

2012

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## Recommended Citation

Mary Fan, *Custom, General Principles and the Great Architect Cassese*, 10 J. INT'L CRIM. JUST. 1063 (2012),  
<https://digitalcommons.law.uw.edu/faculty-articles/114>

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# Custom, General Principles and the Great Architect Cassese

Mary Fan\*

## Abstract

*Major advances in international criminal law and procedure rose on the trusses of judicially elucidated sources of international law — custom and general principles. These sources depend on the crucial art of derivation advanced by the architect of modern international criminal justice, President Antonio Cassese. What has transformed international criminal justice into flourishing law able to address changing configurations of violence is the development of the art of finding law in the dark and wilds of murky unwritten norms. President Cassese pioneered paths through a perilous bog. '[T]he law lives in persons,' and to understand the law one must study the vision of the persons who animate the law, another great scholar and judge wrote. In that spirit, this article explores advances in the art of elucidating custom and general principles in international criminal justice through the lens of President Cassese's legacies and views on legality, sovereignty and the imperatives of humanity. The result are major landmarks in the prosecution of international crimes, such as developing protections in armed conflict and against sexual violence — and also progress in developing defenses and protections for the accused. The article distills lessons to guide the elucidation of customary international law and general principles from national systems and to regulate the transposition of concepts from national criminal law into international criminal law.*

## 1. Introduction

### A. *Construing and Constructing International Criminal Law for Evolving Challenges*

Advances in international criminal law such as developing protections backed by criminal sanctions during armed conflict and bringing sexual violence out

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of the margins of international law are oft and justly celebrated.<sup>1</sup> Less-heralded is the major development that made possible the progress during international criminal justice's astonishing growth spurt. What has transformed international criminal justice into flourishing law capable of meeting modern challenges is the evolution of the art of finding international criminal by elucidating custom and general principles. President Antonio Cassese blazed and lit the way, developing the techniques of finding law using these potent sources through the perilous dark and wilds of political contestation and murky norms.

The renaissance of international criminal justice that began with the launch of the International Criminal Tribunal for the former Yugoslavia (ICTY) also revived custom and general principles as sources of law.<sup>2</sup> These judicially elucidated sources of unwritten international law enable adjudication to keep up with changing configurations of violence that far outpace the slow codification of international criminal law.<sup>3</sup> Article 38 of the Statute of the International Court of Justice (ICJ) recognizes both 'international custom, as evidence of a general practice accepted by law' and 'general principles of law recognized by civilized nations' as sources of international law.<sup>4</sup> In practice, however, extensive treaty practice often obviated the need to divine general principles and custom until the launch of modern international criminal justice — a newer field with a paucity of treaty rules and rapidly evolving challenges.<sup>5</sup>

- 1 See e.g. T. Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals', 100 *American Journal of International Law (AJIL)* (2006) 551, at 567; G.K. McDonald, 'Problems, Obstacles and Achievements of the ICTY', 2 *Journal of International Criminal Justice (JICJ)* (2004) 558, at 568 and note 53; P.M. Wald, 'ICTY Judicial Proceedings: An Appraisal from Within', 2 *JICJ* (2004) 466, at 471–472; S.D. Murphy, 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', 93 *AJIL* (1999) 95. For victims' views about achievements in recognizing the harms of sexual violence, see D.F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Institute, 2010), at 17–18, 71–72.
- 2 See A. Cassese, 'The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the Ascertainment of General Principles of Law Recognized by the Community of Nations', in S. Yee and W. Tieya (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge, 2001) 43, at 45–46; Wald, *supra* note 1, at 471.
- 3 For a view of law as the process of ascertaining changing normative foundations and discussion of the dynamism permitted by general principles see A.C. Voigt, 'The Role of General Principles in International Law and their Relationship to Treaty Law', 31 *Retfærd Årgang* (2008) 3, at 4, 10–11.
- 4 Art. 38 ICJSt. While the ICJ Statute refers to general principles 'recognized by civilized nations' today, 'all Member-States of the United Nations are presumed to be civilized nations'. M.C. Bassiouni, 'A Functional Approach to "General Principles of International Law"', 11 *Michigan Journal of International Law* (1989–1990), 768, at 783–784. See also B. Cheng, *General Principles of Law As Applied by International Courts and Tribunals* (Grotius Publications, 1987), at 25 (explaining the adjective 'civilized' was meant to exclude the 'law of primitive communities which were not yet civilised' but now 'must be considered as merely redundant, since any State which is a member of the international society must be considered as civilized').
- 5 See e.g. Cassese, *supra* note 2, at 46; F.O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff, 2008), at 8–16, 71–74; T. Meron, 'Revival of Customary International Humanitarian Law', 99 *AJIL* (2005) 817, at 817, 821–832.

The very dynamism enabled by the vigorous revival of custom and general principles has drawn criticism, however. Critics claim that judges have used the cover of custom and general principles to pursue preferences for how the law *ought* to be rather than *is*, to the detriment of the accused and the legality principle expressed in the maxim *nullum crimen sine lege* (no crime without pre-existing law).<sup>6</sup> Indeed, despite the ICJ Statute's inclusion of custom as a source law, during the framing of the Rome Statute of the International Criminal Court (ICC Statute) there was serious consideration of precluding customary international law as a source for identifying crimes.<sup>7</sup> Fueling the debate on judicially derived sources are competing worldviews about (1) whether the domestic-law version of legality fits in the international context, (2) how to balance the interests of individual accused with the community's interest in accountability, and (3) whether the imperatives of humanity should temper the strong solicitude for state consent embedded in demands for written codification or strong proof of state usage.

