[89] Id., p. 385.

provided for in articles 31 and 32 of the Vienna Convention on the Law of the Treaties and article 21(3) of the Statute."[90]

According to Schabas, there is a tendency in the practice of the Court to treat the sources of article 21(1)(a) as a complete codification of sources, particularly what comes to procedural rules. Chambers have refused several times to compose new procedural rules from other sources than those enumerated in article 21(1)(a), i.e., the Statute, Elements of Crimes and the RPE.[91] For example, in *Katanga* the Pre-Trial Chamber rejected new modes of liability based on customary international law, since "[p]rinciples and rules of law constitute a secondary source applicable only when the statutory material fails to prescribe a legal solution."[92]

Article 21(2) authorizes the Court to follow its previous decisions. This is not a rule of *stare decisis*, however, since the Court is not obligate to do this; the wording of the provision is merely permissive. Moreover, the article does not indicate any hierarchy between the decisions of various chambers. Even though the Pre-Trial and Trial Chambers are not inferior compared to the Appeals Chamber, it is suggested that there should be hierarchical order that gives priority to the rulings of the Appeals Chamber.[93] This is also the case with the *ad hoc* Tribunals for there is no rule of hierarchy of decisions in their statutes but in practice the Trial Chambers are bound by the *ratio decidendi* of rulings of the Appeals Chamber.[94] According to the Appeals Chamber of the ICTY, the rule that its higher courts follow their previous decisions is a matter of "consistency, certainty, and predictability".[95] The ICC has followed its earlier decisions on several occasions, and it seems that there is a tendency that the Pre-Trial and Trial Chambers hold rulings of the Appeals Chamber as binding decisions. What comes to other judicial bodies, the ICC has often referred to the case law of the *ad hoc* Tribunals and the ECtHR, but precedents of these courts are in no sense binding, and the Court has actually departed from their ruling on several occasions.[96]

Article 21(3) reflects the growth of the international human rights movement at the time of creation of the ICC. This article is not just verbiage; it guides the application and interpretation of all other provisions of the Statute, including the other sources of law.

[90] *Al Bashir* Decision on Arrest Warrant, para. 126.
[91] Schabas 2010, p. 389.
[92] *Katanga* Decision on Charges, para. 508.
[93] Schabas 2010, p. 395.
[94] *Aleksovski* Appeal Judgment, para. 113.
[95] Id., para. 97.
[96] See chapter 6.2.2; see also Schabas, (2010), p. 396.

Repeatedly cited in the Court's early case law, this provision has proved to possess great potential and fundamental role in the Court's work. For instance, human right sources have strengthened and expanded the fair trial rights set out in the Statute. Article 21(3) has also affected to the creation of several procedural innovations not listed in the Statute, what comes to victim participation and protection in particular.[97] In this respect, once could argue that customary law has affected the case law of the ICC.

Although customary law is listed as a source of applicable law in the Rome Statute, it is most likely to play a remarkably smaller role in the ICC compared to the *ad hoc* Tribunals. This is because of the detailed provisions of the Rome Statute and hierarchically higher status of the sources in subparagraph (a). Even if some provisions in the Statute depart from customary international law, the Elements of Crimes take precedence over customary law. However, article 31(3) of the Rome Statute gives special weight to customary rules in respect of grounds excluding criminal responsibility since it allow customary rules to take precedence over the Statute.[98] Moreover, customary rules may become relevant in assessing the mental element of crimes within the Court's jurisdiction whenever the Statute or the Elements of Crimes do not provide a specific *mens rea*.[99]

2.3 Concluding Remarks

The UN Tribunals' approach to the sources of international law differs profoundly from that of the ICC. Whereas ICC clearly treats custom as a secondary source of law, the UN Tribunals have applied it as a primary source of law. Although the *ad hoc* Tribunals have been authorized to resort to treaty law instruments, they have not seized this opportunity. Their case law reveals that the Tribunals have firmly followed the rules of customary law with respect to their subject-matter jurisdiction.

[97] Schabas, (2010), pp. 337-340.
[98] "At trial, the Court may 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." Art. 31(3) of the Rome Statute.
[99] Akande 2009, pp. 50-51.

3. Custom and Other Sources of Substantive International Criminal Law

3.1 The Generality of Customary Law

Customary international law comprises the rules of international law that emerge through a general practice accepted as law, as stated in the ICJ Statute. More generally, it can be understood to comprise all rules of international law that are not covered by treaties: the unwritten rules of international law. Naturally, those rules can also derive from the general principles of law but in practice international lawyers and judges tend to turn to customary law whenever there are no treaty provisions to apply. Often the general principles of law are associated with customary law in such a manner that it is impossible to identify which of the two sources a given rule is derived from. Regardless of this, customary law holds particular prominence in ICL since it is the only unwritten source of law on the basis of which individuals can be held criminally responsible.[100] For this reason general principles are often used only to ascertain the content of customary law.

General principles have played a major role in the jurisprudence of the *ad hoc* Tribunals and they have proven to be the most prominent (and therefore most controversial) tool for the *ad hoc* Tribunals in identifying customary law.[101] This source of law is a complex and vast concept, closely related to and constantly overlapping with other sources of law, particularly with custom. According to Degan, the general principles of law can be understood in two meanings. In their broad sense, as a basis of any legal order, they form a unity with the two other main sources, customary law and treaties. In their narrow sense, they are seen as a tool for international judges to fill in gaps of positive law when there is no suitable treaty or

[100] It still remains disputed whether the general principles of law can serve as an independent source of ICL, distinguished from customary international law, and thus provide for criminal responsibility. According to Gallant, the texts of the ICCPR and the ECHR as well as the jurisprudence of the ICTY imply that the general principles of law can be a source of criminalization. Gallant 2009, p. 373; ICCPR, art. 15(2); ECHR, art. 7(2); See also *Tadić* Judgment on Allegations of Contempt, paras. 13-28. However, the way that ICTY has associated general principles with the formation of customary law indicates the unease that judges still feel with applying the general principles of law as the sole basis of defining criminal conduct. Indeed, the ICTY seem to have used the terms "customary law" and "general principles of law" almost as complete synonyms. There is a place for criticism here since the assimilation of general principles into custom is apt to confuse the understanding of unwritten sources of international law. Degan 2005, p. 57 ft. 22; See also *Furundžija* Trial Judgment, paras. 183-184, where the customary law definition of rape was broadened by resorting to "general principle of respect for human dignity".

[101] By contrast, the scarce practice of the ICC has been much more cautious, keeping general principles as subsidiary sources of international law. One could argue that according to the Rome Statute, only general principles derived from national legal systems are subsidiary in nature and that general principles inherent to international system are equal with treaties and custom. However, some scholars apparently make no distinction between these two when addressing the matter. Nevertheless, the world has seen the potency that this source of law encloses.

customary rule to apply.[102] Although the principle of legality sets strict limits to the gab-filling function of general principles in respect of the definitions of crimes, these principles can still be used for excluding criminal responsibility for instance.[103]

In the context of ICL, custom has aroused a considerable amount of debate and disagreement. As ICL is a mix up of different legal systems there prevails no unanimity over the nature and status of customary norms. The common law and civil law systems, for instance, have truly differing stances on unwritten laws. In ICL, the big debate circles around the application of the principle of legality in international law. The main issues are related to legal certainty and foreseeability, which are profound requirements of any criminal justices system. The initial question is whether customary law can provide basis for individual criminal responsibility. This is because the principle of legality requires that crimes are to be defined with certain amount of detail and customary law is, in the absence of written rules, inherently indeterminate. It seems that the whole concept of custom remains vague as its content cannot be determined exhaustively. Notwithstanding that some authors still question the appropriateness of customary law for providing criminal liability, judicial praxis from the Nuremberg trials onward has shown that international crimes can and do emerge through customary international law.[104]

However, one should be aware of the criticism directed towards the vagueness of customary law. Degan, for instance, argues that the principle of legality prohibits criminalization that is based solely on customary international law. Hence, the statutes of international criminal courts should provide all the definitions of crimes beforehand and in written form, as the

[102] Degan 2005, pp. 52-53. Article 31 of the Rome Statute (that indicates grounds for excluding criminal responsibility) offers an example of these principles in their broad sense. However, its third paragraph refers to article 21 as a supplementary source for considering new grounds for excluding criminal responsibility. The use of general principles of article 21(2)(c) to fill in "gaps" of article 31 (through comparative analysis of national legal systems) works as an example of the general principles of law in their narrow sense. Degan 2005, pp. 81-82. Understandably, the codification of general principles in the Part 3 of the Rome Statute is welcomed by several scholars since it is apt to clarify the distinction between these two sources of law. See, e.g., Degan 2005, pp. 58-62. In contrast, the statutes of the UN Tribunals contain only a small number of general rules. For this reason the UN tribunals have frequently resorted to rules common to national legal systems. By now, the need for a "general part" of ICL is widely recognized and the Rome Statute has answered to this call by providing for the first time a comprehensive set of general principles in a written form. However, Akande notes that since the codification process is fairly recent, the status of some principles may be unclear as they need time to achieve their full "doctrinal maturity". Akande 2009, p. 55.

[103] See, e.g., Rome Statute, art. 31(3).

[104] The ICTY Appeals Chamber has declared that "in the case of an international tribunal such as this, accessibility does not exclude reliance being placed on a law which is based on custom." *Hadzihasanovic* Decision on Command Responsibility, para. 34; See also Heikkilä 2011, p. 920; and Meron 2005, pp. 818, 821-822.

Rome Statute largely does.[105] Eventually, this criticism leads us to the question of how the principle of legality should be understood in international law. Degan's perception of this principle is strictly positivistic (*nullum crimen sine praevia lege scripta*), a view that is followed typically in civil law countries. As it is often argued, the version of the principle of legality applied in international criminal proceedings seems to be more relaxed than what is meant by Degan.[106] Even though I argue later in this work that the application of ICL is heading towards stricter legality, it is by no means necessary, in my opinion, to base criminalization of international crimes solely on written texts.

The distinctive character of the principle of legality in international law is mainly caused by the contradictory nature of international criminal proceedings. As they are usually set out during or after devastating events of widespread human injustice, such as genocide, they must balance between the aims of justice and peace.[107] In addition, one cannot assimilate the horizontal lawmaking process of the international legal system to a national one. The fact that some international rules are written does not add any particular authority to them. As there is no legislative authority at international level there are no written laws in their actual meaning. Furthermore, associating criminal responsibility to unwritten rules is due that customary law has wider reach than treaties, since treaties eventually bind only the parties. Customary law is most likely to retain its position as a general source of ICL since it is able to provide a rather comprehensive set of international norms which are compelling to all States and individuals. Although some skepticism is directed against the binding nature of customary law, several scholars argue that the core crimes have attained a status of *jus cogens* under customary law so that even the persistent objector doctrine does not allow State officials to escape accountability.[108]

Degan also criticizes the general character that has been given to customary law in the jurisprudence of the *ad hoc* Tribunals. [109] There is some truth in this. It is remarkable how the ICTY has sometimes used all the sources of international law in a mixture to prove the existence of customary law norms. In *Hadžihasanović* , for example, the Court constructed its findings on treaties, general principles of law, and judicial decisions, concluding that they altogether establish the existence of a customary rule providing command responsibility in

[105] However, Degan agrees that codified customary rules can serve as a model for future statutes of international criminal courts. Degan 2005, p. 67.
[106] See, e.g., Gallant 2009, p. 321; Schabas 2006, p. 63; Meron 2005, p. 829.
[107] See, e.g., Bassiouni 1999, p. 144.
[108] See, e.g., Cassese 2008.
[109] Degan 2005, p. 64.

internal armed conflicts.[110] The Rome Statute does not offer any better solution to this indeterminacy as it states that the Court shall apply, in the second place and besides treaties, "principles and rules of international law". Although general principles are codified separately in Part 3 of the Rome Statute, the wording of this provision reflects the reluctance of the drafters to address the inconsistency prevailing over the unwritten sources of international law as it does not clearly indicate that the court is able to apply customary law, but merely "rules of international law". As noted above, Degan argues that this provision may relieve judges from the task of proving the customary character of newly discovered rules.[111]

The generality surrounding customary law is overwhelming. As there is no common agreement on its content, it may be utilized to provide interpretations of law that cannot be supported by strong legal arguments. Customary law is constantly overlapping with other sources of international law. Due to this constant interaction, one cannot always clearly distinguish between custom and other sources of law.[112] Therefore, it may be easy for a judge to provide an explanation that international law "in general" supports the existence of a given rule without actually identifying which sources and to what extent support this finding. Given the demands of the principle of legality, this is a profound shortcoming in criminal proceedings. Future challenge for international criminal judges is to distinguish clearly between customary law, general principles of law, and judicial decisions if they are to be held as separated sources of international law, as stated in the ICJ statute.

3.2 The Interplay of Customary Law and Judicial Decisions

In public international law, the decisions of international courts, such as those of the ICJ, have usually "no binding force except between the parties and in respect of that particular case".[113] Moreover, judicial decisions are only subsidiary means for the determination of international rules.[114] The word "subsidiary" indicates that courts do not actually make law but they should apply existing law.[115]

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[110] See *Hadžihasanović* Decision on Command Responsibility, paras. 12-13.
[111] Degan 2005, p. 80.
[112] "The sources of international law are not self-contained but interrelated, and each source give rise to rules which have to be understood against the background of rules deriving from other sources, so that any non-consensual element in one source of law may indirectly affect the rules deriving from other sources." Jennings & Watts 1996, p. 25.
[113] ICJ Statute, art. 59.
[114] Id., art. 38(1). Cassese states that because judicial decisions are subsidiary in nature they do not constitute a source of ICL *per se*. Cassese 2008, p. 26.
[115] Jennings & Watts 1996, p. 41.

Thus, the primary function of courts in general is to apply law, not to make it. Article 59 of the ICJ Statute that limits the effects of the Court's decisions in respect of future cases expresses the idea that the Court should not be considered as a law-making institution. In practice, however, the ICJ has given precedential value to its own decisions, and one can certainly notice a desire for consistency in the Court's jurisprudence.[116] Moreover, the Court has adopted a role of an authoritative interpreter of international law and its decisions are regarded highly authoritative by States, other international courts, and international organizations.[117] Thus in reality, the ICJ plays a major role in contemporary law-making since it is a leading authority to deliver opinions and issue statements upon the current state of public international law.[118] This results from the decentralized system of international law. In the absence of a legislative body a majority of its rules are unwritten and judicial decisions play a major role in discovering and establishing these rules.[119]

In ICL, judicial decisions have played even more prominent role in defining the substance of law. For instance, during the establishment of the ICTY the UN Secretary-General referred to the case law of the Nuremberg Tribunal in order to determine crimes that were "beyond any doubt part of customary law",[120] a statement that was later approved by the Security Council. This can be regarded as a confirmation that the case law of international criminal courts can be treated as an element of practice defining customary law.[121]

The subsidiary status of judicial decisions does not appear to be sustained by the UN Tribunals. Even though the *ad hoc* Tribunals do not follow the *stare decisis* doctrine, they regard the rulings of their common Appeals Chamber as authoritative.[122] The SCSL Statute also contains a provision according to which "[t]he judges of the Appeals Chamber of the

[116] Boyle & Chinkin 2007, pp. 293, 297.
[117] After all, the ICJ is the principal judicial organ of the UN. See arts. 7(1) and 92 of the UN Charter; Boyle & Chinkin 2007, p. 293; See also Higgins 1994, pp. 202-203, stating that "[s]tates which have no dispute before the Court follow the judgments of the Court with the greatest interest, because they know that every judgment is at once an authoritative pronouncement on the law, and also that, should they become involved in a dispute in which the same legal issues arise, the Court, which will always seek to act consistently and build on its own jurisprudence, will reach the same conclusion."
[118] Id., p. 202.
[119] As Boyle & Chinkin phrase it, "[i]n a decentralised legal system the ICJ offers an authoritative voice on the meaning of international instruments and unwritten principles." Boyle & Chinkin 2007, p. 268.
[120] Report of the UN Secretary-General (S/25704), paras. 34, 42-44, 47-49.
[121] See, e.g., Gallant 2009, pp. 348, 355.
[122] Although not stated in the Statutes, the *ratio decidendi* of the Appeals Chamber's rulings is found to be binding on the Trial Chambers. Likewise the Appeals Chamber usually follows its previous decisions "in the interests of certainty and predictability". *Aleksovski* Appeal Judgment, paras. 104-110 and 113.

Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda."[123]

The Tribunals have also cited rulings of other international courts, such as the ECtHR and IMT, as well as national constitutional courts, such as the House of Lords, the Supreme Courts of Canada and the United States and the French *Conseil constitutionnel*.[124] According to Schabas, the Tribunals have, however, referred to these rulings "in the parameters of article 38(1) of the Statute of the International Court of Justice, using the decisions not as binding precedent but as persuasive and compelling authorities, deserving of serious consideration."[125] However it may be, the fact that the UN Tribunals tend to follow their own previous decisions imply that the distinction between the three main sources and subsidiary means in the ICJ Statute is not that clear in the context of ICL.[126] Even the Rome Statute mandates the ICC to "apply principles and rules of law as interpreted in its previous decisions".[127] This has led some scholar to argue that a weak form of *stare decisis* has actually developed within ICL.[128]

Nevertheless, the tendency of courts to follow previous judicial decisions as evidencing the content of customary law should be distinguished from courts' actual ability to create law. Customary law is traditionally deemed to form through consistent practice of States, not courts. The fact that customary law is nowadays often associated with the case law of international courts is because the disputes over the existence of certain customary rules are usually solved in international proceedings. In addition, it is not unusual that States disobey

[123] SCSL Statute, art. 20(3). The provision continues: "In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone." However, one of the SCSL Trial Chambers has argued in favor of a cautious approach in respect of rulings of the *ad hoc* Tribunals: "It must be emphasized, that the use of the formula 'shall be guided by' in Article 20 of the Statute does not mandate a slavish and uncritical emulation either precedentially or persuasively, of the principles and doctrines enunciated by our sister tribunals." *Sesay,* para. 11. The common Appeals Chamber for the ICTY and ICTR is apt to improve legal consistency among the work of the *ad hoc* Tribunals. A Shared Appeals Chamber between the SCSL and the *ad hoc* Tribunals was also considered but later rejected by the Security Council. Mettraux 2005, pp. 19-20.

[124] Bantekas suggest that the tendency of the international tribunals to follow previous decisions of other international courts derives from the legal education and writings of academics and lawyers with common law backgrounds. Since the academic writings in the field of ICL started to emerge not until after the Second World War, they relied heavily on the Nuremberg and other judgments during the Cold War together with large amounts of soft law. This led to a "culture of ascertaining the little available international criminal law on the basis of soft law and judicial pronouncements" that invaded international criminal law. As an example, Bantekas points out the formulation of the JCE doctrine, which relied almost entirely on WWII case law. Bantekas 2006, pp. 131-132; *Tadic* Appeal Judgment, paras. 194 et seq.

[125] Schabas 2006, p. 110.

[126] Indeed, Nollkaemper states that the distinction is generally overstated. Nollkaemper 2003, p. 291.

[127] Rome Statute, art. 21(2).

[128] Van Schaack 2008, p. 170.

rules of international law without actually aspiring to change the content of law. Such behavior is typical during wartime for instance. Thus the ascertainment of a consistent State practice is associated with some major difficulties within areas such as humanitarian law, human rights law, and ICL.[129] Because of this, customary rules of ICL are often drawn from previous judicial decisions (and treaties).[130] But this does not mean that international judges are allowed to legislate from the bench *per se*.

In the context of ICL customary law system resembles those national common law justice systems that still include unwritten common law offences. Yet it is important to make a distinction between the legislative activity practiced by the common law courts (often referred as "judge-made law") and the use of judicial decisions in the customary law-making process. [131] The difference is that customary norms are not made *per se*; they form through a consistent State practice supported by a common belief that such practice amounts to law and is binding on all (*opinio juris*). In contrast, the common law justice system builds up on *stare decisis* doctrine with huge amounts of judicial precedents and a hierarchical structure of courts.[132] In international law such a doctrine does not exist, at least not to the same extent as in common law tradition.[133] Thus, in common law tradition judicial precedents are binding, whereas in ICL they serve merely as assistance in determining if a given customary rule has crystallized into law. Furthermore, the international law-making process is horizontal with no compelling authority. This is why some authors emphasize the distinction between so called "judge-made law" and customary international law.[134]

However, in ICL the relationship between judicial decisions and customary law is a rather obscure one. Usually judicial decisions work as declarations of existing customary law but in some cases they may have a crystallizing effect on customary rules. In the latter situations,

[129] These difficulties are appraised more closely in chapter 6.
[130] Heikkilä 2011, p. 920.
[131] Indeed, Degan emphasizes the differences between "judge-made law" and customary law by stating that the two have nothing in common. Degan 2005, pp. 67, 73-75.
[132] As a matter of *stare decisis*, the judges in common law countries are usually obliged to follow (the *ratio decidendi* of) former judicial precedents. In common law justice system there is a clear hierarchy between judicial organs, and only the final decisions of the highest courts are binding precedents. It is inherent to the system that judges are able to create new offences on the basis of the *stare decisis* doctrine. However, apparently even the courts of the English and US common law traditions no longer maintain the power to create new criminal offences in judicial proceedings. Ashworth 2009, p. 59; Van Schaack 2008.
[133] The fact that judicial decisions are referred only as subsidiary means in the ICJ Statute implies in itself that the rule of *stare decisis* does not exist in international law. In addition, article 59 of the ICJ Statute clearly says that decisions of the Court are not to be held as binding precedents. However, some authors, such as Akande for instance, argue that the *ad hoc* Tribunals do apply this principle. Akande 2009, p. 53; For dissenting opinions see Nollkaemper 2003, p. 291; Degan 2005, p. 76; Schabas 2010, pp. 394-397; Mettraux 2005, pp. 19-20.
[134] See, e.g., Degan 2005, pp. 67, 73-75.

judicial decisions themselves become part of the customary law-making process. But even in these cases the customary status of a given rule results not from the fact that the rule is originated by a court but from the proof of evidence that the court has provided.[135]

According to Degan, judges of the *ad hoc* Tribunals have frequently confused judicial decisions with customary law. Instead of referring to the basic elements of custom (State practice and *opinio juris*) judges have relied on judicial decisions using them as the sole evidence of customary law.[136] Thus, the judges have combined these two sources with each other by referring to judicial decisions as "customary law".[137] It is unlikely that they have meant to do this. The used articulation in general still implies that judicial decisions are deemed to form only a part of the identifying process. However, regarding judicial decisions only as "subsidiary means" understates their prominence in ICL. Some scholars argue that the *ad hoc* Tribunals' way to use supplementary sources, both judicial decisions and academic writings, has elevated these to the status of primary sources.[138] Indeed, international precedents from Nuremberg onward "have been a primary, if not the primary, source" of ICL, as Gallant concludes.[139] Having said this, it is important to acknowledge that the practice of the Tribunals has aroused lots of criticism since several authors see that the methods being used have not been very plausible in their selectivity and inconsistency.[140]

Former judicial decisions are still deemed to evidence either existing State practice or *opinio juris* to some extent, but they are not customary law *ipso facto*. Occasionally, they may play a major role in the formation of new customary rules, but the basic elements (practice and *opinio*) are still vital parts of custom and need to be established. However, when there is only a small amount of State practice to discover, the decisions of international courts gain more importance. Thus, the borderline between judicial decisions and customary law remains rather unclear. But care must be taken, especially in respect of criminal proceedings. As

[135] Degan 2005, p. 75; Mettraux 2005, pp. 15, 366.
[136] See chapter 7.
[137] Degan 2005, p. 75.
[138] See, e.g., Bantekas 2006, pp. 129-133. Bantekas by no means welcomes this phenomenon. He argues that due to the supplementary nature of judicial decisions, they are meant to elucidate and support the primary sources, not to work as a direct basis for the law when the primary sources are silent. In the absence of customary and conventional rules judicial decisions can serve as evidence of the general principles of law, but if such principle is not to be found the court must decide in favor of the accused.
[139] Gallant 2009, p. 349.
[140] Bantekas 2006; Zahar 2011; Hoffmann 2010.

