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LEGAL STUDIES DEPARTMENT
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INTERNATIONAL CRIMINAL TRIBUNALS AS LAWMAKERS – CHALLENGING THE BASIC ASSUMPTIONS OF INTERNATIONAL LAW

BY

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To my parents and my brother, who have encouraged and supported me throughout my education

To my father; I am sorry that you were not able to see the finished work

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ABSTRACT

The thesis focuses its inquiry on the issue of international criminal tribunals as law-makers. It starts with the hypothesis that courts, both domestic and international, have enormous normative weight that allows them to shape and form the law. In Chapter I, the thesis critically describes how the lawmaking process in international law is suppose to work, pointing out the deficiencies of the international law master narrative in explaining the functioning of courts.

In Chapter II, the thesis, using literature analysis, describes the process by which the international *ad hoc* criminal tribunals have expanded and shaped international humanitarian and international criminal law. It claims that the *ad hoc* tribunals have imported a considerable number of definitions of crimes from its sister branch, international human rights law, but national criminal law as well, and then modified them to suit the specific international criminal environment and the international system more broadly.

Chapter III, asks the intermediate question of acceptances of the normative outcomes of the *ad hoc* tribunals by other actors, namely scholars and other international (criminal) courts. It concludes that, for the most part, the outcomes of the *ad hoc* tribunals have been accepted by the wider scholarly community and other international courts. However, courts, other than the other international/ized criminal courts, see the outcomes of the *ad hoc* tribunals as something stemming from a foreign normative sphere, something that they cannot argue with but only accept.

Chapter IV tackles the issue of the background of doctrine of sources master narrative and its compatibility with the way in which international courts argue and structure their judgments and argues that the legitimizing method that international tribunals have adopted is the one that fits better with the structural environment of the international system.

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

TREATIES

LIST OF ABREVIATIONS

ACHPR	African Charter for Human and Peoples' Rights
ECHR	European Convention for the Protection of Human Rights
ECtHR	European Court for Human Rights
GATT	General Agreement on Tariffs and Trade
IACHR	Inter-American Convention on Human Rights
IACtHR	Inter-American Court for Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILO	International Labor Organization
PCIJ	Permanent Court of International Justice
SCSL	Special Court for Sierra Leone
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
USSC	United States Supreme Court
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization

INTRODUCTION

HYPOTHESIS

Talking about lawmaking is never an easy job to do. As one humorous remark puts it, and I paraphrase, laws are like sausages, you would not like to see them made.[1] This thesis is one such exercise. Judicial lawmaking in international law is considered to be somewhat of a white elephant, a topic talked about in private, a thing that many scholars might admit to existing[2] while others openly say that such a thing is almost impossible to continue denying.[3] However, most international scholars,[4] when it comes to judicial lawmaking, point to the accepted wisdom of Article 38 of the Statute of the International Court of Justice (ICJ), which puts international judgments "and the teachings of the most highly qualified publicists of the various nations, as [a] subsidiary means for the determination of rules of law."[5] The debate about courts as lawmakers or courts as mere law discoverers, in national settings, is not a recent one and has been repeated several times over the course of the twentieth century.[6] I do not wish to repeat the debate in this thesis, since most scholars are somewhat familiar with its basic tenants.

[1] Largely attributed to Otto Von Bismarck (1815-1898), available at http://www.barrypopik.com/index.php/new_york_city/entry/laws_like_sausages_cease_to_inspire_respect_in_proportion_as_we_know_how_th/ (last visited on February 06, 2011.

[2] Antonio Cassese General Editor., THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, OUP, Oxford, 2009, pp. 53; Guido Acquaviva and Fausto Pocar, *Stare Decisis* in Rüdiger Wolfrum General Ed., THE MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW, Max Planck Institute for Comparative Public Law and International Law, November 2007.

[3] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, pp. 115-130.

[4] Rebecca M.M. Wallace, INTERNATIONAL LAW FOURTH ED., Sweet & Maxwell, London, 2002; Ian Brownlie, PRINCIPLES OF INTERNATIONAL LAW SIXED ED., OUP, Oxford, 2003; Malcolm N. Shaw, INTERNATIONAL LAW, 6th edn., Cambridge University Press, Cambridge, 2008.

[5] Article 38(1)(d) of the Statute of the International Court of Justice.

[6] Brian Z. Tamanha, BEYOND THE REALIST-FORMALIST DIVIDE; THE ROLE OF POLITICS IN JUDGING, Princeton University Press, Princeton and Oxford, 2010, pp. 13-63.

In this thesis, I will analyze the issue of law making by international criminal tribunals with a particular focus on the two *ad hoc* tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). I started this thesis with the hypothesis that international tribunals are lawmakers, that they, through the continuous settlement of cases, shape and modify the law.[7] I set out to confirm my hypothesis by looking into the way that international criminal tribunals have shaped and recast the laws of war.[8] I chose international criminal tribunals for one specific reason. The first reason is that in the past 15 years or so, the two *ad hoc* tribunals, but the other internationalized tribunals as well, have had to settle a large number of complicated cases. They accomplished this by using very terse statutes that were not much help when it came to offering precise definitions. Consequently, choosing to look at international criminal tribunals was choosing to see the shaping and modifying the law in a somewhat fast-forwarded way. Most of the more significant developments were made in the first 7 years of the operation of the tribunals and, therefore, the tribunals themselves managed to turn quite a few heads while issuing their judgments.[9]

When I started researching more deeply into my hypothesis, I found that the issue of judicial lawmaking is multi-layered and that it does not reflect a simple yes or no answer to the question of whether international tribunals are lawmakers. The question, is somewhat made complicated by the different national optics through which most scholars see international law. Consequently, my approach to this thesis was to firs present, in Chapter I, how international lawmaking is supposed to work in the international system. I chose to present the lawmaking process in international law through the framework of underlying master narrative. A master narrative is a short story that tells the account of how the system if suppose

[7] Mohamed Shahabuddeen, PRECEDENT IN THE WORLD COURT: HERCH LAUTERPACHT MEMORIAL LECTURES, Cambridge University Press, Cambridge, 1996, pp. 67-96.
[8] Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 Vand. L. Rev. 1 (2006).
[9] *Ibid.*

to operate, and of why it makes good sense. In short, it gives the underlying premise on which the legal system is based upon.[10] I chose to present the narrative through the accounts presented in text-books by highly regarded scholars because it is this basic account that any law student receives when learning about international law and it is through this account that she will be guided through the rest of her legal career. Furthermore, I also chose to present some issues other than court related issues where this master narrative has encountered problems due to the changing international environment in the post WWII and especially post Cold War eras in order to show that the international system, and consequently, international law is in a state of flux.

In Chapter II, I present a number of examples of how the *ad hoc* tribunals used various techniques to make normative changes in international criminal law, international humanitarian law or general international law. I strive to present as many examples as possible of the various methods that the ICTY and ICTR used for this normative advancement while at the same time trying not to overburden the thesis with repetitive discussion. In that sense, Chapter II presents the raw analysis on which the conclusions in the later Chapters are based.

In Chapter III, I carry out a short exploration into the issue of whether these normative changes have been accepted by both the scholarly community and other international courts, both criminal and non-criminal. I chose not to research the issue of acceptance of states for the simple fact that it would over-complicate my thesis. There are around 190 countries in the world at the moment, having almost as many and quite possibly more than that many official languages as well as different methods of issuing their views on a certain manner. In short, it is a thesis research onto itself, one that cannot be easily handled by one single researcher with modest time and page resources. For the same reason I did not perform an extensive research into the case law of all of the international tribunals mentioned in the PICT chart for interna-

[10] Mitchel Mitchel De S.-O.-L'E. Lasser, *Transforming Deliberations* in Nick Huls, Maurice Adams and Jacco Bomhoff eds., THE LEGITIMACY OF HIGHEST COURTS' RULINGS: JUDICIAL DELIBERATIONS AND BEYOND, T.M.C Asser Press, The Hague, 2009, p. 37.

tional tribunals, but focused on the more prominent ones and the ones that would most likely deal with similar issues as the *ad hoc* tribunals

Based on the conclusion that the normative changes of the *ad hocs* have been accepted by scholars and other courts, I continued in Chapter IV to look at the legitimization method that the ICTY and the ICTR used in order to see what was in the tribunals' approach and method of justification that led to the widespread acceptance of their jurisprudence. I also looked at the reasons how the tribunals' transition into a *stare decisis* system occurred without large protest from most other international actors.

METHODOLOGY

My methodological approach through this thesis has been varied. As with most legal theses, the brunt of my research is case-based research and argumentation. It is only natural since my topic is judicial lawmaking. Furthermore, I adopted a literature approach to reading cases, analysing their form and structure as well as their rhetoric and methods of justification. I used a similar methodological approach to that of Lasser when looking at judicial decisions and dialogue.[11] Lasser explains this methodology and analysis as being

> [...] premised on the basic claim that judicial decisions do more than simply resolve substantive legal issues. The decisions' form, discourse, and rhetoric combine to make implicit assertions about the process that produced the decisions. Judicial decisions, and judicial arguments generally, are therefore texts that offer representations of judicial practice and of the judicial role. These representations may be thought of as portraits: they are images of judging. Insofar as these portraits are produced by judges in judicial texts, they may be termed judicial self-portraits. (footnotes omitted)[12]

[11] Mitchel De S.-O.-L'E. Lasser, *Comparative Law and Comparative Literature: A Project in Progress*, 1997 Utah L. R. 471 (1997), pp. 472-485; Mitchel De S.-O.-L'E. Lasser, *"Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse*, 111 Harvard L. Review 689, (1998); Mitchel De S.-O.-L'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 Yale L. J. 1325 (1995); Mitchel de S.-O.-Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, Oxford University Press, Oxford, 2004.

[12] Mitchel De S.-O.-L'E. Lasser, *"Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse*, 111 Harvard L. Review 689, (1998), p. 691.

In addition,

> Judicial texts engage in [a] complex process by adopting particular modes of discourse - that is, by speaking or writing in particular ways. These discourses are significant because they portray their judicial authors as engaged in specific modes of interpretation. In other words, the way in which a judge expresses herself in a judicial decision constitutes a representation of the type of interpretation that the judge has performed in order to reach the decision. Furthermore, this representation, which links particular modes of discourse with particular modes of reading, is significant in its own right. It portrays the judicial decision as related, in specific ways, to "governing" law. Viewed in this light, judicial decisions emerge as complex - and value-laden - systems of signs: by adopting certain forms, discourses, and rhetorics, judicial decisions present themselves as deploying particular modes of reading, and therefore portray themselves as meaningfully related to governing law.

Consequently, this methodology allows us to see what are the judges' view of the role that they are tasked to perform is, as well as the issues that they faced and the choices that they had to make. Furthermore, I also used a similar methodological approach when I focused on doctrinal texts and their view on the issue of judicial lawmaking, legitimacy and control, especially those related to comparative studies of different national and international judicial systems.

The discussion in this thesis will proceed in four Chapters followed by conclusions. In the first Chapter, I will give a short overview of the changing nature of the international system and the challenge that the post World War II developments have presented international law. In this Chapter, I will present the general view of how international law should work in relation to lawmaking by the two undisputed subjects of international law, states and international organizations. I will continue in Chapter II with presenting the techniques that the *ad hoc* tribunals used in their lawmaking endeavours. I will present the mechanism of import of norms from other jurisdictions and their modification for the purposes of international criminal law through the *ad hocs*' use of material sources and the interpretative techniques that they deployed. I will then go on, in Chapter III, to argue the acceptance of the jurisprudence of the *ad hoc* tribunals by other international courts, both criminal and non-criminal. In Chap-

ter IV, I will continue to discuss the method of legitimization and control that is in operation in international criminal law and how it helped the almost seamless transition into a system of *stare decisis* as well as the reasons why a *stare decisis* system for the entire body of international law is impossible, save some drastic changes in the way that the relations between courts are constructed. I will end my thesis with summarizing my arguments in the final Chapter dedicated to Conclusions.

CHAPTER I – LAWMAKING IN THE INTERNATIONAL SYSTEM: SETTING THE BASIC PREMISE[1]

1.1 INTRODUCTION

When talking about lawmaking in any system, be it domestic or international, it is unavoidable to be overwhelmed by the sheer complexity of the subject. Simply explaining the procedures set down in a Constitution or a Basic Law or other such document by any other name will only touch upon the surface of the topic. Nor explaining the principles of the separation of powers and the mechanisms of checks and balances between the executive and the legislative branch will somehow suffice. Rules regarding political funding, lobbying, procedural rules regarding debates in parliament, issues of who can propose a law or a statute or a regulation, voting procedures and majorities, protests and rallies, "pork barrels" and other stimuli; the list can go on and on of things that matter in a law-making process.

Similarly in international law; talking only about the rules set forth in the Vienna Convention on the Law of Treaties of 1969[2] (VCTL) cannot give the complexities of treaty making a fair representation. Explaining the *dicta* of the necessary parts of an international custom as well as the interplay between custom and treaty, or the rule on persistent objector given in the *Lotus*,[3] *North Sea Continental Shelf*,[4] the *Nicaragua*[5] or other cases will probably not give us the entire picture of how a custom emerges. Add to that the drastic changes that

[1] Parts of this Chapter draws from my previous work during my LL.M thesis, Ajevski Marjan, UNIVERSAL JURISDICTION FOR GROSS HUMAN RIGHTS VIOLATIONS: THE OBJECTIONS RAISED AND THE ANSWERS TO THEM, Budapest : CEU, Budapest College, 2007, available at: http://goya.ceu.hu/record=b1125248~S0 (last visited on October 8, 2010); and Ajevski Marjan, *Serious Breaches, The Draft Articles On State Responsibility And Universal Jurisdiction*, 2 Eur. J. Leg. Stud. 12 (2008) available at http://www.ejls.eu/4/51UK.htm (last visited on October 8, 2010).

[2] Vienna Convention on the Law of Treaties 1969, United Nations, *Treaty Series*, vol. 1155, p. 331.

[3] *The Case of the SS "Lotus"*, Series A, No. 10, September 7, 1927.

[4] *North Sea Continental Shelf"*, Judgment, I.C.J. Reports 1969, p. 3 (hereafter *North Sea Continental Shelf*).

[5] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 14, (hereafter the *Nicaragua* case).

have been going on in the international system since the end of the Cold War, and even earlier since the end of WWII, and the task starts to become a little bit mind boggling.

Luckily enough, others[6] have, in different aspects and focusing on different actors, done much of that task before me. In this Chapter I will give a short overview (as short as clarity can permit) of the lawmaking process within international law. I will explain the traditional approach to the sources of international law, i.e. treaty, custom, general principles, and add to them the recent trends in lawmaking and the emergence of new actors in the lawmaking process. In order to grasp the full picture of the complexity of international lawmaking, I have decided to firstly, introduce international lawmaking in a simplified form by using something that I call the traditional approach or the approach that is still found in text books for international law.[7] When explaining treaty or customary law, this approach concentrates on the centrality of states as the main and sometimes only actor in the lawmaking process. This does not mean that this approach is *per se* a bad one, quite the contrary, it has been acknowledged as a good introduction to international law; it is just that it does not do justice to the nuances of international lawmaking today and does not predict the new emerging trends when explaining the process.

This approach is intended to give an overview of how international law is made to someone who is not familiar at all with international law and its concept. I chose this format of presentation because it underlines an important approach of this thesis. The role of courts in international law-making is part of the master narrative of international law. A master nar-

[6] Mohamed Shahabuddeen, PRECEDENT IN THE WORLD COURT: HERCH LAUTERPACHT MEMORIAL LECTURES, Cambridge University Press, Cambridge, 1996; Rebecca M.M. Wallace, INTERNATIONAL LAW FOURTH ED., Sweet & Maxwell, London, 2002; Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003; Ian Brownlie, PRINCIPLES OF INTERNATIONAL LAW 6th edn., OUP, Oxford, 2003; Anne-Marie Slaughter, A NEW WORLD ORDER, Princeton University Press, Princeton and Oxford, 2004; Antonio Cassese, INTERNATIONAL LAW, Oxford University Press, Oxford, 2001; Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005; Vaughan Lawe, INTERNATIONAL LAW, OUP, Oxford, 2007; Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007.

[7] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003; Antonio Cassese, INTERNATIONAL LAW, Oxford University Press, Oxford, 2001.

rative is, in short, a story.[8] It is a story about the system itself; "a governing underlying narrative that each legal system tells itself – more and less openly – about why it is constructed the way it is, why it operates as it does, and why this makes good sense."[9] A master narrative is the underlying premise that any legal system is based upon. It deals with the basic legal formants[10] of a system, their position relative to each other in a specific hierarchy, the interactions between those legal formants and the reasons for them. It establishes "the basic internal logic of [the][...] system as mainstream legal actors understand it. It is a self-conception, a self-understanding, or as [the original author has] often called it, a self-portrait"[11]

It is this master narrative as it is related to the role of international courts that I have decided to challenge in this thesis. Furthermore, it is this master narrative and its assumptions that most, or at least the mainstream actors, operate under. Therefore, I have decided to structure this Chapter in such a way as to give the reader a slow introduction into lawmaking by first focusing on the state as the main actor and then adjusting this model of lawmaking by showing how other actors modify the same process. Furthermore, I will present this chapter through the optics of the mainstream, text-book academic writings available to me. I will also give a reference point for the role of courts in this changed lawmaking process so that it will serve as a base for comparison for the role of courts in the lawmaking process within international criminal law.