These competing worldviews and the debate over the use of judicially derived sources remain important as international criminal justice continues to forge forward in meeting the challenges of evolving conflicts and modes of violence. Indeed, Article 21 of the ICC Statute provides that 'principles and rules of international law, including the established principles of the international law of armed conflict' are secondary sources of applicable law.<sup>8</sup> '[G]eneral principles of law derived by the Court from national laws of legal systems of the world' — the modern version of the ICJ Statute's 'general principles of law recognized by civilized nations' — also remain a guide to finding and forging law, albeit officially designated a subsidiary source.<sup>9</sup>

This article explores advances in the art of elucidating custom and general principles through the lens of President Cassese's legacy and views on legality, sovereignty and the imperatives of humanity. Another great scholar and jurist, Judge John T. Noonan, Jr, wrote that the law lives in persons and to understand the law, one must study 'the persons in whose minds and in whose interaction the rules have lived'.<sup>10</sup> To understand the course of international criminal law and its future, one must understand the influences of its major modern architect and intellectual father, President Cassese. He led international criminal justice through landmark developments in the prosecution of international crimes — and also in the development of defences and protections for the accused. The article terms his bold approach to finding and forging international criminal law from custom and general principles visionary

6 V.-D. Degan is a particularly vehement critic in this vein. V.-D. Degan, 'On the Sources of International Criminal Law', 4 *Chinese Journal of International Law* (2005) 45, at 47–48, 75–76, 78.

7 S. Lamb, 'Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law', in A. Cassese, P. Gaeta and J. R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford University Press, 2004) 733, at 749 and note 63.

8 Art. 21 ICCSt.

9 *Ibid.*

10 J.T. Noonan, Jr, *Persons and the Masks of the Law* (University of California Press, 1976), at 4, 6.

legal construction. While controversial, his method of bold and creative interpretation of international criminal law laid a crucial foundation for international criminal justice's advances.

The article proceeds in three parts. Section 1 frames the article by explaining the need to gap-fill in international criminal law. The analysis explores how competing visions about how legality should be adapted in the international context and the evolving interest of humanity over sovereignty inform approaches to finding and forging law. Section 2 explores the important role of custom and general principles in decisions involving President Cassese with enduring import for current and future international criminal cases. The discussion covers landmarks in the prosecution of international crimes, including protections in armed conflict in an era where the distinction between internal and international conflict blurs; liability among multiple actors for mass atrocities; and rape and other forms of sexualized violence as the predicate of international crimes. The discussion also covers the development of defences and protections for the accused, including the defence of duress to killings and the rights of the accused to communicate freely and confidentially with counsel.

Section 3 concludes by distilling important lessons from President Cassese's body of work about the use of custom and general principles as sources of law and the transposition of concepts from national criminal law into international criminal law. This part also discusses the enduring import of his visionary interpretation approach today. International criminal law has advanced to more law-like codification to guide future cases. But the challenges and open questions posed by changing configurations of conflict and violence still require the courage and discipline of visionary interpretation that President Cassese pioneered.

## ***B. Gap-Filling and the Visionary Architect of Modern International Criminal Law***

President Cassese is oft-described as 'the chief architect of modern international criminal justice'.<sup>11</sup> The builder metaphor is apt. In international criminal law, particularly at its modern jumpstart with the founding of the ICTY, judges had to build in a very primal way. Jurists had to forage for the very materials — evidence of unwritten customary rules or general principles — from which to construe and construct law.<sup>12</sup> A nascent branch of international law, international criminal law had vast gaps between readily discernible law and the aspiration of accountability.<sup>13</sup> Unlike in mature domestic systems,

11 M. Simons, 'Antonio Cassese, War Crimes Law Expert, Dies at 74', *New York Times*, 24 October 2011, at A11.

12 See A. Cassese, *International Criminal Law* (Oxford University Press, 2008), at 4–5 (explaining the rudimentary nature of international criminal law and how judges must frequently search for custom and general principles).

13 See e.g. M. Shahabuddeen, 'Judicial Creativity and Joint Criminal Enterprise', in S. Darcy and J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010) 184, at 187 (discussing gaps).

international criminal law is not delineated by standing legislatures with a shared legal culture and centuries of application. And unlike legislators with incentives to develop criminal laws to secure the safety of the people and state, the states and leaders of the international system have difficulty agreeing on the content of prohibitions that might bind their power.<sup>14</sup> As a result, international criminal justice is afflicted with a relative paucity of the primary written sources of international law and must fill gaps with the transposition of relevant aspects of national law that have passed into custom or supply general principles.<sup>15</sup>

These profound gaps in law in the face of powerful human need seized President Cassese's great intellect. He related in a 2009 interview that he was drawn to work in these 'areas where the legal network thins and is full of holes, and therefore the observer may better grasp the power relations that exist between the primary actors on the international scene: the sovereign states'.<sup>16</sup> He was moved by the old Roman maxim '*hominum causa omne jus constitutum est* (any rule of law is ultimately made on account of human beings)'.<sup>17</sup> In a brilliant legal architect's hands, custom and general principles became powerful trusses to build international criminal law from rudiments and aspirations.