Degan reminds us, the legislative process is inappropriate for criminal proceedings since it contains a risk of retroactive punishing.[141]

4. Recasting the Sources of International (Criminal) Law?

The increasing number of international courts has resulted in a situation where multiple institutions are interpreting how international law derives from the authoritative list of sources of article 38(1) of the ICJ Statute. Their various perceptions on the matter are bound to cause confusion regarding the understanding of the sources of international law. The *ad hoc* Tribunals have certainly done their share in this respect.[142] In addition, the sphere of ICL contains an another list of sources, the Rome Statute, that serves as an alternative to the ICJ Statute. However, since the Rome Statute is not binding on courts other than the ICC it offers no solution to the uncertainty prevailing over the sources of ICL. Instead, it could be perceived as causing some fragmentation of international law. Yet, for the most part, the sources of ICL are the same as those in other areas of international law –what differs is the respective emphasis and essential differences between various courts: while the ICC largely resorts to written law the UN Tribunals have operated almost entirely with customary law. In this respect the Rome Statute seems like a critical response to the custom-embracing practice of the former tribunals. But as noted above, even the ICC may have to refer to customary law in its jurisprudence.

The *ad hoc* Tribunals have elevated the normative status of international judicial decisions as a source of international law. The Tribunals have done this in two ways. On one hand, they have used former judicial decisions as strong evidence in identifying and discovering customary rules of ICL. On the other, they have themselves participated in forming these rules. As Boyle and Chinkin phrase it, all of the three tasks of an international court – determining applicable law, applying it, and interpreting it– "assume existing law to be applied but in fact contribute to the process of law-making."[143] Like the *ad hoc* Tribunals, the

[141] Degan 2005, p. 78. In addition, since the *ad hoc* Tribunals are diligently citing their own case law, there is a danger that ICL will become overly self-referential. Zahar & Sluiter 2008, preface.
[142] Here one should definitely look at Powderly 2010; Raimondo 2010; Cryer 2010; and Shahabuddeen 2010 to see how exceptional the *ad hoc* Tribunals' use of sources of international law has been.
[143] Boyle & Chinkin 2007, p. 272. But although judicial decisions may have elevated from merely subsidiary means to something else in the jurisprudence of the *ad hoc* Tribunals, they cannot either replace or wholly constitute customary law. What they can do is clarify the mysteries of customary law to some extent. They may serve as evidence of existing law but they may also contribute to the process of making custom by clarifying the

ICC embraces the value of judicial decisions as the Rome Statute allows it to follow "the principles and rules of law interpreted in its previous decisions."[144] However, its reliance on the jurisprudence of other courts has been modest.

The initial reason for the higher status of customary law and judicial decision in ICL lies in the emergence of individual criminal liability in international law. After the WWII it was clear that individuals should be held liable for their atrocities.[145] Nevertheless, States failed to enact penal codes that could apply in international proceedings. Thus, the majority of the fundamental legislation of ICL is taken from treaties that were made to regulate State conduct. Although States created these rules which constitute the fundamentals of ICL, it was only the work of international criminal courts that enabled their direct applicability in actual prosecutions. This has happened via customary law. The work of developing the content of ICL that started in the Nuremberg IMT continued after the Cold War in the *ad hoc* Tribunals.

Although one may conclude that the *ad hoc* Tribunals have recast the understanding of the sources of international law within ICL to some extent, it is important to notice that as they are ending their work the ICC is likely to lead the way towards more conventional ICL. However, the status and importance of customary law still remains since ICL, or any other branch of international law, cannot operate fully on conventional law. What can be said is that one should not blindly follow the sources as enumerated in the ICJ Statute but acknowledge the changing nature of international law. Its sources have the ability to adapt to changing circumstances in which the law is applied, depending on the substance and aims of the law as well as the institutions applying it.

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methods that are used to identify these norms. Indeed, judicial decisions can both represent a newly formed rule of customary law and also provide the process for creating one. This perspective is addressed more closely in the next section of this work.

[144] Rome Statute art. 21(2).

[145] The principle I of the Nuremberg Principles reads as follows: "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment." Principle II states, "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law."

PART II

THE ROLE OF INTERNATIONAL CRIMINAL COURTS IN TODAY'S CUSTOMARY LAW-MAKING PROCESS

> *If large numbers of people believe in freedom of speech, there will be freedom of speech even if the law forbids it. But if public opinion is sluggish, inconvenient minorities will be persecuted, even if laws exist to protect them.*
>
> *-George Orwell*

5. Custom: Traditional and Modern Approaches

There seems to be no agreement on how much State practice is needed to form new norms of customary law. Two competing schools can be observed on this matter. They are usually termed as traditional and modern approaches. Both theories rely on two elements, State practice and *opinio juris*. These elements are both necessary and they are closely intertwined. To identify *opinio juris* one must draw on States' behavior to make presumptions about their common will. To identify relevant State practice one must refer to *opinio juris* since only acts which express the common will of States are counted. Thus, State practice is defined by *opinio juris* and vice versa.[146]

Several sources can be used to evidence a consistent State practice as well as *opinio juris*. These include diplomatic statements, executive practices, domestic legislation, judicial decisions, etc. According to the traditional doctrine, general recognition by most States (or relevant States) is sufficient to confirm a customary rule which is binding on all States. This concerns also States that have not explicitly given their consent to the rule, unless they

[146] Koskenniemi 2005, p. 411. In addition, resorting solely on material practice does not make law normative. Normativity comes from the fact that States in general believe some norm to be binding on all and that deviations are not acceptable. However, to avoid utopianism, a normative custom must be ascertained by recourse to material acts. As a solution, law-creating material practice is deemed to reflect States' wills and beliefs. But there is no general rule to say which acts are custom-forming and which are not. In order to identify relevant practice one must inquire the wills and beliefs behind certain acts. See ibid. pp. 410-438. In fact, Koskenniemi argues that this circularity of the two elements of custom "prevents doctrine from developing a determinate method of custom-ascertainment." Ibid. p. 411. See also pp. 437-438.

qualify as *persistent objectors*. However, even persistent objectors are bound by peremptory norms of customary law, *jus cogens*.[147]

The main difference between the traditional and modern approaches is how they emphasize State practice and *opinio juris* in the formation of customary norms. The traditional approach stresses the State practice element. According to this approach, new customary norms crystallize from patterns of State behavior. The modern scholars stress the *opinion juris* and see that new customary norms derive eventually from tacit agreements.[148] In reality, however, today's customary law seems to be a mix up of both approaches.[149] In fact, several authors have taken an approach that reconciles between these two theories.[150]

Prominent is that through customary law the progressive development of ICL, international humanitarian law, and international human rights law can be made possible. Indeed, what is remarkable about custom is that nowadays it is increasingly being used as a progressive source of law. Particularly in the field of human rights and humanitarian law, the need to provide a just world order has led to a utilitarian use of the customary law-making process.[151] The means being used to ascertain new customary rules have varied considerably and the whole concept of customary law has chanced due to a number of re-interpretations.[152]

Although there is no one method of identifying customary law, it is unanimously accepted that the formation of new customary norms does not require explicit consent from each independent State. What is needed is a general and consistent pattern of State behavior.[153] Thus, States can be bound by a new customary norm if they were simply inactive at the time it was created. However, the *persistent objector* rule allows States to opt out of a particular customary norm by simply objecting the rule during the phase of its formation.[154]

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[147] Lepard 2010, p. 7. See for examples of peremptory norms.
[148] Lepard, for instance, argues that it is not always necessary to identify a separate State practice element in order to create a customary norm. He perceives State practice as an unnecessary evidence of customary norms in areas such as those related to "fundamental ethical principles". Id., pp. 8, 98.
[149] Petersen 2011, p. 1.
[150] See, e.g., Roberts 2001; Lepard 2010.
[151] See, e.g., Zahar 2011; Simma & Alston 1989.
[152] Id.
[153] Here we run into two basic problems. First, which group of States is the one to lead the formation of customary law and which group's interests are overruled? Second, once the solution has been made how can it be justified? Koskenniemi 2005, p. 385.
[154] See *Anglo-Norwegian Fisheries Case,* p. 131. However, it may be problematic to ascertain whether the objection concerns only the application of the norm or its *erga omnes* validity. In the former case, the persistent objector actually affirms the existence of the rule in question but aims to prevent its application to itself. In the latter case, the objection is directed to the customary norm itself, to its validity. See Koskenniemi 2005, p. 444.

5.1 Traditional Approach

Traditionally, new customary rules emerged through an extensive, uniform, and consistent State practice. In this law-making process *opinio juris* had merely an evidentiary role supporting the newly formed praxis. In other words, deeds had priority over words. Sometimes customary rules were even deemed to emerge from State practice alone. This made the job for international courts easier since they had to rely mainly on States' behavior in order to ensure new customary rules.[155] Thus, the traditional approach beholds custom as an inductive process in which customary patterns are searched from States' behavior in order to create new customary rules.[156] Traditional custom can be characterized as an evolutionary (rather than innovative) process since it tends to look in the past and recognize a uniform pattern of State behavior. It is far from being a progressive source of law since it changes rather slowly and requires large amount of evidence in order to prove new customary rules.

However, proving the existence of a consistent State practice is a problematic task. It is unclear what kind of behavior can be counted as legitimate State practice for the purpose of identifying custom. For example, it is not clear what role should treaties or GA resolutions play in this respect.[157] Some scholars argue that only acts (but not statements) should be counted as practice while others welcome all sort of behavior in this regard. Even if this can be solved, it can be rather difficult to identify relevant practice among all State behavior in an objective manner. Moreover, as Koskenniemi has pointed out, same body of State practice can be used to prove completely opposite customary norms.[158] This is where the "exception confirms the rule" idiom applies. In order to identify a rule, one must point out what can be regarded as an exception of that rule. However, at certain point when the number of exceptions increases high enough the rule in question loses its customary status or changes. Indeed, what comes to customary international law, an essential method of law-making is law-breaking.

As noted, State practice without *opinio juris* is not enough to determine the existence of a customary norm.[159] The latter differentiates voluntary practice from that what is required by law. However, identifying *opinio juris* can be even more complicated than State practice since there is no certainty about the sources of evidence for *opinio juris* either. For example,

[155] Simma & Alston 1989, pp. 88-90; See also *Lotus Case*.
[156] Roberts 2001; Simma & Alston 1989, p. 89.
[157] Lepard 2010, pp. 34-35.
[158] Koskenniemi 2005, pp. 397-410.
[159] See *Lotus Case* and *North Sea Continental Self Cases*.

it is not clear how diplomatic correspondence, national and international judicial decisions, bilateral and multilateral treaties, and GA resolutions are to be weighted (if they can be counted as legitimate sources at all) when proving the existence of *opinio juris*.[160] Moreover, are no methods for measuring the normative attitudes of States.

In the end, time appears to be the most problematic concept in custom-formation. The duration of State practice is used to distinguish custom from mere usage. However, this makes custom a slow and cumbersome source of law that is unable to response rapidly to changing circumstances. In the field of international criminal justice this is a profound shortcoming. As we have seen from the Nuremberg trials onward the enterprise of international criminal justice is in need of a customary law that is responsive to social changes. But even though a slow process of custom formation seems obsolete, it is more normative than a rapid one. The faster and flexible the process becomes the more it loses its normativity as it becomes unpredictable, an instrument of politics.[161]

5.2 Modern Approach

Already in the 1980s Simma and Alston wrote that the inductive process of identifying custom is be replaced by a new "broad-based" approach of ascertaining customary law. There exist several examples of this. Particularly in the field of human rights law, obligations upon States are usually deemed to derive from customary international law. Simma and Alston point out that the 1948 Universal Declaration of Human Rights, for example, has always been largely regarded as customary law.[162] This is understandable, since less than 60 States participated in drafting the Declaration. The recognition of its substance as customary law obligations, and further obligations *erga omnes*, has removed this unpleasant obstacle. Indeed, human rights lawyers have often been characterized as wishful thinkers. However, different approaches can be noticed. Against this broad-based view there are stricter views, denying the legally binding force of the Declaration.[163]

Then, what is this so called broad-based, or more familiarly known as *modernized,* customary law-making process? First of all, modern customary law has granted a new kind of normative power to non-State actors. International organizations, including international courts and

[160] Lepard 2010, pp. 30-33.
[161] On the requirements of normativity and concreteness of law, see Koskenniemi 2005, pp. 17-22.
[162] For several examples of opinions in favor, see Simma & Alston 1989, pp. 90-92.
[163] Id., pp. 84-85.

tribunals, now participate in the customary law-making process along with States.[164] Particularly in the field of human rights law, today's customary law is no longer made by States but by "publicists, NGOs, and other internationalist elite groups". Estreicher argues that the change from "state-centered, bottom-up process" to a "policy/entrepreneur-centered, centralized practice" has been so dramatic that the process has lost its whole legitimacy.[165]

Although today's trend is that States are losing part of their sovereignty to other actors on the international stage, they are still the major lawmakers of international law.[166] It is not that some supranational institutions would be expropriating States' competences but rather that States are delegating their decision-making authority to these entities. Moreover, these institutions are operating within the limits that States have agreed to grant them. Indeed, it is the States that have created these international organizations and equipped them with their competences and powers. Thus, the limitation of States' sovereignty is mostly caused by their own decisions to delegate their powers to other entities. Therefore the possible ability of these entities to create new international law depends on the approval of the States.[167]

Secondly, today's customary law-making process has become faster. Often there is no time to wait for the new rules of customary law to achieve their full maturity through consistent and uniform State practice. What has become relevant in evidencing custom is the approval of States, not their uniform practice. The focus is on the consent and this can easily be reached through some international panel, General Assembly for example. The State practice has lost its constitutive role due to its slow and cumbersome nature. Another way of looking it is to say that the concept of State practice itself has changed from a real life practice into "paper practice", as Simma and Alston characterize.[168] Paradoxically, the *custom* in customary law is sometimes deemed almost meaningless.

Interestingly, international entities appear to be more and more aware about their ability to create custom. Their behavior resembles more an intention to make law rather than obedience to obey existing obligations. This way, States are looking into the future, not acting according to existing law but according to what it should be. The same applies to international courts. Instead of looking back on what the actual custom has been, today's judges tend to look

[164] Gunning 1991, pp. 221-222; Gallant 2009, pp. 306, 402.
[165] Estreicher 2003, p. 15.
[166] Bhuta 2012; Condorelli & Cassese 2012; Alvarez 2012.
[167] Condorelli & Cassese 2012; Darcy 2010, p. 128.
[168] Simma & Alston 1989, pp. 88-90.

forward on how it is to change.[169] Because of these changes, the whole process of ascertaining customary rules has transformed. It has turned from a retrospective and inductive reasoning to a progressive and deductive process. The affirmation of new customary rules starts easily with declarations of States' consent, and this may even suffice itself to fulfill the demands of the new law-making process. How the States actually behave is irrelevant. This has turned the process on its head since it starts to build up on general statements of desirable rules rather than already existing ones. [170]

In the words of Simma and Alston, customary law is suffering from a "profound identity crisis". Not only is the emphasis taken away from State practice in favor of *opinio juris* but the latter element is counted twice. According to their view, evidence accepted to fulfill the State practice element is something else than actual State behavior. The evidence of *opinio juris*, i.e., the articulation of a given rule, has a tendency to fulfill both elements.[171]

Regardless of all the criticism, some authors find no problem with the progressive way of forming new customary rules.[172] Indeed, the modern approach is more flexible and rapid way to meet the challenges of the time. Condorelli, for instance, argues that customary law-making can happen in a very short time frame if the evidence in favor emerges synchronically rather than in a long time period.[173] However, this is the point where scholars often disagree. Is the suddenly emerged evidence enough to form a new customary rule or does it need a long-lasting and consistent State practice beside it? Furthermore, due to the horizontal structure of international law, it is not clear who has the final word to declare what is counted as custom, although the ICJ has some authority in this respect. In its jurisprudence,

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[169] Id.

[170] Roberts 2001, p. 758; Simma & Alston 1989, pp. 88-90. A good example of this new law-making process would be the *Nicaragua* case. Since Nicaragua claimed that U.S. had violated the customary rule of non-intervention, ICJ had to determinate whether non-intervention was actually a customary norm. The Court had no problem in identifying *opinio juris* in favor of this rule, but the actual behavior of State(s) proved otherwise. Resorting to the ambiguity as to what consisted State practice element, the Court ruled that certain "subjective elements" such as GA resolutions were enough to evidence relevant practice. See *Nicaragua Case,* para. 185. One could argue that the Court downplayed the importance of actual behavior of States in order to maintain a desirable rule of non-intervention. It seems that the Court would have achieved different conclusion if the traditional way of determining customary norms were applied.

[171] Simma & Alston 1989, pp. 88, 96-97; See also Koskenniemi 2005, pp. 410-437.

[172] See, e.g., Condorelli 2012; Lepard 2010.

[173] At least two factors offer better conditions for today's rapid and synchronous "evidence gathering". First, information moves more quickly throughout the world and this allows immediate reactions towards undesirable regulations. Secondly, and more importantly, a vast range of international fora (ILC, GA, etc.) allows collective debates and fast agreements on new reforms of law. While conventional law-making is governed by international legal rules, the customary law-making process depends entirely on the acceptance of the international community. This is largely facilitated by a large consensus achieved in some international panel. Hence the synchronous way of gathering "evidentiary facts" of new practice. Condorelli 2012, p. 151.

the ICJ has usually declared the importance of both of the two basic elements of custom when determining the existence of customary rules. However, it has often acted otherwise. Instead of evaluating on the practice of States the ICJ has highlighted factors that can be counted in the element of *opinio juris*.[174]

As noted, the traditional method of identifying customary rules was set out by the ICJ in the *North Sea Continental Shelf Cases*.[175] But the court has changed its stance in subsequent practice. A more modern approach was taken in *Nicaragua*, where general consistency ruled over state practice element.[176] In the *Nicaragua* judgment the ICJ determined the existence of a new customary rule on the basis of certain soft law instruments (such as the consent of the parties on certain GA resolutions) even though the actual behavior of States proved otherwise. It is as if the judges had rationalized the inconsistencies between State practice and *opinio juris* through the idiom of "exception confirms the rule". Accordingly, the rule in question was based primarily on *opinio juris* and the inconsistent practice was deemed as an exception of that rule.[177]

The *Nicaragua* judgment marked the beginning of an era of modern custom. The identification process changed from inductive to deductive, *opinio juris* took an advantage over State practice, and non-State actors were welcomed to participate in the law-making process. In addition, the whole concept of *practice* seemed to change.[178] In the next section, I analyze how this trend has gained ground in the field of ICL.

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[174] See, e.g. *Nicaragua Case*; see also Condorelli 2012, p. 150.

[175] "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 involved." *North Sea Continental Shelf Cases*, para. 74. See also paras. 73-81.

[176] *Nicaragua Case*, para. 186.

[177] "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 indications 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." Id., para. 98.

[178] Van den Herik 2010, p. 99; Roberts 2001; Simma & Alston 1989. In *Nicaragua* the ICJ took a rather relaxed approach to the determination of new customary norms and has followed the same path subsequently. In *Arrest Warrant Case*, for example, the Court was ascertaining a customary rule on immunity regulations. The Court based its conclusions generally on State practice and *opinio juris* without actually citing any practice in favor of the customary rule in question. It seems that the significance of contrary practice has diminished. If inconsistent practice is explained to form (a justified) exception to the rule, this would in fact confirm, not weaken the rule. This sounds reasonable in the first place and is certainly effective way to identify customary rules, but in any case it downplays the significance of the State practice element. See, Meron 2005, p. 820.

6. Modern Custom and International Criminal Law

It seems that both of the basic elements of customary law are poorly defined and can be identified rather subjectively. Since some sources have been used to fulfill both the State practice and *opinio juris* elements, it appears to be impossible to categorize every single act or gesture to either one of these elements. If they are to be used as the elements of existing customary law, a clear method of identification should be developed. The contemporary mix-up model of traditional and modern custom allows States to pick and choose on what behavior should be counted to support whatever norms they wish to pursue.