1.2. INTERNATIONAL LAWMAKING IN A NUTSHELL – THE TRADITIONAL APPROACH

[8] Mitchel Mitchel De S.-O.-L'E. Lasser, *Transforming Deliberations* in Nick Huls, Maurice Adams and Jacco Bomhoff eds., THE LEGITIMACY OF HIGHEST COURTS' RULINGS: JUDICIAL DELIBERATIONS AND BEYOND, T.M.C Asser Press, The Hague, 2009, p. 37.
[9] *Ibid.*
[10] On the idea of legal formants see Rudolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)*, 39 AJCL 1 (1991).
[11] Mitchel De S.-O.-L'E. Lasser, *Transforming Deliberations* in Nick Huls, Maurice Adams and Jacco Bomhoff eds., THE LEGITIMACY OF HIGHEST COURTS' RULINGS: JUDICIAL DELIBERATIONS AND BEYOND, T.M.C Asser Press, The Hague, 2009, p. 37.

In domestic law we usually do not have a problem identifying what the law is or where to find it. When one wants to find what the law is on a given subject area, one looks at whether the subject area is covered by the constitution, or a statute, or a government regulation, or in some countries, judicial precedent. A good first step would be to look at the official gazette of the state. The next step would be to go through court reports to see if there is any case law on the subject area and by what kind of court (administrative, criminal, commercial, municipal or superior courts and so on). With some patience and a little ingenuity we can be relatively certain of what the law is.[12]

This is in stark opposition to the process of discovering what the law is in the international system. For one, the international system is one of anarchy (so defined because of the lack of a central governing entity), opposite to the national system which is one of hierarchy where there is one central governing institution, the state.[13] On the other hand in the international system the states are the main actors and they are, for the purpose of the law, sovereign and equal entities.[14] There is no institution above the states that can impose legal obligations on them; there is no world government. Consequently one cannot simply go and look at an official gazette to see what the law is for the simple reason that there is no central lawmaking body to make such legislation so that can be published in an official gazette.

Similarly with going to the courts in order to see what is their say on a given subject matter. There is no centralized, compulsory, court system. The judgments issued by the courts are binding only to the parties to the dispute, and since there is no central court and no rules for discovering the hierarchy of the courts,[15] it is difficult to say what their precedent

[12] For more *see*: Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 64-65; Antonio Cassese, INTERNATIONAL LAW, Oxford University Press, Oxford, 2001, pp. 5-6.
[13] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, p. 6.
[14] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 5-11; Antonio Cassese, INTERNATIONAL LAW, Oxford University Press, Oxford, 2001, pp. 5-6.
[15] One proposition for building an international system of courts through establishing rules of comity between courts, both domestic and international, is presented in: Jenny S. Martinez, *Towards an International Judicial System*, 56 Stan. L. Rev. 429 (2003).

value is. Even the concept of a precedent in international law has been disputed.[16] International courts are not supposed to make law (although they often do) but just discover and apply it.[17]

If there is no central governing body, no world parliament and if courts are not suppose to make law then how does lawmaking work in international law? For that we better start at the classical view of the sources of international law. Article 38 of the Statute of the International Court of Justices (ICJ) is taken to be an authoritative list of the sources of international law, the reasons being that almost all states are part of its Statute by virtue of their membership in the United Nations, although non members can also be party to it, one notable example was Switzerland before its entrance in the UN in 2002.[18] The Statute lists the sources of international law as follows:

> Article 38
> 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.

As we can see, the list of sources, without order of preference or hierarchy, is: treaties, custom and general principles, while judicial decisions and the teachings of the most highly qualified publicists are subsidiary means of determining the law. But how do we get to an international treaty or a custom or a general principle; how are they made?

To get to that answer I will ask you to imagine the following situation: two friends agree to play a game of chess. They draw a lot to decide on who plays with the white and who plays with the black pieces. They also agree that in the first move a pawn can move two

[16] For more on the precedent value of judicial decisions *see*, Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, pp. 293-300.
[17] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, p. 67.
[18] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, p. 66.

places. The one playing with the white pieces, in his third move, takes a pawn, moves it to the other end of the chessboard and check-mates the opposing player's king. A dispute arises about the conformity of the white player's move with the rules of chess and they wisely decide that instead of disrupting their friendship they would rather take the problem to one of their mutual friends, who also happens to be a very experienced chess player.

Now put yourself in the place of the mutual friend of our two players. How will she know what the rules of chess are? What she knows is that the only agreement that her two friends made was to play chess and that in their first move a pawn can move two places. No other rules have been agreed. She will no doubt have to look at some standard rules in order to see whether the white player's move was "legal". For that she starts asking herself how she and other of her friends play the game of chess; what rules do they adhere to? She also asks herself how the game of chess has been played throughout the ages. Was there consistency in the way a pawn was allowed to move on the chessboard? Did those that followed the rule that a pawn can only move one place forward in one move did so because it was convenient for them at the time or because they were convinced that they were following the rules of chess?

This simple example allows me to introduce the basic ides of a custom and treaty in international law and how they are made. For instance, first the two friends agreed to play a game of chess. No one made them play that game, they were two autonomous individuals (sovereign and equal as far as the rules of chess are concerned) who felt that their mutual time would be well spent if they exercised their power of reasoning for a short period of time. If both of these individuals were to be thought of as states then their agreement would be considered an international agreement.

By agreeing to play the game of chess, they also agreed to play it under the normally understood rules of chess, unwritten though they may be. They did not agree to substitute the rules of chess (this would be custom in international law) with other rules of their own mak-

ing, although this would be in their domain of discretion, as long as it was understood that the new rules were binding only between them. Consequently, the conformity of the "white" player's move would be measured by the common rules of chess, the rules under which other players down the ages have played and have become accepted as the rules of chess (in other words customary international law). One of the hallmarks of international law, both treaty and customary is that it is a product of the sovereign equality of states and that for any rule to be considered binding upon a subject of international law, and especially states, then the subject would have to have consented to being bound by that rule.[19]

1.2.1. The Treaty Making Process

The law of treaties is governed for the most part by the Vienna Convention on the Law of Treaties of 1969 (VCLT). It governs the way treaties are concluded, by whom, what the necessary steps that need to be taken before a treaty can enter in to force are, how can a treaty be terminated, when a treaty is null and void, what constitutes a breach of a treaty and so on.[20] The making of a treaty can be explained in a relatively straight forward manner although the level of complexity increases drastically the bigger the number of parties that are involved in the treaty making process. The level of the complexity of the process has increased over the years as well, but astonishingly, so has its uniformity. But a little bit later on this last point.

Treaties on a bilateral level are concluded by two parties. State representatives, at different levels of government with varying degrees of expertise on a given subject, negotiate the terms of the agreement. The level of the negotiator's discretion to make compromises in-

[19] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 5-11; Antonio Cassese, INTERNATIONAL LAW, Oxford University Press, Oxford, 2001, pp. 3-12

[20] For more *see*: Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 88-92 and 810-860; Antonio Cassese, INTERNATIONAL LAW, Oxford University Press, Oxford, 2001, pp. 126-138.

creases as they go higher up in the chain of government with the highest discretion awarded to the Head of State or the Prime Minister or the Minister of Foreign Affairs. They are, by customary international law and the VCLT, presumed to be authorized to legally bind a state by the virtue of their office.[21]

After the negotiation ends, a signing ceremony usually takes place where the agreement is signed and the internal procedure for adoption is started. The agreement can enter into force either with its signing or through a ratification procedure that is different in each state dependant on the constitutional arrangements. Once the instruments of ratification have been exchanged between the two parties, the agreement has entered in to force and is binding international law between those parties.[22] Usually in bilateral treaty-making, reservations are uncommon and in order for them to take effect the other party needs to agree to them. The reason for this is that any objections to the wording or the provisions could have easily been aired during the negotiating process and attaching reservations to an already negotiated agreement shows the intention to change that agreement even before it creates its effect. A reservation in this setting, since both of the parties need to agree to it, is a *de facto* amendment to the treaty itself.[23]

Multilateral treaty making, even in a traditional model setting, is more complex. Multilateral treaty making is usually done at international conferences where state representatives meet and negotiate a treaty. These conferences are usually convened on an *ad hoc* basis when the interest of regulating a specific subject matter becomes acute. Since states are the main actors in this model, international conferences are usually convened at the invitation of a state that has a specific interest in the topic of the conference. The negotiated draft is then submit-

[21] Article 7 of the VCLT, but also *see*: *Arrest Warrant of 1 I April2000 (Democratic Republic of the Congo* v. *Belgium),* Judgment, I.C.J. Reports 2002, p. 3 (hereafter the *Arrest Warrant* case).
[22] Articles 11-18 of the VCLT, also *see*: Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 815-820; Antonio Cassese, INTERNATIONAL LAW, Oxford University Press, Oxford, 2001, pp. 128-129.
[23] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 821-831; Antonio Cassese, INTERNATIONAL LAW, Oxford University Press, Oxford, 2001, pp. 129-131.

ted for signing and ratification and once a sufficient number of states have ratified it (dependant on the provisions in the treaty itself) the treaty will enter into force. Reservations to the treaty have to be accepted by all of its parties, otherwise the party submitting the reservation is not considered a member of the treaty arrangement until this acceptance. The enforcement of multilateral treaties is dependent on the unilateral actions of the member parties to a specific treaty and based on their own assessment and is usually done by suspending the treaty obligations towards the transgressing party, although other actions are not precluded.[24]

One example of such multilateral treaty making is the 1899 and 1907 Hague Conferences and the resulting treaties and Hague Regulations. The Conferences were held in the heyday of state dominance and state consent in international law. The 1899 conference was convened under the invitation of Tsar Nicolas II of Russia on the topic of arms reduction and limitation; a need brought about by the Tsar's inability to keep up with the spending on armaments with the other European powers.[25] Not all nations that claimed sovereignty at that time were invited to the 1899 Peace Conference; the four African nations that claimed to be sovereign were not invited at all, neither were representatives of the colonies.[26] As it was the practice of the time, there was no right to participation at conferences; the government that decided to convene the conference also decided who to invite and that was usually its allies.[27]

Twenty six governments sent their representatives at the Hague Conference where they hammered out an agreement on quantative and qualitative arms reduction (as well as number of other principles), and a permanent mechanism for establishing arbitral tribunals

[24] For more on this *see*: Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 821-831; Antonio Cassese, INTERNATIONAL LAW, Oxford University Press, Oxford, 2001, pp, 129-131; Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, pp. 273-279.

[25] Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, pp. 275-276; but also *see*, David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AJIL 4, (2000); Detlev F. Vagts, *The Hague Conventions and Arms Control*, 94 AJIL 31 (2000).

[26] Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, p. 276; Detlev F. Vagts, *The Hague Conventions and Arms Control*, 94 AJIL 31 (2000), p. 33.

[27] Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, pp. 275-276.

that would settle disputes among the parties in the form of the Permanent Arbitral Tribunal.[28] Consistent with the practice at the time, the negotiations were held behind closed doors with little contact between the negotiators and their home governments for the reason of slow communication compared to today's standards. Therefore, the state representatives were sent with clear instructions on what to compromise on, which was reflected in the rigidity of the negotiators in accepting compromises.[29]

Furthermore, since every delegation was responsible for providing its own data concerning state practice, legal precedents and alike, not all delegations were able to fully contribute to the negotiating process.[30] As is typical for international drafting conferences today, the negotiations were held in working groups or committees tasked with drafting certain aspects of the total issues discussed at the conference. Voting on the drafts was usually done in unanimity and a final text was adopted which was later sent for approval within the domestic constitutional mechanism. No records were kept of the drafting history and, as said before, the negotiations were held behind closed doors severely limiting the possibility of any representatives of the international civil society of the time to influence the negotiations in a more immediate manner.[31]

This is not to say that there was no interest by an international civil society on the humanization of warfare and arms reduction. The international peace movement, one example being Henry Dunant and the Red Cross Society and its success with the Geneva Conventions, was very much interested in the outcomes of the Hague Conference and made its feelings known through various news articles, books and other writings on the topic.[32]

[28] Detlev F. Vagts, *The Hague Conventions and Arms Control*, 94 AJIL 31 (2000), pp. 33-35; David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AJIL 4, (2000), pp. 15-18
[29] Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, pp. 274-275.
[30] *Ibid.*, p. 275.
[31] *Ibid.*, p. 274.
[32] *See* generally: Detlev F. Vagts, *The Hague Conventions and Arms Control*, 94 AJIL 31 (2000); David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AJIL 4, (2000).

The original idea of the 1899 Peace Conference was to have one every 7-8 years as a follow up mechanism, therefore, certain issues were deferred for the conference of 1907 where similar issues were discussed and the now famous Hague Regulations (IV) on Warfare on Land[33] were adopted. Follow-up mechanism to conferences, like exchanges of information or setting up arbitration mechanisms, were uncommon for that time and, as said earlier, it fell on each state to secure the obligations owed to it by the said treaty, whether by suspending the obligations arising from it, submitting the dispute to arbitration or ultimately the use of force.

There were no reservations to the agreements made at the Hague Conferences. Before the now famous advisory opinion on *Reservations to the Genocide Convention,*[34] all reservations made to a treaty had to be accepted by all the other parties to the treaty. If one party objected to the reservation made by another state to the treaty then the party making the reservation was not considered to be party to it,[35] the idea being that a state can only be bound by a treaty provision if it has agreed to it and, consequently, cannot be bound by a reservation to the same treaty that it has not consented to.[36] To do otherwise would be to allow *post facto* unilateral amendments to the treaty thus frustrating the whole purpose of negotiating a treaty in the first place. In the words of the International Court of Justice (ICJ)

> It is […] a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations.[37]

[33] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.
[34] *Reservations to the Convention on Genocide*, Advisory Opinion: I.C.J. Reports 19-51, (hereafter *Reservations to the Genocide Convention*).
[35] *Ibid.*, p. 21; but also *see* Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, p. 825.
[36] *Reservations to the Genocide Convention*, p. 21.
[37] *Ibid.*

However, the rise in the number of states, and the need for multilateralism, the fact that, as the ICJ said, the Genocide Convention and most other conventions, are a product of a series of majority votes during drafting,[38] compelled the restructuring of the reservations regime. The change that the ICJ instigated in the reservations regime, i.e. that a reservation that was not against the object and purpose of a convention was acceptable, even if other states objected to it,[39] was latter discussed by the UN International Law Commission (ILC) and found its way into the VCLT.[40]

As the law currently stands, a state can make a reservation, unless "the reservation is prohibited by the treaty",[41] or the treaty provides for specific reservations which do not include the reservation in question,[42] or if the reservation is "incompatible with the object and purpose of the treaty."[43] Acceptance of only one party to the treaty of a reservation to the treaty by an acceding state is enough for the state to become a party to the treaty.[44] Furthermore, a reservation is deemed to be accepted if no state objects to the reservation within 12 months of notification.[45] The effects of a reservation are different for those states that have objected to the reservation and to those that have accepted the reservation. Between the reserving state and the states that have objected to the reservation the treaty provision to which the reservation was made does not apply,[46] while it modifies the content of the treaty obligation between the reserving state and the states that have accepted the reservation.[47]

Another aspect of treaty making and the centrality of state consent is that states cannot create rights or obligations to third parties without their explicit consent. Since in this state

[38] *Ibid*., pp. 21-22
[39] *Ibid*., pp. 23-25.
[40] Articles 19 and 20 of the VCLT
[41] *Ibid*., Article 19(1)(a)
[42] *Ibid*., Article 19(1)(b)
[43] *Ibid*., Article 19(1)(c).
[44] *Ibid*., Article 20(4).
[45] *Ibid*., Article 20(5).
[46] *Ibid*., Article 21(3).
[47] *Ibid*., Article 21(2); for more on reservations *see* Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 821-831.

centric model the consent of states is put in the forefront of international law the consequences arises that a state cannot be considered bound by a treaty that has been concluded by other states without it giving its explicit approval.[48] States can, arguably, create a treaty that creates obligations for third states but, according to the VCLT rule, the third state will not be bound by that treaty unless it explicitly assents to it in writing.[49] This *de facto* means that a separate agreement has been concluded by the states creating the obligation and the third state. The standard is a little bit more relaxed when it comes to creating a right in a treaty to third states. In this the consent does not have to be given in such an explicit manner. The assent is presumed so long as there is no evidence to the contrary.[50] Using the right in question undoubtedly would be considered consent.