Yet the reliance on such malleable judicially derived sources is vulnerable to critiques of conflation of the *ought* with the *is* and judicial legislation rather than interpretation.<sup>18</sup> Critics contend that judicial derivation of custom and general principles is merely a thin disguise for running roughshod over the principle of *nullum crimen sine lege* (no crime without law) in the drive to transform desired law into governing law.<sup>19</sup> Because rigorous methodology is the rebuttal to such accusations, critics also challenge the methodology for deriving customary international law and general principles.<sup>20</sup> The critiques are a variant of the longstanding accusation that international criminal justice is the fiat of power rather than law and merely pursues the desires of the mighty in violation of the principle of legality.<sup>21</sup>

14 This tension has, for example, resulted in the rather remarkable inability to define the crime of aggression for purposes of the vesting of jurisdiction conferred by the Rome Statute until recently at the Kampala conference. For an overview, see C. Kreß and L. von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression', 8 *JICJ* (2010) 1179, at 1110–1209.

15 A. Cassese et al., *International Criminal Law: Cases and Commentary* (Oxford University Press, 2011), at 2–3.

16 H. Verrijn Stuart and M. Simons, *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese* (Amsterdam University Press, 2009), at 154.

17 *Ibid.*

18 See e.g. T. Meron, 'The Geneva Conventions as Customary Law', 81 *AJIL* (1987) 348, at 361; M. Swart, 'Judicial Lawmaking at the *Ad Hoc* Tribunals: The Creative Use of Sources of International Law and 'Adventurous Interpretation'', 70 *ZaôRV* (2010) 459, at 475, 478–480, 485.

19 See e.g. Degan, *supra* note 6, at 51–52, 75–76, 78.

20 See e.g. *ibid.* at 75–78 (critiquing reliance on judicial opinions); G. Mettraux, 'The Internationalization of Domestic Jurisdictions by International Tribunals', 7 *JICJ* (2009) 911, at 924–925 (critiquing 'modest documentation').

21 For the classic vociferous accusation see Separate Opinion of Radhabinod Pal, *United States v. Araki*, International Military Tribunal for the Far East, 12 November 1948, at 37, 61–64.

Concerns over legality and legitimacy led the United Nations (UN) Secretary-General to specify that the judges of the new ICTY were limited to applying ‘rules of international humanitarian law which are beyond any doubt part of customary law’.<sup>22</sup> If strictly construed, such a task would have put the judges in an impossible position — adjudicate individual criminal liability based only on clear customary law though clear customary international law is hardly existent. *Non liquet* and the failure of the fledgling endeavour loomed. The unintended result of such rigid constraints may have been to impel judges to frame their decisions as customary international law — and thus establish more enduring law beyond the case or context of the ad hoc tribunal.<sup>23</sup> The judges who rose to this impossible task launched a wildly successful movement, if measured by the flourishing of subsequent international criminal justice efforts and praise for the enlarging *corpus juris* on international humanitarian law among other substantive legal developments.

Yet the pioneers — President Cassese chief among them — also took much flak. President Cassese later recalled learning that the draftsmen of the Rome Statute of the International Criminal Court feared the “Cassese approach”, namely judges overdoing it, becoming dangerous by, say, producing judgments that can be innovative’.<sup>24</sup> Unlike the spare ICTY Statute, which only granted jurisdiction over headings of crimes without specifying fundamental elements, the ICC Statute is a much more detailed code, supplemented by the Preparatory Commission’s Elements of Crimes. The ICC Statute defines the details of crimes — and even pins down several policies designated ‘general principles of criminal law’ such as modes of liability, how to construe *mens rea*, legality and offshoot limitations including *nullum crimen sine lege*, *nulla poena sine lege*, non-retroactivity *ratione personae* and defences.<sup>25</sup>

While detailed specification is done under the banner of the *nullum crimen sine lege* interest of the accused, President Cassese worried that binding judges in a detailed code served the interests of states in controlling international criminal justice.<sup>26</sup> He observed that for the grave crimes adjudicated by

22 UN Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, UN Doc. S/25704, 3 May 1993, at § 34.

23 M. Swart suggests the Secretary-General’s particularly tight constraint on the ICTY may have contributed to more of what she terms ‘lawmaking’ and ‘adventurous interpretation’ by ICTY judges. Swart, *supra* note 18, at 461.

24 Quoted in Verrijn Stuart and Simons, *supra* note 16, at 52–53.

25 Arts 6–9, 22–34, ICCSt. For analysis of the provisions see K. Ambos, ‘General Principles of Criminal Law in the Rome Statute’, 10 *Criminal Law Forum* (1999) 1. For a contrast of these articles with the earlier conceptions of general principles at Nuremberg see H.-H. Jescheck, ‘The General Principles of International Criminal Law Set Out in Nuremberg, As Mirrored in the ICC Statute’, 2 *JICJ* (2004) 38, at 40–48.

26 One hears President Cassese’s voice in the analysis of the Editorial Board of the Oxford Commentary to the Rome Statute in expressing concern that the elaborate specification of crimes and elements may be too detailed, ‘symptomatic of States’ concern to control the Court and its judges’. The Board of Editors, ‘The Rome Statute: A Tentative Assessment’, in Cassese, Gaeta and Jones (eds), *supra* note 7, 1901, at 1905. He worried this risking undermining the Court’s work ‘by unduly implicating States in the Court’s rule-making and jurisprudence’. *Ibid.*

international courts defendants are hardly lacking notice about the criminality of their conduct.<sup>27</sup> He was concerned that detailed specification by states would constrain effective judicial inquiry into evolving configurations of violence that take shelter in blind or blurry zones in the rules.<sup>28</sup>