But there is no single solution to the problem at hand. Whereas the traditional approach seems slow and cumbersome, the modern (instant) custom encases a danger of becoming mere politics. It is rather problematic if the formation of customary law does not require any State practice at all. Then it would be enough that relevant States establish their *opinio juris* by, for instance, voting on GA resolutions. Even though the ICJ has affirmed that GA resolutions have legal significance as evidencing customary international law they work as poor grounds when used as a sole basis for customary law norms.[179] However, in the field of ICL the nature of custom may be slightly different since the interaction between States and other entities on the international stage does not derive from inter-State disputes but from a common will to pursue the aims of international criminal justice. As the direct addressees are not States but individuals and the acting (legislative, executive, or judicial) entity is (or should be) acting on behalf of the international community, the understanding of practice and *opinio* may differ from public international law.

[179] "A "rule" that is based only on General Assembly resolutions is unlikely to achieve substantial compliance in the real world and, therefore, will result in undermining rather than strengthening the rule of law." Scharf 2010, p. 448.

6.1 Identifying Customary Law: From Inter-State to Community-Centered Law-Making

6.1.1 Defining State Practice

The *Nicaragua* ruling has been criticized for that the new customary rule in question never had the time to crystallize through uniform and consistent practice; the inconsistencies between State practice and *opinio juris* existed right from the very beginning.[180] Indeed, it seems a bit problematic to argue that the little practice at the formative stage actually represented an exception of a rule that in fact emerged at the same time. However, when the customary rule in question concerns an abstention it is difficult to identify State practice supporting the rule since States do nothing when they abstain from breaking a rule. [181]

In international human rights and humanitarian law this is typical. Regardless of frequent violations of basic human rights and humanitarian law obligations, no one denies them to be binding on all States. These obligations are usually based on several sources, such as customary and conventional law, general principles of law, and even on some soft law instruments. In practice, however, their binding nature emerges simply from the fact that no one actually denies it since the existence of even frequent violations may not be sufficient enough to destroy the customary rule of abstention.[182] In this regard, utopia emerging dominant over apology is evident.[183]

In general, no rule would certainly exist without exceptions. If all customary rules demanded universally consistent State behavior, this would not only diminish the effectiveness of custom but also lose the sole purpose of it. As Meron notes, customary rules demand some

[180] Simma & Alston 1989, p. 97.

[181] In the field of international human rights and international humanitarian law the regulations are usually prohibitive in nature. Violations of these rules are always visible but compliant behavior is not. However, Condorelli emphasizes that both practices should be weighted and compared. Thus, even repeated violations do not necessarily overrule a customary rule if a common believe can be detected that it will be respected in most cases. Condorelli 2012, pp. 150-151.

[182] Id., p. 150. See also Koskenniemi 2005, p. 437, declaring that whether or not State's behavior is abstention, in order to determine "the normative sense of behavior" we must know the "internal aspect" first, i.e., we must know "how the State itself understands its conduct."

[183] In his work *From Apology to Utopia*, Koskenniemi has set out certain "requirements" for international law. On one hand, the law must be distanced from State behavior so that it does not become "a mere sociological description" (apology). On the other, it must to be concrete enough to be law so that it does not collapse into mere utopianism: "[t]o prevent international law from losing its independence *vis-à-vis* international politics the legal mind fights a battle on two fronts. On the one hand, it attempts to ensure the *normativity* of the law by creating distance between it and State behaviour, will and interest. On the other hand, it attempts to ensure the law's *concreteness* by distancing it from a natural morality." Id., p. 17.

sort of a balance between support and objection.[184] The wide spread of human rights doctrines together with the fact that individuals have entered as new actors on the international scene have changed the nature of international law to a more human rights-oriented. As Iovane writes: "We are witnessing a crucial shift from classical international law, whose only purpose is the protection of a state's governmental power and the delimitation of this power vis-à-vis other states, towards the protection of human rights and fundamental liberties."[185]

Some have argued that customary international law may not form the best basis to explain the universally binding nature of human rights obligations. First of all, States' actual behavior often demotes rather than promotes these obligations. As noted above, this usually results from the prohibitive nature of these obligations. Some authors see that this is likely diminish the importance of State practice so that it becomes almost meaningless.[186] Secondly, in the field of human rights law, there is no constant interaction between States, which is intrinsic and essential to the State practice element. Since human rights violations are usually carried out by States towards their own citizens, these violations do not often arouse instant reactions from other States.[187]

Particularly in the field of humanitarian law, where inter-State practice is extremely difficult to identify, the role of other actors has become more crucial. As noted in chapter 3, it is not unusual that during wartime States disobey rules of international law without actually aspiring to change the content of law. Thus, the formation of consistent practice "does not require a worldwide armed conflict in which all States should apply these rules in their mutual relations."[188] In addition, the ICTY has noted that since the actual behavior of troops is out of judicial sight in wartime, "reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions."[189] By applying humanitarian law in their jurisprudence the *ad hoc* Tribunals have showed that even if this field of law is repeatedly violated in wartime it does not cease to exist.[190]

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[184] Meron 2005, p. 820.
[185] Iovane 2012, p. 608.
[186] Simma & Alston 1989, pp. 96-99.
[187] Simma and Alston conclude that law-making through common acceptance of general principles rather than through customary law is much better suited for human rights obligations. Even though this can be argued against, they certainly are right in stating that "in the development of human rights law principles have always preceded practice." Id., pp. 96-99, 107.
[188] Degan 2005, p. 66.
[189] *Tadić* Appeal Judgment on Jurisdiction, para. 99; See also Heikkilä 2011, p. 920.
[190] Mettraux 2005, p. 364.

This lack of inter-State interaction is inherent to ICL as well.[191] As Lee points out, the core crimes usually concern atrocities committed by State officials on the State's own territory and against the State's own citizens.[192] Interfering to this kind of activity does not (usually) contain any interests between States *per se* but is a matter of maintaining peace and security, protecting the innocents, ensuring their human rights, and in the end, punishing the violators of the most fundamental values of the international community. Indeed, carrying out an *actio popularis* by prosecuting persons who are *hostes humani generis* (whether in domestic or international courts) entails usually no obligations between States. Therefore, there is no need for other States to react.[193]

Thus, it can be argued that the "element of interaction" is not vital for customary law to develop in certain fields of international law, such as ICL. The practice that creates custom in ICL constitutes largely out of judicial practice, particularly international courts practice. As van den Herik points out, the distinctive nature of ICL should be taken into account. International criminal courts are established for the very reasons that domestic courts have failed to punish the perpetrators of international crimes.[194] Given this, the actual "State practice" concerning ICL is not always found from national court decisions, but on the international stage instead.

To conclude, the substance of ICL requires different kind of methods of identifying custom. There are good reasons for this. First of all, traditional methods of identifying State practice were originated at the time when the true rise of human rights obligations –not to mention individual accountability– in international law was yet to come. Those methods were no doubt suitable for solving disputes between States but they were simply not made to identify fundamental rules of international law that derive from the common will of the international community, rules of such a fundamental gravity that even their repeated violation would not lead to their decease.

As with international human rights and humanitarian law, in ICL the lack of inter-State interaction causes that the traditional methods of identifying State practice are not workable. In some cases it is impossible to identify actual State practice in its original meaning. Then it

[191] Van den Herik 2010, p. 100.
[192] Lee 2010, p. 18.
[193] This leads to the question whether (and to which extent) actual State practice can arouse through national case law. Since all national prosecutions are made within the limits of the State's own legal system, they do not usually have an effect on other States' legal systems.
[194] Van den Herik 2010, p. 100.

is important to search for the evidence of (State) practice elsewhere, not to focus on observing States' external behavior. In addition, the whole nature of a customary rule is different when the issue is not an obligation between States but a prohibition that concerns individuals also. In the latter situation, it may not be useful to identify State practice that often violates these rules. Therefore, the common will, i.e., *opinio juris*, often becomes decisive.[195]

Thus, the distinctive nature of ICL poses challenges for the customary law-making process, changing it into a more institution-centered, modernized source of law. The question is to which institutions the law-making power can be delegated. In today's practice, the elements of State practice and *opinio juris* are often fulfilled with judicial precedents of international criminal courts. In further sections it is appraised whether international criminal courts are legitimate institutions to develop customary international law.

6.1.2 Defining Opinio Juris

Defining *opinio juris* is a complicated task since it can be understood in two meanings. It may either resemble States' belief that something is law (*lex lata*) or States' will that something should be law (*lex ferenda*). The declaratory and constitutive approaches argue whether *opinio* resembles an opinion that something already is law and thus does not participate in the creation process (declaratory theory) or whether it actually creates custom being the direct cause of custom's obligatory character (constitutive theory).[196]

In practice, *opinio juris* is used to fulfill both tasks at the same time.[197] For instance, in *Nicaragua*, the ICJ argued that the customary rule of non-intervention emerged through certain GA resolutions since they reflected the "attitude" of States. However, the Court did not clarify whether this actually was the *will* or *belief* of States.[198] In spite of the clear

[195] Yet one must not totally abandon State practice since it enhances law's concreteness. Without it law would simply collapse in utopianism. On the requirements of normativity and concreteness of law, see Koskenniemi 2005, pp. 17-22.
[196] According to Koskenniemi, favoring the declaratory view (*opinio* is associated with objective knowledge, not with subjective will) enhances custom's overall normativity. The problem is, however, that it fails to provide explanation on how custom is created in the first place. Id., pp. 417-420.
[197] "[S]tandard doctrinal argument makes use of both senses of the *opinio* in a happy mixture, resorting to one when argument would otherwise seem too apologetic, to the other when too utopian." Id., p. 418.
[198] *Nicaragua Case*, para. 188. Koskenniemi argues that in this case the Court's discussion seemed to comply with the declaratory approach. Koskenniemi 2005, p. 419.

contradiction between will and knowledge, *opinio juris* of arising customary law tries to build on both of them.

Somewhat as a compromise, custom can be explained as a process during which *opinio* transforms from will (*opinio necessitatis*) into knowledge (*opinio juris*). However, it is hard to argue how this happens and in exactly which point the "ought" turns to "is". *Opinio* surely cannot include both at the same time. It is absurd to think something as a binding rule and simultaneously as an expression of the subjective will of what ought to be one. In this case the borderline between *lex lata* and *lex ferenda* would be completely vanished.[199]

Therefore, an apparent paradox always inheres in *opinio juris*. The formation of *opinio* for new rules of customary law requires States to believe that they are legally bound to obey a rule that does not yet exist. Thus, the belief of States must be initially incorrect.[200] This paradox remains as contemporary theories fail to provide a solution to the problem between present and future. Regardless of this, customary international law continues to develop. The fundamental questions behind the process are something that we just have to live with, or at least they go beyond this paper.[201]

At this point it would be easiest to conclude that in the absence of international legislator ICL is nothing more than politics. But this destroys the fundamental aspect of ICL, legality. To believe in the enterprise of international criminal justice is to believe in the rule of law. This means that the judicial authority, at least, must take more positivistic approach on the matter and separate law from politics and subjective wills of States by believing in its objective character. As Koskenniemi puts it, if we believe international law to be law, we must *assume* that these two aspects are to be separated: "States must be assumed capable of leading a schizophrenic existence- being legislators in a "private", subjective capacity and judges in a "public", objective one."[202] On the face of it, international courts should adopt the latter role, but identifying the common will of States in our world of disagreement is not always an easy task to accomplish. What happens when *opinio* cannot be clearly established and there are no rules for the courts to apply?

[199] Id., pp. 420-424.
[200] Lepard 2010, p. 9. Lepard apires to resolve this paradox by interpreting *opinio juris* as a forward looking element. Ibid. p. 112.
[201] Lepard, for instance, tries to answer to these questions by creating a new theory of custom. See Lepard 2010.
[202] Koskenniemi 2005, p. 424.

As many of the ICL proceedings have taken place in international courts, international judges have inevitably participated in interpreting the *opinio juris* element. Likewise with States, international courts have played a bilateral role in this respect. This is because States have failed to enact comprehensive ICL for the courts to apply. As noted above, international law has originally been designed to be an instrument for governing relations between States, so most of the treaty provisions embodying international prohibitions were never made to be applied directly in international prosecutions. However, international courts have used these prohibitions via customary law as a basis for individual criminal liability and thus engaged in developing the law within their own jurisdictions. Therefore, international criminal courts have not merely contented themselves with passive application of international law but they have worked as quasi-legislators in deciding that *opinio juris* favors their approach.

Furthermore, as I point out in the following chapters, international criminal courts have resorted to the objectives of ICL and to the immorality of an act as interpretational methods when defining the core crimes and liability forms under customary international law. By doing this, they are not merely interpreting but representing the *opinio juris* element of custom in their judicial reasoning. Some scholars see no problem with this. As noted, the formation of ICL is more community-centered than public international law. Because States are always driven by their own interests, international judges turn out to be better authorities in representing the "moral condemnation of the international community".[203]

6.2 Can International Criminal Courts Make Law?

6.2.1 Legitimacy Issue

In this chapter I focus on the question whether courts in general are competent to serve as (quasi-) legislators on the international stage. The impartiality of a court and the separation of powers are crucial issues in this respect.

The amount international criminal courts can contribute to the development of ICL depends upon the weight that is given to their rulings. These rulings become law only if States accept them and build their practice around them. A court is likely to be accepted to produce authoritative statements of law if it is found to be an impartial and legitimate institution that

[203] Van Schaack 2008, p. 192.

follows the basic principles of law. Several factors affect the legitimacy of a court. Factors that enhance courts' legitimacy are *inter alia* fair procedure and outcome, availability of appeal, a great number of judges participating in the decision-making, availability of court documents, judicial consistency and predictability (court's reliance on its previous decisions), and impartiality of judges.[204]

As noted, non-State actors have increasingly contributed to the making of international law. Indeed, today's international law is increasingly made in international forums, meetings, and conventions.[205] According to the modern view mentioned above, customary law can be made almost instantly through common acceptance, consensus. Thus, it is not always necessary to wait for an extensive, uniform, and consistent State practice. If the common will of the international community (*opinio juris*) is what matters, the next question is which entities are competent to express this. If the common will can be expressed by the Security Council or by a GA meeting (as in the *Nicaragua* case), can the formation of this common will be delegated to international courts as well?[206]

At first, the difference between the actions of the Security Council and those of international courts must be emphasized. The acts of the Security Council –for example the establishment of the *ad hoc* Tribunals– are acts of an international organization. Since the Council operates by the votes of its members, its acts may even be regarded as State practice or *opinio juris* of those States.[207] In any case, the acts of the Council are binding on all UN members. The acts of international courts are also acts of international organizations. For instance, the *ad hoc* Tribunals are acting as subsidiary organs of the Security Council.[208] However, the acts of the Tribunals are independent of the wills of States (even though the Statutes of the *ad hoc*

[204] Boyle & Chinkin 2007, pp. 300-301.
[205] Along with this, the Security Council has been more active in authorizing coercive measures against individuals. The number of international courts and tribunals is rising and several State functions seem to be delegated to these actors. It seems that States are losing their monopoly as political actors on the international stage as other entities are producing their own rules and procedures. Bhuta 2012.
[206] On the delegation of the law-making power, see Danner 2006.
[207] Gallant 2009, p. 344. This point of view can be contested. Since the decisions of the Council need not be unanimous, the acts of the Council are not always collective acts of all member States. In addition, the permanent members enjoy more power than the rest of the States. Thus, the States voting in favor should be able to separate from the States voting against. Only in this way the possible State practice or *opinio juris* of individual States could be identified. However, at least when the Security Council acts under Chapter VII powers of the UN Charter it acts on behalf of the international community and arguably expresses *opinio juris* of the community.
[208] To compare, the SCSL is an independent organization, created by an international agreement between a State and an international organization (the UN). Its decisions are its acts. The ICC is also an international organization, separated from the UN, even though it has a "relationship agreement" with it (Rome Statute, art. 2). Its decisions are its acts.

Tribunals are binding on all member States by virtue of article 25 of the UN Charter) and thus do not represent either State practice or *opinio juris per se*.[209]

Then, should international criminal courts be given the ability create law? One argument in favor is that the rules made by international judges, rather than national policymakers, may be fairer. States and their diplomats are usually engaged in multilateral negotiations seeking to drive their own interests at first hand. Nowadays strong and powerful States benefit most from customary law since they are able to force smaller States to play with their rules.[210] As judges should be impartial, they should also have an objective standpoint to create new regulations. Their "objectiveness" may be even more pure than what can be obtained in the UN decision-making.[211] The biggest advantage in judges' contribution to the development of ICL would be that it may reduce the political influence of powerful States. Even though this may be more apparent in public international law where States settle their disputes in international courts, the existence of political power play is very real in ICL also. Unfortunately, even international criminal courts have not managed to escape from this.[212] However, they enjoy considerably less freedom than other institutions in the international law-making process.

On a theoretical basis, if an international criminal court carries out an *actio popularis* by prosecuting persons who are *hostis humani generis*, can it be said that it acted on behalf of the entire international community, thus expressing *opinio juris* of all States? If so, the motive of the prosecution would be common, it would derive from the serious nature of the crime, and its sole purpose would be to enhance international justice by holding perpetrators of the core crimes accountable for their atrocities.[213]

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[209] To do this, there should be some delegation of powers manifested.

[210] The wealthiest States have better possibilities to depart from customary rules. The costs of "contracting away" from customary rules by bilateral treaties, for instance, may often be too high for the smallest States. Estreicher 2003, p. 10.

[211] Even though all States are sovereign, they do not seem to enjoy the exact same amount of sovereignty. World politics is ruled by the most powerful states. Consistent with Orwell's famous slogan in *Animal Farm* that "all animals are equal", Condorelli and Cassese point out that there are five "more sovereign" states in the UN Security Council. Condorelli & Cassese 2012, p. 18; Orwell 1972.

[212] For instance, the ICTY's failure to indict NATO leaders in respect of the bombings of Serbia in 1999 aroused discourse whether the ICTY is politically biased.

[213] The prosecutor of the ICC is vested with great powers in this respect. As he or she possesses an ability to open an investigation on his/her own initiative, he/she also possesses the ability to act on behalf of the State parties and, to some degree, of international justice. As Cassese puts it, "[i]n a way, he or she is the holder of a sort of *actio popularis contra auctores criminum* in that he or she acts to […] incarnate the interest of the world community". Cassese 2012 (A), p. 298.

This idea is hardly rejected. The very reason behind establishing these courts is found from their common purpose to carry out prosecutions that States are unable or unwilling to execute themselves. However, even if they can be seen as objective institutions that are able to express the common will of the international community the idea that courts could simultaneously use judicial and legislative powers is commonly objected. This is where the separation of powers becomes crucial.

The Montesquieuan way of separating powers, usually adopted more clearly in civil law countries, is modeled for the governance of a State. This has not been carried out that explicitly in ICL since international criminal courts –quite similarly as courts in common law tradition– still possess some legislative power. However, it is commonly agreed that even in international law the substantive lawmaker may not be the same authority that carries out prosecutions or even establishes courts.[214] For this reason it is awkward when international courts practice judicial creativity.

Although international courts should not able to legislate *per se*, an element of law-making inheres always in the work of international courts. As the ECtHR has noted, application of even criminal law provisions involves an inevitable element of judicial interpretation.[215] This results from to the indeterminacy of language. To clarify, some acts may be within the core of a crime definition and some clearly outside that definition, but no legislator can include all possible acts beforehand in it. Thus law, even criminal law (be it either statutory or case law), is always in need of interpretation. Moreover, in ICL where courts often apply customary rules of international law judges face new kinds of challenges since the inherent obscureness of customary law allows them to interpret the content of law more broadly.

As mentioned, States are still the primary law-makers on the international stage. The fact that they delegate some law-making power to other entities does not deprive away their sovereignty or status as the primary law-makers.[216] The area of criminal law is deeply rooted in the core of State sovereignty, whereupon States have their interests in sustaining wide

[214] Gallant 2009, p. 394.
[215] Referring to *S.W. v. UK* and *C.R. v. UK* the Court held that "however clearly drafted a provision of criminal law may be, in any legal system, 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." *K.-H.W. v. Germany*, para. 85.
[216] Indeed, it is States that decide what amount of independency is given to these other entities. Differences can be detected. For instance, some have argued that the *ad hoc* Tribunals have limited State sovereignty more than the ICC. This is because the system of complementary, under which the ICC operates, can be seen not as an expropriation of the repressive power of sovereign States, but rather as way to sanction for failing to use it.Condorelli & Cassese 2012, p. 19-20.

discretion in respect of the law-making process. Rulings of national criminal courts play also a major role in the development of ICL. However, national courts play with the rules of their own legal systems and their rulings must be evaluated in that context. Therefore, the rulings of international courts can be held as more prominent precedents. Now, if international criminal courts are able to create law to some extent, it is crucial to clarify how this happens in practice.

6.2.2 How and Why Rulings of International Criminal Courts Become Binding Customary Law?

In the end, the jurisprudence of international criminal courts is binding on States only insofar as they agree it to be or where it embodies precisely what customary international law is.[217] Thus, when judicial findings are not in line with contemporary rules of international law States' subsequent approval becomes decisive. This is elucidated by the following examples.

The Appeals Chamber's decision in *Tadić*, declaring that the subject-matter jurisdiction of the ICTY extends to internal armed conflicts, is arguably the most well-known decision in the ICTY's practice. This decision was subsequently endorsed by the ICTR, other ICTY courts, and drafters of the Rome Statute. [218] This is despite the criticism addressed to the methods used to ascertain the customary status of the rule in question.[219] Today, the decision seems to represent the state of customary law.

Not all the decisions made by the Appeals Chamber have achieved the status of customary law. For example, duress is acknowledged as a complete defense to a charge of murder as a crime against humanity or war crime in the Rome Statute even though the Appeals Chamber of the ICTY clearly rejected this in *Erdemović*.[220] How is this so? Since the subject-matter jurisdiction of the ICTY is based on customary international law, does not this mean that all its final decisions (at least those defining substantive regulations of customary international law) should be taken as expressions of binding customary law? Unfortunately, the matter is not that simple.

[217] Darcy 2010, p. 128.
[218] See, e.g., *Akayesu* Trial Judgment and *Furundžija* Trial Judgment.
[219] Darcy 2010, p. 118; Hoffmann 2010.
[220] Rome Statute, art. 31(1)(d); *Erdemović* Appeal Judgment. See also Schabas 2010, p. 490.