During their lifetimes, certain provision in treaties can start to become obsolete due to ever changing circumstances. Therefore a mechanism for changing existing treaties needs to be in place. This is done through amendment and modification of treaties. The amendment of treaties is the more formal way of changing a treaty and it is done through concluding a separate treaty stipulating the amendments that are made to the existing treaty. Because this is a separate treaty, all of the procedures that have been discussed above, convening a conference, negotiation, signing and ratification, plus the procedure of reservations, usually also come into play.[51]

Amending a treaty can lead to a mindboggling situation. It can lead to a situation where members who are party to the original treaty, but have decided not to be party to the amendments, have no obligations towards the other parties of the treaty who have accepted the amendments. Therefore, a two tier level of obligations emerges and states have to track

[48] VCLT, Articles 34-38; but also *see*: Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 834-836.
[49] VCLT, Article 35; Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 834-837.
[50] *Ibid*, Article 36; Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 834-837.
[51] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 837.

which obligation is owed to what state according to which version of the treaty. And this is without mentioning the possibility of what if the amendment to the agreement conflicts with certain obligations of the original agreement? Then the parties would be put into a situation where they would violate one of the agreements regardless of what action they would decide to take.[52] On the same note, states cannot relieve themselves of an obligation towards states that are members of a treaty by entering into a separate agreement with a third state or states. The treaty obligation is still owed to the other parties regardless of the new obligations undertaken by the state.[53]

Modifying a treaty on the other hand is considered to be something different. Two or more states that are parties to the same treaty can conclude a separate treaty that excludes certain effects of the previous treaty but only among themselves.[54] This sort of modification should not produce effects outside of the parties modifying the treaty. This is technically still legal since formally the parties modifying the treaty are only excluding certain effects of that treaty among themselves and that change does not produce effects outside of that community of states. The question arises what if most of the states parties to the original treaty become parties to this treaty modification? Can it be said that that in of itself frustrates the purposes of the other treaty and the intent of the original parties to regulate a certain issue in a specific manner?[55]

Another situation that might arise is the issue of successive treaties. Aside from the amendment procedure to a treaty, it has happened that two or more treaties at different periods of time have been negotiated and adopted that cover the same substantive issues (the Conventions on the Law of the Sea being just one example). The easiest way to deal with this situation is to see what the subsequent treaty says about the previous one. If the intent of the

[52] *Ibid.*
[53] For example *see*: *Matthews v The United Kingdom*, Application No. 24833/94, 18 February 1999 (hereafter the *Matthews* case) especially paragraphs 31-34.
[54] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 838.
[55] *Ibid.*

parties to the new treaty is to substitute the previous treaty and if that is expressly mentioned in the subsequent treaty then the problem is less complex. The new treaty applies to the parties from the moment it enters into force unless some of the parties to the old treaty have not become parties to the new treaty. In this case we again find ourselves with a two tier obligations as in the situation of treaty amendments.[56] If the intention is not so clear then the problem is left to interpretation and the question of how much of the previous treaty is covered in terms of substance matter with the subsequent treaty. If they regulate the same subject matter then the subsequent treaty applies. In other cases a situation might arise where certain provisions of the previous treaty may still be in force since the subsequent treaty failed to regulate that subject matter or a specific part of it.[57]

A further situation that might arise is where there are two agreements that cover the same substantive issue area but one does so in a general and the other in a more specific manner. In such a situation the *lex specialis* rule is applied which says that generally a rule or a body of law that is more specific for a certain situation will be applied in precedence over a much broader rule. This was plainly said in the ICJ's *Nuclear Weapons Case*[58] where the court found that even though human rights law was applicable in armed conflicts, nevertheless, this standard had to be weighed against the standards used in international humanitarian law as the *lex specialis* for armed conflicts.[59] The *lex specialis* rule is a conflict solving device which is used when two rules of the same order conflict, but as most things in international law, doubt can arise as to what is the more specific legal rule.[60]

[56] For more *see*: Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, pp. 248-249.
[57] *Ibid*, p. 249.
[58] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226 (hereafter *Nuclear Weapons Case*).
[59] Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, pp. 252-253; *Nuclear Weapons Case,* para. 25.
[60] Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, p. 252.

The VCLT introduced a very important concept in international treaty law and international law in general; the concept of *jus cogens*. *Jus cogens* are a higher body of norms that supersede all other international norms. The concept of *jus cogens* saw its first codification in Article 53 of the VCLT which stipulates that:

> *Article 53*
> *Treaties conflicting with a peremptory norm of general international law ("jus cogens")*
>
> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of genera international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[61]

The debate about the concept of *jus cogens* has been continuing in various different forums with certain authors giving reasons for,[62] and others giving reasons against the concept or its dangers and its futility. [63] One of the points of contention about *jus cogens* norms is their source. The VCLT in Article 53 states that peremptory norms are norms "accepted and recognized by the international community of States as a whole" and therefore puts the source of peremptory norms in the consent of States. Others put the source of *jus congens* norms in natural law, international public order, or general principles of international law.[64] If the source of *jus cogens* is derived from consent of States then their applicability is limited only to the law on treaties with regard to the validity and applicability of treaties.[65] For those who see the sources of *jus cogens* norms in public order, peremptory norms are there to pro-

[61] Article 53 of the VCLT.
[62] *See*: Alfred Vedross, Jus Dispositivum *and* Jus Cogens *in International Law*, 60 A.J.I.L. 55 (1966); Christopher A Ford, *Adjudicating* Jus Cogens, *13 Wis. Int'l L.J. 145* (1994); David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of* Jus Cogens*: Clarifying the Doctrine*, 15 Duke J. Comp. & Int'l L. 215 (2005); Dinah Shelton, *Normative Hierarchy in International Law*, 100 A.J.I.L. 291, (2006); Jonathan I. Charney, *Universal International Law*, 87 A.J.I.L. 529 (1993).
[63] *See*: A. Mark Weisburd, *The Emptiness of the Concept of* Jus Cogens, *as Illustrated by the War in Bosnia-Herzegovina*, 17 Michigan J. of Int'l L. 1 (1995); Carin Kahgan, Jus Cogens *and the Inherent Right to Self-Defense*, 3 ILSA J. of Int'l & Comp. L. 767 (1997); Georg Schwarzenberger, *International* Jus Cogens*?*, 43 Tex. L. Rev. 455 (1964-1965); Prosper Weil, *Towards Relative Normativity in International Law*, 77 A.J.I.L. 413 (1983); Dinah Shelton, *Normative Hierarchy in International Law*, 100 A.J.I.L. 291, (2006).
[64] Dinah Shelton, *Normative Hierarchy in International Law*, 100 A.J.I.L. 291, (2006), p. 300-302.
[65] *Ibid*., p. 302.

tect the highest values of the community of States and, therefore, are of a higher level in the hierarchy of norms. They also radiate their effect beyond treaty law and can be used in the sphere of the other two sources of international law; customs and general principles of international law.[66] As the *ad hoc* judge Dugard put it in his separate opinion in the case of *Armed Activities on the Territory of the Congo*[67]

> Norms of *jus cogens* are a blend of principle and policy. On the one hand, they affirm the high principles of international law, which recognize the most important rights of the international order – such as the right to be free from aggression, genocide, torture and slavery and the right to self-determination; while, on the other hand, they give legal form to the most fundamental policies or goals of the international community – the prohibitions on aggression, genocide, torture and slavery and the advancement of self-determination. This explains why they enjoy a hierarchical superiority to other norms in the international legal order. The fact that norms of *jus cogens* advance both principle and policy means that they must inevitably play a dominant role in the process of judicial choice.[68]

The concept of *jus cogens* as defined in Article 53 of the VCLT has two major components, first that it is a superior norm in terms of hierarchy to all other norms of international law that are not of the same stature; and secondly, in order to produce such an effect it has to be recognized as such by the international community of States as a whole.

Decisions of international tribunals give some clues as to the first consequences, although the use varies from tribunal to tribunal. The ICJ for instance has tried to settle the issues brought before it without the help of *jus cogens*. In the *Nicaragua case*, the Court pronounced the prohibition of aggression as a *jus cogens* norm only as a plus argument for its discussion on the use of force.[69] It did not elaborate any further on what the consequences of *jus cogens* norms are or how one can identify them.

[66] *Ibid.*
[67] *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo* v. *Rwanda),* Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6 (hereafter the *Armed Activities on the Territory of the Congo* case).
[68] Separate opinion of *ad hoc* Judge Dugard, *Armed Activities on the Territory of the Congo,* paragraph 10.
[69] *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, I.C.J. Reports 1986, p. 14, para. 190, (hereafter the *Nicaragua* case); but also see Dinah Shelton, *Normative Hierarchy in International Law,* 100 A.J.I.L. 291, (2006), p. 305.

In another decision, *Armed Activities on the Territory of the Congo*, the ICJ went into more detail of their consequences. The Court remained very cautious of using *jus cogens* norms to trump other norms of international law. In *Armed Activities on the Territory of the Congo* case, the ICJ, although finding that the crime of genocide set out in the Genocide Convention is of a peremptory character,[70] decided that its *jus cogens* nature is only in regards to the substantive provisions of the Genocide Convention and it does not apply to the provisions on jurisdictional issues.[71] Thus, it could be said that this concept is similar to the notion that reservations are allowed for provisions of a treaty that are not against its object and purpose and the jurisdictional clauses are not the object or the purpose of the Convention. Thus, the reservation that Rwanda made when it acceded to the Genocide Convention with regard to the compulsory jurisdiction of the ICJ in disputes arising out of the Genocide Convention cannot be overridden by the *jus cogens* nature of the crime of genocide.[72] It seems that "[n]o peremptory norm requires a state to consent to jurisdiction where compliance with a peremptory norm is the issue before the Court."[73]

The second implication given by the definition of *jus cogens* in the VCLT is the questions of how we can recognize a norm of *jus cogens*; what are the criteria for it achieving such a status? A small help is given in the words "recognized by the international community of States as a whole", but that does not give many tantalizing clues as to what constitutes "the international community of States as a whole" and where one can find that recognition.

The ILC in its commentaries to the Draft on the Law of Treaties that later became the VCLT, when elaborating on the concept of *jus cogens*, said that

[70] *Armed Activities on the Territory of the Congo*, para. 64.
[71] *Ibid.*, para. 64-70; Dinah Shelton, *Normative Hierarchy in International Law*, 100 A.J.I.L. 291, (2006), pp. 306-307.
[72] "Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfillment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention." *Armed Activities on the Territory of the Congo*, paragraph 67.
[73] Dinah Shelton, *Normative Hierarchy in International Law*, 100 A.J.I.L. 291, (2006), p. 307.

> there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*. Moreover, the majority of the general rules of international law do not have that character, and States may contract out of them by treaty. It would therefore be going much too far to state that a treaty is void if its provisions conflict with a rule of general international law. Nor would it be correct to say that a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted, so that another treaty which conflicted with that provision would be void.[74]

Jus cogens norms can arise from all sources of international law, custom, convention or general principle, and it is worth noting that "[I]t is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, […], give it the character of *jus cogens*".[75] But the criterion which is set out in Article 53 cannot be easily set aside. The requirement is that the norm is recognized as such by the international community of States as a whole. The question arises that if recognition of the entire community of States is needed, then does that mean that any member of that community has a right to veto the emergence of a *jus cogens* norm?

One consequence of that sentence is that it is only States that can give rise to peremptory norms. Opinions and practices of international organizations do not count. This is inherent in the term "community of States". Statements made at the Vienna conference on the Law of Treaties by State representatives give clues to the answer to this question. Every member of the international community does not have a veto power; rather a peremptory norm can come into existence if the essential members of the international community of States recognize it as such.[76]

As we can see from what has been said above, the main actor in the treaty making process, at least by the end of WWII, is the state with minimal, but still noticeable, influence

[74] *Commentaries to the Draft Proposal on the Law of Treaties*, ILC, Year Book of the International Law Commission 1966, Volume II, paragraph 2.
[75] *Ibid*.
[76] Dinah Shelton, *Normative Hierarchy in International Law*, 100 A.J.I.L. 291 (2006); Eva M Kornicker Uhlmann, *State Community Interests*, Jus Cogens *and Protection of the Global Environment*, 11 Geo. Int'l Envtl. L. Rev. 101 (1998-1999), pp. 112-113; Prosper Weil, *Towards Relative Normativity in International Law*, 77 A.J.I.L. 413 (1983), pp. 419-423.

of the international civil society. States were the initiators, the drafters, the makers and the final enforces of a treaty. The influence of other international actors was minimal at best. There were no international organizations coming even close to the calibre or what we can find today, or even the League of Nations, established little over a decade later that would influence the sharing of information or the preparation of negotiations, let alone enforcement of obligations. There were no permanent international adjudicators as there are today. Although the Hague Peace Conference of 1899, for instance, created the Permanent Court of Arbitration, the parties did not bind themselves to put any disputes relating to the Conference itself, or to any other treaty arrangement for that matter, to arbitration. The Court was just a convenient mechanism on how to easily establish arbitral panels if ever an agreement arose to settle a dispute by way of arbitration. The main form of adjudication of international disputes was through *ad hoc* arbitration severely dependant on the agreement of states on whether to go to arbitration, let alone the type of law applicable to the dispute or the principles that would be used in the adjudication.[77] Permanent courts or adjudicative bodies as part of pre-commitment strategies in international relations only started to emerge with the establishment of the Permanent Court of International Justice (PCIJ) after the First World War and even more so after WWII.[78]

1.2.2. The Process of Making International Customs

[77] For more on the prevalence of international interstate arbitration *see*: Eric A. Posner and John C. Yoo, *Judicial Independence in International Tribunals*, 93 Calif. L. Rev. 1 (2005); but also *see*: Laurence R. Helfer; Anne-Marie Slaughter, *Why States Crate International Tribunals: A Response to Professors Posner and Yoo*, 93 Cal. L. Rev. 899 (2005).

[78] *See*: Laurence R. Helfer; Anne-Marie Slaughter, *Why States Crate International Tribunals: A Response to Professors Posner and Yoo*, 93 Cal. L. Rev. 899 (2005).

In domestic law, customs do not play any significant role in the legal system. They are seen as "cumbersome and unimportant and often of nostalgic value."[79] In international law, on the other hand, customs play an important role, especially in the beginning of the current shape of the international system. In a decentralized international system with no world legislator, customs provide the possibility of creating and modifying the law without going through the treaty making process. It can be an essential tool for bringing about change in the law when there are acute gaps in international law which is followed by the unwillingness to undertake the normal treaty making process.[80]

So what are international customs? Article 38 of the ICJ Statute defines customs "as evidence of general practice accepted as law."[81] From this provision we can conclude that custom is comprised of two elements, general practice and *opinio juris*. One needs both to find that a certain custom exists in international law. The initial factor of a custom is the actual practice of states that they engage while operating in the international sphere. Several points have to be taken into account when discussing the actual practice of states: duration, consistency, repetition and generality.[82]

Most of these attributes of general practice are flexible. The duration of the practice before it becomes custom is one such example. Different municipal systems have different time scales to measure at which point a practice has become law and this can span from several decades to several years and in few cases, like the law of outer space, a single occurrence could be considered as sufficient.[83] What is important that that there is continuity and consistency in the practice of states. The ICJ had several cases in which to tackle this issue. In the *Asylum case*[84] the court had to establish whether there was a regional custom concerning Co-

[79] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, p. 69.
[80] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 69-71.
[81] Article 38 of the Statute of the International Court of Justice.
[82] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, p. 72.
[83] *Ibid.*
[84] *Colombian-Peruvian asylum case,* Judgment of November 20th 1950: I.C.J. Reports 1950, p. 266.

lombia's right to determine if the offence of an asylum seeker was of a political nature. If it was so then Colombia could grant of asylum and request a guaranteed of safe passage from Peru to the asylum seeker from its embassy in Peru to Columbian territory. The Court said:

> The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the officia1 views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.[85]

In the *North Sea Continental Sea Shelf Cases* the ICJ, while deciding in a dispute between Holland and Denmark on one side and West Germany on the other, had to decide whether the equidistance rule for delimitating the continental shelf has become a new customary rule of international law. The Court noted that:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what bras originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked […][86]

In the later *Nicaragua case* the court elaborated more on the uniformity of the practice required by states in order for it to be elevated to the level of international custom and went on to say that

> [t]he Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as 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.[87]

[85] *Ibid*, p. 277.
[86] *The North Sea Continental Shelf* case, para. 74.
[87] *The Nicaragua Case*, decision on merits, para. 186.

As we can see the threshold that a certain state practice must attain in terms of uniformity and consistency can vary and it depends on the nature of the rule (local or general custom etc.) and the opposition that it creates by other states. As noted earlier even limited practice can lead to the formation of custom as evidenced by the customary law creation within air and space law, where, for instance, the non-sovereignty over the space route followed by artificial satellites rule was established after the first launches of the sputnik satellites.[88]

Not all states have the same weight when it comes discussing the practice that is able to establish an international custom. The practices of the specially affected states counts more towards establishing a custom, as well as the practice of the more powerful states. For instance the practice of the bigger maritime states, like the United States, Britain or Japan are far more relevant in establishing a custom when it comes to the law of the sea then, let's say, Macedonia, a landlocked country. As one influential scholar has put it

> [...] the duration and generality of practice may take a second place to the relative importance of the states precipitating the formation of a new customary rule in a given field. Universality is not required, but some correlation with power is. Some degree of continuity must be maintained but this again depends upon the context of operation and the nature of the usage."[89]

The question now arises what can be used as evidence of state practice? What actions or even inactions of states can be considered as practice? Is every kind of state behaviour considered state practice? When we answer these questions we have to keep in mind that states are not living entities but rather a conglomerate of various departments and organizations run by state officials like, government officials, ministers, ambassadors, courts, the military and so on. Each of them, or more precisely each of their actions, in a specific way and in specific circumstances, can be used as evidence of state practice. This evidence can be sought in the speeches of political leaders, in memoranda published by official institutions, of offi-

[88] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, p. 74.
[89] *Ibid.*, p. 76.

cial manuals, diplomatic interchanges and so. The municipal laws of states can also in certain circumstances form the basis for establishing the existence of practice if the states have legislated on a specific issue in more or less the same terms.[90] The not taking of certain actions does not *per se* establish an international custom. The fact that Great Britain has not attacked France in several centuries does not establish the custom that Great Britain has legally accepted the obligation not to attack France at any time whatsoever.[91] More evidence is needed than the simple inaction of states in order to establish a custom.

Not every state practice, regardless of how uniform it is, becomes international custom; the reason being that it lacks one important part of an international custom, and that is *opinio juris. Opinio juris* is the belief that the state, when it is undertaking a certain action, is doing so out of something that *is or should be* a legal obligation and not because of certain convenience or courtesy. In the *Lotus case* the Permanent Court of International Justice (PCIJ), when answering France's assertion that there was an international custom that established the exclusive jurisdiction of the flag state of the accused brought about by the abstention of states prosecuting such cases, said that

> Even if the rarity of judicial decisions to be found among the reported cases were sufficient to prove in point of fact [of the existence of practice of exclusive jurisdiction of the flag state] it would merely show that states had often, in practice abstained from instituting criminal proceedings, and not that they have recognized themselves as obliged to do so; for only if such abstention were based on their being conscious of their duty to abstain would it be possible to speak of an international custom.[92]

The ICJ has adhered to this principle established by the PCIJ in its *North Sea Continental Shelf Cases* and the *Nicaragua case*. In the former it said that

> [n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that

[90] *Ibid.*, p. 78.
[91] *Ibid.*
[92] The *Lotus case*, p. 28.