At the core of the debates are competing visions of what legality should mean in the international context and how strongly state interests should be privileged in the adjudication of human suffering. President Cassese was quite open about his views on legality. In his leading treatise, he took pains to distinguish between legality in *national* systems versus the *international* system.<sup>29</sup> Within national systems, he distinguished between legal cultures embracing a vision of *substantive justice* and *strict legality*. Cultures with criminal laws founded on substantive justice privileged society over the individual and punishing wrongdoers regardless of whether the law at the time of the conduct defined the crime. The vast majority of democracies today embracing *strict legality* adopted what Franz von Liszt called 'the criminal's *magna charta*' guaranteeing the individual's right to be punished only in accord with requirements specified in advance by law.<sup>30</sup> President Cassese underscored that the transposition of legality and its corollary protections such as specificity into international law is qualified because of different circumstances, including lack of a legislature and many open-textured and unwritten rules in need of adaptation to social challenges.<sup>31</sup>

To contend legality has crystallized as a principle of customary international criminal law is just the start of the conversation. It matters *which* conception of the competing visions has crystallized. In the international scene, there is a debate between two worldviews: between (1) those who would transpose strict legality and its particulars from mature national systems straight into international law — sometimes dubbed in shorthand the 'national criminal lawyers',<sup>32</sup> and (2) those who believe that legality must be adapted to the realities of the international context and point out that perpetrators of the kinds of grave crimes adjudicated internationally are amply aware of their criminality, sometimes dubbed in shorthand the 'international lawyers'.<sup>33</sup> Moving from the frame of individual interests to state interests, President Cassese was open

27 See *ibid.* ("The crimes to be adjudicated by the ICC are "the most serious crimes of international concern" (Article 1 of the Statute) comprising acts that are (usually) manifestly illegal. Everyone knows what a murder is, what a rape is, what wanton destruction and genocide are.")

28 For a discussion of gamesmanship around the rules posed by conduct such as extraordinary rendition designated as deportation for cruel, inhuman and degrading treatment by foreign proxies, see e.g. M.D. Fan, 'The Police Gamesmanship Dilemma', 44 *UC Davis Law Review* (2011) 1407, at 1453–1458, 1470–1471, 1473.

29 Cassese, *International Criminal Law*, *supra* note 12, at 36.

30 *Ibid.* at 36, 40 (quoting F. von Liszt, 'Die deterministischen Gegner der Zweckstrafe', 13 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1893) 325, at 357).

31 *Ibid.*, at 41–52.

32 See A. Pellet, 'Applicable Law', in Cassese, Gaeta and Jones (eds), *supra* note 7, 1051, at 1057.

33 President Cassese described the cleavage in views between the national criminal lawyers and international criminal lawyers in a 2009 interview. For more, see the interview in Verrijn Stuart and Simons, *supra* note 16, at 65–66.



about his deep conviction that any rule of law is ultimately made on account of human beings.<sup>34</sup> In his first landmark judicial decision in the *Tadić* Interlocutory Appeal, to which he devoted much labour, President Cassese explained that the sovereignty of states did not eclipse *either* the protection of victims in nominally internal armed conflict *or* the ability of an individual accused to mount a plea of the violation of state sovereignty.<sup>35</sup> The decision rejected the rule that individual accused 'have no standing to challenge violations of international treaties in the absence of a protest by a sovereign involved.'<sup>36</sup> President Cassese explained the notion was a throwback to the times of sacrosanct and unassailable sovereignty that 'recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights.'<sup>37</sup> He also held that the old distinction curtailing protections in internal conflict in deference to state sovereignty is eroding, in part because '[a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.'<sup>38</sup>

The decision was bold, rendered by a visionary shaped by his times. Without judicial creativity, changing configurations of violence and conflict would evade redress in the gaping dark of international criminal law's interstices. The fledgling effort at international criminal justice would have been mired in the paralyzing murk. Surmounting the challenge, President Cassese deployed dynamic interpretation, construing the law in light of background principles, including changing human rights commitments. The approach is vulnerable to critiques of transgression of what President Cassese would term strict legality.<sup>39</sup> But President Cassese forthrightly championed the idea that legality must be adapted to the pragmatic realities of the international context.

The needs of international criminal justice can change in part because of the maturation of law enabled by the jump-start of visionary interpretation. The Rome Statute is more code-like in specifying crimes in advance, thereby permitting stronger protections against retroactive application of law and other corollaries of legality principle. The ambit and need for judicial creativity is thus narrowed. Yet President Cassese's insights about interpretation remain important in the post-Rome Statute world. No code can cover everything and judicial interpretation and gap-filling remain necessary. As experts assessing the

34 *Ibid.*, at 154; Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (ICTY-94-1), Appeals Chamber, 2 October 1995, § 97 (hereafter '*Tadić* Interlocutory Appeal Decision').

35 *Tadić* Interlocutory Appeal Decision, §§ 55, 97.

36 *Ibid.* at § 55 (quoting *United States v. Noriega*, 746 F. Supp. 1506, 1533 (S.D. Fla. 1990)).

37 *Ibid.*

38 *Ibid.*, § 97.

39 See e.g. C. Kreß, 'Nulla Poena, Nullum Crimen Sine Lege', *Max Planck Encyclopedia of Public International Law* (2010), § 17 ('There can be no doubt, however, that the manner in which customary international criminal law was discerned and held to exist made the *Tadić* Case a creative precedent susceptible to criticism under a strictly construed principle of non-retroactivity').