In *Erdemović*, the Appeal Chamber denied the existence of a principle according to which duress is a complete defense against a charge of crimes against humanity or war crimes involving the killings of innocent persons. Erdemović was initially charged with one count of a crime against humanity or, alternatively, of a war crime.[221] Having pleaded guilty to the first charge he was sentenced to ten years' imprisonment by the Trial Chamber for crime against humanity. The defense mounted an appeal pleading that the crime had been committed under duress. After surveying through a considerable amount of material the Appeals Chamber held that although there was a defense of duress in international law, it did not apply to crimes involving the killings of innocents.[222] However, it found that duress can serve as a mitigating factor in sentencing. Erdemović was finally sentenced to five years' imprisonment. [223]

Due the strongly dissenting opinions of Judges Cassese and Stephen, the finding was rather controversial.[224] The dissenting opinions were subsequently favored by the drafters of the Rome Statute.[225] Now that duress can be a complete defense under the Rome Statute one could conclude that customary international law has changed since the *Erdemović* ruling. Gallant explains this change in the law by the subsequent events of the Rwandan genocide, where a great number of Hutus participated in slaughtering Tutsis in fear that refusal would certainly have led to their own deaths.[226] This point of view was not left unnoticed by Judge Cassese in *Erdemović*.[227]

Prominent is that in both of these cases the ICTY's decision has led to progressive development of ICL, but with reverse results. What has been decisive is the subsequent

[221] Erdemović, a member of a Bosnian Serb military unit, was forced to kill civilians as a member of an execution squad under threat that were he refused to do so, he would have been killed himself.
[222] See *Erdemović* Appeal Judgment, Separate Opinion of Judge Li, paras. 1-12; Separate Opinion of Judges MacDonald and Vohrah, paras. 32-89.
[223] Generally on the defense of duress in the jurisprudence of the ICTY see Raimondo 2010, pp. 54-56; Fournet 2010, pp. 236, 238-241.
[224] The matter was decided by a bare majority of three judges against two. Cryer et al. argue that two of the judges determined the matter on policy-based grounds. Cryer et al. 2010, p. 411; For the dissenting opinions of Judges Stephen and Cassese see *Erdemović* Appeal Judgment, paras. 23-67 and 11-51.
[225] Fournet 2010, p. 240.
[226] Gallant 2009, pp. 323-324**.**
[227] "No matter how much mitigation a court allows an accused, the fundamental fact remains that if it convicts him, it regards his behaviour as criminal, and considers that he should have behaved differently . I have tried to demonstrate that this may be unjust and unreasonable where the accused can do nothing to save the victims by laying down his own life." *Erdemović* Appeal Judgment, Separate and Dissenting Opinion of Judge Cassese, para. 48 (footnote omitted).

approval of the international community.[228] This can be manifested through various ways in these modern times. For instance, a Trial Chamber of ICTY has held that "the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States."[229] The requirements of the defense of duress as laid down in the Rome Statute represent arguably customary international law.[230]

In the end, the fact that some rules from the jurisprudence of international courts amount to customary international law does not depend on the fact that the rules in question are originated in an international court, but upon the quality of the judicial arguments stating that they represent customary law.[231] Through plausible arguments the acceptance of States is easier to achieve, and occasionally it may even be unnecessary. Yet the subsequent endorsement of the *Tadić* decision reveals that an international norm that is found to be indispensable is also followed afterwards, no matter how weak its judicial basis may be at the time of its foundation. The bulk around the thin rule can be created afterwards through a wide acceptance and consistent practice. All this demonstrates that customary norms of ICL are often generated in a pragmatic process of *lex ferenda*, a process in which courts contribution is often indispensable.

6.3 Conclusions

Today, more and more customary rules are codified in international conventions.[232] The controversial character of custom had led some authors to argue that the importance of custom as a source of law in general has diminished.[233] However, conventional law on its own provides a rather unsatisfactory basis for universal obligations. Indeed, when it comes to human rights obligations one can observe a strong desire to turn to customary law in recent

[228] See Mettraux 2005, p.16, stating that the credibility of international norms rely mostly on how States comply with them. In this respect, it is important for the international courts to maintain the trust that States have given them.
[229] *Furundžija* Trial Judgment, para. 227.
[230] Cryer et al. 2010, p. 412; Cassese 2008, pp. 288-289.
[231] "A statement that a norm is customary is therefore only ever as good as the explanation referred to by the court in support of its finding to that effect." Mettraux 2005, p. 15.
[232] One may notice interaction between general customary norms and written rules. This has argued to give a "double value" to a particular treaty provision if it is deemed to represent customary law also. A treaty provision can acknowledge already existing customary rule, or work as a crystallization of that rule, or it may form a new rule that can subsequently lead to a new customary rule (See *North Sea Continental Self Cases,* paras. 60-82). It seems that large parts of international law can consist of similar customary and conventional provisions. For this reason international lawyers often turn to major international conventions if available, since those are deemed to correspond with general international law. Condorelli 2012, pp. 151-152.
[233] Estreicher 2003, pp. 14-15; Kelly 2000.

decades. Customary law can supply a comprehensive set of international norms which are compelling to all States.[234]

With respect to customary law-making, disobedience seems to be a fatal but vital element of the process. In order to change existing law States must act according to and believe in a rule that does not yet qualify as law. If the arising rule is in violation of existing ones this means that States have to disobey existing law to create new laws. This is bound to diminish the normativity of customary law since the creation of new rules requires States to ignore the binding character of the former ones. Custom is thus vulnerable to becoming mere "apology for State behavior".[235] In contrast, sometimes the process relies heavily on fundamental principles that are abstracted from actual State practice. This occurs in areas related to fundamental moral and ethical values, namely human rights and humanitarian law obligations.[236] All this makes custom seem like a tool for purposeful and pragmatic law-making, a process that does not clearly distinguish between *lex lata* and *lex ferenda*.

This is evident in ICL. Whenever rapid developments of international law were needed, custom was the doctrine used. Throughout the history of ICL new rules of customary international law have emerged with exceptional rapidity. These developments have been necessary for the international community to respond to devastating events and satisfying demands of international justice at exceptional times. Revolutionary changes in customary law have led judges and scholars to justify them in various ways. Concepts such as "instant custom" or "Grotian Moment" emerged to explain the legitimacy of these changes.[237]

The sudden changes are often associated with issues concerning the maintenance of international peace and security, human rights and humanitarian law obligations, and international criminal justice, all of which are closely related to fundamental values of the international community. Thus, it is not surprising that the developments have relied heavily

[234] In the field of human rights law, two ways to replace the absence or insufficiency of treaty rules can be detected. The mainstream position is to resort to a progressive theory of customary law in order to encompass all substantive human rights obligations under universally binding customary rules. The other way is to resort to the general principles of law. In the absence of actual State practice (when dealing with abstention rules for instance) the law-making process through general principles is argued to be more suitable. Simma & Alston 1989.

[235] See Koskenniemi 2005, p. 17.

[236] See, e.g., Lepard 2010, pp. 98, proposing that in such areas the identification of State practice would be unnecessary.

[237] The term "Grotian Moment" is relatively recent. It is used, for instance, by Scharf to explain the rapid creation of the JCE doctrine in the Nuremberg trials. According to him, "Grotian Moment" denotes "a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance." Scharf 2010.

on utopian arguments rather than apologetic. This demonstrates the pragmaticalness of customary law. In the end, the contemporary qualification for a rule to be custom is that States generally consider it as "obligatory or right" under international law.[238]

The view that substantive regulations created in today's international criminal proceedings would become law henceforth may not be consistent with the traditional views of customary law-making. However, this idea is approved by the modern, instant, theory of custom. The modern approach is pragmatic and often more suitable for the demands of ICL since it is more compatible with the nature and purposes of ICL.[239] As noted by Meron, there is no inherent reason that the principle of legality requires the traditional approach.[240]

Although judicial decisions are generally deemed to represent only subsidiary sources of international law, in ICL they have commandeered the process of custom formation. Since the Nuremberg trials, international criminal tribunals have been among the primary law-makers of ICL.[241] The rise of international courts as developers of ICL is a result of States – still the supposed primary law-makers– failing to establish a comprehensive ICL for the courts to apply. Without the contribution of international courts the state of ICL would be vastly different. Yet one must remember that judicial decisions are not customary law *per se*, but work as singular (though crucial) factors in the process of custom formation.

Finally, although international criminal courts participate in developing the customary rules of ICL to some extent, their work in the process is (or should be!) more restricted than courts working in other areas of international law. This is due to the principle of legality. By developing the content of ICL courts are not only treading on states' toes but also violating the rights of individuals by expanding the scope of criminal liability.

[238] Jennings & Watts 1996, p. 27.
[239] One could conclude that the modern approach approves that the acceptance of States can be obtained beforehand, giving criminal tribunals the ability create law *ipso facto*. However, as this is not clearly manifested anywhere, the subsequent approval of States seems to be vital in today's customary process. On the delegation of the law-making power from States to international criminal courts, see Danner 2006, pp. 41-48.
[240] Meron 2005, p. 823.
[241] Gallant 2009, p. 402.

7. Methods of Identifying Customary Law in the UN Tribunals

As noted, crimes based on customary international law are to be reconciled with the principle of legality. In order to maintain its legitimacy, the identification process of customary law must be carried out using appropriate, i.e., coherent and predictable, methods.[242] When international criminal courts ignore the widely approved requirements of customary law they walk on thin ice and risk their credibility as the providers of international criminal justice and the rule of law.

In contrast with the modern approach applied by the ICJ in its recent practice, Meron argues that international criminal tribunals, especially the ICTY, have taken a rather traditional and conservative approach in identifying and ascertaining existing customary norms. According to Meron, the ICTY chambers have firmly established the customary status of the crimes within the Tribunal's jurisdiction by surveying intensely relevant State practice and *opinio juris*. In addition, the chambers have been reluctant to contribute to "an overly broad or rapid expansion of customary law offences".[243] Several scholars disagree with this point of view.[244] In the *ad hoc* Tribunals' practice, the existence of customary norms of ICL is usually proved by referring to international legal praxis and/or conventional law.[245] The *ad hoc* Tribunals have generally emphasized the importance of the traditional elements of customary law but the evidence of these elements has been gathered from various sources.[246]

Occasionally, the Tribunals have recognized customary rules even without referring specifically to neither of these elements. In these cases the existence of customary rules is usually evidenced by resorting to general principles of law, previous judicial decisions, treaty provisions, and national laws. For instance, in the absence of relevant State practice, the Appeals Chamber has based its conclusions on such elements as "official pronouncements of States, military manuals and judicial decisions."[247] According to van den Herik, the evidence used by the ICTY to prove the existence of customary rules can be divided into two

[242] See, e.g., Iovane 2012, p. 624, pointing out that also at domestic level, strict and consistent methodological principles should be applied in order to sustain the legitimacy of innovative decisions.
[243] Meron 2005, pp. 817, 821-823;
[244] Hoffmann 2010, stating that "Meron's assessment of the ICTY methodology as 'conservative' seems almost ironic"; Bantekas 2006, stating that the methodologies of criminal tribunals in general have been incoherent, subjective, and selective in nature.
[245] Heikkilä 2011, p. 920.
[246] See, e.g., *Hadžihasanović* Decision on Command Responsibility, para. 12.
[247] *Tadić* Appeal Decision on Jurisdiction, para. 99.

categories, (1) national legislation and case law, and (2) international documents, including treaties.[248] In addition, the ICTY has made several referrals to its earlier case law.[249] As noted, the ICTY Appeals Chamber has approved the use of its previous decisions as statements of customary law. The following examples elucidate the methods used by the Tribunals.

In the aforementioned *Erdemović* case judges of the ICTY had a major disagreement whether duress is a complete defense to the killing of innocent persons.[250] The decision has been criticized subsequently for that it relied heavily on European war crime cases. In addition, Zahar and Sluiter emphasize that in general when surveying domestic legislation and judicial decisions the *ad hoc* Tribunals have only seldom referred to practice in the Russian Federation, India, China, Indonesia, South Africa, etc.[251]

In *Hadžihasanović*, the Appeals Chamber considered whether the principle of command responsibility could be applied to internal conflicts under customary international law. The Chamber noted that showing the existence of State practice and *opinio juris* was indispensable in order to prove that this principle was part of customary international law.[252] Yet most States did not have this principle in their domestic legislation. According to the Chamber, this did not, however, establish whether States have accepted the principle at the international level, as a matter governed by customary international law.[253] Instead, the acceptance of States was proved by referring to decisions of the ICJ, including the *Nicaragua* case, in which common article 3 of the Geneva Conventions had been accepted as customary law. Citing the *Tadić* jurisdiction decision, the Chamber saw no reason why this concept could not apply to internal conflicts as well.[254] In addition, the Chamber referred to some

[248] It is noteworthy that national case law, which has often proved to provide useful guidance, has sometimes been used as the main evidence without specifying which element it fulfilled. Van den Herik notes that in general, the ICTY has not distinguished between State practice and *opinio juris* and has often failed to specify which element was fulfilled by the submitted evidence. Even though it seems to be accepted that national case law can evidence both State practice and *opinio juris*, it is deemed to be problematic if national decisions are used to fulfill both elements at the same time. Nollkaemper 2003, pp. 281-286; Van den Herik 2010, p. 102.
[249] Id., pp. 101-102.
[250] See *Erdemović* Appeal Judgment, separate opinion of Judges McDonald and Vohra, paras. 49-50.
[251] Zahar & Sluiter 2008, p. 94.
[252] *Hadžihasanović* Decision on Command Responsibility, para. 12.
[253] Id., para. 17.
[254] Id., para. 13.

other international instruments as evidencing general acceptance of States that the principle of command responsibility applies to internal conflicts under customary international law.[255]

In *Furundžija*, when the Trial Chamber contemplated whether a forced oral penetration constitutes an international crime of rape, it referred to international instruments, international criminal and international human rights jurisprudence, the general principles of ICL and international law, and general principles of law recognized in national legislations. Interestingly, since the Chamber found no definition of rape under customary international law it searched to ascertain the elements of the crime first through the general principles of ICL, and failing that, through the general principles of international law, and finally through general principles of criminal law "common to the major legal systems of the world". But due to a major discrepancy of national legislations, no common definition of rape that would include forced oral penetration was found. Even this did not stop the judges from seeking such a rule. Resorting to "general principle of respect for human dignity" that was found eventually from humanitarian and human rights law, the definition of rape was finally broadened.[256]

The ICTY's evaluation on customary rules in *Furundžija* was quite purposeful since the given rule was established beforehand and the interpretations on customary law followed subsequently. According to van den Herik, this demonstrates how customary law has been utilized by the ICTY to validate a given interpretation.[257] In general, the practice of the ICTY

[255] The Chamber referred to Additional Protocols I and II to the Geneva Conventions, the Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention No. IV of 1907, and the ICRC Commentary on the Geneva Conventions. Id., paras. 14-15.

[256] *Furundžija* Trial Judgment, paras. 177-184. The approach taken by the Trial Chamber on the sources of law seems a bit inconsistent. First the Chamber noted that "no elements other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity (*Bestimmtheitgrundsatz*, also referred to by the maxim "*nullum crimen sine lege stricta*"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws." (para. 177). However, since national laws did not offer a solution, the Chamber seemed to return to the general principles of ICL and IL: "Faced with this lack of uniformity, it falls to the Trial Chamber to establish whether an appropriate solution can be reached by resorting to the general principles of international criminal law or, if such principles are of no avail, to the general principles of international law." (para. 182). Finally, the usable principle was found from international humanitarian and human rights law: "The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law." (para. 183). This forth-and-back method indicates that the Chamber took a very purposeful approach on the matter. One could certainly argue that the new definition of rape was determined to include this new element beforehand and customary law (or the general principles of law) was used afterwards simply to validate this new interpretation of law. In support of this view, see paras. 162 and 253 of the judgment.

[257] See, e.g., Van den Herik 2010, pp. 101-104.

seems to follow largely the modernized version of custom formation, but in some cases it goes even further than this. Instead of basing their findings on inductive or deductive reasoning, judges of the Tribunal sometimes establish a given rule first and explain the value of State practice subsequently in its light.[258] Hence, in the ICTY's jurisprudence, *opinio juris* has prevailed largely over State practice.[259] Interestingly, in his dissenting opinion in *Stakić* Judge Shahabuddeen introduced an approach that disregarded State practice entirely:

> In appreciating the "essence" of a clarification, the question to be attended to is not whether a particular set of circumstances was ever concretely recognized by the existing law, but whether those circumstances reasonably fall within the scope of the existing law. […] In other words, the question is not whether the law, as it stands, was ever applied concretely to a particular set of circumstances, but whether the law, as it stands, was reasonably capable of applying to those circumstances.[260]

Needless to say, this opinion has aroused some criticism.[261]

As noted above, the Tribunals have often used judicial decisions, particularly those of the ICJ and some domestic courts, to support newly discovered rules of customary law. It is often unclear whether such judgments are used as reflections of State practice or *opinio juris*, or both. As noted, national and international judgments can both evidence the crystallization of a new rule of customary international law, but by themselves they should not be able to form one. Unfortunately, it seems that in *Tadic*, judges of the ICTY focused on the ICJ's ruling in *Nicaragua* (and later in the jurisprudence of the Iran-USA Claims Tribunal) as a primary and only source of law in order to internationalize the armed conflict, even though this was never expressly pronounced in the judgment.[262]

As mentioned, the SCSL follows the jurisprudence of the *ad hoc* Tribunals to some extent. To make an example, in *Fofana* the customary status of article 3 of the Geneva Conventions and its applicability to both internal and international armed conflicts was proved by referring to the decisions of the ICJ and the ICTY.[263] Besides this, the SCSL has resorted to all sorts of evidence in identifying customary law. In its famous *Taylor* case, the SCSL Appeals Chamber concluded that international law did not grant immunity from criminal prosecution

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[258] See, e.g., *Furundžija* Trial Judgment, paras. 162, 253; *Tadić* Appeal Judgment, paras. 163-169.
[259] Mettraux 2005, p. 13 fn. 4; Hoffmann has expressed similar arguments concerning the *Tadić* judgment. See Hoffman 2010.
[260] *Stakić* Appeal Judgment, dissenting opinion of Judge Shahabuddeen, para. 39.
[261] See, e.g., Zahar & Sluiter 2008, pp. 103-105, stating that "[t]he old formula of state practice plus *opinio juris* is not simply relaxed, it seems to have been supplanted in Shahabuddeen's approach by the methods of the Cambridge school of analytic philosophy."
[262] See Bantekas 2006, pp. 129-133; *Tadić* Appeal Judgment.
[263] *Fofan*, paras. 21-24.

on a head of state. In this decision it relied on various sources, such as the statutes of the ICTY, ICTR, and ICC, GA resolutions, an ICJ's decision (*Democratic Republic of the Congo v. Belgium*), scholarly views, and a British domestic court decision.[264] Moreover in *Norman*, when the SCSL Appeals Chamber held that child recruitment into armed forces was criminalized under customary international law, it deemed that widespread ratification of several treaties was enough to fulfill the element of State practice.[265]

To conclude, even though the jurisprudence of the UN Tribunals distantly resembles the modern approach to custom formation, it does not to wholly comply with neither of the theories addressed above. Hoffman argues that due to the aforementioned Secretary-General's statement on the subject-matter jurisdiction of the ICTY the Tribunal should be obliged to recourse to conservative and positivist methods of identifying customary law.[266] However, the approach taken by the ICTY has departed from the traditional view on several occasions. This is the case with the SCSL as well. The given overview of these tribunals' case law reveals that they have not followed only one but several methods in identifying customary norms.[267] Yet the tribunals themselves have not articulated their method(s), which has led to a severe criticism. Zahar, for instance, argues that the only identifiable method in the ICTY's practice has been an aspiration to fill in gaps of law, i.e., "to legislate from the bench".[268]

Yet one must take into account that there existed only little State practice, domestic legislation, or judicial precedents that the ICTY could have relied on. Given this scarcity of applicable sources available, the more lenient approach taken by the ICTY may be justified. As Van den Herik argues, the amount of evidence needed to confirm the customary status of a given rule differs per situation. Even a small amount of consistent State practice may suffice to create a customary rule if no deviations can be detected.[269] As to the question whether there has been a method of discovering customary law in the jurisprudence of the UN Tribunals, I cannot provide a straightforward answer of yes or no. Instead, it is safe to say

[264] *Taylor,* paras. 43-53.
[265] *Norman*, paras. 18-24.
[266] Hoffman 2010.
[267] Zahar notes that the ICTY has not tried to specify any of its several methods, and therefore the methods of the ICTY must be "abstracted from its decisions". Zahar 2011, p. 478.
[268] Id., p. 483; See, also, Hoffmann 2010, stating that the ICTY applied a "method of judicial lawmaking". For another critical review on the methods of international criminal tribunals, see Bantekas 2006.
[269] Van den Herik 2010, p. 102- 104.

that there is no single, identifiable, method to confirm.[270] It is important to keep this in mind in respect of the following discourse about the legislative interpretations of these courts.

8. Progressive Development of Law through Judicial Activity

Wir wollten Gerechtigkeit und bekamen den Rechtsstaat

-Bärbel Bohley

8.1 The Principle of Legality

As ICL constitutes out of two bodies, international law and criminal law, it must be appraised from both standpoints. Although the two bodies seem compatible, criminal law sets out certain fundamental requirements that are unfamiliar to some areas of international law. When international criminal courts apply ICL they draw from the sources of international law but comply with the fundamental principles of criminal law. Due to one distinctive feature of ICL, the fact that individuals can be held accountable, the rights of the accused must be protected. This is carried out by applying the principle of legality, *nullum crimen sine lege*.[271] This principle is deemed to have particular prominence in the international sphere due to the incoherent nature of international law. [272] All international organizations, including international criminal courts, are bound by the principle of legality. However, it is usually the customary international law version of this principle that they follow.[273] Only the ICC has its own provisions concerning this principle.