> they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.[93]

The question that poses itself is where do we find the evidence of *opinio juris*? Similarly as with the evidence of practice, the speeches of public officials, the issuing of memoranda or other legal opinions by governmental branches, decisions taken by judges, exchanges between foreign ministries and the enactment of statutes are a good place to start. Nevertheless, distinguishing the subjective element is never easy partly because there is no one single mind that we can attribute to a state; there is no internal will of the state.[94]

Therefore, the creation of customary international law has to be seen as a process and not just as a onetime event where everything (practice and *opinio juris*) comes together in one single point in time. It is hard enough to pinpoint when a practice has formed, and when have states started to adhere to a specific practice because out of the sense of legal obligation and when was it done out of other considerations, like expediency. One example given of the making of international custom is the example of how a road forms on a fresh field. First there are many tracks and paths that people take over the field. But over time a single path starts to be more used then the other because it is the most convenient for most of the travellers. Soon an opinion forms that this one most used path is the legal and legitimate road and must be used by all. It is hard to pinpoint when has this opinion formed but it is there nevertheless.[95]

As is the creation of a custom a process, so it is with its modification. It is almost unimaginable that a custom can be changed without first being violated by some states. As circumstances change over time (sometimes a short period of time) the need for a change of custom arises and some states deviate from its proscribed conduct. If enough states fall behind this new deviation it becomes the new custom and supplants the old one. Not even the ex-

[93] *The North Sea Continental Shelf* case, para. 77
[94] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 82-83.
[95] *Ibid*, p. 75, explaining the analogy given by de Vissacher on the creation of practice and custom.

press acceptance of this deviation by most states is considered to be necessary. The lack of protest by other states to the states conduct will be taken as evidence of tacit approval with the states action and a new custom will be considered to be formed.[96] The criticism to this approach is straight forward; not all states have the capacity to monitor the actions of other states and arguable, the change of practice of a few powerful states could bring about a change of international law without the consent of the majority of states.

The idea of having to have to voice out objection to an emerging custom begs the question of what to do with those states that actually raise one from the beginning of the process? Should the new rule not apply to them or will they be forced to accept the new customary rule regardless of their objections? In order to reconcile the need for creation of new rules and preserve the centrality of the consent of states, international law has introduced the persistent objector rule. The persistent objector rule means that if a state persistently objects to the formation of a certain custom from the beginning of the process of its creation then this new rule will not apply to that states. Similarly when a state persistently objects to the practice modifying a certain custom and claims adherence to the old customary rule, the new emerging custom does not apply to it. As for those states that did not exist when the customary rule was forming it is generally accepted that when they entered into relations with other states without objection then they accepted the totality of international law that is then in existence.[97]

1.2.3. General Principles of International Law

[96] *Ibid*, 84-86.
[97] *Ibid*, 86-87, but also *see*: Antonio Cassese, INTERNATIONAL LAW, OUP, Oxford, 2001, pp. 121-122 for the contention that other then the dicta in the *Fisheries case*, the persistent objector rule has had no practical implication and has largely been overcome as a concept in international law.

The third source of international law mentioned in article 38 of the ICJ Statute is the "general principles of law as recognized by civilized nations".[98] In domestic law, general principles of law are used to fill in gaps in the law that have not been settled either by statute, precedent or similar source. They mostly become relevant during adjudication when judges have to fill in the gaps left by legislators and use analogy from other branches of law or principles that form the basis of the domestic legal system, like justice, equity or considerations of public policy. In international law the gaps in the law are much more frequent then domestic law and similarly as in domestic law, international adjudicators use general principles to fill in the gaps and avoid using a declaration of *non liquet*.[99]

There are disagreements as to what general principles stand for. Some consider that behind the concept lies the idea of Natural Law as a way of testing the validity of positive law. For the positivists, on the other hand, they fall under the category of sub-headings of either treaty or customary law and are incapable of adding anything new to international law that has not already been consented to by states. The most prevalent thought on general principles is that they are a separate source of international law with a very limited and incidental scope of application.[100]

In order to find what the general principles of law are on a certain matter, judges go to the basic principles of municipal legal systems and see whether they are applicable in the given situation. It is not necessary to look in all of the nearly 200 municipal systems in order to surmise what the general principles have to say on a certain issue given the fact that a lot of countries in the world share the same legal tradition, the Anglo-American, French, Germanic and so on. Examples of general principles are *res judicata*, *pacta sunt servanda*, the rule of estoppel, good faith, *nullum crimen* in international criminal law, just to name a

[98] Article 38 of the ICJ Statute.
[99] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 92-93; Antonio Cassese, INTERNATIONAL LAW, OUP, Oxford, 2001, pp. 151-153.
[100] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, p. 94.

few.[101] Although they have a limited use they are, nevertheless, a vital tool in the adjudicators' toolkit.

1.3. The Changing Face of International Lawmaking

In the previous part of this Chapter, I talked about how international law is seen to be made from a classical perspective. This classical perspective encompasses two major components, one being the centrality, and the exclusivity of states, in the law-making process and the second being the necessity of consent by states to the law being made. In this part of the Chapter, I am going to explain how the rise of other actors has changed, not only the law-making process, but also the way we see international relations play out. In this part, I will explain, in broad strokes how actors other than states have changed the law-making process and will give a brief overview of the role of courts, both domestic and international, in this new environment.

1.3.1. International Organizations as Lawmakers

The rise of International Organizations in the past half century has been an interesting phenomenon that has been studied by both scholars and politicians alike. The rise of IO has been so profound that academics from both the legal and the political science profession have been talking about the rise of Global Governance, pushed and managed by global international governmental organizations.[102] The number of international organizations has risen ex-

[101] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 97-99

[102] Jose E. Alvarez, International Organizations as Law-makers, Oxford University Press, Oxford, New York, 2005; Jose Alvarez, *Governing the World, International Organizations as Lawmakers*, 31 Suffolk Transnat'l L. Rev. 591 (2008); Jose Alvarez, *International Organizations: then and now*, 100 A.J.I.L. 324, (2006); and also *see* the symposium volume of the European Journal of International Law - Nico Krexch &

ponentially and with it their influence on the international and domestic sphere. Just think of the increase and the widening of the powers of the United Nations (UN) and most notably its Security Council. The UN has risen to be more than just a place where Governments meet to discuss global issues, draft treaties and decide on collective action. It has become, through its Chapter VI and most notably Chapter VII powers, a global legislator, keeper of the peace, administrator of territories, dispute resolution mechanism, the one who sets borders between States, decides on the type of weapons that States can have in their arsenals, monitor elections, as well as many other things.[103] Nowhere in the Charter are these situations or involvement of the UN regulated. Yet that has not stopped the UN from taking action, rightly so in most cases.

The rise of IOs goes beyond the story of the UN and its ubiquitous Security Council. One can find numerous such examples explained in the literature all over. For instance, the International Civil Aviation Organization (ICAO) has a mandate to promote the contact among States in order to foster the development of civil aviation around the world. Yet in its fifty years of existence it has been a place where issues of use of force against civilian aircraft have been resolved,[104] where Standards and Recommended Practices (SARPs) have been drafted and circulated to its Member States. These SARPs are not legally binding as such; they live in the realm of "soft law". But because of the way that they are drafted (through a discussion between air security experts of Governments) States are extremely willing to abide

Benedict Kingsbury, *Global Governance and Global Administrative law in the International Legal Order*, 17 Eur. J. Int'l L. 1 (2006) (first article in the series); Nicholas Tsagourias ed., TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN PERSPECTIVES, Cambridge University Press, Cambridge, 2007.

[103] For a more detailed discussion of most of these examples *see*: Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005.

[104] Generally *see*: Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005.

by them. It may happen that planes may be refused permission to land if they or their pilots do not comply with the relevant SARP.[105]

Similar examples can be given with the many guidelines that Governments are requested to adhere to or the conditions imposed by the World Bank and International Monetary Fund (IMF) when States approach these organizations for loans. These conditions can vary from accepting and enforcing rules regulating government bribery and other best practices and good governance, to making sure that indigenous communities are consulted when important infrastructure projects are implemented.[106] These conditions and guidelines are formally only "soft law" but, nevertheless, Governments starved for cash are only too happy to promise to abide by them.[107]

This unavoidably leads us to the question of what is understood by the term "soft law", as opposed to "hard law." The quotation marks should give us some clue as to the difficulties in pinning down the notion. "Soft law" can take the shape of various SARPs, non-binding resolutions or reports by expert bodies, like the Council of Europe's Committee for the Prevention of Torture (CPT). The usual meaning of "soft law" can be attached "to any international instrument other than a treaty that contains principles, norms, standards, or other statements of expected behavior."[108] However, the term "soft law" has also been used to denote non-binding or promotional language of a binding treaty.[109] Also, some scholars have made the distinction between "soft" and "hard" law on the type of responsibility that they would provoke in instances of none compliance. "Soft law" has been said to evoke political responsibility, while "hard law" would also involve legal responsibility.[110]

[105] Jose Alvarez, *Governing the World, International Organizations as Lawmakers*, 31 Suffolk Transnat'l L. Rev. 591 (2008), p. 604.
[106] *Ibid*, but also *see*, Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, pp. 235-241.
[107] Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, pp. 235-243.
[108] Dinah Shelton, *Normative Hierarchy in International Law*, 100 A.J.I.L. 291 (2006), p. 319.
[109] *Ibid.*
[110] *Ibid.*, pp. 319-320.

Regardless of whether the issue at stake is one of binary distinction (law and not-law) or that of range of normativity[111] what most scholars would agree is that "soft law" is not law,[112] otherwise we would have to agree that law can be non-binding. I would argue that law is always binding, but that in itself does not mean that it has to be followed[113]. Furthermore, there are other notions that are not law or legal which have a level of normativity and evoke compliance, morality being one such example. Consequently, for the purposes of this thesis, when I use the terms "soft law", I mean those instruments that cannot be pigeonholed into the normal Article 38 sources of law, i.e. treaties, customs and general principles, with judicial decisions and the writings of scholars as *authorities.*

The examples above only show that international organizations have risen in number and prominence, but how much have they changed international law-making? The short answer would be, a lot. Let us not forget that international organizations are subjects of international law capable by themselves of entering into international agreements.[114] International treaty making has a new subject of international law which is not the case with the other actors in the law-making process.

Further example of how international organizations have changed the face of international law-making is the sheer number of treaties that have been attributed to the UN treaty making assistance; one estimate puts it at half of almost 1500 multilateral treaties that were in

[111] *Ibid*., p. 320
[112] Malcolm N. Shaw, INTERNATIONAL LAW, 6th edition, Cambridge University Press, Cambridge, 2008, pp. 117-119.
[113] One example that comes to mind is the famous Radbruch's formula ("that 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") that the German Federal Court of Justice used in its reasoning in the Border Guards cases *see Streletz, Kessler and Krenz v Germany*, (Applications nos. 34044/96, 35532/97 and 44801/98), Judgment, March 22, 2001, para. 22.
[114] The ICJ in its *Reparations for Injuries* advisory opinion acknowledged that international organizations posses functional subjectivity in international law allowing them to be invested with international rights and obligations including which the conclusion of treaties necessary for the execution of their mandate; *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion: I.C.J. Reports 1949, p. 174.

existence by 1995.[115] One of the reasons why so many multilateral agreements have been reached with the help of the UN, and this generally applies for other international organizations as well, is that IO's present the perfect forum for negotiating treaties. Take, for instance, the network of specialized agencies that work within the UN system. They present an overwhelming opportunity where representatives of the UN members can meet and discuss with their opposite numbers on very narrow issues that are of their concern and expertise. Some of these meetings end up with a treaty draft, most with certain kinds of recommendations or best practices concerning an issue on the agencies' agenda.

One of the biggest changes that IO's have brought to international law-making is to the sphere of multilateral treaty making. As you may remember from earlier, one hallmark of multilateral treaty making was that it is done at international conferences convened by one or more powerful states. On the other hand, with the rise of the number and prominence of IOs, they have become the main organizers of these treaty making conferences. One prime example is the International Labour Organization and its treaty makings system. So far it has adopted 188[116] conventions since its creation in 1919. Recently it has been noted that its treaty making mechanism has been able to produce a convention on a specific issue every three or so years. [117]

The participation in these treaty making conferences has also changed. No longer does the state that hosts the conference get to decide who is invited to the drafting process. Quite the contrary, there is a presumption that states have the right to participate in such conferences, not only through the suggestions of amendments to the draft, but also by taking part in the vote during the adoption of the final draft of a treaty. Participation in these treaty making

[115] Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, pp. 273-274.
[116] This count as of January 25, 2011; see ILO website http://www.ilo.org/ilolex/english/convdisp1.htm (last visited on January 25, 2011).
[117] For the treaty making process with in the ILO *see*: Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, pp. 321-337.

conferences has been overwhelming, just think of the number of state participants during the Rome conference on the creation of the ICC.[118]

The Rome Conference is actually a very good example of how international organizations have changed law-making. After WWII and the Nuremberg trials, the UN adopted a resolution confirming the principles established at Nuremberg to be customary international law and taxed the newly created International Law Commission (ILC) with drafting a text for a convention establishing a permanent criminal court.[119] The realities of the Cold War settled in pretty quickly and despite the ILC's effort in drafting a convention on international crimes no treaty making conference was scheduled. The ILC silently continued its work until such a time when its services would be needed again.

Nearing the end of the Cold War, a proposal was put in place from Trinidad and Tobago for a creation of a criminal tribunal that would deal with international drug trafficking.[120] The proposal was passed by the General Assembly and the ILC was tasked with drafting a statute for such a court. A significant preparatory work was undertaken by the ILC, such as the drafting of the draft Code on Crimes Against Peace and Security of Mankind and its submission for comments to states. The final draft of the Code prepared by the commission was submitted to the Preparatory Committee for the drafting of the statute of the international criminal court (prepcom) with the comments submitted by states.[121] In the draft that was presented before the delegates at the Rome Conference there were around 1400 square brackets denoting the various proposed alternatives to the proposition being discussed or disputed provisions.[122]

[118] *Ibid*, pp. 274-275.
[119] *See*: GA Resolution 95(I), 11 December 1946, UN Doc. No. A/RES/95(I).
[120] Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007 pp. 148-149;
[121] *Ibid*, p. 149; but also *see* the web site of the ILC available at: http://www.un.org/law/ilc/ (last visited February 7, 2009).
[122] *Ibid.*, p 149; and *see*: Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 Vand. L. Rev. 1 (2006); Philippe Kirsch and John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 A.J.I.L. 2 (1999), p. 3.

This herculean task was divided to 13 Working Groups responsible for negotiating a different issue of the draft and all of them reporting to the Committee of the Whole (CW). The states divided themselves into several blocks each sharing certain common issues around which they grouped, like the group of like-minded states that favoured an independent prosecutor with the possibility to start investigations; or the group of the Permanent 5 (P-5) members of the UNSC, which favoured a high dependence of the Court from the UNSC or like the states from the Arab League and the Holly See which joined their efforts around the issue of forced pregnancy as a war crime or other gender issues and other more loose coalitions of states.[123]

A central role was played by the CW and its bureau that were responsible for looking after the integrity of the text which was suppose to be put to a vote. Towards the end of the Conference, when it seemed that an integrated text was not going to be negotiated, the bureau started issuing discussion papers which contained proposals and narrowed the negotiation options. And the CW also held bilateral talks with particular delegations in order to search for a compromise. In the end a package deal for the provisions of the treaty was negotiated and put to the plenary session for a vote in a "take it or leave" it fashion.[124] It was impossible to demand to renegotiate one provision of the draft without compromising other provisions that were linked to that provision because one group of states accepted the proposed solution as a compromise on another issue. When the draft was put to a vote a hundred and twenty countries accepted the final proposal with seven against and twenty one abstentions.[125]

The success of the Rome Conference was due to several factors; the astuteness of the Chairman of the CW and the dedication of the bureau are surely one of them, but the overwhelming work of the ILC before the convening of the conference was undoubtedly another

[123] Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, p. 149.
[124] *Ibid*, p 150; and Philippe Kirsch and John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 A.J.I.L. 2 (1999), p 10.
[125] *Ibid.*

one. The preparatory text of the ILC as well as its comments and suggestions proved invaluable during the negotiations later. The other important feature of modern multilateral treaty making conferences, which was used in this one to great benefit, is the more widespread use of package deals where the acceptance of one provisions by one group of states is connected to the acceptance of another provision by a different group of states. In the end one gets a bundle of treaty provisions that have been accepted as part of a package and that in turn creates the consequence that it is very difficult to attempt to renegotiate certain treaty provisions after the adoption of a draft and its submission for ratification.[126]

Creating a forum for discussion of treaties and drafting the preparatory material for treaty making conferences is far from the only way by which international organizations have changed international law-making. True enough the ILC has been the key player in drafting several multilateral treaties, some with more success than others, as evidenced by the statute of the ICC or the VCLT.[127] But recently, the ILC has done more than just draft treaties and sending a notice to the UN General Assembly for a recommendation of adoption as part of its mandate to codify international law.