ICC Statute observe, much more work needs to be done, especially in developing the general parts of crimes such as modes of liability, mens rea standards and defences.<sup>40</sup> The ICC Statute recognizes this by retaining 'principles and rules of international law, including the established principles of the international law of armed conflict' and 'general principles of law derived by the Court from national laws of legal systems of the world' as applicable law.<sup>41</sup> President Cassese was at once an architect of his times — pioneering the launch of international criminal justice — and an architect for the future of international criminal law. His body of work leaves many lessons on the art of elucidating customary international law and general principles to help guide the future of international criminal law.

## 2. The Art of Elucidating Customary International Law and General Principles

### A. Deriving Customary International Law

The discipline of elucidating customary international criminal law was in disarray when President Cassese took the helm of the first international criminal justice endeavour since the World War II era tribunals. True, the ICJ Statute long had listed custom as a source of law.<sup>42</sup> But the theory and practice of elucidating custom was under siege. Commentators debated everything from the amorphousness and circular illogic of requiring *opinio juris* — state compliance out of the belief a principle is law — for the principle to be law, to the difficulties of amassing evidence of widespread state practice and *opinio juris*, to whether customary international law has any influence at all on state behaviour.<sup>43</sup> Moreover, the ICJ's 1984 ruling in *Nicaragua v. United States*<sup>44</sup> and subsequent decisions left international experts dismayed at the state of the discipline of discerning customary international law.<sup>45</sup>

40 See e.g. G.P. Fletcher, 'Parochial versus Universal Criminal Law', 3 *JICJ* (2005) 20, at 33 (discussing how 'international criminal law desperately needs serious work on why and when intention should be required and, even more acutely, on the meaning of intentionality and recklessness'); F. Mantovani, 'The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer', 1 *JICJ* (2003) 26, at 26–27, 31–36 (discussing underdevelopment of the general part of international crimes).

41 Art. 21 ICCSt.

42 Art. 38(1)(b) ICCSt.

43 See e.g. A.A. D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971), at 6. See also A.T. Guzman, 'Saving Customary International Law', 27 *Michigan Journal of International Law* (2005) 115, at 124–131 (collecting and responding to critiques); J. Goldsmith and E. Posner, *The Limits of International Law* (2005), at 43–45 (exposing the fiction of customary international law's basic assumptions).

44 Judgment, *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, ICJ Reports, 27 June 1986, at 14.

45 See e.g. A.A. D'Amato, 'Trashing Customary International Law', 81 *AJIL* (1987) 101, at 103; Meron, *supra* note 5, at 820.

The ICJ in *Nicaragua* considered the liability of the United States for arming, training, financing and otherwise supporting the rebel *contras* in their attempt to overthrow the Nicaraguan government. The ICJ found the United States breached a customary international law obligation of non-interference in the internal affairs of another state. The ICJ declined, however, to hold the United States liable for international humanitarian law violations by the *contras* holding that effective control over the *contras* in their operations was required for liability. Beyond the substantive outcomes, international law experts expressed consternation at the ICJ's method for declaring customary international law 'without even considering the practice of states and without giving any independent, ascertainable meaning to the concept of *opinio juris*'.<sup>46</sup>

The *Nicaragua* decision also roused President Cassese's concern because of the pronouncement of rules limiting liability without explicating from whence they come at all. Commenting on the ICJ's 'effective control' test, President Cassese wrote:

The 'effective control' test may or may not be persuasive. What matters, however, is to establish whether it is based on either customary law (resulting from state practice, case law and *opinio juris*) or, absent any specific rule of customary law, on general principles on state responsibility or even general principles of international law. It is, however, a fact that the Court in *Nicaragua* set out that test without explaining or clarifying the grounds on which it was based. No reference is made by the Court either to state practice or to other authorities. This is in keeping with a regrettable recent tendency of the Court not to corroborate its pronouncements on international customary rules (other than those traditional rules that are largely upheld in case law and the legal literature) with a showing, if only concise, of the relevant practice and *opinio juris*.<sup>47</sup>

President Cassese's contributions to the discipline of elucidating customary international law are all the more remarkable when assessed against this backdrop of doubt and disarray.

From the start, President Cassese delivered a bold decision in *Tadić* giving international humanitarian law teeth, even within internal armed conflicts. He ruled that customary international humanitarian law extended an array of protections in internal conflicts.<sup>48</sup> He also concluded that customary international law levies criminal liability for serious violations of Common Article 3 to the Geneva Conventions regulating internal armed conflict.<sup>49</sup>

The decision's approach to elucidating customary international humanitarian law was a significant advance from the scant rationales given by the World War II-era jurisprudence for declaring customary international law.<sup>50</sup> Judge Cassese's opinion canvassed *opinio juris* and state practice, traversing

46 D'Amato, *supra* note 45, at 103.

47 A. Cassese, 'The *Nicaragua* Test and the *Tadić* Test Revisited in Light of the ICJ Decision on Genocide in Bosnia', 18 *European Journal of International Law* (2007) 649, at 653–654.

48 *Tadić* Interlocutory Appeal Decision, §§ 96–136.

49 *Ibid.*, §136.

50 T. Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', 90 *AJIL* (1996) 238, at 239.

internal armed conflicts from Yemen to China to Chechnya to the Congo, El Salvador and Spain and mining military manuals, UN resolutions, official pronouncements and myriad other sources.<sup>51</sup> Then-professor and now-ICTY President Meron has observed that the decision's focus on statements rather than actual practice resembled the approach in human rights law where *opinio juris* is emphasized to compensate for the paucity of supporting practice.<sup>52</sup> President Cassese explained why: '[I]t is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field' because of limited access to the theatre of military operations and even misinformation about what is happening in the field.<sup>53</sup> He thus forged a more practicable approach.