8.1.1 Rationale of the Principle of Legality

The principle of legality can be seen as a part of the more general ideal of the rule of law.[274] Usually, it is addressed in the context of criminal law.[275] Its primary objective is to protect

[270] See, e.g., Zahar & Sluiter 2008, p. 92, reaching the same conclusion.
[271] The principle of legality is often summarized in the Latin maxim *nullum crimen, nulla poena sine praevia lege poenali,* but in this paper I address mainly the first part of the maxim, *nullum crimen sine lege*, and the rules of punishment are left aside. On the definition of the principle, see Haveman 2003 (B); Ashworth 2009.
[272] See, e.g., Cryer 2011, p. 17.
[273] Gallant 2009, p. 393.
[274] See, e.g., *Jorgić v, Germany,* para. 10; Gallant 2009, p. 15; Ashworth 2009, p. 57.

individuals against arbitrary and discriminatory use of power by the government. [276] In judicial practice, however, "*foreseeability* and *accessibility* are the central notions of the principle of legality".[277] Four aspects within the principle of legality can be distinguished: punishment according to law (*nullum crimen sine lege*), ban of retroactivity (*lex praevia*), ban of analogy (*lex stricta*), and requirement of specificity (*lex certa*).[278] All these aspects come into play when criminal courts submit to judicial creativity. [279] Hence the particular importance of the principle of legality in criminal proceedings.

Before proceeding to the features of the principle of legality in international law, it must be noted that an absolute notion of strict legality, and thus non-retroactivity, is impossibility.[280] This is mainly caused by the indeterminacy of language (be it either statutory or case law). Even in civil law systems the application of criminal provisions requires interpretation. Hardly ever a statutory provision matches completely with real life incidents, so a given provision must be applied to new circumstances. Therefore, all judicial praxis is retrospective in some respect, and since "the ideal of *lex certa* can never be absolute" the question is whether the law is *certain enough*.[281]

8.1.2 The Principle of Legality in International Law

In international law, the principle of legality is deemed to be *sui generis* in nature as it differs from its national counterparts. Since international law contains many unwritten rules, some scholars have suggested that the maxim *nullum crimen sine iure* would meet the requirements

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[275] Issues concerning the principle of legality are usually connected to criminal law. However, some social justice theorists, such as Rawls, have viewed it in the context of social justice theories. See Rawls 2003.
[276] Within criminal law, the function of the principle of legality is twofold. On one hand, an individual person must know what kind of behavior is punishable (deterrence), and on the other, the State cannot intervene in a person's rights if the law does not allow this (legal protection). The protective function of the principle of legality emerges also through the Montesquieuan way of separating the powers of the State. Haveman 2003 (B), pp. 43, 51. It can be noticed that this separation has, somewhat typically to common law tradition, not been carried out that distinctively in ICL since international criminal courts seem to have certain legislative power left.
[277] Id., p. 50.
[278] However, one must notice that the interpretation of these aspects differs in some extent between common law and civil law traditions. See, e.g., Id., p. 40-50.
[279] For instance, in respect of substantive provisions, a definition of a crime can be inaccurate due to ambiguous wording or because the crime is based on unwritten law (*lex certa*). In addition, an extensive interpretation of a provision may include conduct that was not punishable earlier (*lex stricta*). Both of these situations may lead to retroactive punishing (*lex praevia*).
[280] The matter is addressed only briefly here. For further elaboration, see Gallant 2009, pp. 31-45.
[281] Id., pp. 31-33.

of legality more precisely.[282] The phrase also characterizes the limited role that the principle of legality has played in international law. Indeed, some have argued that this principle, particularly in respect of humanitarian law practice, has derived a new meaning in international law that no longer respects its original background.[283] The major challenge for the principle of legality derives from the vagueness of ICL.[284] This branch of law still contains a number of poorly defined concepts. Given this indeterminacy, the contribution of courts, both national and international, is essential in modifying and clarifying these concepts. On the other hand, this is bound to increase the fragmentation of ICL since so many courts within their own legal systems participate in developing ICL.[285]

The principle of legality can be found from several international conventions, such as the Universal Declaration of Human Rights (UDHR), European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR).[286] In all of these conventions the punishment of individuals directly under international law is accepted. However, none of these conventions (nor the principle of legality in general) requires that the prohibition of criminal conduct should be based on some particular source of international law. To mention, all prohibitions under international law do not entail criminal responsibility. After it has been established that a certain prohibition exists under international law, it must also be established that the prohibition applies to individuals, is sufficiently foreseeable and accessible, and entails criminal responsibility.[287]

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[282] Bassiouni points out that the distinctive character of the principle of legality in international law is caused by the fact that it has to balance between two competing factors. On one hand, it must provide a fair trial for the accused but, on the other, is must promote world peace. Bassiouni 1999, p. 144. In contrast, Haveman argues that this distinctive character of "international" principle of legality should not be used to diminish the rights of the accused. In fact, since the accused can be tried before an international criminal court under international law, he may even deserve more protection because of the distinctive nature of the core crimes and the greater demand for punishment, which may affect the impartiality of the judge. After all, these are the main reasons for establishing international criminal tribunals in the first place. Haveman 2003 (B), p. 76. According to Haveman, the international application of the principle of legality is influenced more by the common than by civil law tradition. Id., p. 53.

[283] Id., p. 55.

[284] One reason for this vagueness is that the majority of the regulations that compose the foundations for ICL were not meant to be criminal acts originally. As Haveman points out, the substance of ICL is made mostly by humanitarian lawyers. Since these rules were not made for the purpose of providing individual criminal liability, the aspects of the principle of legality were not taken into account. Id., pp. 76-77.

[285] See, e.g., Cassese 2008, pp. 41-43.

[286] The Universal Declaration of Human Rights, art. 11(2); the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 7(1); the International Covenant on Civil and Political Rights, art. 15(1). In addition, the principle of legality is codified in the African Charter on Human and People's Rights (art. 7(2)) and in the American Convention on Human Rights (art. 9).

[287] Mettraux 2005, p. 13.

8.2 Judicial Law-Making in Theory

No doubt international criminal tribunals have been highly influential in developing ICL throughout its history. In particular, the contribution of the ICTY has been huge. Not to mention its impact on procedural rules considering international criminal proceedings, the ICTY's case law has clarified several elements of substantive law: definitions of crimes, features of armed conflict, the applicability of the law of war crimes to internal armed conflicts, etc. What comes to the so-called general part of ICL, the ICTY has elaborated on the principle of legality, modes of criminal liability, and the application of the *stare decisis* doctrine to mention but a few.[288] Focusing mainly on the definitions of the core crimes, in this section I address the question whether the principle of legality prohibits an international criminal court from regarding an act as a crime when the definition of the crime has subsequently been specified by the court during the process.[289] The respected views of various scholars usually differ on how flexible the definitions of crimes are and how to deal with possible exceptions of the main rule of legality.

The ECHR as well as the ICCPR include a rather liberal notion on the principle of legality. These conventions allow punishment according to "act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations" (ECHR) or "by the community of nations" (ICCPR).[290] According to Shahabuddeen, these provisions mean that the demands of specificity are met if the conduct is regarded as "fundamentally criminal" (by the community or by civilized nations), regardless of whether the correspondence between the definition of the crime and the act is perfect or not.[291] This point of view can be criticized.

What is at stake here is the foreseeability and accessibility of criminal law. Every individual person should know whether certain conduct constitutes a crime under international law. The issue is twofold. It is not enough that the conduct is "fundamentally criminal", but it has to be *criminal* under *international law*. The difference comes important when the core crimes are differentiated from the "original" ones. At first, one has to be able to predict whether his or

[288] For an excellent overview on the contribution of the ICTY to ICL, see Cassese 2004, pp. 591-594.
[289] The issue has been addressed, *inter alia*, by Shahabuddeen and Meron. Both authors approve the progressive development of law to some extent, although Shahabuddeen seems to take a far more approbative stance to this question. See Shahabuddeen 2004; Meron 2005.
[290] The European Convention on Human Rights, art. 7(2); the International Covenant on Civil and Political Rights, art. 15(2). The difference in the wording is caused by the general change in language. Due to the decolonisation period, all nations were considered "civilized" in the ICCPR.
[291] Shahabuddeen 2004 p. 1011.

her act constitutes a crime under international law or national law. Indeed, it is a question of jurisdiction to prescribe.[292] A person should be able to tell which laws will be applied to him or her. In this respect, the principle serves as a limitation of both jurisdiction to prescribe and jurisdiction to adjudicate.[293] Secondly, it is a question of punishment according to law, not moral. It is not enough that an act is fundamentally wrong or even illegal under international law; it has to be *criminal* (under international law) in order to provide for individual criminal responsibility. If the definition of a crime is altered during the court proceeding, the new definition may either exceed the subject-matter jurisdiction of the court or be treated as retroactive creation of substantive law.

The case concerning Joint Criminal Enterprise (JCE) doctrine illustrates well how the issue of legality can be manifested both as jurisdictional and substantive law matter.[294] In this case the Appeals Chamber considered whether the new definition of crime fell within the scope of the subject-matter jurisdiction of the Court, but also, whether the new form of liability (the JCE doctrine) in fact existed under international humanitarian law.[295]

However, the issue is merely theoretical at its best. It is not a prerequisite that the person involved need actually have foreseen the applicability of the law to his or her actions, not to mention (whether the act falls within) the exact definition of a crime. If even judges at international tribunals are in pains to establish the foreseeability and accessibility of a crime, one cannot surely expect that every individual is capable of doing this. It is rather a question of public awareness: could the act in question have been *reasonably understood* as criminal under existing law?[296] This begs the question whether foreseeability of the law is *de facto* determined according to moral imperatives instead of actual existing legal provisions.

In the Nuremberg trials, for example, perceptions of moral justice prevailed over strict legality.[297] As Gallant phrase it: "[t]he point of horror at which this [the acceptance of

[292] The jurisdictional issue concerns retroactive characterization of a crime (jurisdiction to prescribe) at first, but later also retroactive application of the law (jurisdiction to adjudicate). See, e.g., Gallant 2009, p. 404.
[293] Id., pp. 407-408.
[294] Approaches differ among scholars. The differentiation is rather difficult since "the crimes [of international criminal tribunals] were not enumerated as in a criminal code, but simply as a specification of the jurisdictional authority of the relevant court. The value and scope of those enumerations was therefore only germane to the court's jurisdiction and did not purport to have a general reach." Cassese 2008, p. 5.
[295] *Milutinovic* Decision on JCE; See also Gallant 2009, pp. 307, 312-313, 356-358.
[296] Id., p. 366.
[297] "In the first place, it is to be observed that the maxim "*nullum crimen sine lege*" is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, *it*

retroactive crime creation] occurs is the point at which anyone who is a positivist decides that there is a natural law of humanity prohibiting these acts."[298] Indeed, even Kelsen wrote in 1947:

> Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the Second World War may certainly be considered as more important than to comply with the rather relative rule against ex post facto laws, open to so many exceptions.[299]

It is important to notice that the principle of legality entered on the international stage only after the WWII. This can be seen somewhat as a reaction to the flexible approach taken in the Nuremberg trials. Quite recently, the ECtHR has stated that the purpose of the article 7(2) "was to specify that Article 7 did not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish, *inter alia*, war crimes so that Article 7 does not in any way aim to pass legal or moral judgment on those laws".[300] According to Schabas, both the ECHR and the ICCPR endorse the approach of the Nuremberg IMT, "while implicitly acknowledging that it did not, strictly speaking, faithfully respect the *nullum crimen* principle."[301]

Thus, the approach of the Nuremberg Tribunal has been accepted expressly because of the prevailing circumstances.[302] Although the retroactive crime creation at Nuremberg may have been acceptable, it is no longer so. As Gallant argues, the moral force that was used as a justification for this cannot displace legality in international law anymore since the principle of legality has obtained the status of customary international law.[303]

The issue is not, however, that simple. The ban of retroactivity is a "rather relative rule" as Kelsen noted, at least in respect to international law. Authors such as Meron consider legality as more of an ideal, a principle whose application always involves an element of legal fiction; it would be naive to expect that all citizens have read and understood all criminal law

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would be unjust if his wrong were allowed to go unpunished." *Nuremberg IMT Judgment,* Part 22, para. 219, (emphasis added).

[298] The citation is taken from Gallant's incomplete version (2007). He seems to have rephrased this sentence in his published edition. See, however, Gallant 2009, p. 404.

[299] Kelsen 1947, p. 165.

[300] *Kononov v. Latvia*, para. 186.

[301] Schabas 2012, p. 70.

[302] Meron 2005, p. 830.

[303] Gallant 2009, pp. 404-406.

regulations. In respect of war crimes, for example, customary international law prohibits acts "that everyone would *assume* to be criminal anyway".[304] Surely this should satisfy the populace's sense of justice. As Foucault has noted, the distinction between forbidden and permitted has stayed quite the same from one century to another. What has changed is how we relate with the crime itself, "the object with which penal practice is concerned, has profoundly altered: the quality, the nature, in a sense the substance of which the punishable element is made, rather than its formal definition. Undercover of the relative stability of the law, a mass of subtle and rapid changes has occurred."[305]

Interestingly, the demands of justice and natural law have maintained a strong position in German legal history after the Nuremberg trials. Perhaps as a response to the Nazi regime's abuse of the legislation process justice-promoting theories, such as the "Radbruch formula", have gained support in German judicature. According to the formula, even unjust and irrational positive law prevails over substantive notions of justice unless the contradiction becomes *intolerable*. The limit of intolerableness is reached when positive law neglects the aims of justice and equality explicitly and systematically.[306] Prominent is that even the ECtHR has approved the usage of this theory.[307] The basic idea behind the Radbruch formula is significant and embodies the values and goals of criminal law; politically used criminal law that neglects the goals of justice should be considered null and void. The philosophy is not unfamiliar to other legal traditions either: the equity system of English common law history, for instance, shares some similarities with the formula.[308] What comes to international criminal proceedings, the so called "Martens clause", used by the Trial Chamber of the ICTY in *Kupreškić*, seems to follow this idea as well.[309]

8.3 Judicial Law-Making in Practice

International criminal courts are thus obligated to apply substantive criminal rules that existed at the time of the defendant's act. However, they are allowed to elaborate on existing rules, as

[304] Meron 2005, p. 821 (emphasis added).
[305] Foucault 1977, p. 17.
[306] The formula was created by Gustav Radbruch in 1946.
[307] See *Streletz, Kessler and Krenz v. Germany* below.
[308] Bohlander 2009, p. 13.
[309] The Martens Clause was introduced in the Convention with Respect to the Laws of War on Land (Hague II): "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."

the ICTY Appeals Chamber set out in *Aleksovski*.[310] The way in which the ICTY has used customary law to recast the definitions of some of the core crimes is in the gray area of legality. In the following chapters, I provide a framework for a universal stance on the limits of progressive development of law in international criminal proceedings. In order to do this, I must draw from various sources. For instance, there is no external human rights court supervising the practice of international criminal courts. Thus, there are no precedents evaluating whether the praxis of these courts is in line with the principle of legality.[311] However, the case law of the ECtHR has great importance in respect of the principle of legality in ICL. Although international courts are not bound by rulings of the ECtHR, its rulings are authoritative to the member States of the ECHR.[312] Since ICL is not limited to international criminal courts' practice, the influence of the ECtHR can emerge through domestic case law as well. Indeed, some important rulings have proven to be highly relevant in recent legal discourse on the matter.[313]

The jurisprudence of the ECtHR has had great importance to international criminal courts' work and vice versa. Contrary to some predictions, the number of direct references from international criminal courts to ECtHR's case law appears to have increased in recent years and seems to increase also in the future.[314] The recent symposium on the influence of the ECtHR's case law on ICL proposes that the Court holds a significant position in the dialogue between judges of international criminal tribunals.[315] Due to the great number of courts participating in this dialogue, many fear incoherence and fragmentation of ICL but as Schabas suggests the interaction between ECtHR and ICL can also be described as synergistic.[316] Although the Court operates physically in Strasbourg, it is not made to promote *European* human rights but universal values.[317]

The importance of the ECtHR's case law in international criminal proceedings has increased in recent years since it has expanded to areas of ICL, and particularly to issues concerning

[310] The Court stated that the principle of legality "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."*Aleksovski* Appeal Judgment, para. 127.
[311] Heikkilä 2011, p. 922.
[312] European Convention on Human Rights, art. 46.
[313] See, e.g., Cassese 2008 pp. 44-47; Shahabuddeen 2004; Meron 2005.
[314] Roth & Tulkens 2011; Schabas 2011.
[315] Roth & Tulkens 2011 and following articles in the Journal of International Criminal Justice, vol. 9, 2011, pp. 571-695.
[316] Schabas 2011, pp. 613-632.
[317] Still quite often the ECtHR is called upon to solve tensions between civil law and common law traditions, upon which ICL is build.

substantive law. Quite recently, the Court has explored the application of the principle of legality in respect of war crimes,[318] crimes against humanity,[319] and genocide.[320] However, the interaction between the ECtHR and international criminal courts is a complex issue. There is a certain tension between human rights and criminal law, and one can certainly question whether international criminal courts are the place to promote human rights obligations. The ECtHR is unlikely to serve as an "appeals" court on human rights issues in the future, but its participation in the dialogue between courts is crucial.[321]

8.3.1 The European Court of Human Rights

The ECtHR held in *C.R. v. United Kingdom* that the rules of criminal liability can be clarified through judicial interpretation insofar as "the resulting development is consistent with the essence of the offence and could reasonably be foreseen".[322] The case concerned the development of law in English common law tradition. It was remarkable because the husband's legal immunity concerning marital rape was removed in the British court proceedings. Since marital rape was not prohibited in the UK at the time of commission, the question was whether the British courts had breached article 7(1) of the ECHR by extending the definition of rape. The European Court held that the British court ruling was in line with the article 7(1) of the ECHR. The decision of the ECtHR has gained significant attention. Even though it concerned national legislation based on English common law tradition, the ruling was embraced later by the ICTY in *Ojdanić*.[323] This may not come of a total surprise since international law is deemed to be akin more to English law tradition than to others.[324]

A few years later the Court contemplated the Berlin Wall shootings and killings committed by the border guards of the former GDR. Because of the policy of the GDR's National

[318] *Kononov v. Latvia.*
[319] *Korbely v. Hungary.*
[320] *Jorgić v. Germany.*
[321] Schabas 2011, p. 610.
[322] " However 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. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen." *C.R. v. United Kingdom*, para. 34; See also *S.W. v. United Kingdom,* paras. 37-47.
[323] See chapter 8.3.2.1.
[324] See, e.g., Cassese 2008, p. 38.

Defence Council to protect the border at all costs, several people were killed trying to cross over to the FRG. After the unification of Germany several former East German soldiers were convicted of these killings even though they were under orders –and the former socialist law, applicable at the time, entitled them– to annihilate all border violators. In addition, three senior officials of the GDR, Streletz, Kessler, and Krenz, were convicted of the border killings by the courts of the FRG.[325] All three appealed arguing that they acted according to general State policy and laws applicable at the time. The convictions were upheld by the Federal Court of Justice, and the Federal Constitutional Court declared that the convictions were compatible with the constitutional law referring to the Radbruch formula.[326]

The case was finally brought to ECtHR together with one application from a low-ranking border guard, K-H.W, who was convicted of shooting of one border violator.[327] In both cases the ECtHR held that the GDR's border-policing policy, i.e., State practice, could not be considered as "law" within the meaning of article 7 of the ECHR and thus was not covered by the protection of article 7(1) of the Convention. The Court concluded that the applicants' acts constituted offences defined with sufficient accessibility and foreseeability at the time of commission both in GDR law and international law, when read together.[328] The border guard cases imply that the punishment of cruel atrocities does not violate the ban of retroactivity since such acts must be punished at all costs. However, one must consider these rulings in light of the circumstances of the time, the history of confrontation in Germany during the cold war and the fresh memory of the cruelties committed by the Nazi regime in WWII. As important as they are, these cases can be used only limitedly to determinate the limits of legality within ICL. However, the Court has quite recently evaluated national understandings of international crimes in three important cases.

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[325] Streletz Kessler and Krenz were convicted of intentional homicides on the ground that they had participated in the decision-making of the GDR's highest authorities, such as the National Defence Council, where the border-policing policy was created and thus were responsible for killings of a number of people trying to flee the GDR.

[326] "positive law must be considered contrary to justice where the contradiction between statute law and justice is so intolerable that the former must give way to the latter." Para. 1(b)(cc)(2) of the Judgment of the German Federal Constitutional Court, 24 October 1996, extract in the *Streletz, Kessler and Krenz v. Germany* para. 22.

[327] The applicants submitted that their acts did not constitute crimes under the GDR law, applicable at the time of commission, or international law, and that their convictions were retrospective and thus in breach of article 7(1) of the ECHR.

[328] Streletz, Kessler and Krenz submitted that their actions had been justified by the justifications of the written GDR law, and more importantly, by the GDR State practice. However, the ECtHR stated that the gap between the GDR's legislation and its practice was caused to a great extent by applicants themselves. What comes to Mr. K-H.W., the Court stated that even a private soldier cannot blindly obey orders which clearly violated internationally recognized human rights.

In *Korbely*, Hungarian courts applied ICL directly and deemed that a violation of article 3 of the 1949 Geneva Conventions was criminalized as a crime against humanity under international law. Since the Hungarian understanding about the crimes against humanity differed from its international definition (the Hungarian view did not entail the requirement that the act would have to be a part of widespread and systematic attack against civilian population), the ECtHR had to evaluate whether the act was defined with sufficient accessibility and foreseeability as an offence under international law at the time of commission. The Court held that it was not foreseeable that the applicant's acts constituted a crime against humanity under international law. Therefore, the Hungarian courts had violated article 7(1) of the ECHR. [329] Similarly in *Jorgić*, the ECtHR evaluated the German understanding about the international crime of genocide. The Court stated that national interpretations of international crimes must not be entirely identical with their international counterparts. What matters is that the *essence of the offence remains* and that the national interpretation of the international crime is *reasonably foreseen*.[330]

Quite recently, the Court has explored also a Latvian interpretation of an international crime. In *Kononov*, the applicant was prosecuted for war crimes committed in 1944, and he complained that his acts (killing of collaborators during the war) could not be considered as a war crime at the time. The main issue was whether the law used in the Nuremberg IMT should be applied in today's case dealing with events that occurred during the WWII. Kononov, a Soviet partisan during WWII, was convicted of war crimes committed in Latvia, Mazie Bati, in 1944. In the Mazie Bati killings, Kononov led a unit into a Latvian village where, posing as German Wehrmacht offices, they killed 9 people, including three women, one of which was in the latest stages of pregnancy. In its final ruling, the ECtHR stated that the execution of villagers violated international law at the time, particularly since Kononov's unit was wearing German disguises. According to the Court, Kononov was entitled only to arrest the villagers, not to kill them.