One of the more marked successes of the ILC is the Draft Articles on State Responsibility. The ILC has worked on the Draft Articles for over four decades and it has had notable breakthroughs and marked drawbacks during the span of their work. Again, it took the end of the Cold War and the changing of the whole concept of state responsibility for the Draft Articles to finally find their current form. By 2001 the ILC finished its final reading of the Draft Articles and together with the UN Sixth (Legal) Committee, it recommended to the UN General Assembly to "commend the Draft Articles to the governments without prejudice to the

[126] One example of such an attempt that was partly successful was the attempt on the part of the US to renegotiate certain provisions on the deep see bead after the adoption of the UN Convention on the Law of the Sea (UNCLOS) of 1982 *see* Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, pp. 144-148.
[127] *Ibid*, pp. 171-204

question of their future adoption or other appropriate action".[128] The way that the ILC presented their final Draft Articles, with which the UN Sixth Committee agreed, was that the articles themselves have already passed into customary law and backed it up with a staggering amount of case law and state practice in its report. Most, if not all, of the Draft Articles are now considered to be part of general international law and states have accepted this, partly due to the prolonged debate on the issue (some forty years) and the incorporation of the opinion of states filtered through the UN Sixth Committee. The end result was a text that had a strong backing by most states with an extensive and persuasive commentary. The expert, non political nature of the composition of the ILC gives it a further clout when issuing its drafts and proposals.[129]

Yet another way in which international organizations create international law through treaties is by their interpretation. Prime example of this is the various human rights treaty bodies of the UN under the umbrella of the Economic and Social Council. These treaty bodies have been created and negotiated as part of the implementation mechanisms of the various human rights instruments. The first human rights instruments within the UN system, like the International Covenant on Civil and Political Rights (ICCPR), had a reporting system where states were obligated to report on the implementation of the covenants and the measures that they have adopted.[130] Article 40 of the ICCPR also gave a prelude to the next steps that these

[128] Responsibility of States for Internationally Wrongful acts, UN. Doc. No. A/RES/56/83, 12 December 2001.
[129] Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, pp. 184-186
[130] "Article 40
1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
(b) Thereafter whenever the Committee so requests.
2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.
4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The

bodies would take, i.e. to enter a dialogue with the reporting states on the condition of human rights within their territory and through this achieve a progress in implementation of the treaty and a progress of the human rights situation in that specific state. But this dialogue has evolved into something much more. By issuing general comments on the Covenants and on separate articles as guidelines to state parties on the way they should write and structure their reports, the treaty bodies have also interpreted and expanded the scope of protection under these conventions.

For instance, the Human Rights Committee, responsible for overseeing the implementation of the ICCPR, has issued by 2009 thirty-one general comments regarding the interpretation of various articles within the Covenant. One of its more controversial comments is regarding reservations to the ICCPR and to human rights treaties in general.[131] In General Comment No. 24, for instance, the HRC has taken upon itself the prerogative of determining which reservations are acceptable to the object and the purpose of the Covenant. It would be safe to say that this was something that has not been envisioned by either the Covenant itself, nor by the VCLT when regulating the consequences of reservations and especially reservations that are against the object and purpose of a treaty, let alone the severability of obligations that the HRC advocates.[132] A similar issue arises with regard to the continuity of obliga-

Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article." International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, p. 171 and vol. 1057, p. 407.

[131] General Comment No. 24, *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant* (Fifty-second session, 1994), UN Doc. No. CCPR/C/21/Rev.1/Add.6, General Comment No. 24, November 04, 1994.

[132] *See*: General Comment No. 24, para. 16-18 more specifically "[i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State's compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to

tions that the HRC committee foresees in its General Comment No. 26 where it states that one, states cannot denounce the Covenant and two, even more controversial, that if a state ceases to exist due to dismemberment or state succession the obligations arising out of the Covenant still apply to the territory of the now non-extant state, even within this new state structure.[133]

A prime example of the expansion through a dialogue with states is of the interpretation of Article 2 of the International Covenant on Civil and Political Rights (ICCPR) in the Committee's review sessions with Israel.[134] Article 2 sets out the scope of applicability of the Covenant in terms of territory and it mandates that states have an obligation to secure the rights under the Covenant to all persons within their territory *and* subject to its jurisdiction. In its reports to the Human Rights Committee (HRC), Israel has consistently maintained that the provisions of the ICCPR do not apply to the West Bank and other occupied territories held by

perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation."; but also *see* Ryan Goodman, *Human Rights Treaties, Invalid Reservations and State Consent*, 96 A.J.I.L. 531 (2002).

[133] "4. The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.
5. The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it." General Comment No. 26: *Continuity of Obligations*, 08/12/97, UN Doc. No. CCPR/C/21/Rev.1/Add.8/Rev.1.

[134] Article 2
1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.

Israel.[135] As a response to this, in its Concluding Observations and Recommendations to Israel's report, the HRC has interpreted Article 2 to mean quite the opposite, i.e. that the ICCPR applies to individuals that are outside of the parties' territory that are under its jurisdiction.[136] Most notably it has said that

> 10. The Committee is deeply concerned that Israel continues to deny its responsibility to fully apply the Covenant in the occupied territories. In this regard, the Committee points to the long-standing presence of Israel in these territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein. In response to the arguments presented by the delegation, the Committee emphasizes that the applicability of rules of humanitarian law does not by itself impede the application of the Covenant or the accountability of the State under article 2, paragraph 1, for the actions of its authorities. The Committee is therefore of the view that, under the circumstances, the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bank where Israel exercises effective control. The Committee requests the State party to include in its second periodic report all information relevant to the application of the Covenant in territories which it occupies.[137]

This consistent interpretation of Article 2 by the HRC has later been accepted by the ICJ in its *Legal Consequences of the Construction of the Wall*[138] case without even going into a discussion of the meaning of the plain textual reading of Article 2 which requires double conditionality to the term territorial applicability of the Covenant as required by the VCLT. It rather just simply accepted the HRC interpretation and said that the ICCPR is applicable to the occupied territories that are under the effective control of Israel.[139] Just months before the

[135] *See for instance*: *Summary Record of the 1675th Meeting*, UN Doc. No. CCPR/C/SR.1675, 21 July 1998, para. 21

[136] *See*: *Considerations of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Israel*, UN Doc. No. CCPR/C/79/Add.93 of 18 August 1998, para. 10; *Considerations of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Israel*, CCPR/CO/78/ISR of 21 August 2003, para. 11

[137] *Considerations of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Israel*, UN Doc. No. CCPR/C/79/Add.93 of 18 August 1998, para. 10.

[138] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136 (hereafter *Legal Consequences of the Wall* case).

[139] *Legal Consequences of the Wall case*, para. 106-111.

ICJ's advisory opinion was issued in 2004, the HRC also issued its General Comment No. 31 where it reiterated its stance on the subject.[140]

The optional protocols have given an even more frequent chance of these treaty bodies to interpret and through that expand the applicability of the treaties. The optional protocols gave the power to individuals to send complaints to the treaty bodies regarding human rights violations. The Committees then review this complaint in a quasi-judicial review procedure and issue Recommendations to the state parties finding (or not) a violation of the provisions of the conventions. The more complaints a body receives the more opportunities it has in interpreting its specific treaty and consequently, of expanding the scope of its treaties. This expansion trough interpretation by reviewing cases will be explained in more detail when I discuss the role of courts in this changing setting of international law-making; suffice it to say that the lower the bar of accessibility of non-state actors to these bodies the greater the likelihood of law-making through interpretation.[141]

The UN has come into its own when it comes to international law-making by becoming a kind of global legislator through the increase of the powers of the Security Council. One such prime example is the UN Al Qaeda/Taleban Sanction Committees, subsidiary bodies created by the UNSC. It has been almost ten years now that the UN has established the Taliban/Al Qaeda Sanctions Committee.[142] It was established as a measure for sanctions against the Taliban regime, which was in power in Afghanistan at the time, and the operations of the Al Qaeda organization following the attack of the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania and the refusal of the Taliban to surrender the Al Qaeda opera-

[140] General Comment No. 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, May 26, 2004, UN Doc. No. CCPR/C/21/Rev.1/Add.13.
[141] Robert O. Keohane, Andrew Moravisik, Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 Int'l Organization 457 (2000), discussing the differences in dispute resolution mechanisms and the impact of choices of institutional design of the courts on their influence of the regime specific law.
[142] The Security Council established the 1267 Committee pursuant to resolution 1267 (1999) on 15 October 1999 is also known as "the Al-Qaida and Taliban Sanctions Committee", *UN Security Council Resolution 1267 (1999)*, UN Doc. No. S/RES/1267 (1999).

tives responsible for them.[143] The UN's anti-terrorism approach goes further than 1267 Sanction Committee, but for the purposes of this case-study I will not go into a deeper explanation of the UN's activities in that field, suffice it to say that the other sanctions and resolutions adopted by the Security Council have a greater level of discretion when it comes to the implementing measures of the Member States.[144]

The 1267 Committee was first established as a simple mechanism of flight ban and asset freeze measures. It has grown since then in a mammoth regulation that spans all Member States of the UN; it has a global reach and an open ended time limit. The first sign of the augmentation of the regime was in 2000 when the SC expanded the scope of sanctions to the Taliban controlled part of Afghanistan to include arms embargo and broadening the asset freeze to include the assets of Osama bin Laden, Al Qaeda, and their supporters included on the Committee's consolidated list.[145] After the attack on September 11, the Security Council adopted resolution 1390 (2002)[146] and no longer limited the territorial application of the sanctions to the Taliban controlled territory of Afghanistan; it took the measure globally, targeting Al Qaeda and its members all over the world.

It is needless to say that this has been a huge shift in international law-making. The UNSC has in fact become the first true global centralized lawmaker. It is not the first time that it has used its powers under Chapter VII of the Charter in a controversial way; it is just that this is the most drastic example. Let us not forget that the UNSC under these same Chapter VII powers established the *ad hoc* international criminal tribunals with an entire judicial mechanism that goes along with it, like international prosecutors and investigators. This has

[143] UN Security Council Resolution 1267 (1999), p. 1.
[144] Generally *see*: Erie Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 A.J.I.L. 745 (2003) describing the four prongs of the Security Council's approach to counter-terrorism.
[145] *United Nations Security Council Resolution 1333 (2000)*, UN Doc. S/RES/1333 (2000); also *see* Erie Erie Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 A.J.I.L. 745 (2003), p. 747.
[146] *United Nations Security Council Resolution 1390 (2002)*, UN Doc. No. S/RES/1390 (2002); also *see* Erie Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 A.J.I.L. 745 (2003), p. 747.

been a dramatic step one that has striking consequences that might go far beyond the narrow time and space of the conflicts that these tribunals were designed to adjudicate on.

Thus far, I have focused on the role of IOs related to the treaty making process, including something that cannot be easily pigeonholed like "soft" law. However, international organizations have modified the process of creating international customs as well. Similarly as with treaty making, international organizations have changed customary law making by providing a forum for states where, through their practices a new customary law emerges. But also similarly as with treaties, once international organizations became subjects of international law with their own rights and obligations, they also became a part of the actors creating custom.

One of the most well known examples of treaty modification by custom is the amendment of the UN Charter's provision on voting on UNSC resolutions. Article 27(3)[147] clearly states that for a resolution that is not related to procedural matters, a concurring vote of all permanent five members is needed for a resolution to be considered as passed. But, it did not take long for a practice to evolve out of necessity that an abstention from voting by one of the permanent five does not mean that a resolution cannot be adopted or that it is not binding. This practice has been acquiesced by all members of the UN and is now part of the procedural practice of the SC and is, for all intents and purposes, an amendment to the Charter.[148]

The greatest impact that international organizations have had on the making of international customs is in the articulation of *opinio juris* by states. International organizations, as

[147] "Article 27 of the UN Charter
(1) Each member of the Security Council shall have one vote.
(2) Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
(3) Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting." Charter of the United Nations, signed on 26 June 1945, entered into force 24 October 1945.
[148] *See* Antonio Cassese, INTERNATIONAL LAW, OUP, Oxford, 2001, pp.125-126.

noted on several occasions, are convenient forums where states can have their say on a certain issue. This could be through a vote in one of the organs of an international organization producing a non-binding resolution or recommendation as well speeches and interpretations appended to those same non-binding instruments. One of the biggest questions that arise in terms of the relations between non-binding instruments (i.e. soft law) is when do these non-binding instruments become treaty or customary norms, i.e. become "hard law"?

There are several factors that can be said that influence the answer to that question and it is dependent on an assessment on a case by case basis. The phrasing and the wording of the document must be of such a character as to be of a norm creating effect, namely having a certain generality but also specificity that would normally be found on a norm generating instrument such as a treaty.[149] A general promise of friendship and consultation does not a norm make. The context in which these instruments are negotiated and drafted is also one other such example. A resolution that has been adopted by consensus or by a high majority of states has greater chance of being accepted as stating existing law than resolutions that fail to get a broad support.[150]

But, even if a resolution has been adopted by consensus, statements made during the adoption of the resolution in question can undermine the process of its passing into customary international law. States can easily say that such a resolution was meant to be a guideline, an expression of public consciousness and not of legal obligation.[151] Another factor that is also important is which states actually supported a certain instrument. If, for example, the specially affected states are not in support of the instrument then it could hardly be said that it is evidence of *opino juris*. A UN General Assembly resolution banning nuclear weapons without the support of the nuclear weapons states would be such an example. It would be highly

[149] Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, p. 225.
[150] *Ibid*, p. 226.
[151] *Ibid*, p. 226.

unlikely that anybody would consider such a resolution as evidence of customary law even though, taken in numbers, there would be only a dozen or so states that would object to such a resolution.[152]

These factors indicate why it is so difficult to think of the phenomenon of instant custom. As noted earlier, space law is one area where we can say for some certainty that instant custom has occurred through a resolution[153] on the establishing the principles of friendly use of outer space which was later substituted without a vote. The resolution was first negotiated by the US and the USSR and then unanimously adopted by the UN First Committee, the Outer Space Committee and the General Assembly.[154]

It is sensible at this time to point out that a question arises of when exactly do these non-binding "soft law" instruments become "hard law"? From the moment of their adoption; from the moment of their reference by parties at a dispute or negotiations; from the moment of when a court decides to pronounce it is law? As early as 1983, Prosper Weil[155] has voiced his critic of the emerging trend of blurring[156] the normativity threshold, where one can no longer tell when a certain instrument has become law or not. And if it is difficult to say when an instrument has become law then it is also difficult to say when a certain state has breached its international obligation.

Nevertheless, there is evidence that states, in certain circumstances, do turn to "soft law" instruments to achieve certain desired results. Negotiating a separate treaty, as has been pointed out, is a cumbersome process. States or their representatives, and let us not forget this, make a conscious choice on whether to opt for making a "hard law" instrument, like a

[152] *Ibid,* p. 226.
[153] UN General Assembly Resolution 1721 (XVI), *International co-operation in the peaceful uses of outer space*, adopted on 20 December 1961, UN Doc. No. A/4987
[154] Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, p. 227.
[155] Prosper Weil, *Towards Relative Normativity in International Law*, 77 A.J.I.L. 413 (1983).
[156] *Ibid.*, pp. 415-416.

treaty, or a non-binding, "soft-law" instrument.[157] Correctly or not, they weigh the pros and cons of creating an internationally legally binding instrument or entering into something else, i.e. "soft-law".

Using "soft law" instruments is the less costly alternative, both to sovereignty (since it is presumably non-binding) and to reputation, e.g. if a state objects to a creation of a treaty.[158] Furthermore, those states that do not enter into a treaty will have good reason to considered themselves not to be bound by such a treaty. Using "soft law" creates the opportunity to sneak past the objection of certain states new law that can encompass the entire community of states.[159] Using a period of time between the passing of the instrument and its consideration as law binding, advocates of the "soft law" can persuade states to change their practices in conformity with the instrument, increasing its law-making capacity in a shorter time and at fewer costs than a treaty. And again, if a treaty does not share a wide consensus it will, despite its "hard" form, produce less effect and compliance than a widely supported General Assembly resolution.[160]

The phenomenon of "soft-law" has to be understood as almost a constant companion to law, because in some cases comes before the creation of actual law, as it is the case of international human rights treaties (the UN Universal Declaration on Human Rights later became the UN Covenants for civil and political and for economic and social rights for instance).[161] In other instances, "soft law" mechanisms have be used after treaty creation to either aid in the interpretation of the commitments in the treaties,[162] to complete and supple-

[157] Dinah Shelton, *Normative Hierarchy in International Law*, 100 A.J.I.L. 291, (2006), p. 320-321.
[158] Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, p. 228.
[159] *Ibid.*
[160] *Ibid.*
[161] Dinah Shelton, *Normative Hierarchy in International Law*, 100 A.J.I.L. 291, (2006), p. 321.
[162] *Ibid.*, p. 321.

ment treaty obligations (like the Antarctic treaty regime) or to monitor the implementation and authoritatively interpret the treaties (the CPT for instance).[163]

1.3.2. Non-state Actors in the Law-making Process

There are a large variety of organizations and entities that can fit the category of non-state actors on the international scene. The first thought that comes to most people's minds when talking about non-state actors are Non Governmental Organizations (NGOs), but there are other that arguably have more influence on international law-making. For instance non-state entities, like the Holy See, or the Palestinian Authority, Taiwan, the Sovereign Military Order of Malta, and others have participated in the making of various law-making instruments. The Holy See was part of the negotiations of the Rome statute and had an overwhelming influence in the definition of gender related crimes.[164] Allowances have been made in order to include these entities in the workings of the international system, mostly because of their clout or because of what they represent. Taiwan for example has been allowed to join the WTO in 2002 for the simple reason that it represents the fourteenth largest economy in the world and it would be counterproductive to exclude it from international trade regulatory mechanisms.[165]

Indigenous peoples are another non-state actor that has been accepted at different law-making forums. The ILO has adopted a convention 107 on Indigenous and Tribal Populations as early as 1957. This Convention was later revised in 1989 and participants from members of the Indigenous peoples alongside states, non-governmental organizations, academics and independent experts were engaged in a dialogue as to the shape of the revision. Indigenous

[163] *Ibid.*
[164] Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, pp. 46-47.
[165] *Ibid.*, p. 47.

peoples have also been a part of the working of the UN's ECOSOC in drafting the resolution and declaration on the rights of Indigenous peoples.[166]

Transnational and transgovernmental networks are another type non-state actor that has risen in prominence in the past few decades.[167] A typical example of a transgovernmental network would be the network of securities regulators built by the US Securities and Exchange Commission (SEC). Prompted by issues of better regulation and enforcement of securities issues, the SEC built around itself a network with other securities regulators by entering into more than 30 Memoranda of Understanding (MoU). In the different MoUs they agreed that they would cooperate on issues like "clearance and settlement mechanisms; trade recording and comparison systems; order handling systems; privatization of state-owned companies; regulatory mechanisms related to accounting and disclosure; and regulatory requirements relating to market professionals and capital adequacy."[168] Securities regulators from other states followed the SECs suit and entered into similar MoUs with other securities regulators using the MoUs to bypass the more settled, but in their view, more cumbersome, international treaty mechanisms.[169]