Ascertaining customary international law can be a toilsome and thankless task because one can always wish for more evidence. One can always do more if one had unlimited time and resources to study the world. And because the whole world is not canvassed (and may not always agree — nor need to uniformly agree) one is subject to the accusation of picking and privileging evidence that supports the result one seeks.

Controversial outcomes against the interests of defendants have come under intense fire. For example, Judge Cassese presided in the *Kupreskić* judgment, which refused to recognize a defence to the killing of civilians in combat zones as legitimate reprisals. Putting heavy weight on evidence of *opinio iuris sive necessitatis*, *Kupreskić* held that an absolute rule forbidding reprisals against civilians in combat zones had crystallized.<sup>54</sup> The decision has drawn vigorous criticism regarding the derivation of the rule while omitting contrary practice and declarations.<sup>55</sup> Part of the concern is that methodological protections in derivation and interpretation of customary international law may be relaxed in the drive to reach a result the judge normatively desires.

Perhaps most controversial of all, President Cassese's derivation of joint criminal enterprise (JCE) doctrine as a matter of customary international law in the *Tadić* appeal judgment has sparked a vast literature.<sup>56</sup> Substantively, the most controversial aspect of JCE liability is the third limb that permits

51 *Tadić* Interlocutory Appeal Decision, §§ 105, 102, 117.

52 Meron, *supra* note 50, at 239–240.

53 *Tadić* Interlocutory Appeal Decision, § 99.

54 Judgment, *Kupreskić* (IT-95-16), Trial Chamber, 14 January 2000, §§ 527–534.

55 C. Greenwood, 'Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', in H. Fischer, C. Kreß and S.R. Lüder (eds), *International and National Prosecution of Crimes Under International Law: Current Developments* (Arno Spitz, 2001) 546.

56 Judgment, *Tadić* (IT-94-1), Appeals Chamber, 15 July 1999, at 185–229. For just a sample of the vast literature, see e.g. M. Osiel, *Making Sense of Mass Atrocity* (Cambridge University Press, 2009), at 66–78; J.D. Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', 5 *JICJ* (2007) 69; M. Badar, "'Just Convict Everyone!'" Joint Perpetration: From *Tadić* to *Stakic* and Back Again', 6 *International Criminal Law Review* (2006) 293; A.M. Danner and J.S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California Law Review* (2005) 75. For President Cassese's response to the criticisms, see A. Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', 5 *JICJ* (2007) 109.

conviction for unintended but foreseeable crimes outside the common criminal purpose akin to *Pinkerton* liability in American conspiracy law or natural and probable consequences doctrine at common law.<sup>57</sup> Substantive disagreement also combine with methodological critiques, including the oft-raised concern about the *Tadić* court's heavy reliance on judicial decisions stemming from the World War II era, often in Anglo-American zones of influence. More aggressive critiques allege that the 'Just Convict Everyone' doctrine, as JCE is sometimes termed, used the amorphous Rorschach blot of customary law as cover to ease the path towards conviction by judges with a predilection for the prosecution.<sup>58</sup>

Yet President Cassese defied such caricatures. He was a humanist to the core, for victims and for the accused. President Cassese was a dissenting voice at the ICTY who argued that the accused should be able to mount a defence of duress to charges of war crimes and crimes against humanity even when the underlying crimes involve homicide.<sup>59</sup> On this controversial question, President Cassese marshalled a wide array of cases — and relevant law in the former Yugoslavia — to reject the Prosecutor's argument that customary international law excludes duress as a defence to killings.<sup>60</sup> He argued that where customary international law does *not* dictate the answer, the customary principle *nullum crimen sine lege* counsels a ruling in favour of the accused.<sup>61</sup> In compassion for the difficult situations faced by people — including the accused — in armed conflict, President Cassese wrote: 'Law is based on what society can reasonably expect of its members. It should not set intractable standards of behaviour which require mankind to perform acts of martyrdom, and brand as criminal any behaviour falling below those standards.'<sup>62</sup>

The case involved Drazen Erdemović, a lance corporal in the Bosnian Serb Army haunted by guilt over killing between 10 and a 100 Bosnian Muslim men and boys under threat of death for disobedience of the order to kill.<sup>63</sup> President Cassese later recalled:

I was in so many trials, but only once I saw remorse, in Drazen Erdemović. He was a young man who admitted to having killed many Muslims in the Srebrenica area. He cried when he said, I had refused to take part in the killing, but the commander of the execution squad threatened me with death if I dropped out. So I had to accept under duress. I went on killing because I have a wife and a small child. ... On that occasion I saw that somebody

57 So-called because of *Pinkerton v. United States*, 328 US 640 (1946) (recognizing extended liability for co-conspirators).

58 In this regard, see e.g. Degan, *supra* note 19, at 51–52, 75–78.

59 Separate and Dissenting Opinion of Judge Cassese, *Erdemović* (IT-96-22), Appeals Chamber, 7 October 1997, at §§ 16–49.

60 See *ibid.* at §§ 18–19 (summarizing Prosecutor's claim predicated on asserted customary international law); *ibid.*, at §§ 20–39, 49 (rebutting claim).

61 *Ibid.*, at § 48.

62 *Ibid.*, at § 47.