At first, the Court held that the applicant could not reasonably have foreseen that his acts amounted to a war crime under the *jus in bello* applicable at the time. However, the ruling was reversed by the Grand Chamber stating that "there was a sufficiently clear legal basis,

[329] *Korbely v. Hungary*, paras. 73-74, 82-84, 95.
[330] The Court approved the interpretation of the offence of genocide by German courts since this was, among other things, supported by legal literature. Interestingly, the German interpretation was broader than that of the ICTY's but this was not relevant according to the Court since the legal praxis of the ICTY was aroused after the time of commission. See *Jorgić v, Germany,* paras. 103, 106-113.

having regard to the state of international law in 1944, for the applicant's conviction and punishment for war crimes." The Court concluded that "at the time when they were committed, the applicant's acts constituted offences defined with sufficient accessibility and foreseeability by the laws and customs of war."[331] Interestingly, the Grand Chamber referred to the Nuremberg Principles in declaring norms of customary international law.[332]

The ECtHR's praxis demonstrates that the principle of legality does not have a strict positivistic character in human rights law. The ECtHR's ruling on *C.R v. United Kingdom* favors an approach that forces the populace to behave on moral values, i.e., to avoid morally dubious practices and to predict what kind of behavior will be considered illegal in near future.[333] To criticize, such customary law that changes along with changing attitudes of society is not predictable since we cannot know what these attitudes are beforehand but only *post facto*. In addition, on the international stage this would lead to a complete apologism.[334] However, the case was not about creating new crimes or expanding the definition of a crime but about removing immunity.[335] Indeed, there is a long way from removing a personal immunity for a criminal act to applying e*x post facto* laws and thus criminalizing acts that were not crimes at the time of their commission, as Meron has pointed out.[336] Even in common law tradition, the era of judge-made crime creation seems to be over.[337] What comes to the border guard cases, the ECtHR favored an approach of doing justice in times of injustice regardless of what positive law says if the law is wicked in itself. But as noted above, these cases along with *C.R v. United Kingdom* represent ECtHR's solutions on national legislation within national justice systems (although the border guard cases had some

[331] *Kononov v. Latvia*, para. 244.
[332] Id., paras. 117, 122, 207.
[333] Gallant sees that one of the greatest dangers for foreseeability is composed by this approach since it allows courts to simply declare that the development of criminal law in question, i.e., arguable expansion of substantive law by the court, was *foreseeable* and thus in line with the principle of legality. Gallant 2009, p. 366.
[334] See Koskenniemi 2005, p. 426.
[335] The question whether defense destruction can occur retroactively is a whole other topic in itself. There exist different opinions on the matter. The issue arouse earlier in the series of cases concerning East German border guards who committed the Berlin Wall shootings. In these cases, the ECtHR upheld the domestic convictions of the border guards even though they claimed defense of following superior orders and government policy of killing persons who attempt to cross over (See *Streletz, Kessler and Krenz v. Germany*). Fletcher argues that retroactive defense destruction is permissible when the defense is unjust and the act is clearly criminal. The issue is mainly the same in the border guard cases as in the marital rape cases. See Gallant 2009, p. 221, referring to Fletcher, P.: *The Grammar of Criminal Law: American, Comparative, and International (Foundations)*, Oxford University press, 2007, pp. 145-148.
[336] "I see a difference between removing personal immunity for liability for an obviously criminal act and extrapolating from it a theory of evolution and ex post facto application of criminal liability for acts that were not unlawful at the time of their commission." Meron 2005, p. 826.
[337] Apparently, even the courts of the English and US common law traditions no longer maintain the power to create new criminal offences in judicial proceedings. Ashworth 2009, p. 59; Van Schaack 2008.

connection with international law) and they cannot be used as such directly to determine the limits of progressive development of ICL.

But the latter cases do not provide a straightforward solution to the problem either. For instance, Kononov's conviction was overturned once in domestic appellate courts but he was subsequently charged again by the prosecutor following a new investigation and convicted. Afterwards, the ECtHR overturned his case twice. What does this tell us about the foreseeability of law? It would be unrealistic to expect Kononov to have foreseen the content of positive law at the time and under the war-time circumstances if even judges have disagreed over it subsequently in such a manifest manner. Perhaps it is for this very reason that judges often emphasize the moral wrongfulness of the act instead of the definition of the crime set out in law. Although judges are bound to apply positive law, individuals often evaluate their acts on the basis of moral perceptions.

To conclude, there are no clear limits that the principle of legality would provide. Expressions such as "the essence of the offence must remain" or that "the definition of the crime must be reasonably foreseen" give only little guidance if evaluated outside the context of the cases in which they were declared. Thus, the evaluation concerning the application of the principle of legality should be made on a case-by-case basis. At least above cases demonstrate that this does not always come without controversies.

8.3.2 UN Tribunals

The *ad hoc* Tribunals have struggled with the application of the principle of legality throughout their lengthy legal praxis. The judges contemplated the legal limits of progressive interpretation of law in so many cases that it is impossible to deal with all of them here. Instead, I will provide a brief overview of the approach that the Tribunals, particularly the ICTY, have taken towards judicial law-making. The case law of the SCSL is also briefly addressed here.

8.3.2.1 Writing Moral as Law

In *Hadžihasanović*, it was held that as to foreseeability, it is sufficient that the accused understands that the conduct in question is "criminal in the sense generally understood, without reference to any specific provision." What comes to accessibility, the court held that

it does not exclude reliance on customary law.[338] This was subsequently followed by the SCSL in *Norman*.[339]

The ICTY Appeals Chamber held in *Ojdanić* that the principle of legality "does not prevent a court from interpreting and clarifying the elements of a particular crime."[340] The Court continued:

> Nor does it preclude the progressive development of the law by the court. But it does prevent a court from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification. This Tribunal must therefore be satisfied that the crime or the form of liability with which an accused is charged was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time, taking into account the specificity of international law when making that assessment.[341]

By "progressive development of the law" the Appeals Chamber referred to several rulings of the ECtHR and cited the *C.R. v. United Kingdom* judgment.[342] By this the Appeals Chamber seemed to approve the ECtHR's approach in the *C.R. v. United Kingdom* and affirm that progressive development of criminal law through judicial law-making is part of ICL as well, not just a distinctive feature of the common law tradition.

It is difficult to determine when international law is sufficiently foreseeable and accessible for an individual. Usually individuals act within the knowledge of national laws. These laws may provide some notice that a given act is criminal also under international law. However, international law does not completely correspond with any national legal system. Hence, the character of customary international law must be taken into account.[343] Since international customary law includes several unwritten norms, its accessibility is not as straightforward as with written criminal codes. "But rules of customary law may provide sufficient guidance as

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[338] *Hadžihasanovic* Decision on Command Responsibility, para. 34.
[339] *Norman*, para. 25.
[340] The same has been said in *Aleksovski* Appeal Judgment, paras. 126-127; and in *Delalić*, Appeal Judgment, para. 173.
[341] Milutinovic Decision on JCE, para. 38. (emphasis added and footnotes omitted)
[342] The Court referred to *Kokkinakis v. Greece,* paras. 36 and 40; *EV v. Turkey,* para. 52; *S.W. v. United Kingdom,* paras. 35-36. It cited paragraph 34 of the *C.R v. United Kingdom* Judgment:"However 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. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen." Milutinovic Decision on JCE, para. 38 fn. 93.
[343] See Milutinovic Decision on JCE, para. 39. The Appeals Chamber cited the ECtHR again by declaring that the meaning and scope of the concepts of *foreseeability* and *accessibility* are defined by "the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed". (*Groppera et al. v. Switzerland,* para. 68)

to the standard the violation of which could entail criminal liability."[344] All this implies that at the time of commission the perpetrator does not have to be fully aware which crime he or she is about to commit, not to mention the exact definition of that crime. It is enough that the perpetrator must know that he is committing a crime. This can be explained by the lack of specificity that customary law always contains.

According to the Appeals Chamber, the atrocious and criminal nature of an act (together with domestic laws) can also be used to assist the evaluation of the foreseeability of a crime based on customary international law. Domestic laws usually provide some notice that certain acts are regarded as criminal under international law and this may be used to establish that the accused could reasonably have known that his act was "prohibited and punishable".[345] Thus, the immorality of an act may be an important factor in determining whether the perpetrator has committed a crime under customary international law even though it is not sufficient to create criminal liability on its own.[346] Although the *Ojdanić* motion concerned a form of criminal liability (JCE doctrine) the case illustrates well how the ICTY deemed that foreseeability and accessibility of customary international law are to be established. In my opinion, this case tends to over-emphasize the immorality and wrongfulness of a particular act in order to demonstrate its criminality.

One interesting case concerning the importance of morality in ICTY's case law is the Judgment in *Kupreškić*, which has subsequently been criticized for its moral nuance.[347] In this case the Trial Chamber, presided by Professor Cassese, considered whether military reprisals against civilians are prohibited under customary international law. Apparently, the Chamber ignored almost completely contrary State practice and relied on the *Martens clause* in order to identify the customary rule in question.[348] The Chamber held that a widespread

[344] Milutinovic Decision on JCE, paras. 40-42.
[345] Id., para. 41.
[346] Id., para. 42. Also in Tadić the criminal natures of certain acts proscribed by common article 3 of the Geneva Convention were used to evidence that these acts were criminal under international law. *Tadić* Trial Decision on Jurisdiction, para. 68.
[347] See, e.g., Zahar 2011, p. 483; Cryer 2006, pp. 255-256.
[348] "Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* has taken shape. This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus,* as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows 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. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law." *Kupreškić* Trial Judgment, para. 527.

opinio necessitatis prohibiting reprisals against civilians can be detected, and this was enough to confirm the customary status of the rule.[349]

According to Meron, the principle of legality is designed to protect persons only from being punished for an act that he or she believed to be lawful when committed. Hence, the principle of legality would not require that the customary status of every crime in question should be established by the court as long as the unlawfulness of the act is clear.[350] The ICTY followed this view in *Ojdanić*.[351] In addition, in *Čelebići* the Appeals Chamber held that as long as the perpetrators knew that they were committing an act that is criminal in nature "[t]he fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence."[352] Given this, the ICTY's approach as well as Meron's arguments seem to disregard that some prosecutions may be subject of international, rather than national, jurisdiction. This certainly raises the question of foreseeability and accessibility since the gravity of the crime may be something else when it amounts to international level.

Nonetheless, Meron's point of view is in line with the practice of the ECtHR. The criminal nature of certain acts, such as murder or torture, is always clear, as noted by the ECtHR in *Kononov*.[353] However, it is usually not that clear whether these acts amount to war crimes. For instance, some acts may not be so clearly prohibited when carried out in extraordinary circumstances (where one could plead on military necessity for example) than if they were carried out in ordinary circumstances.[354] What follows is that a defendant who commits an act of murder or torture knowing that he or she can be convicted under domestic law may not realize that he or she could also be convicted under international law of the war crime of

[349] Zahar criticizes this by stating that the use of military manuals and a vast adoption of a certain GA Resolution by the Chamber in evidencing *opinio juris* was not sufficient to embody the state of law. He notes that military manuals express State policy rather than international law. In addition, GA Resolutions can be political and aspirational in nature and therefore do not always express the state of law either.
[350] See Meron 2005, p. 822.
[351] Milutinovic Decision on JCE, para. 42.; Also in *Tadić,* the Trial Chamber referred to Meron citing that "the principle *nullum crimen* is designed to protect a person only from being punished for an act that he or she reasonably believed to be lawful when committed." *Tadić* Trial Decision on Jurisdiction, para. 69; Meron 1995, p. 566.
[352] *Čelebiči* Trial Judgment, para. 313; See also *Čelebići* Appeal Judgment where the Appeals Chamber stated: "The scope of this principle was discussed in the *Aleksovski* Appeal Judgement, which held that the principle of *nullem crimen sine lege* does not prevent a court from interpreting and clarifying the elements of a particular crime.226 It is universally acknowledged that the acts enumerated in common Article 3 are wrongful and shock the conscience of civilised people, and thus are, in the language of Article 15(2) of the ICCPR, "criminal according to the general principles of law recognised by civilised nations." *Čelebići* Appeal Judgment, para. 173.
[353] *Kononov v. Latvia*.
[354] Darcy 2010, p. 126; Zahar 2011, p. 486. Zahar points out that, for example, a form of torture practiced by United States and some of its allies in the war of terror is considered excusable by them.

murder or torture in non-international armed conflict.[355] The ECtHR's ruling in *Kononov* gave only little weight to this question.

8.3.2.2 Creating New Crimes: The Definition of the International Crime of Rape

The creation of the definition of rape in international law by the *ad hoc* Tribunals offers a good example of something that could be called judicial creativity. The *Akayesu* case was the very first conviction in the ICTR and also the first conviction of rape as a crime against humanity. More importantly, it was recognized for the first time that rape can also constitute an act of genocide. Before *Akayesu* there was no commonly accepted definition of rape in international law, as the Trial Chamber noted,[356] and the judgment fulfilled this lacuna in the law.[357] The *Akayesu* judgment has been both praised and criticized for its creativity and progressiveness. The need for a definition of rape in international law was vital at the time and the significance of this legal creation cannot be overstated. However, the definition has been criticized over its vagueness and legal basis. Not only failing to comply with the proper sources of international law, the Chamber disregarded the application of the principle of legality. The Chamber did not refer to any legal instruments or previous case law that would have supported the new definition. Moreover, the whole judgment omitted to take a stance on whether the crime existed in any form in customary international law at the time of commission.[358]

The creativity concerning the definition of rape did not end to this at the *ad hoc* Tribunals.[359] In *Furundžija,* the ICTY Trial Chamber considered whether forced oral sex fell within the concept of rape in ICL. There was no case or a treaty in international law, nor consistent national practice, that would have affirmed this even though forced oral sex was regarded generally as criminal in national laws. Even national legislations did not identify any common definition that would have solved the problem, so the Chamber went on to apply the "general principle of respect for human dignity", which it referred to be a basic underpinning of international humanitarian law and human rights law and which permeated the whole body

[355] Id.
[356] *Akayesy* Trial Judgment, para. 596.
[357] Hayes argues that the Trial Chamber went far further than just filling in the lacuna. Instead, it provided "an innovative progressive interpretation of international law" in its definition of the crime of rape. Hayes 2010, p. 133.
[358] Id., pp. 135-136. According to Hayes, one reason for this is the view that the ICTR Statute does not require such a strong recourse to customary law than the ICTY Statute does.
[359] The ICTY dealt with the matter in *Furundžija, Čelebići,* and *Kunarac.* Leading cases in ICTR besides *Akayesu* were *Muhimana, Musema,* and *Gacumbitsi*. For an excellent overview on these cases, see Hayes 2010.

of international law. Moreover, it was a principle that, according the judges, favored broadening the definition of rape.[360] It is remarkable how the judges invoked the objectives of law as an interpretational element in determining the content of customary law.

The approach taken by the Trial Chamber can certainly be characterized as a progressive interpretation of law. However, unlike in *Akayesu*, the Chamber applied the principle of legality and made a special reference to the requirement of specificity.[361] About the principle of legality the Chamber noted the following:

> Moreover, the Trial Chamber is of the opinion that it is not contrary to the general principle of nullum crimen sine lege to charge an accused with forcible oral sex as rape when in some national jurisdictions, including his own, he could only be charged with sexual assault in respect of the same acts. It is not a question of criminalising acts which were not criminal when they were committed by the accused, since forcible oral sex is in any event a crime, and indeed an extremely serious crime.[362]

The judges of the *ad hoc* Tribunals have had an important impact on the evolution of rape as an international crime. Without their contribution such a reasonable and functional definition could not have been created within such a short time frame. The judges have not escaped criticism and allegations of impartiality, in particular, since female judges played a major role in these creative and progressive rulings.[363] Importantly, the ECtHR declared in *MC v. Bulgaria* that the ICTY's jurisprudence on the definition of rape "reflects a universal trend".[364] The result in *Furundžija* has also been codified in the ICC's Elements of Crimes.[365]

Although the ruling in *Furundžija* seems exceptional, judicial interpretations based on internationally recognized values are not unfamiliar to domestic courts either. Fundamental principles of international law, such as respect for human dignity, are used to create innovative solutions that answer to the changing needs of society as well as the whole international community. As Iovane points out, the vague nature of these principles makes

[360] *Furundžija* Trial Judgment, paras. 183-184. The Chamber continued: "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. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape."
[361] Id., para. 177.
[362] Id., para. 184.
[363] See, Hayes 2010, pp. 154-155.
[364] *MC v. Bulgaria* para. 163.
[365] Elements of Crimes, supra note 72, at. Art 7(1)(g).

evolutive interpretations possible as they represent the moral views of the community as whole.[366]

To conclude, the ICTY –or international criminal courts in general– has not applied the strictest definition of the principle of legality (*nullum crimen sine praevia lege scripta*), as Gallant notes.[367] First of all, the requirement of written law (*lex scripta*) is rejected. More importantly, is seems to be enough that a given act is "criminal in the sense generally understood" (as formulated in *Hadžihasanović*) to provide for criminal responsibility under international law. This phrase seems somewhat problematic in its whole obscureness. As noted by Gallant, it might allow courts to "re-characterize" national crimes into international crimes retroactively,[368] an act which is regarded as forbidden analogy by some.[369] Thus, what contemporary ICL requires is that the defendant should have reasonably foreseen that his/her act was to be held criminal under some existing law applicable at the time of commission. It is of no matter if the person cannot actually identify the crime or its elements he/she is convicted of. If the prohibition is found only from national law, it could possibly be still transferred to international law since the national criminalization indicates that it is regarded generally criminal.

8.4 Two Competing Arguments: Substantive Justice and Strict Legality

The presented case law reveals that the application of the principle of legality is very much alive in international criminal proceedings. Indeed, judges at the Tribunals have taken pains to articulate their innovative solutions in terms of legality. What is remarkable about their arguments is that they constantly seem to struggle between two competing doctrines. On the one hand, they attempt to ensure the rights of the accused by resorting to the principle of

[366] Iovane 2012, pp. 615-617, 624.
[367] Gallant 2009, p. 321; This is noted also by Schabas, who characterizes the Tribunal's interpretation of legality of substantive criminal law as relatively relaxed and close to Nuremberg-style of legality. Schabas 2006, p. 63.
[368] Gallant 2009, p. 322. About re-characterization of crimes see p. 41. See also p. 321, where Gallant argues that the ICTY and SCSL appear to have accepted in *Hadžihasanovic* and *Norman* that re-characterization of crimes is in-line with the principle of legality. *Hadžihasanovic* Decision on Command Responsibility, para. 34*; Norman*, para. 25. Gallant also argues that the UN Tribunals have not particularly used re-characterization in their jurisprudence, at least in their opinions. However, he concludes that at least the application of the JCE doctrine requires the use of this technique. See Gallant 2009, p. 324, referring to *Milutinović* Decision on JCE, para. 10.
[369] Bassiouni 1999, pp. 158-159.

legality. On the other, they attempt to pursue the aims of justice, accountability, and world order by providing humane interpretations of law. [370]

However, since some of the elements of the core crimes and liability forms under the ICTY's jurisdiction were only evolving at the time most of the crimes were committed, the Court faced serious difficulties in providing fair and just trials. No doubt the substance of the core crimes has always been morally condemned but this is not enough for criminal conviction; the conduct has to be prohibited in law and provide for individual criminal liability. This is the primary fault of custom-based criminalization. In the absence of textual authority, it is difficult to say exactly when moral condemnation evolved into law that proscribed criminal liability. In response, judges of the ICTY had to reconcile substantive justice and strict legality. In considering how to prioritize these notions, they have resorted to the objectives of ICL, considered whether a breach of international law exists, and evaluated the wrongfulness of the act in question.[371]

8.4.1 The Complex Interplay of Immorality, Illegality, and Criminality

In the identification of relevant State practice, there is a trend in which judges have resorted to behavior that corresponds with the general idea of justice. The criticism directed towards the selectivity of the ICTY in this respect is appropriate, but the same kind of selectivity exists in the case law of the ICJ, particularly in the *Nicaragua Case*. It seems that the amount of support from State practice and *opinio juris* required to form new customary norms depends on the value and importance of those norms. In ICL, factors such as changing social needs and moral wrongfulness of the act have guided the formation law, as evidenced by the *C.R. v. United Kingdom* and *Furundžija* cases.[372]

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[370] This juxtaposition is not typical to international criminal proceeding sonly. Although criminal law (in general) is becoming increasingly localized, the basic concepts beyond the surface of various statutory texts and unwritten rules are still very much alike. As Fletcher writes, each criminal justice system builds upon certain dichotomies that are inherent in criminal law and thus common to all legal cultures. One of these basic dilemmas is to distinguish between justice and legality in the criminal process. Needless to say, this question gains particular prominence in the field of ICL. See Fletcher 1998, pp. 3-5, 206-211.

[371] See, e.g., *Tadić* Appeal Judgment, paras. 190-191, focusing on the objectives of ICL when establishing the doctrine of JCE; *Kupreškić* Trial Judgment, para. 527 also focusing on the objectives of ICL when resorting to the Martens Clause; *Furundžija* Trial Judgment, paras. 183-184, focusing on the objectives of humanitarian law and human rights law when broadening the definition of the crime of rape.

[372] There is a place for criticism here since concepts such as "justice", "social needs", and "morality" are all subjective notions. See Koskenniemi 2005, pp. 412-413 on this. Resorting to them leads to a situation where law becomes eventually the will of the judge. I argued in chapter 6 that in order to avoid custom based on subjective preferences the task of identifying custom should be delegated to courts since they may have a more objective

As Van Schaack writes, the core judicial arguments concerning the application of the principle of legality in international criminal proceedings circle around immorality, illegality and criminality.[373] In this respect it is important to note that Sir Hartley Shawcross, the British prosecutor at the Nuremberg trial, argued on closing that there is "no difference between illegality and criminality".[374] This is certainly not an up to date state of affairs since it is now widely acknowledged that not every violation of international law, i.e., illegal act, creates criminal liability. The equation of illegality with criminality is a result of the fact that most modern treaties that compose the foundations of ICL were originally made to regulate State conduct, not to be used as penal statutes for convicting individuals. Only through the jurisprudence of international criminal tribunals have the direct addressees of these regulations transformed from States to individuals.