The idea of transgovermnetalism started around the 1970s and was defined as sets of direct interactions among sub-units of different governments that are not controlled by the policies of the cabinets or chief executives of those governments.[170] Contemporary scholars of trasngovenmentalism argue that the rise of globalization has actually increased the reliance

[166] *Ibid*, p. 49-50.
[167] Although, arguably, transnational/transgovernmental networks are consisted of governmental entities, they are not, as such, seen as representing the whole state as a unitary actor. For more on this issue see *infra*, part 3 of this Chapter.
[168] Kal Raustiala, *The Architecture of International Cooperation: Trangovernmental Networks and the Future of International Law*, 43 Va. J. Int'l L. 1 (2002), p. 30.
[169] *Ibid*., pp. 30-31.
[170] *See*: Kal Raustiala, *The Architecture of International Cooperation: Trangovernmental Networks and the Future of International Law*, 43 Va. J. Int'l L. 1 (2002), p. 19; but also generally *see* Jose Alvarez, *Governing the World, International Organizations as Lawmakers*, 31 Suffolk Transnat'l L. Rev. 591 (2008); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 Stan. J. Int'l L. 283 (2004); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies and Disaggregated Democracy*, 24 Mich. J. Int'l L. 1041 (2003); Anne-Marie Slaughter, A NEW WORLD ORDER, Princeton University Press, Princeton and Oxford, 2004.

of States on these transgovernmental networks. Since the actors that the domestic regulatory institutions regulated have gone international, (just think of the multinational corporations, or the trafficking of drugs and people, environmental threats and their cross border impact), these institutions have had no other choice but to network with their opposite numbers in order to enhance information gathering and sharing, enforcement and harmonization of different regulations.[171] Furthermore these networks have used the advancements in technology, both in the convenience of travel and easy access to communication technologies to grow and expand to numerous areas of domestic regulatory spheres. These networks are held together by a mishmash of non-binding MoU, both bilateral and multilateral, where no one single member sits at the centre of the network.[172]

Trangovernmental networks are said to have several advantages over IOs. International Organizations are seen as cumbersome, weighed down with by elaborate procedural rules, voting rights, concerns about sovereignty issues and so on.[173] On the other hand, transgovernmental networks are seen as flexible and adaptable, able to foster communication and innovation. The dialog is held on issues that are seen as narrow and technical, requiring the expertise of technocrats rather than foreign affairs bureaucrats. Furthermore, these networks are seen as self-enforcing since these agencies can better implement the common understanding through their internal mandate. The mechanism of compliance is geared more towards "soft power"[174] approaches of attractiveness and persuasion than traditional "hard power" coercion.[175]

However, there is a negative side to transnational networks. They are often described as "club" like where the participants are governmental regulatory bodies, technocrats who

[171] Kal Raustiala, *The Architecture of International Cooperation: Trangovernmental Networks and the Future of International Law,* 43 Va. J. Int'l L. 1 (2002), p. 21.
[172] *Ibid*, p. 22-23.
[173] *Ibid*, p. 24
[174] Joseph Nye, SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS, Public Affairs, 2004.
[175] Kal Raustiala, *The Architecture of International Cooperation: Trangovernmental Networks and the Future of International Law,* 43 Va. J. Int'l L. 1 (2002), p. 24-26.

speak the same language of their respective fields, but do not increase the "represetativness" of the law that they espouse. They also can be far less transparent than IO since, unlike some International Organizations who have NGO or civil society participation these networks almost never have such a participation.[176]

Not only that, but not all Governments have the resources or the abilities to participate in these networks, and States from the global South and East are being left behind. The dominance of North and West countries in these networks is astounding as evident, for instance, by the export of US Securities and Exchange Commission type regulations to the rest of the world through such networks.[177] The compliance with international human rights instruments are also not a given thing with these networks, for the simple reason that they are not formal subjects of law under international law and, as such, cannot be part of nor consider themselves limited by these instruments. The only ones that they arguably answer to is their domestic governments through the internal control mechanisms within the respective states.

One of the most visible non-state actors on the international state are NGOs. Without going into a discussion of what NGOs really are, for the purposes of this thesis, I will use the term NGO to denote any organization that is comprised of individuals who share common interests and have common goals and strive to achieve them through a civil organization and outside of the realm of government. This would also include, beside the commonly understood charity or environmental organizations, human rights monitoring organizations and alike, multinational corporations, organizations of business or entrepreneurs and so on.

NGOs have had a major impact on law-making especially through the UN system but out of it as well. The UN has, for quite some time now, allowed for NGOs to be part of its daily operation as observers. The ECOSOC allows for different types of national or international NGOs to be part of its meetings. It is even considered that NGOs now have the right to

[176] Kal Raustiala, *The Architecture of International Cooperation: Trangovernmental Networks and the Future of International Law*, 43 Va. J. Int'l L. 1 (2002), p. 25.
[177] *Ibid*, pp. 26-35.

participation in as observes in a meeting of parties or at a UN sponsored treaty making conference.[178] A process of accreditation, which determines the privileges that NGOs have, is in place at the UN. The accreditation determines whether or which NGO can attend meetings, which documents it may receive and whether and for how long can they speak.[179] NGO participation at meetings that are not part of the UN system is still pretty much dependent on the good will of the meetings' organizers, and the subsequent treaty provisions (whether they establish the right of future participation of NGOs at review conferences), but it is generally considered that participation of NGOs, no matter how slight, is a positive development.

One very good example of the influence of NGOs on the law-making process is the participation by NGOs at the Rome Conference. If you may remember from what was discussed earlier in this Chapter, more than hundred and sixty states participated at the Rome Conference reviewing a draft that was prepared by the ILC with several blocks of states having numerous remarks on the wording of the provisions. This draft was presented in 1994 to the UN General Assembly and an *ad hoc* committee was created but a conference was not scheduled just yet. The response of the civil society was to build a coalition of more than 30 NGOs by February 1995 in order to lobby for the creating of a permanent criminal court.[180] As the work move along from the *ad hoc* committee to the preparatory committee, the NGO Coalition intensified its efforts, organizing itself in a form of a secretariat and officials. The strategies of the Coalition were varied and as the stages of negotiation proceeded so did the level of sophistication of the strategies of the Coalition improved. They organized

> NGO-government consultations and expert dialogue; activity to raise awareness of, and garner civil society support for, the ICC; documentation and dissemination of relevant information; meetings with state delegations from both those opposing the Court and from members of the like-minded group; [held] meetings for information giving and lobbying in different regions of the world; and [made] full use of the

[178] Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, pp. 54-55.
[179] *Ibid*, p. 54.
[180] *Ibid*, p. 72.

internet and electronic communication to pass information and maintain in constant contact.[181]

At the Conference itself, there were over 200 NGOs that were accredited to attend, more than participating states. The Coalition despite the overwhelming numbers of participants managed to maintain solidarity among its members. The Coalition encouraged a wide participation in the process by states; it assisted smaller states with expertise advice as well as focused on particular issues that were of interest to some of the members of the Coalition, like the Women's Caucus which was formed to counter the influence of the Vatican and some Islamic states.[182]

The work of NGOs continued even after the adoption of the statute by shifting its promotional and lobbying efforts home, in order to bring a speedier entry into force. NGOs continue to participate in the Assembly of Parties and the Coalition continues to promote education and awareness for the ICC especially focusing on adopting specific and strong measures of implementation by national governments.[183] It is undisputable that the NGO participation in at the Rome Conference significantly changed its outcome especially in gender related matters that were absent in the original ILC draft. Similarly with the provisions on the independent prosecutor and her ability to start investigation on her own initiative, subject the approval of the Pre-Trial Chamber. It has even been argued that the Court itself would not have had come to existence if it was not the active support of the NGO sector. It can be without a doubt said that it certainly would not have had the shape it has now if it was not for civil society participation.[184]

But NGO participation in law-making does not stop with the treaty making process. It does not stop just with agenda setting and lobbying for the adoption of an international instrument, be it "hard" or "soft". Nor does it stop with the lobbying for greater state participa-

[181] *Ibid.*
[182] *Ibid*, p. 73.
[183] *Ibid*, pp. 73-74.
[184] *Ibid*, p. 74.

tion in and ratification of such instruments. To come back into the field of human rights, NGOs, through their observer status in the UN and the ECOSOC, have submitted so called "shadow" reports, complementary to the state's reports on human rights issues giving the UN treaty bodies with a view other than the one presented in the state party reports.[185] While submitting "shadow" reports to the UN bodies, NGOs also submit interpretations on the various international instruments, some interpretations that are later accepted by these treaty bodies in their commentaries to the state parties or in the general comments expounding the specific human rights instrument.

Furthermore, NGO participation outside the treaty making process can most visibly be seen in their direct or indirect participation in litigation in front of both domestic and international forums. In the regional human rights bodies NGOs have directly submitted complaints against governments when their own rights have been violated, most notably freedom of assembly or freedom of expression.[186] The African human rights system even allows NGOs to submit communications on behalf of third parties even without their consent effectively allowing for *actio popularis* in front of the African Commission on Human and Peoples' Rights and in the newly created African Court on Human Rights.[187] Needless to say that this has greatly improved and expanded the jurisprudence of the African Commission since it allows for third parties to submit complaints on behalf of people who are not able or are frightened to so.

[185] For more generally *see*: Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 281-318, discussing the UN mechanisms of protection of human rights; Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, pp. 83-87.

[186] *See*, for instance, Article 34 of the European Convention on Human Rights "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto."

[187] Guidelines for Submission of Applications issued by the African Commission on Human and Peoples' Rights "Anybody, either on his or her own behalf or on behalf of someone else, can submit a communication to the commission denouncing a violation of human rights. Ordinary citizens, a group of individuals, NGOs, and states Parties to the Charter can all put in claims. The complainant or author of the communication need not be related to the victim of the abuse in any way, but the victim must be mentioned."
available at http://www.achpr.org/english/_info/guidelines_communications_en.html (last visited on February 21, 2009).

Moreover, NGOs have had a deeper and more lasting influence through the submission of *amicus* briefs. Advocacy NGOs regularly submit *amicus* briefs to courts when they settle cases that are of international prominence. For instance Amnesty International filed an *amicus* brief for the *Pinochet case*[188] which later was the reason for a controversy that resulted in the setting aside of *Pinochet I* judgment and the decision in *Pinochet III*.[189] The UK based NGO, Interights, regularly submits *amicus* briefs or handles strategic litigation internationally in order to promote the status of international human rights and it has a global reach as evidenced by its rising docket of submissions throughout the years.[190]

NGOs also submit, on a regular basis, third party interventions in front of the regional human rights systems, the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR) and as already mentioned earlier, the African Commission on Human and Peoples' Rights (ACHPR). They use their innovative arguments to guide the way of the reasoning of these bodies and have lead to far reaching reinterpretation of substantive provisions. One example give is the case of *Velasquez Rodriguez v. Honduras,*[191] where the IACtHR came to a landmark decision regarding the positive obligation of states and the principle of due diligence in reference to the right to life, as well as recognizing disappearances and the state responsibility for omission. In this case a cluster of NGOs, Amnesty International, the Association of the Bar of New York City, the Lawyers Committee for Human Rights and the Minnesota Lawyers International Human Rights Committee made *amicus*

[188] Judgment of the House of Lords: *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte, [2000] 1 AC 61*, 25 November 1998 (hereinafter Pinochet I); Judgment of House of Lords, *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (Amnesty International and others intervening) (No 3), *[2000] 1 AC 147, [1999] 2 All ER 97, [1999] 2 WLR 827* (hereinafter Pinochet III).

[189] The controversy arose because one of the Law Lords was serving on a Board of Directors on one of the charities that Amnesty International was a founder of; *see R v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte*, [1999] 2 WLR 272, 15 January 1999 (available at http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm (last visited on February 21, 2009).

[190] For more on the case docket of Interights visit http://www.interights.org/case-docket/index.htm (last visited on February 21, 2009).

[191] *Valesques Rodreguez v. Honduras,* Judgment, IACtHR, July 29, 1988, Ser. C, No. 4 (1988).

submissions, which arguably guided the Court's reasoning. The reasoning of the IACtHR has later been accepted by the ILC when issuing its Draft Articles on State Responsibility.[192]

In the field of international criminal law NGOs have also had a similar role. In the *Blaskic* case, when the ICTY had to determine whether it had the authorization to issue a subpoena to as sovereign state or not and whether it can individually subpoena members of governments of those same states. A number of NGOs submitted their views and *amicus* briefs on the issue.[193] The international criminal tribunals have had to rely considerably on NGOs to assist them in their work. Having not much previous case law other than the Nuremberg trials, the ICTs have relied heavily on the assistance of academics and NGOs to supply them with information and legal assistance.[194]

The help of NGOs has gone far beyond the *amicus curiae* briefs. For instance the Open Society Archives in Budapest has an impressive collection of original material that was collected on the topic of human rights with an extensive collection related to the conflicts in the former Yugoslavia.[195] One of its more prized positions is the records produced by another NGO, Physicians for Human Rights, that did extensive work on the field in the former Yugoslavia related to the forensic assistance that this organization carried out for the prosecutorial service of the ICTY as well as the local governments.[196] The material gathered was later used as evidence in front of the ICTY.

NGOs have also been active in front of domestic institutions as well. The Aliens Tort Claims Act of 1789 has been used in numerous cases to bring tort actions in US courts against individuals violating human rights by their victims. The Center for Constitutional

[192] Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, p. 84.
[193] *Ibid*, p.85.
[194] *Ibid.*
[195] For more *see*: http://www.osaarchivum.org/guide/fonds/humanrights.shtml (last visited on February 21, 2009).
[196] *'Records of the Physicians for Human Rights' Bosnia Projects*, Open Society Archives, HU OSA 386, available at: http://www.osaarchivum.org/db/fa/386.htm (last visited on February 21, 2009.

Rights, Washington DC, and the Center for Justice and Accountability, San Francisco together with the human rights law clinics of Yale University and City University of New York used the opportunity that this statute provided to litigate a number of cases in front of US courts. During these cases, the courts had to pronounce on issues such as the prohibition of torture,[197] rape as an act of war crime or an act of genocide[198] adding to the global case law regarding these crimes. This avenue has been somewhat closed after the US Supreme Court's judgment in the *Sosa* case[199] but that does not diminish the impact that these NGOs have had on the judicial development of international criminal law in the US.[200]

NGOs as advocacy movements have had other effects on law-making especially on the field of "soft" law. One of the most interesting examples is the World Health Organization's (WHO) Code on Marketing of Breast Milk Subsidies. It was formally adopted by the WHO Assembly in 1981 under Article 23[201] of its Constitution giving power to the WHO to issue recommendations to its members regarding issues within its competence. But the story of how the Code was adopted is very telling of the influence of NGOs in raising public awareness. Multinational companies like Nestlé were selling powdered breast milk subsidies to poorly developed countries in Africa and, with their intensive marketing champagne,[202] was successful in convincing nursing mothers to switch to using powdered breast milk substitutes. The issue emerged when, due to the lack of clean drinking water, infant mortality be-

[197] *Filarltiga v. Pena-Irala*, 630 F 2d 867 (US Ca, 2nd Circ).
[198] *Kadic v. Karadjic*, 70 F 3d 232 (2nd Circ).
[199] *Sosa v. Alvarez-Machain*, 124 USSC 2739, (2004).
[200] Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, pp. 85-86.
[201] "*Article 23* of the WHO Constitution
The Health Assembly shall have authority to make recommendations to Members with respect to any matter within the competence of the Organization." Constitution of the World Health Organization, New York, 22 July 1946, United Nations, *Treaty Series*, vol. 14, p. 185
[202] Some campaigns used sales staff dressed in nurses outfits to tell the local communities of the benefits of using their products *see* Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, p. 234.

gun to rise. A report was issued by a UN Protein Advisory Group called Declaration 23 in 1972 which was later reprinted in several magazines issued by NGOs.[203]

Following the previous pattern, a coalition of NGOs was created called INACT (the Infant Formula Action Coalition) which pushed and pressured for some kind of action to be taken and advocated for a boycott of all Nestlé products. This international pressure worked and the WTO Assembly started working on guidelines for breast milk substitutes. Parallel to the WTO Assembly, Nestlé, feeling the worldwide consumer boycott pressure, negotiated with the NGOs through a WHO and UNICEF mediation, and decided to abide by the WHO Code. During these negotiations the WTO promised to provide technical assistance to Governments regarding the implementation of the Code. A survey taken 1984 by the WHO showed that only four out of 134 members of the WTO were not willing to implement the Code, while seven countries by that time have already adopted it entirely in their domestic legal systems.[204]

As a final point, it has to be understood, however, that even though non-state actors can influence the treaty making process by being present at instances of negotiation, creating pressure for adoption or ratification, supplying arguments in the treaty interpretation process, they are not the actual treaty makers. States and to some extent international organizations are still the only subjects of international law that can enter into a legally binding treaty. Non-state actors have to work through and with states and international organizations, simple as that. However, it would be imprudent to exclude the influence of non-state actors in the treaty making process as suppliers of expertise, arguments and pure pressure on governments for a certain type of outcome.

1.3.3. International Courts and the Making of International Law

[203] *Ibid.*
[204] For a more detailed discussion on the WHO Code *see*: Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, pp. 234-235.