63 For background, see e.g. P. Rowe, 'Duress As A Defence to War Crimes After Erdemović: A Laboratory for a Permanent Court?', 1 *Yearbook of International Humanitarian Law* (1998) 210.

as human as I am happened to commit a crime because he found himself in the maelstrom of war.<sup>64</sup>

This deeply human interaction informs our understanding of the heart of the law. Judge Cassese brought with him the empathy that humanizes the law and makes it capable of governing through the tumult of history. His vision, compassion and reasoning may yet inform the interpretation of Article 31(1)(d) of the ICC Statute, which does not on its face exclude duress as a defence to crimes involving killing.

Among President Cassese's last decisions was a strong ruling on the due process protections for the defence. This time the president who helped launch international criminal justice's renaissance was leading one of its newest endeavours, the hybrid Special Tribunal for Lebanon. One of the earliest issues for the President was whether persons detained in Lebanon under the authority of the Special Tribunal for Lebanon have the right to enjoy privileged and confidential meetings with their attorneys. President Cassese held that customary international law conferred the fundamental right relating to due process to communicate freely and confidentially with counsel.<sup>65</sup> The order was brief, referencing the widespread recognition among states and the jurisprudence of the European Court of Human Rights, apparently taking the right as so well-established that lengthy exegesis was unwarranted. Here, President Cassese wielded customary international law to develop the robust protections for the right of the accused to a fair trial that mark the progress of a maturing international criminal justice system.<sup>66</sup>

## B. General Principles

Norms that have not yet passed into customary international law may nonetheless inform interpretation and gap-filling if sufficiently widespread among national laws to permit derivation as a general principle.<sup>67</sup> The launch of contemporary international criminal justice powerfully revived general principles from virtual desuetude as a source of law in the new field where law was

64 Quoted in Verrijn Stuart and Simons, *supra* note 16, at 87.

65 Order on Conditions of Detention (CH/PRES/2009/01/rev), Before the President of the Special Tribunal for Lebanon, 21 April 2009, at §§ 7, 16–18.

66 For an excellent overview of the evolution of how the increasing incorporation of human rights norms into international criminal procedure have enhanced protections for the accused, see S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford University Press, 2003).

67 See Art. 21(1)(c) ICCSt. (listing general principles as a subsidiary source). Schabas observes that general principles are often confused with customary international law. W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006), at 102. The two are distinct, however — induction of principles from social phenomenon common across national systems rather than general state practice accompanied by *opinio juris* are the primary evidence of general principles derived from national systems, and general principles are a subsidiary rather than secondary source of applicable law under the ICC Statute. *Ibid.*

scarce and guideposts needed.<sup>68</sup> International adjudication of individual rather than state liability for grave wrongs presents the challenge of filling in the basic and general parts of crimes, such as modes of liability, mens rea standards and defences. Judges had to draw from national criminal laws to fill in the details. This grafting to build a hybrid branch of international law with concepts from municipal jurisdictions is still in progress.<sup>69</sup> Judicial induction of general principles from national laws is an important regulator of the transposition of national criminal doctrines.

Two major challenges of applying general principles to gap-fill arise from (1) differences between the national and international context that require tailored transposition and (2) and differences between national legal cultures. Judge Cassese cautioned against mechanical transposition of national practices and called for circumspection and adaptation of principles derived from national criminal law to harmonize with the international context.<sup>70</sup> He also was a leader in teaching the need to consider a diversity of approaches. A major challenge in forging international criminal law and procedure is harmonizing and hybridizing across diverse legal cultures, including the civil and common law systems.<sup>71</sup> In this complex domain, President Cassese also lit the way. He explained that a principle of national criminal law should only be considered a general principle ‘if a court finds that it is shared by common law and civil law systems as well as other legal systems such as those of the Islamic world, some Asian countries such as China and Japan and the African continent’.<sup>72</sup> A disciplined method of induction regulates the transposition of national criminal law concepts into international criminal law.

President Cassese and general principles greatly enriched an oft-cited major advance of international criminal justice — defining rape and sexual assault as predicates of international crimes. President Cassese laid the intellectual foundations for the recognition of rape as a war crime years at the outset in the 1995 *Tadić* jurisdictional appeal. He wrote in *Tadić*: ‘Why protect civilians from belligerent violence, or ban rape, torture or [wanton destruction and other crimes] ... when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted “only” within the territory of a sovereign State?’<sup>73</sup> He later recalled critiques of the bold move to argue for the first time that ‘rape in internal armed conflict is as much a war crime as in international conflict’

68 Cassese, *supra* note 2, at 45–46.

69 Cassese, *supra* note 15, at 2.

70 See e.g. Separate and Dissenting Opinion of Judge Cassese, *Erdemović* (IT-96-22-A), Appeals Chamber, 7 October 1997, at §§ 2–5.

71 For insights see O.-G. Kwon, ‘The Challenge of An International Criminal Tribunal, As Seen from the Bench’, 5 *JICJ* (2007) 360.

72 Cassese, *International Criminal Law*, *supra* note 12, at 22.

73 *Tadić* Interlocutory Appeal Decision, § 97.

and facing arguments that 'rape was only regarded as a national offense, so punishable under Serbian law or Bosnian law, not under international law'.<sup>74</sup>

President Cassese's influence also shaped the definition of rape and sexual assault as international crimes. While the International Criminal Tribunal for Rwanda's decision in *Akayesu* was the first international case to define rape as a matter of international criminal law, its exceedingly broad and amorphous definition created without reference to sources proved controversial and short-lived.<sup>75</sup> *Akayesu* defined rape 'as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'.<sup>76</sup> It fell to the ICTY to inject greater rigour in the elucidation of the definition of rape in international law.