Thus, the judges have had to identify what constitutes criminality in each case. In identifying this they have often resorted to the moral wrongfulness of the act and to the objective and purpose of ICL; whether it would be against the interest of justice to let the actors escape accountability.[375] In the end, the used arguments fall into the two aforementioned categories of justice and legality. Judges often find themselves struggling between these two competing notions as they consider how far the principle of legality can be stretched in the name of justice to convict perpetrators of serious atrocities even if the conduct in question was not clearly prohibited in ICL at the time of commission.

8.4.2 Recourse to Human Rights Argument

The three aforementioned arguments used in judicial reasoning (illegality, morality, and the objectives of ICL) resemble arguments often used by human rights lawyer, and many of the developments in ICL derive from human rights ideology. Indeed, one peculiar phenomenon of the late 20th century was the human rights movement's invasion into international law, and particularly into ICL. This has had its impact on the formation of customary international law. Human rights and humanitarian law obligations have obfuscated the process by assuming that international law builds upon some core values of the international community.

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standpoint compared to States. However, it seems that we have gone nowhere from subjective wills of States if we settle to subjective wills of Judges. It is difficult to see how they can argue which views of justice are legitimate.

[373] Van Schaack 2008.

[374] *Nuremberg IMT Judgment,* p. 472.

[375] Id., Part 22, para. 219.

While there may be some truth in this, there is a certain tension between human rights and ICL. Although their main objectives share some similarities, they also have important differences. Human rights are a poor justification for a criminal conviction. Resorting to them may release the judge from the burden of subjective perception but does not manage to legitimate his or her decisions. In the end, human rights represent the core values of the Western societies, and more importantly, they can be (and increasingly are!) used as leverage for pursuing political agendas since there is no consensus over who has the authority to declare the fundamental and obligatory human rights.

The assumption of the apolitical nature of human rights can easily be questioned. Biletzki, for instance, argues that the politicization of human rights is very real both in theory and praxis.[376] As she notes, pragmatic human rights lawyers often use the universal status of human rights to argue the separation of human rights and politics. In contrast, strict positivists defend human rights against the accusation of their political nature by grounding them on law- "for the law is conventionally thought to be beyond and above politics."[377] This clear contradiction reveals the obscurity surrounding human rights, specifically, the sources they derive from. Defending human rights through the concept of "universalism" assumes that we have common universal values to protect. [378] Unfortunately, in our world of moral disagreement such values hardly exist. Grounding judicial reasoning on such values simply rejects the idea of legality and exposes law to political abuse and subjective interpretations. As noted by de Frouville, human rights are "more a language than a substance".[379]

Yet, I cannot deny that human rights law, particularly the work of the ECtHR, has promoted the application of the principle of legality. But although this principle has been a major concern in legal discourse concerning international criminal proceedings, the discourse is not always driven by a sincere concern about the rights of the accused. As Schabas writes, during the drafting of the Rome Statute where legality was a major topic the participants seemed to be more concerned about the consequences that might occur for the States themselves, rather

[376] See Biletzki 2010. "The work done by human rights organizations is ultimately political work and is naturally enlisted for political agendas. It is "defended" through the construct of universalism, but not just for practical or efficacious reasons. Rather, the defense arises from the understanding that universalism enjoins us to protect the victim and that such protection is essentially political in character. Political in character, but legal in procedure. " Ibid, p. 196.
[377] Id., p. 185.
[378] See id. for the term "universalism".
[379] De Frouville 2011, p. 634. He continues: "human rights are a specific way of establishing rules, not as objective norms, but as subjective rights. Why? For purposes of political foundation."

than individuals, since the core crimes are usually connected with State activities.[380] This demonstrates that authorities promoting human rights may often, in reality, be driven by political imperatives.

In the end, human rights represent vital values of the international society that go beyond positive law -the moral standards- and guide the formation of the law. However, the principle of legality requires that the inclusion of "the moral consideration" should not occur in courts applying the law but in the legislative process because moral norms lack clear and unambiguous content and basis. While human rights play an important role in the judicial process, guaranteeing the fair trial requirements etc., it is not for the court to integrate the moral standards they represent into substantive legal rules.[381]

International criminal courts should not be seen as platforms for promoting these norms. There are strong arguments not to let human rights law gain too much ground in the judicial arena. This may lead some people to question the basics of the *Furundžija* Trial Judgment where the customary law definition of the international crime of rape was broadened by resorting to "general principle of respect for human dignity". It is difficult to argue where this principle originated if not from ideologies of humanitarian law and human rights law, since it certainly did not clarify through a consistent State practice or generally acknowledged *opinio juris*, the two necessary elements of customary law.

But what should courts do when there is no law to apply? Many of the important decisions in the jurisprudence of the ICTY have been made in circumstances where there were no treaty provisions or clearly identified rules of customary law to apply. It seems that the *ad hoc* Tribunals have expanded the reach of ICL beyond positive law in these cases. It would be pointless to argue that the Court should have relied solely on existing rules of international law when a lacuna in positive law clearly existed. More importantly, would decisions convicting defendants of offenses, or under forms of liability, that were not part of positive law at the time have been foreseeable for the defendants? At least in the light of human rights law the jurisprudence of the *ad hoc* Tribunals has largely been in line with the principle of legality, which requires, according to the ECtHR, that the essence of the offence must remain and that the defendant should have reasonably foreseen innovations under the circumstances.

[380] Schabas 2010, p. 408.
[381] Arajärvi 2011, p. 171.

8.4.3 Utilizing Custom to Make Law out of Morality

Invoking the objectives of ICL, human rights law, or humanitarian law as a justification for rapid developments of law abandons the basic theories of custom formation. This opens the door for natural law arguments and subjective views of justice, both of which are against the basic idea of legality.[382] Unfortunately, the most important norms (prohibition of genocide etc.) are those which cannot be argued for by reference to consent or past behavior, but only by "moral law". This explains why the *ad hoc* Tribunals have not rigorously applied the traditional methods of custom formation when filling the gaps in positive law or "legalizing" these moral norms through the doctrine of customary law. Concepts like the objectives of law or immorality can easily be included in the *opinio* element of customary law. This causes *opinio juris* to constantly outweigh State practice in ICL, human rights law, and humanitarian law.[383]

In Koskenniemi's distinction between apology and utopia, Van Schaack notes that "utopians emerge dominant in international criminal law".[384] This is a result of the retrospective application of ICL. Since most international criminal tribunals were established after atrocities occurred, their objectives have consisted of condemning these past horrors instead of applying prospective penal codes to future events. As a result, no international penal code has had an opportunity to develop and thus moral condemnation has overweighed the recourse to positive law.[385] Fortunately, the ICC regime offers a welcome change to this state of affairs.

8.4.4 The Unattainability of Substantive Justice and Strict Legality

Thus judicial arguments struggle with balancing substantive justice and strict legality, but do not (or should not) solely resort to either of them since both these notions are unattainable. Rawls' distinction between "partial compliance" and "ideal" theory elucidate the reasons for this unattainability. In the *Theory of Justice* Rawls separates these two concepts in order to

[382] Koskenniemi argues that using humanitarian principles such as "elementary considerations of humanity" as the ICJ did in *Corfu Channel* case will either undermine the fundamental character of these principles (apologism) or abandon the standard definition of custom (utopianism). Koskenniemi 2005, pp. 400-402.
[383] Meron 1996, pp. 238-239.
[384] Van Schaack 2008, p. 192.
[385] Since natural law approaches have infiltrated the process of custom formation one could easily question whether the law is actually customary or something that distantly resembles it. The *Furundžija* Trial Judgment offers a good example of something that Koskenniemi characterizes as "behavior-related natural law". Koskenniemi 2005, p. 409.

address the matter – the theory of justice – under utopian circumstances. In order to construct his ideal theory (known as "Justice as Fairness") he had to set aside prevailing societal (real life) conditions. Thus, he created principles that were only applicable in ideal circumstances; the theory was never meant to be fully applicable in real life.[386]

As Leslie P. and John G. Francis note, the typical circumstances under which international criminal tribunals have been invoked are those of partial compliance, "situations of unfavorable natural circumstances and situations of widespread human injustice".[387] The genocide in Rwanda, where countless individuals were forced to participate in the ongoing slaughter on pain of death, is a perfect example. In the judicial aftermath of such events it is hard to imagine that both requirements, substantive justice and strict legality, could be fulfilled.

Thus, notions of substantive justice and strict legality are ideal principles, and not fully applicable in real life circumstances. Rather, they serve as the objectives of ICL, and they may even share the same goals, but they cannot be fulfilled simultaneously. Having a law that applies in all circumstances and produces fully just outcomes seems utopian. Therefore, we must accept that "the standards of justice must not simply be assumed to be those of ideal justice."[388] The same goes for legality. This is why the principle of legality sometimes hampers the aims of justice and vice versa.

Now, it is left to the judges to determine at which point between justice and legality *in dubio pro reo* should apply. This evaluation has been made on a case-by-case basis leaving the point of *beyond reasonable doubt* somewhat indeterminate. No doubt, this indeterminacy has been utilized throughout the history of the ICL regime. The Nuremberg trial has already aroused a never ending debate between natural law and positive law approaches. Fuller and Hart had their famous debate in the 1950s about whether the Nuremberg precedent violated the principle of legality by reaching an outcome that seemed to be morally acceptable but legally questionable. Whereas Hart promoted strict legality and "fidelity to law", Fuller argued that legality is rather a matter of the legislative process and that "the inner morality of law" should be appreciated in courts.[389]

[386] Rawls 2003.
[387] Francis & Francis 2010, p. 63.
[388] Id., p. 65.
[389] Hart 1958; Fuller 1958.

To date, there has been no clear solution as to whether natural law or positive law should prevail in the judicial arena. In ideal circumstances, the both would lead to the same outcome. What is evident, though, is that occasionally natural law has the upper hand on positive law even though the general trend has moved towards the latter. There are good examples of this. For instance, concepts such as the Radbruch formula and Martens clause work as backups in the judicial process, a process that generally aims to operate on positive law. Bohlander argues that natural justice represents a kind of "safety-valve" in the German legal system, even though the system otherwise tends towards positivism.[390] Quite similarly, in ICL there is an aspiration towards strict legality but also a desire to hold on to the magic wand of natural justice in order to remedy the unexpected emergence of gaps in the law.

8.5 Conclusions

Koskenniemi writes that in international law each discursive topic is "constituted by a conceptual opposition"; accordingly the discourse on progressive development of ICL is constituted by a juxtaposition between justice and legality, or naturalism and positivism, an endless struggle between two competing concepts attempting to be prioritized over one another. Furthermore, as Koskenniemi points out, these arguments, contradictory on first impression, in reality rely on each other since there cannot be law without justice or justice without law within ICL.[391]

According to Cassese, international law has long operated on the basis of *substantive justice* and has only recently turned to the doctrine of *strict legality*.[392] The retroactive application of international law in the WWII tribunals, and subsequently in the *ad hoc* tribunals, gave rise to the principle of legality on the international stage. One can certainly see the call for strict legality as a response to the overwhelming usage of moral argumentation as a justification for international convictions. However, it is unclear at exactly what point Cassese determined that strict legality overruled substantive justice. It seems that the application of substantive justice strongly prevailed even in relatively recent judicial praxis.[393] Nevertheless, the

[390] Bohlander 2009.
[391] Koskenniemi 2005, pp. 9-10.
[392] The recourse to substantive justice was resulted mainly from the absence of criminal rules providing individual responsibility when the first international crimes (in particular, crimes against humanity and crimes against peace) were created. According to Cassese, replacement of this doctrine by the strict legality happened for two reasons. First, the principle of legality was codified in a number of human rights treaties after the WWII. Second, the extent of ICL expanded greatly through conventional and customary law. Cassese 2008, pp. 38-41.
[393] Cassese has also noted this himself. Cassese 2006, pp. 416-417.

aspiration towards strict legality is an ascending trend; this is manifested in court rulings and academic writings.

The previous analysis of the ICTY's case law reveals that in the end the goal determines the methods and arguments used in judicial decision-making. For instance, in *Furundžija*, the only acceptable and justifiable solution was to identify the atrocities committed as criminal under international law. The judges turned to new sources again and again until they were able to articulate a solution that could be held both just and (objectively) ascertainable. This reveals the pragmaticalness of international law and conforms to Koskenniemi's observation that in international law (and particularly in respect of customary law) anything can be legalized.[394] With formally valid and coherent arguments lawyers and judges can pursue any objectives they wish.

The difficulty in applying the principle of legality in international proceedings is a collateral effect of international law's original purpose of regulating state conduct. Because of this, the methods of criminalization are different in international and national criminal justice systems.[395] Since the principle of legality is derived from national justice systems, it is no wonder international judges have difficulties applying it to the international environment. As long as customary law remains a primary source of ICL, strict positivism –and thus full implementation of the principle of legality in international criminal proceedings– is impossible.

Acknowledging this, judges in international criminal courts and human rights courts have allowed this principle to obtain distinctive features in international law. It is not a strict rule that is fully applicable in all circumstances but a general principle of justice that appreciates the objectives of ICL.[396] International criminal courts have convicted defendants of crimes and under forms of liabilities that were not part of positive law at the time of commission and thus have deviated from strict application of the principle of legality. However, the ECtHR has affirmed that the application of this principle does not demand strict legality; it requires that the essence of the offence remains and that the resulting development was foreseeable to

[394] Koskenniemi 2005, p. 409.
[395] Whereas in national systems the legislator defines the crimes, in ICL, States and NGO's draft treaties that embody international prohibitions. The crimes are rarely defined with accuracy and in terms of the basic elements of criminal conduct since much of the treaty drafting has been made by diplomats who are working in political environment and pursuing State interests. Van Schaack 2008, p.135.
[396] See id., ending up with similar conclusions.

the defendant at the time of commission. The jurisprudence of the *ad hoc* Tribunals has met these standards.

PART III

FUTURE PERSPECTIVES ON CUSTOMARY INTERNATIONAL CRIMINAL LAW

9. Future Perspectives on Judicial Law-Making

In a world of saints, no law is needed.
-Martti Koskenniemi

9.1 The ICC: Leading the Way towards Strict Legality

By determining that the Elements of Crimes and the RPE would not be left for the judges to decide but were to be set out at the Assembly of States, drafters of the Rome Statute minimized the law-making capacity of the ICC in this respect.[397] Seemingly, the more cautious approach expresses the member States' will to hold on to their sovereignty more closely. The elaborated and nearly exhaustive provisions of the Statute results in that the ICC does not have to resort to customary law provisions inasmuch as the UN Tribunals have had to. The Court is not, however, disabled from applying customary law. For instance, the Statute incorporates customary international human rights law as an essential part of the Court's applicable law.[398]

The provisions of the Rome Statute concerning legality provide good protection against several problems of retroactivity.[399] First of all, the ban of analogy and requirement of

[397] Boyle & Chinkin 2007, p. 276.
[398] Rome Statute, art. 21(3).
[399] Id., arts. 11 and 22-24. ICC also follows legality manifested in human rights law. See art. 21(3).

specificity are established expressly in the Statute.[400] The Statute also requires that ambiguities are to be resolved in favor of the accused (*in dubio pro reo*).[401] In situations involving only State parties the ICC follows the stricter version of the principle of legality (*nullum crimen sine praevia lege scripta*). However, problems may arise if the crimes are not defined with sufficient specificity (*lex certa* requirement) or if the Court interprets them expansively (*lex stricta* requirement).[402] These situations are unlikely to occur since the definitions of crimes are most accurate.

However, concern has been expressed particularly over the so-called "catchall" provision of the crimes against humanity, which includes "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" to the definition of the crime.[403] This provision is often characterized as a residual category of the crimes against humanity,[404] a clause that can be used to fill in gaps when other crime definitions are not applicable. In Katanga, Pre-Trial Chamber I defined *inhuman acts* as serious violations of customary international law and norms of international human rights law, "which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute".[405] The definition of *inhumane acts* still remains vague.

Unlike the UN Tribunals, the ICC does not have jurisdiction over incidents that have occurred before its creation.[406] The creation of new jurisdiction retrospectively to deal with crimes that have already happened is accepted in ICL.[407] However, as Gallant notes, retroactive court creation contains a danger of political abuse of the prosecution process.[408] In addition, since the ICC is created by a treaty, it most likely does not have to question its legal basis, as the UN Tribunals have done.[409] Thus the ICC is walking on safer ground in this respect.

However, the ICC may gain jurisdiction retrospectively over persons and crimes that were outside its jurisdiction at the time of commission (as long as the crimes were committed after

[400] Id., art. 22(2).
[401] Id., art. 22(2). The principle of complementarity, on the basis of which the ICC operates, can also be seen as enhancing the legality of the Court. Criminal proceedings are found to be more legitimate by some when the accused is not removed from his or hers "natural judge". Gallant 2009, pp. 290-293, 337.
[402] Id., pp. 333-336.
[403] See Rome Statute, art. 7; Gallant 2009, pp. 333-336; Schabas 2010, p. 409.
[404] Schabas 2010, p. 409.
[405] *Katanga* Decision on Charges, para. 448.
[406] Rome Statute, art. 11.
[407] A good example of this would be the *ad hoc* Tribunals.
[408] Gallant 2009, p. 320.
[409] See *Tadić* Appeal Decision on Jurisdiction, paras. 26-63; *Norman*.

its creation). There are at least two ways in which the ICC may do this.[410] Firstly, a non-party State may accept the jurisdiction of the ICC over acts that have already occurred.[411] Secondly, the UN Security Council may refer a situation involving non-party State to the ICC retrospectively.[412] In both of these cases, the ICC would be able to prosecute crimes over which it had neither jurisdiction to prescribe nor jurisdiction to adjudicate at the time of commission. This raises a question whether the Court can apply the provisions of the Rome Statute in these situations since a person who is national of a non-party State and who has committed an act in a non-party State before the ICC's intervention has not been bound by the provisions of the Rome Statute at the time of commission. According to Gallant, the prosecution in these two situations requires some other source of substantive law applicable at the time, so the Court would most likely apply customary international law existing at the time of commission.[413]

It is controversial whether the crimes of the Rome Statute can be applied to acts committed before the Security Council's referral or acceptance of jurisdiction by a non-party State. While Gallant argues that this is inconsistent with the Statute's provisions concerning legality, some authors approve this, at least in cases of referral by the Council.[414] According to Schabas, article 22(1) of the Rome Statute "excludes any possibility of prosecutions for offences based solely upon customary law."[415] Thus, the Court would have no choice but to apply the provisions of the Statute to such acts. What is evident, however, is that when ICC obtains jurisdiction retrospectively, it does not apply the strictest version of the principle of legality.

On the face of it, there would be no contradiction if all the crime definitions in the Rome Statute were exactly the same as in customary international law. But this is hardly so. Although most of the subject-matter provisions of the Rome Statute are similar with customary law provisions, the Rome Statute clearly distinguishes between the law of the

[410] For a possible third way, see Gallant 2009, p.338.
[411] Rome Statute, art. 12(3).
[412] Id., art. 13(b).
[413] According to Gallant, other options would be to apply treaty law, general principles of law, or as a final possibility, the law of the State where the crime was committed. The last option would mean that a domestic crime would be imported from national law to international law. The use of national laws, or as Gallant phrases it, the retrospective re-characterization of domestic crime to a violation of the Rome Statute, is no doubt controversial. Gallant 2009, p. 337-341.
[414] Id., p. 342; Sadat 2002, pp. 12 and 138-139; Schabas 2010, p. 301.
[415] Id., p. 407.

Statute and the law outside the Statute.[416] In fact, the extremely detailed definitions of the core crimes complemented by the Elements of Crimes seem to response to the indeterminacy that prevails over the customary law definitions of these crimes. Yet again, the crime definitions of the Rome Statute have contributed to the content of customary international law to some extent.

In the end, the law of the ICC is far more foreseeable and accessible than the law of the Tribunals. Schabas emphasizes that the provision of the Rome Statute on strict construction marks a contrast with the jurisprudence of the *ad hoc* Tribunals, which has given only little significance to this principle. In respect of applicable law, the crime definitions of the Rome Statute correspond largely with their customary law counterparts. This means that the even if the ICC would gain jurisdiction retrospectively, the number of situations where judges of the ICC had to figure whether a crime in the Rome Statute constitutes also a crime under customary international law is most likely to remain low.

Gallant argues that a strict recourse to legal principle is essential if ICL is to become a convincing enterprise. According to him, stricter enforcement of legality is needed to make international criminal justice system more effective. However, it is most unlikely that the strictest form of legality, i.e., *nullum crimen sine lege praevia scripta*, would be applied in ICL. Hardly even the ICC will amount to this in its jurisprudence.[417]

9.2 The End of an Era: Judicial Law-Making at its Close

When evaluating the jurisprudence of the *ad hoc* Tribunals one should bear in mind the circumstances in which the courts were established. Indeed, the timing for their establishment was propitious for the progressive development of ICL. The evolution of individual accountability and crime definitions that started at the WWII tribunals, but froze for the Cold War period, started to flourish again in the 1990s. Accordingly, some have characterized the end of the Cold War as the beginning of the "renaissance of international criminal justice".[418] The end of the 20th century was an era "marked by goodwill, enthusiasm, and great expectations".[419] Moreover, it was the time for judicial law-making.

[416] Rome Statute, arts. 10 and 22(3).
[417] Gallant 2009, p. 405-406.
[418] Schabas 2012, p. 14.
[419] Raimondo 2010, p. 59.

As there prevailed no consensus over the content of ICL, the establishment of the *ad hoc* Tribunals was a step towards a more coherent set of rules, and this certainly contributed to the drafting of the Rome Statute. Thus, one could say that the power of elaborating new rules of international law was transferred from State conferences, via the Security Council, to judges' chambers at the *ad hoc* Tribunals. Yet, it was still the law of the States, since the Tribunals were only allowed to search for already existing rules that had emerged from the States' own practices and declarations.