In recent years the explosion of international tribunals has been astounding. Never before have international communications and international relations been so "legalized". The Project on International Courts and Tribunals (PICT)[205] has counted forty-three existing, extinct, dormant or nascent judicial bodies. It has applied five sets of criteria to define what it considers a "judicial" body.[206] The vast majority of these judicial bodies have been established or re-modelled in the past two decades. More importantly, a large number of these judicial bodies have started to resemble a specific model, i.e. a supranational tribunal.[207]

When we talk about judicial law-making the first set of questions that usually come to mind are: are international tribunals allowed to make law? Are they suppose the make law? Are they, in fact, making law? On its face, international tribunals are not supposed to make law. For a start, Article 38(1)(d)[208] of the ICJ statute puts international judgments as subsidiary sources of international law, as a reference point for their discovery of what the law is. Furthermore, international judgements are only binding to the parties to the case and do not have a precedent value.[209] The drafters of the first permanent international tribunal, the PCIJ, were very clear in their intention that the PCIJ was not supposed to make law. Baron Deschamps, one of the members of the Advisory Committee of Jurists for the establishment of the PCIJ in 1920 set the parameter for the judicial function, by saying that:

[205] For more on the project visit: http://www.pict.org; but also *see*: Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 NYU J. Int'l L & Pol. 709, (1999); Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, p. 458.
[206] Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, p. 458.
[207] Laurence R. Helfer; Anne-Marie Slaughter, *Why States Crate International Tribunals: A Response to Professors Posner and Yoo*, 93 Cal. L. Rev. 899 (2005).
[208] Article 38(1)(d) of the ICJ Statute"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."
[209] Article 59 of the ICJ statute.

> [d]octrine and jurisprudence no doubt do not create law; but they assist in the determining rules which exist. A judge should make use of both jurisprudence and doctrine, but they should serve only as elucidation.[210]

Judges at the ICJ have also voiced the same arguments, i.e. that they are authorised to only interpret and apply existing law and not to create new law. In the *Legality of Threat or Use of Nuclear Weapons* case the court has once again asserted this orthodoxy by saying that:

> Finally, it has been contended by some States that in answering the question posed, the Court would be going beyond its judicial role and would be taking upon itself a law-making capacity. It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.[211]

This reasoning has also been stipulated in the Secretary General's report submitted to the UNSC on the draft statute of the ICTY where he said that the "principle *nulllum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law"[212] meaning that the Tribunal should not make law. Several delegates in the Security Council stressed this idea that the tribunal could not make law. The then President of the Security Council stressed that as a subsidiary organ of the UNSC the ICTY could not and would not be assumed to be empowered to "set down norms of international law or to legislate with respect to those rights. It simply applies existing international humanitarian law."[213] The ICTY has plainly said that

> Being international in nature and applying international law *principaliter*, the Tribunal cannot but rely upon the well-established sources of international law and,

[210] Baron Descamps as quoted in Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, p. 267.
[211] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 18 (hereafter *Nuclear Weapons* case).
[212] Report of the Secretary General Pursuant to paragraph 1 of Security Council Resolution 808, U.N. Doc. S/25704 (May 3, 1993), para. 34.
[213] As quoted in: Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 Vand. L. Rev. 1 (2006), p. 21

> within this framework, upon judicial decisions. What value should be given to such decisions? The Trial Chamber holds the view that they should only be used as a "subsidiary means for the determination of rules of law" […] Hence, generally speaking, *and subject to the binding force of decisions of the Tribunal's Appeals Chamber upon the Trial Chambers*, the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries. *Indeed, this doctrine among other things presupposes to a certain degree a hierarchical judicial system. Such a hierarchical system is lacking in the international community*. Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes. Similarly, the Tribunal cannot rely on a set of cases, let alone on a single precedent, as sufficient to establish a principle of law: the authority of precedents (*auctoritas rerum similiter judicatarum*) can only consist in evincing the possible existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior occasion propounded the correct interpretation of existing law. *Plainly, in this case prior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight.* Thus, it can be said that the Justinian maxim whereby courts must adjudicate on the strength of the law, not of cases (*non exemplis, sed legibus iudicandum est*) also applies to the Tribunal as to other international criminal courts. (emphasis added).[214]

But let us not discard international judicial bodies as lawmakers just yet. There is a significant difference between what the theory says and what is actually being done in practice by international courts and tribunals.[215] International courts can make law in both general international law or in regime specific law, mostly dependant on the whether the tribunals themselves are embedded in a specific regime setting or are of a general nature, like the ICJ and the PCIJ.

[214] *Prosecutor v. Zoran Kupreckic et al.*, Trial Chamber Judgment, IT-95-16-T, 14 January 2000, para. 540 (hereafter *Kupreckic* Trial Chamber judgment); but also see *Prosecutor v. Zlatko Aleksovski*, Appeals Chamber Judgment, IT-95-14/1-A, March 24, 2000, para. 92-115 (hereafter *Aleksovski* Appeals Chamber jument).

[215] Generally *see*: Robert Y. Jennings, *The Judiciary, International and National, and the Development of International Law,* 45(1) I.C.L.Q. 1 (1996); and also *see* Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, pp. 266-272.

One of the biggest developers of general international law through the bench is naturally the ICJ.[216] One only has to think of the ICJ's Advisory opinions in the *Reservations to the Genocide Convention* or the *Certain Expenses* or *Reparations for Injuries* cases to see that point. In the *Reservations to the Genocide Convention* the ICJ turned the existing treaty-making process on its head. It changed the requirements of acceptable reservations to a treaty and espoused the rule that acceptable reservations are the ones that are not against the object and the purpose of the treaty.[217] Needless to say that this development was not discussed in other forums nor was it part of state practice.[218] This was later accepted by the ILC and the drafters of the VCLT as the default rule regarding reservations to treaties, regardless of the fact of whether they are of a nature similar to the Genocide Convention.

Similarly with the *Certain Expenses* case where the ICJ interpreted the General Assembly's jurisdiction regulated by Charter to allow not only for a deployment of peacekeeping missions under UN authority, but to also pay for those expenses trough the UN's regular budget taxed from all its members, including those that objected or were less than enthusiastic to the setting up of the mission.[219] One more example from the ICJ's advisory role is the *Legality of the Wall* case mentioned above where the ICJ used the non-binding interpretation of the Human Rights Committee to extend the jurisdictional scope of the ICCPR. [220]

The ICJ's contentious jurisdiction is similarly full of examples where the ICJ has expanded international law in a drastic way. In the *Barcelona Traction* case the ICJ introduced the distinction between two sets of obligations, one that exists *inter se* i.e. among the parties

[216] For an early example of the ICJ's impact on law-making *see*: Edward Gordon, *The World Court and the Interpretation of Constitutive Treaties: Some Observations on the Development of an International Constitutional Law,* 59 A.J.I.L. 794, (1965)
[217] Generally *see*: Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 824-828.
[218] *Ibid*, pp. 825-826.
[219] Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, pp. 122-129.
[220] *Legal Consequences of the Wall* case, para. 106-111.

and a second one that is owed to the international community as a whole.[221] It justified its reasoning pointing to the difference in type of obligations owed under the Genocide Convention, fundamental rights and non-discrimination to other international obligations like diplomatic protection.[222] In the *Nicaragua* case the ICJ, without much elaboration, declared that Common Article 3 of the Geneva Conventions[223] is a "minimum yardstick"[224] applicable to both non-international (as was intended by the drafters of the conventions) and international conflicts. It did so without taking its standard exploration into whether the Conventions or that specific article was intended to be applied in such a manner, nor whether state practice and *opino juris* has changed in order to bring about such a result.

Regime specific courts[225] also play a law-making role, mostly in their regime specific environment but with external ripple effects as well. The most notable examples of this are the ECJ and the ECtHR. The ECJ for instance has been called as being one of the key actors in reshaping the European Communities and the European Union.[226] Through the introduc-

[221] *Barcelona Traction, Light and Power Company, Limited*, Prclimii1ars Objections, Judgment. I.C.J. Reports 1964, p. 6 (hereafter *Barcelona Traction* case), para. 32-33 "In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of al1 States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."

[222] "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law" *Reservations to the Genocide Convention*, p. 23); "others are conferred by international instruments of a universal or quasi-universal character." *Ibid*, para. 34.

[223] Geneva (I) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949; Geneva (II) Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949; Geneva (III) Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Geneva (IV) Convention relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

[224] "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a noninternational character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts ; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" The *Nicaragua case*, para. 218.

[225] Generally *see*: Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, pp. 465-485.

[226] Generally *see*: J.H.H. Weiler, *The Transformation of Europe*, 100 Yale L.J. 2403 (1991).

tion of the doctrines of direct effect,[227] supremacy of EC law,[228] of implied powers[229] and of human rights[230] it created a system of law that is far more radical than anyone expected in 1951.

The doctrine of human rights is specifically interesting in its conception since an argument could be made that the drafters of the founding treaties intended for EC law to be directly binding and to have supremacy. On the other hand the founders never anticipated a problem with human rights. It resulted as a backlash by domestic courts to the idea of supremacy of EC law over domestic law especially to the possible conflict that might arise between EC law and the constitutional guarantees of human rights. The ECJ's answer was the adoption of the protection of fundamental human rights that are part of the constitutional tradition of the member states and transferring it to the Community level. Now all Community legislation could be challenged in front of the ECJ on the argument of human rights.[231]

One of the more recent controversial cases involves the previously mentioned UNSC Taleban/Al Qaeda sanctions Committee. The EC Council, in order to implement the aforementioned UNSC resolutions, adopted several Regulations freezing the assets of both foundations and individuals who later contested these same Regulations. The Court of First Instance (CFI) came back with a decision where it took upon itself the power to review UNSC Resolutions and their compatibility with *jus cogens* norms of which fundamental rights are a part of.[232] But CFI, nevertheless, found that the restrictions imposed by the UNSC were appropriate given the circumstances of fighting global terrorism under its Chapter VII powers and did

[227] *Ibid*, pp. 2413-2414.
[228] *Ibid*, pp. 2414-2415.
[229] *Ibid*, pp. 2415-2417.
[230] *Ibid*, pp 2417-2419.
[231] *Ibid*, pp. 2417-2418.
[232] Generally *see*: *Kadi v. Council and Commission*, Court of First Instance Judgment, 2005/C 281/32, T-315/01, 21 September 2005, especially para. 226-231, (hereafter *Kadi v. Council I*).

not violate the fundamental human rights of the individuals affected by the sanctions mechanisms.[233]

The ECJ on the other hand came with a different conclusion. It said that the founding treaties of the EC/EU do not confer upon it the powers to review UNSC resolutions but only EC legislation with fundamental rights. But it did not refute nor mention, deliberately or not, the CFI's conclusion of the binding nature of *jus cogens* and fundamental rights on the UNSC and the UN in general, having in mind the Article 103[234] supremacy of UN law over other international law obligations.[235]

This example is here to show us that regardless of how self-reliant (some would say self-contained) specific regimes can be, there is, nevertheless, a fundamental cross-referencing between them. A ruling in one regime may affect a ruling in another that seemingly has very little to do with that specific regime. Another prime example of this is the WTO's Appellate Body decision in the *Shrimp Turtle* case where the Appellate Body accepted concepts of environmental law regime in its interpretation of the specific regimes treaties and deeming turtles an exhaustible natural resource for the purposes of GATT[236] law.[237]

These examples show us that even though certain international courts are designed to interpret a regime specific law it may have incidental consequences outside of that specific

[233] *Ibid*, para. 242-268.
[234] Article 103 of the UN Charter
In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.
[235] For more *see*: Maria Tzanou, *Case-note on Joined Cases* C-*402/05 P & C-415/05* P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of European Union & Commission of European Communities, 10 German L. J. 143, (2009); Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, pp. 1148-1151; Kamrul Hossain, *The Concept of* Jus Cogens *and the Obligation Under the UN Charter*, 3 Santa Clara J. Int'l L. 72, (2005); Carin Kahgan, Jus Cogens *and the Inherent Right of Self Defense*, 3 ILSA J Int'l & Comp L 767, (1997); Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Itnerpretations and Application of United nations Security Council Resolutions*, 16 European J. of Int'l L. 59, (2005).
[236] General Agreement on Tariffs and Trade, Geneva, 30 October 1947, United Nations, *Treaty Series*, vol. 55, p. 187.
[237] Generally *see*: Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, pp. 485-502.

regime.[238] This is not surprising given that fact that all of these judicial bodies are interpreting and implementing a certain type of international law as well as the general tenants of international law. They cannot but apply rules that are used throughout the international law system. Just think of the interlocutory decision in the *Tadic* case[239] of the ICTY. Although the court was asked to resolve "only" a preliminary, procedural issue of whether it had the legal jurisdiction to try the accused Tadic, it nevertheless, had to first: assert that it had a jurisdiction to answer that question by using the notion of *kompetenz kompetenz* (*compétence de la compétence*) and then answer the question of whether the UNSC has overstepped its authority under its Chapter VII powers.[240] Even a seemingly simple question of the competence of an international judicial body will undoubtedly raise questions of the fundamental tenants of international law.

After giving specific examples where courts have acted as lawmakers it is time to revisit the question of precedential value of judicial decisions in international law. When I say precedential value, I mean the value that a decision would have as a binding authority over a specific legal issue. I chose to use the terminology set out by the book *Interpreting Precedents*[241] where they distinguish between a non-binding, authoritative precedent and binding precedent. For the most part, when I use the term precedent in this and following chapters, I have in mind precedents of the binding nature and not a non-binding one. However, I use the terms case-law and jurisprudence interchangeably through the thesis and especially in Chapters II and III.

[238] Generally *see*: Report of the Study Group of the International Law Commission titled *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, International Law Commission, Fifty-eight session, UN. Doc. No. A/CN.4/L.682, April 13, 2006.
[239] *Prosecutor v Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Appeal Chamber Decision, Case No. IT-94-1, October 2, 1995 (hereafter *Tadic Defence Motion* decision).
[240] Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005, pp. 500-502.
[241] D. Neil MacCormick and Robert S. Summers eds., INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, Ashgate Publishing & Dortmouth Publishing, Aldershot, Broofield USA, 1997.

As I said before, judicial decisions are only binding among the parties to the dispute leading us to believe that there is no international precedent, although there are alternative interpretations on Article 59 of the ICJ statute. But even a casual look at a decision handed down by the ICJ, the ECJ, the ECtHR or the IACtHR we can see that judges operate in quite a different manner. We can see that the decisions are full of references to previous cases that have been decided by either that specific tribunal or other judicial bodies, both international and domestic. They are usually structured in two parts, one containing the explanation of the general principles or interpretation of the either general international law or the specific instrument that is before the court and the second applying those same general principles to the case at hand. It is these general principles that are later cited by the same court in later decisions or by other courts.[242] If a court does not agree with a previous decision it usually strives to distinguish the previous cases.[243]

The more cases a court has the bigger the chances that it will create a sizable reference point for itself and the more opportunities it will have for expanding the law through interpretation. The way a tribunal is structured has a significant influence on the number of cases that it will have. An interstate tribunal (one that is limited to only hearing state to state complaints e.g. the ICJ) is likely to have fewer cases before it than a supranational one.[244] For the purpose of this thesis I will use the definition of a supranational tribunal or supranational law

[242] For more on the issue of *obiter dicta* and *racio decidendi* in international judgments *see*: Robert Y. Jennings, *The Judiciary, International and National, and the Development of International Law*, 45(1) I.C.L.Q. 1 (1996), pp. 10-11.

[243] For a thorough presentation on how the ICJ uses its own previous case law *see* Mohamed Shahabuddeen, PRECEDENT IN THE WORLD COURT: HERCH LAUTERPACHT MEMORIAL LECTURES, Cambridge University Press, Cambridge, 1996, pp. 97-164.

[244] For a discussion on the benefits and drawbacks of interstate and transnational or supranational tribunals *see*: Laurence R. Helfer; Anne-Marie Slaughter, *Why States Crate International Tribunals: A Response to Professors Posner and Yoo*, 93 Cal. L. Rev. 899 (2005); Robert O. Keohane, Andrew Moravisik, Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 Int'l Organization 457 (2000); Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L. J. 273, (1997).

given by Laurence R. Helfer; Anne-Marie Slaughter in their seminal article *Toward a Theory of Effective Supranational Adjudication*[245] where they defined supranational adjudication:

> […] in its purest form, as adjudication by a tribunal that was established by a group of states or the entire international community and that exercises jurisdiction over cases directly involving private parties - whether between a private party and a foreign government, a private party and her own government, private parties themselves, or, in the criminal context, a private party and a prosecutor's office.[246]

The international tribunals that would fall under this definition are the European Court of Justice (ECJ), ECtHR, the IACtHR, the African Court on Human and Peoples' Rights (AfCHPR), the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Court (ICC), just to name a few. The reason why these tribunals are called supranational is because they are able "to penetrate the surface of the state"[247] unlike the more traditional international adjudication where the State is seen as a unitary actor speaking with one voice and where the parties to the adjudication process are only States or international organizations. As a result

> […] the direct link between supranational tribunals and private parties creates opportunities for those tribunals to establish direct or indirect relationships with the different branches of domestic governments. Through these relationships, a supranational tribunal can harness the power of domestic government to enforce its rulings in the same way that the judgments and orders of a domestic court are enforced.[248]

Because supranational tribunals allow for the direct access of individuals before them it is only logical to expect that there would be more applications than at an interstate tribunal. For instance there are only 44 member states in the Council of Europe which should be the potential number of applicants if the ECtHR was an interstate tribunal only. As a supranational tribunal it has more than 700 million potential applicants and that is not including NGOs, companies, trade unions and other organizations who can directly apply to it. It is no

[245] Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication, 107 Yale L. J. 273*, (1997).
[246] Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273 (1998), p 289.
[247] *Ibid*, p. 289.
[248] *Ibid*, p. 290.

surprise that the case load of the ECtHR has grown exponentially once more member states allowed for individual applications. This gave, in the course of its development, an astonishing breadth of a potential cases on which the ECtHR built and is still building its case law.[249]

Allowing for individual complaints has inadvertent consequence on the way that international tribunals operate. In their article Robert O. Keohane, Andrew Moravisik, Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*,[250] examine one aspect of the process of legalization of international relations, delegation. They envisage the concept of legalization as variability along three distinct lines, obligation, precision and delegation.[251] Delegation, on the other hand, can also be broken down in further three criteria: independence, access and embeddedness all of which have a specific impact on the effectiveness and compliance rate of a specific tribunal.[252] The greater the independence, access and embeddedness the more effective a tribunal is.