The ICTY's 1998 *Furundžija* trial court judgment became a more enduring landmark in the definition of rape and sexual assault in international law. Part of its influence comes from the injection of greater rigour in the approach to elucidating a definition. President Cassese was a member of the *Furundžija* Chamber and his influence is evident. The trial judgment begins its elucidation of a definition of rape by explaining that

Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since 'international trials exhibit a number of features that differentiate them from national criminal proceedings' account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.<sup>77</sup>

Note the adoption of President Cassese's caution about resort to national criminal laws and teaching about consulting a diversity of jurisdictions in the Trial Chamber's decision. Surveying an array of laws traversing such diverse jurisdictions as Zambia, Pakistan, Chile, China, the Netherlands and of the course Bosnia, the *Furundžija* court concluded that 'in spite of inevitable

74 Quoted in Verrijn Stuart and Simons, *supra* note 16, at 67. In response, Judge Cassese recalled the famous Martens Clause in the preamble to the 1899 Hague Conventions, which provides that in cases not covered by the incomplete text of the convention, protected populations 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'. For background and the continuing vitality and strong influence of the Martens Clause in the world scene see e.g. T. Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', 94 *AJIL* (2000) 78.

75 For a discussion, see e.g. Swart, *supra* note 18, at 477–478.

76 Judgment, *Akayesu* (ICTR-96-4), Trial Chamber I, 2 September 1998, at §§ 596–598.

77 Judgment, *Furundžija* (IT-95-17), Trial Chamber, 10 December 1998, at § 178 (adopting Cassese caution discussed, *supra* at note 70).



discrepancies, most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.<sup>78</sup>

More methodologically controversial is *Furundžija's* approach to analysing whether forcible penetration of the mouth by the male sexual organ constitutes rape, with its full expressive stigma or sexual assault.<sup>79</sup> The Trial Chamber acknowledged the wide divergence of national laws on the question — including under Bosnian law — but nonetheless held despite the strong split that forced oral penetration is rape rather than sexual assault.<sup>80</sup> The Chamber clothed the conclusion in language about general respect for human dignity — but of course, that is hardly determinative of the question and sweeps too broadly. Respect for dignity is implicated in interpretation of most international crimes. Indeed Judge Cassese has critiqued the approaches in *Furundžija* and pointed to refinements in subsequent cases.<sup>81</sup>

The appeal of general principles is their ability to transpose relevant national practices to fill gaps and permit normative development to meet evolving challenges. President Cassese paved the way while teaching rigour and caution. Wielded with sensitivity to the nature and needs of the international context, general principles can be vital to the lifeblood and continued growth of international criminal law, supplying normative standards to guide where the legal terrain is unclear.<sup>82</sup>

### 3. Conclusion

Changing configurations of modern conflict and mass atrocities will continue to press on ambiguities and lacunae in the evolving written codes of international criminal law. For example, what are the standards governing criminal responsibility, including superior responsibility, for crimes by privatized forces such as military contractors or a violent rabble of civilians killing in support of a governmental authority? Is knowledge the same as intent? What other *mens rea* standards regulate modes of liability? President Cassese blazed a path through the rudiments and murk, clarifying many looming questions and clearing space for the astonishing growth of international criminal law — but much work remains to be done.

78 *Ibid.*, at §§ 180–181.

79 *Ibid.*, at §§ 172–183.

80 *Ibid.*, at §§ 183–184.

81 Cassese, *supra* note 2, at 53.

82 Indeed, President Cassese observes that though formally, it is only after consulting primary and secondary sources and finding them to no avail that judges can turn to the subsidiary source of general principles, in practice 'international courts, once they find that no general exists on a specific issue, turn immediately to the subsidiary source'. Cassese, *International Criminal Law*, *supra* note 12, at 21. The reason is because of the relatively scant availability and assistance of the higher-ranked sources and the greater likelihood of finding 'a normative standard applicable to the case at issue' by exploring the principal criminal systems of the world. *Ibid.*

In forging forward, international criminal law would do well to heed President Cassese's cautions about the transposition of national criminal concepts and follow his courageous example of openly revealing his approaches. Indeed Presiding Judge Adrian Fulford's illuminating separate opinion in the ICC's recent and first judgment in *Lubanga Dyilo* spotlights the need to observe President Cassese's cautions and courage.<sup>83</sup> Judge Fulford wrote separately to express concern about the ICC Pre-Trial Chamber's importation of German concepts of co-perpetration into the meaning of liability under Article 25(3)(a) of the ICC Statute for committing a crime 'jointly with another.'<sup>84</sup> Judge Fulford noted that while general principles of law derived from national legal systems may inform interpretation, a 'Chamber should undertake a careful assessment as to whether the policy considerations underlying the domestic legal doctrine are applicable at this Court, and it should investigate the doctrine's compatibility with the Rome Statute framework.'<sup>85</sup>

It is heartening to hear echoes of Judge Cassese's wisdom endure. And so should his courage. It takes courage to show one's work — set forth in the evidence for evaluation — in deriving customary international law or a general principle rather than merely announcing the conclusion. It takes courage to justify the adaptation of national criminal law concepts to the international context — and to explain why certain concepts should not be transposed. It takes courage to use the disciplines of elucidating customary international law and general principles to regulate gap-filling and grafting of national criminal law concepts onto criminal law. The present and the future of international criminal law and its continued growth owe a great deal to the great architect's wisdom and courage.

83 Judgment, *Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 14 March 2012, Separate Opinion of Judge Adrian Fulford.

84 *Ibid.*, at §§ 4, 10–11.

85 *Ibid.* at § 10.