Although the legitimacy of the UN Tribunals is nowadays widely accepted, one should not disregard that they still represent remarkable exceptions as an institutions applying criminal legislation since they are courts operating without criminal codes. Therefore, it has been largely for the judges to discover the unwritten rules of ICL they were to apply. In the absence of consistent State practice or even international judicial praxis in which to rely on it seems almost ironical that the subject-matter jurisdiction of the *ad hoc* Tribunals was decided to derive from customary international law. The judges were forced to create the body of law out of the scarce material they had in their hands. Their work answered to the needs of the time, but now time has changed. Although the judicial activism of domestic courts is predicted to continue in the future,[420] the case may not be the same for international criminal courts. Several authors foresee that the era of judicial law-making may be coming to an end as the *ad hoc* Tribunals are ending their work.[421]

The starting point of the *ad hoc* Tribunals must be contrasted with the establishment of the ICC. During the 1990s, ICL underwent a significant transition from underdeveloped body of law to a more coherent system that is now rich with international jurisprudence. This made the job easier for the drafters of the Rome Statute since they could pick and choose applicable rules from the practice of the Tribunals. It is no coincidence that the ICC's provisions on war crimes in non-international armed conflict, for example, are quite similar with the findings of the ICTY. The ICC, a treaty-based institution with an elaborated and nearly exhaustive Statute, has no need to rely on customary law inasmuch as the Tribunals were forced to. Even if it does this, the customary rules it relies on may already be discovered and defined by the Tribunals with sufficient clarity.

[420] Iovane, 2012 pp. 623-624. Iovane emphasizes that recent activism of national courts in interpreting international law has marked a turning point in the formation of customary international law as the domestic courts have not settled to merely apply existing customary law, but have developed it in a creative manner.
[421] See, e.g., Darcy 2010, p. 127; Gallant 2009, p. 369.

As noted, the application of the principle of legality is becoming increasingly comprehensive. This can be noticed in several ways. The increasing codification of ICL and the establishment of the ICC have played a major role in this respect, but one must not forget the work that the *ad hoc* Tribunals have done. Even though their jurisprudence has downplayed the importance of the strict recourse to the principle of legality, the judges have acknowledged the importance of this principle in international criminal proceedings. Even a quick overview on the bulk of the arguments used in the aforementioned cases reveals that the more judges of the *ad hoc* Tribunals have departed from clear cut regulations the more they have put on an effort in explaining these deviations in terms of legality. As demonstrated, the recourse to the stricter version of the principle of legality (*nullum crimen sine praevia lege scripta*) seems to be an ascending trend.

9.3 The Fragmentation of Customary International Criminal Law

The increasing number of autonomous and hierarchically equal international criminal courts and tribunals has resulted to a number of divergent interpretations and applications of ICL. As each court produces its own substantive law, disparities cannot be avoided.[422] The horizontal relationship of international criminal courts causes fragmentation since there is no entity that would have the authority to decide which interpretation of law is correct. In addition, there exist inconsistencies between international law and national laws that cannot be fixed.[423]

As a necessary change to this state of affairs, several scholars suggest some kind of harmonization of international law. This could be carried out by creating authoritative judicial bodies[424] or other entities[425] at the international level. One should neither forget the importance of the ICRC-study nor the Rome Statute as some degree of codifications of customary international law. But as Koskenniemi notes, it is an insurmountably problematic

[422] Bennouna 2012, p. 287.
[423] Cassese 2012 (B).
[424] See, e.g., Cassese 2012 (B), suggesting that a new judicial body with compulsory jurisdiction should be created in order to remove inconsistencies between international law and national laws. See also Clapham 2012, pp. 323-325, proposing for a World Court of Human Rights to answer to the problems of transnational violence. Acknowledging the utopian flavor of this vision, Clapham still emphasizes the value of this idea as an aspiration to something that would be "the logical development of the project to protect human rights through international law."
[425] Bennouna suggests a creation by the UN General Assembly of a new expert body that would be modeled after the International Law Commission. This expert body would ensure "the progressive development of international law and its codification" required in article 13 of the UN Charter. The main task for this body would be to identify and analyze different interpretations of international law submitted by different international tribunals. Bennouna 2012, pp. 293-294.

idea that one authority would have the capacity, in the name of objectivity and neutrality, to speak for everyone, to express the viewpoint of all.[426] On the other hand one can ask whether such harmonization is necessary.[427] Jérome de Hemptinne argues that the international criminal justice system is in need of certain decentralization in order to improve its cohesion, efficiency, and transparency. According to him, future international criminal prosecutions should be directed to regional or sub-regional internationalized *ad hoc* courts, where the trials would be as close as possible to the population concerned.[428]

Universalization of ICL is a complex matter since criminal law is in the very heart of the sovereignty of States. Different criminal traditions may diverge so profoundly that they are not compatible with each other. Cassese proposes that some primacy should be given to international rules over national laws.[429] However, one should take account the decentralized structure of the international criminal justice system. Prosecuting perpetrators of the core crimes in sub-regional *ad hoc* courts allows judges to take account the cultural underpinnings of the local legal tradition(s).

As a consequence, this would inevitably cause some fragmentation of ICL. It is though better compared to an aspiration towards universal, no doubt Western-modeled criminal justice system that would not take account the diversity of regional legal traditions. To make a point, such fundamental concepts as "freedom" have different meaning in Islamic (legal) tradition. In respect of this, grounding general custom on principles such as "the principle of human dignity" would certainly arouse disagreement on the content of law. These regional differences are perceptible not only at domestic level but also in different international criminal tribunals.

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[426] Koskenniemi 2012, pp. 9-11.

[427] Greenawalt argues that the search for consistency and uniformity is misguided and that the law applicable to the core crimes should not be the same in all cases. However, several scholars (including Greenawalt himself) seem to agree upon that some amount of harmonization is needed and that some basic values of ICL should be the same for all. Greenawalt 2011; see also Bennouna 2012, pp. 291-293; De Hemptinne 2012; and Van Sliedregt 2012.

[428] De Hemptinne argues that a hierarchically organized international criminal judicial order is a utopian idea. Instead, he sees a need for decentralizing cases from the ICC to local courts and truth and reconciliation commissions. This way, certain harmonization of national criminal law could be achieved without disrespecting national legal traditions, as long as the most fundamental standards of international criminal justice are respected. While only few cases would be referred to the ICC, it would still issue "instructive rulings based as much as possible on customary international law". De Hemptinne 2012. Cassese also suggests that in order to achieve some coherence on the international stage, the process should be started within regional groupings. Cassese 2012 (B), p. 199.

[429] Id.

In the field of Human rights law there is a number of regional human rights courts promoting regional human rights standards. As there seems to be no single future for these courts, as Evans suggests,[430] it may be that there is no such thing for international criminal courts either. It could be that the interaction between the ECtHR and the ICTY may not have that much effect on the ICL as a whole but as a regional phenomenon. Thus, the customary law made in the *ad hoc* Tribunals may be only regional or tribunal-specific.[431] Thus, we should not focus our attention on whether fragmentation of ICL is something to object but rather how we are to manage it.[432]

First of all, ICL should acknowledge the environment in which it operates. Consistency at the international level may cause inconsistencies at the domestic level.[433] The SCSL, for instance, operates in such circumstances where it has to take account certain national crimes under Sierra Leonean law. Greenawalt has addressed the impact of domestic laws in ICL in his paper on pluralism. Rather than aspiring to form a single universal code of ICL, he distinguishes between four tiers of ICL: (1) universally binding law, (2) tribunals-specific law (3) restrains on domestic law, and (4) default law.[434] As I focus on the law of international criminal courts, I see the distinction between universally binding law and tribunal-specific law very useful.

According to Greenawalt, ICL establishes some common rules that are universally binding, e.g. the definitions of the core crimes and some liability forms. I agree that the crime definitions of the war crimes, genocide, and the crimes against humanity are elaborated in case law and treaties to the extent that they amount to the corpus of universally binding ICL.[435] This is due to the Genocide Convention, the Rome Statute, and most importantly, the jurisprudence of the *ad hoc* Tribunals. What comes to tribunal-specific law, there is no need to unify inter alia procedural regulations or even some parts of substantive law of different international courts. The Rome Statute is very precise on this.[436]

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[430] Evans 2012.
[431] For instance, The ICTY's ruling on *Erdemović* that that duress cannot serve as a defense for murder but as a mitigating factor in sentencing seems to have no precedential value outside the jurisprudence of the ICTY.
[432] Van Sliedregt 2012; Greenawalt 2011.
[433] For instance, excuses such as duress may not apply when a crime is categorized as an international crime. Id., p. 1068.
[434] Id., p. 1122.
[435] There are still some differences in the definitions of these crimes between the ICC and the *ad hoc* Tribunals, but it would not be reasonable to expect that full unity could be achieved.
[436] The Rome Statute art. 10.

As noted, customary international law has been a primary source of law in the *ad hoc* Tribunals whereas the Rome Statute has lowered it on the second place in its hierarchical layout of sources.[437] However, still the ICC possesses some "potential universality", as Greenawalt puts it.[438] With a referral from the Security Council, the Court may be able broaden its jurisdictional scope to crimes committed anywhere in the world and in these cases it may have to apply rules of customary international law. In contrast to all former international criminal courts, the ICC "truly aspires to achieve universality in its application of ICL."[439]

Although the jurisprudence of the ICTY currently dominates ICL, the enterprise of international criminal justice is soon to exist in the form of the ICC. As noted, the jurisprudence of the ICC departs from the *ad hoc* Tribunals' case law on some matters.[440] In future, judges of the ICC have the power to choose whether they seek consistency with the jurisprudence of the *ad hoc* Tribunals. By relying heavily on the Rome Statute in their practice they could diminish the importance of the law created by the Tribunals. But if the judges of the ICC were to follow the jurisprudence of the *ad hoc* Tribunals they could participate in creating a coherent body of law that might come closer to universally applied ICL. However, the limits within which the judges work are somewhat narrow. If the jurisdictional scope of the Court is to be limited only to its member States, then its effect on the formation of customary ICL is going to be modest.

To conclude, international courts are very diverse in reach (universal, regional), jurisdiction (general, regional), composition (international, hybrid) and substantive law. Bennouna notes that even though each court operates independently, they are not each entirely self-contained systems, as has been asserted by the ICTY.[441] There exists inevitably some degree of interaction between international tribunals since their judges cannot ignore other tribunals' case law when dealing with same matters.[442] Instead of aspiring to create a unitary ICL we should acknowledge the pluralism inherent in its creation, the fact that it builds upon several criminal justice systems.[443] Although some fundamental merits (right to fair trial etc.) should

[437] Id., art. 21.
[438] Greenawalt 2011, p. 1079.
[439] Kreß 2009, p. 143.
[440] For example, ICC's provisions concerning the defense of duress, aiding and abetting, and command responsibility differ from the case law of the ICTY. For aiding and abetting see Rome Statute art. 25(3)(c) and *Furundžija*. For command responsibility see Rome Statute art. 28.
[441] *Tadić* Appeal Decision on Jurisdiction, para. 11.
[442] Bennouna 2012, pp. 288-289.
[443] Greenawalt 2011, p. 1129.

be uniform in all international proceedings, the usefulness of hybrid tribunals lies in the fact that they can pay attention the local social needs, cultural underpinnings, and objectives of national laws.

10. Concluding Remarks

It is phenomenal how international law, an instrument for governing State's relations, has turned into a penal code applied in criminal proceedings. Considering the aims and purposes of the enterprise of international criminal justice, international law is still too centered on States. For instance, perpetrators of the core crimes still have good opportunities to hide behind the shield of a state's sovereignty. To make the system more efficient and to fight against impunity, we must adapt to changes that have already occurred in the formation process of international rules since we need faster means to create obligations and prohibitions *erga omnes*. We must acknowledge that the emergence of individual accountability on the international stage has changed the understanding of the sources of international law. In respect of custom formation, the traditional theory of ascertaining customary law seems to be outdated in that nowadays entities other than States are gaining more and more ground in forming the practice and *opinio* of custom. In this respect, international criminal courts are playing an important role.

International courts still try to resort to the two basic elements of custom in identifying customary law. However, they seem to acknowledge the changing nature of international law and its sources. In general, the addressed case law reveals that the amount of support that a customary norm requires from State practice and *opinio juris* seems to depend on the value and importance of the norm in question. Even case law that may not have been in-line with the principle of legality can be accepted as legitimate for future application. Particularly in the field of ICL, fundamental moral and ethical values have infiltrated the process and transformed it into a more *opinio juris* oriented activity.

The rules of customary ICL are often identified in international proceedings, an act which itself contributes to creating those rules, by not only identifying them but also evidencing their existence. Sometimes the element of State practice, i.e., external behavior of States, becomes almost irrelevant because large amount of the practice that creates the rule arises out

of the identification process itself. Indeed, the post-Cold War phenomenon called *judicialization of international law* has been very much alive in the *ad hoc* Tribunals.[444] It is important that international criminal judges acknowledge the significant role they play in the process and remain cautious when identifying rules that do not clearly represent *lex lata*.

10.1 Law of the *ad hoc* Tribunals

The law of international crimes is a body of law that has been refined on several occasions by international criminal courts, particularly the *ad hoc* Tribunals. As Mettraux notes, one of the major achievements of the *ad hoc* Tribunals was uncovering a whole body of law that had been hidden during the Cold War. By identifying these rules, whose existence under international law was uncertain, the Tribunals have steered international law towards a more human rights-oriented reading.[445] However, the jurisprudence of the Tribunals includes several inconsistencies between various decisions, judgments, and *obiter dicta*. A reasonable observer does not rely on individual cases but tries to see the big picture. Even international judges make mistakes or change their views along with changing societal conditions and moral values. Some cases represent remarkable precedents, some deplorable deviations from the main policy. Lessons must be learned, and the legacy of the Tribunals lies in both their achievements and their errors.

The *ad hoc* Tribunals' use of sources to define, among other things, elements of crimes and forms of personal criminal liability has been an area of controversy and disagreement. Their methods have been pragmatic and aspirational and they have often associated customary law with the other sources of law, namely general principles of law and judicial decision. This has obscured the content and even the whole concept of custom; it has become a general source of law that comprehends all kinds of activities and values. But this has not merely been a choice of the judges of the *ad hoc* Tribunals, rather, it seems that they had no other options for dealing with the situation because there simply were not enough rules for them to apply.

Regardless of the significant contribution of the *ad hoc* Tribunals' jurisprudence, ICL still remains a fragmented and imperfect body of law. The law of the *ad hoc* Tribunals does not represent universally applicable criminal law.[446] However, other courts, both domestic and

[444] On the term, See Bennouna 2012, pp. 287-289; Iovane 2012, p. 623.
[445] Mettraux 2005, p. 364-365.
[446] "Given the apparent general acceptance of the Tadić jurisprudence in spite of the simultaneous perception of judicial lawmaking is it safe to assume that the international community is ready to add international judicial

international, have adopted several of the Tribunals' developments. Some of these developments have even made their way into the Rome Statute. Thus, it is evident that the Tribunals have developed ICL to some extent. Although the Tribunals' job has been to identify rules that were already beyond doubt part of customary international law, some of the rules will only achieve their final customary law status outside the jurisprudence of the Tribunals after they have been approved by the community of nations. The future work of the ICC, principally the extent to which its judges appreciate the law of the *ad hoc* Tribunals, will be prominent.

10.2 The Principle of Legality

The principle of legality, which has allegedly obtained a status of customary international law,[447] has increased in significance to ICL after the World War II trials. Still, in the jurisprudence of the *ad hoc* Tribunals the ban of retroactivity and the requirement of specificity have bent before the needs of justice. In some cases, the manifest wrongfulness of the conduct has provided the justification for criminal convictions. As to foreseeability, incurring punishment for acts *malum in se* prevails over a rigid positivist approach to definitions of crimes. As Van Schaack writes, within ICL foreseeability builds upon several factors, such as applicable domestic law, universal moral values expressed in human rights law, developments in humanitarian law, prevailing circumstances, and overall changes in international order.[448]

This results from the more complicated criminalization process in international law which causes the definitions of crimes to be more ambiguous and open to interpretation. Since international criminal courts have mainly operated with customary law in the 20th century the principle of legality has obtained distinctive features in international proceedings compared to its national counterparts. It has proved to be more flexible, allowing judges to invoke objectives of ICL and the immorality of acts as interpretational methods in determining the legal limits of criminal offences and liability forms. Although the *ad hoc* Tribunals' work has been subject to severe criticism, they seem to have followed the human rights standards of

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decisions as a new source of international law, to give rise to pre-emptive custom? The answer is firmly in the negative." Hoffmann 2010.

[447] Gallant 2009. The main argument of Gallant's book is that the rule of *nullum crimen, nulla poena sine lege* has obtained a status of customary international law. In addition, he argues that it is still uncertain whether the rule has also become *jus cogens*. See, e.g., pp. 8-9, 404.

[448] Van Schaack 2008.

legality set out by the ECtHR since they provided interpretations of law that have been reasonably foreseeable and consistent with the essence of the offences.

These rather ambiguous standards clarify the contradiction between customary law and the ban of retroactivity. Although the principle of legality requires that crimes be defined beforehand and with sufficient clarity, crimes based on customary international law are inherently indeterminable; one cannot determine the exact moment they started to exist, i.e., became punishable under international law. Even judgments of international criminal courts may not suffice to prove the universal customary status of a rule, as evidenced by cases concerning the defense of duress and the JCE doctrine. Under one perspective, these courts do not create rules of customary international law but only declare their existence under the given court's jurisdiction.

In terms of foreseeability, Schabas provides the most enlightening view of its true essence in customary law: "Even if law is not written down, this does not mean it did not begin at some point in time. The existence of the norm is explained by evolving values and their attendant prohibition. These are foreseeable and accessible to a potential offender. We do not need abstract and eternal morality to get this result."[449] Deviating from strict adherence to the *nullum crimen* principle is approved whenever the offence engages vital moral values. This is evident from the spousal rape cases of the English common law system to the evolving definitions of the international crime of rape. As moral values continue to develop, so do the definitions of crimes, liability forms, rules of immunities, etc. Although judges know the law and are obligated to apply it, individuals often evaluate their acts on the basis of their moral perceptions. Thus, the foreseeability of a criminal conduct always relies on moral perceptions and evolving values of society. This is evident with respect to the core crimes since they are associated with the core values of the international community.

10.3 Between Justice and Legality

From the Nuremberg trials onward the principle of legality has been characterized as a "general principle of justice".[450] Considering the tension between justice and legality in the judicial process (the fact that the principle of legality ensures mainly the rights of the accused,

[449] Schabas 2012, p. 71.
[450] *Nuremberg IMT Judgment,* Part 22, para. 219; Schabas 2010, p. 403.

not victims), this may come across as a rather contradictory expression, but it reveals the juxtaposition that is inherent to international criminal proceedings.

International criminal judges are forced to balance positive law and natural law approaches. Even as they attempt to avoid producing an unjust outcome they must also make every endeavor for maintaining the credibility of the international criminal justice system. Since international criminal trials are usually carried out after devastating events that have shocked the world order, these courts' establishments may often be politically affected and their proceedings under high public attention. Therefore, judges of these courts are pressured to produce justice for the victims as well as respond to public expectations, concerns that should not be part of the judicial process. The challenge international criminal judges face is ineffably formidable. In order to meet this challenge, they must provide solutions that are both just and (objectively) ascertainable.

Given this, it may often be difficult for the judges to distinguish between *lex lata* and *lex ferenda*, but also between legal and moral norms. Nevertheless, searching for rules that go beyond existing law diminishes their validity since they become vulnerable to subjective perceptions. The principle of legality simply rejects the idea that a judge would know what justice is. If this was the case, no laws would be needed in the first place. Thus, the rule in question should always be objectively ascertainable. In this objective inquiry, judges distance their rulings from their subjective perceptions. But as we have seen, the eye of the law is not omniscient. Hence, judicial arguments identifying the boundaries of criminal conduct cannot always (if ever) resort solely to strict legality, but must reconcile strict legality and substantive justice. It is left to judges to decide where the line should be drawn.

10.4 The Future of Judicial Law-Making

Over the last two decades ICL has undergone a tremendous transformation due to the establishment of several international criminal courts. In the absence of positive law ICL has operated largely on the basis of substantive justice. Now, as the *ad hoc* Tribunals are ending their work and the ICC is starting to produce its judicial praxis the ascending trend leans towards strict legality. This means that statutory texts are gaining more ground and, as a result, the principle of legality is becoming a more rigid rule (rather than a principle of justice) allowing no deviations even in exceptional circumstances.

The desire to punish the perpetrators of the core crimes by any means necessary remains strong in the international community. However, a transformation of the *nullum crimen* principle from *sine iure* to *sine lege* is an ascending trend, a direction of change welcomed by all the supporters of international criminal justice. Fidelity to law becomes reality in judicial proceedings as ICL is positivising; the definitions of crimes are determined more precisely and they are codified in written instruments. Because of the recent developments in ICL, international criminal courts may no longer be compelled to operate on the basis of substantive justice. Instead, they are afforded the opportunity to improve the legal basis of ICL by heading towards strict legality, as Cassese predicted. While the ICL has, throughout history, been in a continuous phase of transition, the incipient era marks the end of substantive law's most dynamic transitory phase.

Afterword

Judicial praxis that interprets and develops law at the same time is like a vicious cycle. By identifying a rule that has generated from custom, judges simultaneously generate custom by verifying the existence of that rule. There is no doubt that they work within the customary law-making process. On the judge's bench customary law becomes a self-producing product that increases at the same rate as judges do their work. This can be seen as a hermeneutic process in which judges create content for the rules they aspire to discover.

Usually when judges try to find support for their findings on customary law they turn to the basic elements, the practice and opinion of States, but in fact it may be the establishment of the rule that provides the necessary and vital support for its existence and its future application. Sometimes the rule in the formation becomes dependent on the judicial process establishing it. Therefore, identifying the rule does not always result in distinguishing between *lex lata* and *lex ferenda*. This encompasses the whole framework of the interpretive process and its inability to keep legislative and judicial tasks separate.

It has been my intention to clarify the process of the formation of customary law within ICL rather than to obscure it. Hopefully I have managed to do this. In addition, I have tried to introduce readers to some important issues concerning the progressive development of customary international law. At the end of the day, a number of questions still remain unsolved. Many of them are questions to which no legal answers can be given.