The criterion of embeddedness is an interesting one. It shows the connections that the tribunal has with its domestic counterparts. Take the ECJ for example, it is arguable the most embedded tribunal that is currently in existence. Its decisions, especially handed down through the preliminary ruling procedure, are directly enforceable by domestic tribunals without the need to go through the cumbersome mechanisms of the national government. Its preliminary ruling procedure is designed in such a way so that a dialogue between national courts and the ECJ is started and the ultimate judgment that the ECJ gives in terms of answering the question of implementation of EC/EU law posed by the national court, takes the form

[249] Generally *see*: Robert O. Keohane, Andrew Moravisik, Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 Int'l Organization 457 (2000); Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication, 107 Yale L. J. 273*, (1997).
[250] Robert O. Keohane, Andrew Moravisik, Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 Int'l Organization 457 (2000).
[251] Robert O. Keohane, Andrew Moravisik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 Int'l Organization 401, (1999), pp. 401-404.
[252] Robert O. Keohane, Andrew Moravisik, Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 Int'l Organization 457 (2000).

of decision by the national court.[253] Consequently, if governments want to defy a decision of the ECJ on a matter of EC/EU law, they would also have to defy the decision of the national court as well, which is not easy in a democratic, liberal domestic setting.[254]

This is something markedly different than what is happening at interstate tribunals. Recently the ICJ issued its interpretation[255] of the *Avena*[256] judgment in which it ruled that the United States of America (US) is under the obligation to review and reconsider the cases of Mexican nationals that have been convicted and are expected to undergo the death penalty for not guaranteeing them their Vienna Convention on Consular Relations rights.[257] In the request for interpretation Mexico asked for the court to rule that its decision had a direct effect in the United States and, therefore, US courts were obliged to implement the decision.[258] The ICJ rejected Mexico's request by saying that

> [t]he *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153(9). *The obligation laid down in that paragraph is indeed an obligation of result which clearly must be performed unconditionally*; *non-performance of it constitutes internationally wrongful conduct*. However, the Judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law. Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law. (emphasis added)[259]

[253] *See*: J.H.H. Weiler, *The Transformation of Europe*, 100 Yale L.J. 2403 (1991); but also *see*: Robert O. Keohane, Andrew Moravisik, Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 Int'l Organization 457 (2000); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273 (1998); Laurence R. Helfer; Anne-Marie Slaughter, *Why States Crate International Tribunals: A Response to Professors Posner and Yoo*, 93 Cal. L. Rev. 899 (2005).

[254] Robert O. Keohane, Andrew Moravisik, Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 Int'l Organization 457 (2000).

[255] *Request for interpretation of the judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, General List No, 139, (Hereafter *Avena Interpretation* case).

[256] *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 12 (hereafter the *Avena* case).

[257] Generally see the *Avena* case, para. 153(9).

[258] *Avena Interpretation* case, para. 43.

[259] *Ibid*, para. 44.

This request was preceded by litigation in US courts that started after the *Avena* judgment was handed down which resulted in a case by the US Supreme Court in which it explicitly refused to give effect of the *Avena* judgment.[260]

From what I have said above about international tribunals as lawmakers we can now draw some conclusions as to how law-making may be done by these same tribunals. The fact of the matter is that whenever an international tribunal receives a request to settle a dispute it is asked to interpret and apply law to a specific problem. And as any law, international law, in order to be applicable to a wide variety of cases, needs to have a certain level of abstraction and imprecision and sometimes it just simply has gaps. When talking about gaps created in a treaty making process, these gaps can either be left unintentionally or on purpose by the treaty drafters because of a lack of consensus leaving the imprecisions and gaps to be filled in by the tribunals themselves. The tribunals themselves in the case of intentionally left gaps are seen to have the mandate to fill in these gaps through the dispute resolution mechanism.[261]

Through the natural interpretation and gap-filling process, courts may make law where no law existed or may expand the existing law to areas which previously it was not applicable. Just think of the *Soering* judgement[262] of the ECtHR ruling that the death-row phenomenon that was associated with the death penalty was inhumane and degrading treatment and the effects that it had on other states, both inside and outside of its natural jurisdiction.[263] This argument was considered by other constitutional/supreme courts and some, like the Indian and Canadian Supreme courts declined to follow the path of the ECtHR and declare the death penalty, as the issue was recast, unconstitutional.[264] The British Privy Council

[260] *Medellin v. Texas*, 552 U.S. 491 (2008).
[261] *See*: Laurence R. Helfer; Anne-Marie Slaughter, *Why States Crate International Tribunals: A Response to Professors Posner and Yoo*, 93 Cal. L. Rev. 899 (2005), pp. 936-940.
[262] *Soering v The United Kingdom*, Plenary Session Judgment, (Application no. 14038/88), July 07, 1989.
[263] For more on the impact of the *Soering* judgment *see*: CL'Heureux-Dube, *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 Harv. L. Rev. 2049 (2001), pp. 2052-2059.
[264] *Ibid*., pp. 2053-2059.

sitting in a case from Jamaica and the South African Constitutional Court, on the other hand, found this argument persuasive and found the death penalty unconstitutional under the parameters of inhumane and degrading treatment.[265]

The ECtHR, even though had specific provisions allowing for the death penalty, found a way to hinder the execution of a death sentence by reframing the issue in Article 3 terms. It started by focusing on the issue of the death-row phenomenon as an inhumane treatment in the *Soering* judgment[266] but then later took the death penalty discussion a bit further than the death-row phenomenon. What started with the invalidation of the death-row phenomenon for extradition purposes, later developed into the abolition of the death penalty in times of peace even before the full ratification of Protocol 6.

As it now stands, all State Parties to the European Convention on Human Rights[267], save for Russia, have ratified Protocol 6, which abolishes the death penalty in times of peace,[268] and four State Parties have not ratified Protocol 13, which abolishes the death penalty in all instances.[269] However, in the *Ocalan* First Section judgment, the ECtHR went to a hair's width to almost invalidating the death penalty in times of peace through the method of interpreting the convention as a living instrument,[270] and looking at the practice of the vast majority of States Parties in abolishing the death penalty.[271] However, the ECtHR did not go

[265] *Ibid.*
[266] *Soering* judgment, para. 111.
[267] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, European Treaty Searies No. 5.
[268] Robin C. A. White & Clare Ovey, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 5th edn., OUP, Oxford, 2010, p. 144.
[269] *Ibid.*
[270] *Öcalan v. Turkey*, Judgment, First Section, (Application No. 46221/99), March 12, 2003, para. 193 (latter fully endorsed by the Grand Chamber) (here after the *Öcalan* First Section judgment); but also *see Selmouni v France*, Grand Chamber Judgment, (Application No. 25803/94), July 28, 1999, para. 101 "having regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions", the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" (citations removed).
[271] *Öcalan* First Section judgment, para. 195-198.

on to conclusively say that the death penalty in times of peace, due to the practice of states, was now written out of Article 2 of the Convention. What it said was that

> it cannot now be excluded, in the light of the developments that have taken place in this area, that the States have agreed through their practice to modify the second sentence in Article 2 § 1 in so far as it permits capital punishment in peacetime. Against this background it can also be argued that the implementation of the death penalty can be regarded as inhuman and degrading treatment contrary to Article 3. However it is not necessary for the Court to reach any firm conclusion on this point since for the following reasons it would run counter to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial.[272]

The ECtHR, chose the less controversial option of invalidating Öcalan's death sentence on account of its imposition following an unfair trial. It did so not under Article 2 grounds, but under Article 3, as amounting to an inhumane treatment.[273]

In the issue of the death penalty, it was not the fact of gaps or silences in the law that allowed for the ECtHR to take the step of modifying the Convention to such an extend as to read out a part of an express wording. To be fair, there was a big abolitionist move within the State Parties themselves, with an almost universal ratification of Protocol 6 by the time of the *Öcalan* First Section judgment.[274] However, it is equally plausible that the ECtHR could have said that the State Parties chose a mechanism of treaty amendment through a protocol in order to allow the State Parties to opt in or out of whether they would abolish or not the death penalty in times of peace or war. In this case the ECtHR specifically decided to modify the law in a certain direction.

[272] *Ibid*., para. 198.
[273] "In the Court's view, to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention. Having regard to the rejection by the Contracting Parties of capital punishment, which is no longer seen as having any legitimate place in a democratic society, the imposition of a capital sentence in such circumstances must be considered, in itself, to amount to a form of inhuman treatment." *Ibid*., para. 207.
[274] The states that had not ratified yet Protocol 6 by the time of the *Öcalan* First Section judgment were Russia, Turkey and Armenia, *Öcalan* First Section judgment para. 195.

Furthermore, we are witnessing the emergence and development of a judicial dialogue that is going on between national judges and international courts and between national judges of different jurisdiction. Some see it as a development of transjudicial networks that are part of the new world order.[275] Regardless of whether one sees the idea of a networked world order as a viable next step in creating a world order,[276] it is hard to deny that judicial networks exist and a judicial dialogue is taking place.[277] It is through this judicial dialogue that norms created by courts get disseminated and ultimately get accepted in domestic or international law.

One recent theory that explains this process is the concept of the transnational judicial process[278] advanced by the dean of Yale Law School, Harold Hongju Koh. The transnational legal process is carried out through three distinct stages: interaction, interpretation and internalization.[279] States as well as other transnational actors like NGOs, International Organizations etc. interact with each other on the international stage and through that they "generate and interpret international norms and then seek to internalize those norms domestically."[280] The internalization occurs through interpretation and implementation of international law by domestic bureaucracies, through transnational litigation started by domestic or international actors (think of the Alien Torts Claims Act litigation in the US as an example, or even better yet the litigation through the ECtHR) and so on. When these norms become internalized,

[275] Anne-Marie Slaughter, A NEW WORLD ORDER, Princeton University Press, Princeton and Oxford, 2004, Chapter 2 discussing the rise of judicial networks and their impact around the world.
[276] For a critique on Slaughter's take on a networked world order *see*: Jose Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 European J. Int'l Law 183, (2001); Jose Alvarez, *Governing the World, International Organizations as Lawmakers*, 31 Suffolk Transnat'l L. Rev. 591 (2008).
[277] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, pp. 89-91 regarding the almost regular meetings of judges from various different courts.
[278] Harold Hongju Koh, *Transnational Legal Process*, 75 Nebraska L. R. 181, (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599, (1997); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 Ind. L.J. 1397, (1999); Harold Hongju Koh, *Transnational Legal Process After September 11th*, 22 Berkeley J. Int'l L. 337, (2004).
[279] Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599, (1997), p. 2649.
[280] *Ibid*, p. 2651.

through these domestic actors, they become part of the state's domestic law with all the domestic law implementing/enforcement mechanisms that go with it.[281]

The problem with the concept of the transnational legal process is that it only looks at one aspect, albeit a very important one, of international law and that is: why nations obey international law. It presupposes that there is international law to implement "somewhere out there" and gives no insight into how international law is created.

1.4. Where Do International Criminal Tribunals Fit In This Changed International Setting?

I started this Chapter with a small example of two friends playing a game of chess as an analogy of how the traditional model of international law-making works. In that example the autonomous and equal individuals decided to play a game of chess and got into an argument on whether the "white" player made an illegal move. It is not difficult to see how much this idea of autonomous and equal individuals is very much the idea on which the international system of law is based on. One just has to substitute the idea of autonomous and equal individuals with sovereign and equal states.[282] This idea of inclusive, pluralistic, international society regardless of the internal order of a state won out at the negotiations at Dumbarton Oaks where the UN Charter was drafted.[283] It was later confirmed by the ICJ's Advisory Opinion on the *Conditions of Admission of a State to Membership in the United Nations*[284] case where the ICJ stated that the conditions laid out in Article 4 of the Charter were an ex-

[281] *Ibid.*
[282] Gerry Simpson, *Two Liberalisms*, 12 European J. Int'l L. 537, (2001), describing the two ideas of liberal international theory, one been a liberal anti-pluralism centered on the exclusion of states that do not have a liberal or "civilized" domestic order and the second one of liberal pluralism transposing the idea of autonomy and equality to the international sphere where states have been for the individual as the main actor. In the liberal anti-pluralism system which dominated pre WWII, European states were seen as the only ones that could be members of the international system and subjects of international law, while other nations, like Japan, China, the Ottoman Empire and so on were excluded as being un civilized and unequal treaties could be forced upon them.
[283] *Ibid*, pp. 550-555.
[284] *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion: I.C.J. Reports 1948, p. 57

haustive list to the conditions of membership and that no member can attach further conditions to membership especially in term of the domestic order of the applicants.[285]

The consequence of this idea of the international system as consisted of sovereign and equal states is, as I have said, the centrality of states and state consent. There is limited room for international organizations and no room for individuals. The central idea at the negotiations at Dumbarton Oaks was to create a system that was capable of achieving peace and security for *states*. Article 2(7) of the UN Charter represents the pinnacle of this idea of states being seen as unitary actors interacting on the international stage where other actors cannot pierce its surface to its internal sphere. The ICJ ruling on the interpretation of the *Avena* judgment is the latest example of such an idea of international law.

On the other hand, what a large part of this Chapter has strived to show was that states are no longer the only actors in the international sphere and that state consent is no longer the silver bullet of international law overruling all other considerations. Just remember the concept of *jus cogens* as a way to overrule the objections of states to the emergence of a new rule of international law.[286] What we can see today is that there is a plurality of actors that are on the international stage that make law, while technically still only states and international organizations are subjects of international law with the full entitlement of law-making.

The broadening scope of actor has also changed the focus of international law. While the centrality of states and state consent was once the principle that underpinned all international law it is no longer so. The field of international human rights, humanitarian law and international criminal law has eroded the idea of hard sovereignty and has stripped away the many layers of protection of states offered by Article 2(7) of the Charter. The process of bot-

[285] *Ibid*, p. 65.
[286] Prosper Weil, *Towards Relative Normativity in International Law*, 77 A.J.I.L. 413 (1983); Dinah Shelton, *Normative Hierarchy in International Law*, 100 A.J.I.L. 291, (2006).

tom-up law-making has shifted the power of legislation, however slightly, from states and international organizations to individuals, NGOs and multinationals.[287]

Some suggestions from international relations scholars on the remodelling of the international system have already been voiced.[288] A new liberal theory of international relations puts the focus on the changing nature of state preferences (opposite to immutable, constant ones advocated by Realists and Insitutionalists) dependant on the domestic organization of states where domestic politics shapes the goals and preferences that states pursue internationally. In this theory, states are seen only as representatives of these domestic preferences once and sometimes twice removed from the domestic preference setting arena.[289] Anne-Marie Slaughter's networked world order consistent of transgovernmental i.e. executive, judicial, and parliamentary networks is another variant of liberal international thought.[290] These networks share information, harmonize and create law, or improve enforcement of already existing law. They can be horizontal (the G-8 for instance) or vertical (the ECJ and national courts of the EU member states) with different advantages and drawbacks.[291]

What these new theories have in common is that they take the view, the idea, of a unitary state actor and literally take it apart. They advocate that the interaction of various state, sub-state and non-state actors on both the domestic and international sphere is what the ex-

[287] Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 Am. Soc'y Int'l L. Proc. 240, (2000).
[288] Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 Stan. J. Int'l L. 283 (2004); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies and Disaggregated Democracy*, 24 Mich. J. Int'l L. 1041 (2003); Anne-Marie Slaughter, A NEW WORLD ORDER, Princeton University Press, Princeton and Oxford, 2004; Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 Am. Soc'y Int'l L. Proc. 240, (2000); Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 54 International Organization 513, (1997); Jeffrey W. Legro and Andrew Moravcsik, *Is Anybody Still a Realist?*, 24 International Security 5, (1999);
[289] Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 54 International Organization 513, (1997) pp. 516-521 giving the basic assumptions of a new liberal international theory; for a critic, one which I fully agree with *see* Christian Reus-Smith, *The Strange Death of Liberal International Theory*, 12 Eur. J. Int'l L. 573 (2001).
[290] Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 Stan. J. Int'l L. 283 (2004); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies and Disaggregated Democracy*, 24 Mich. J. Int'l L. 1041 (2003); Anne-Marie Slaughter, A NEW WORLD ORDER, Princeton University Press, Princeton and Oxford, 2004.
[291] Generally *see*: Anne-Marie Slaughter, A NEW WORLD ORDER, Princeton University Press, Princeton and Oxford, 2004.

planations of the different phenomena in the international system should focus on. Regardless of whether one agrees that we live in a *Hot, Flat and Crowded*[292] world or whether it is a world where rational choice dominates international relations,[293] courts do have a role to play and an increasing one at that.

However, at this point in the thesis, I would like to reserve my judgment as to the question of whether international tribunals, and international criminal tribunals in specially, are lawmakers. The answer to this question, as I have said in my introduction, is somewhat more complicated than a simple yes or no. What I would like for the reader to have in mind when proceeding through the next two chapters is the fact that, regardless of whether one calls international tribunals lawmakers or not, they have an enormous normative influence on the shape of the law. In the next two chapters, I will try to demonstrate this normative influence through numerous examples and show how the *ad hoc* tribunals have used the material sources at their disposal and the interpretative techniques available to them to exert this normative influence.

[292] Thomas L. Freedman, HOT, FLAT, AND CROWDED: WHY WE NEED A GREEN REVOLUTION - AND HOW IT CAN RENEW AMERICA, Penguin Books, New York, 2009.
[293] Jack L. Goldsmith and Eric A. Posner, THE LIMITS OF INTERNATIONAL LAW, OUP, Oxford, 2005; Andrew T. Guzman, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY, OUP, Oxford, New York, 2008.

CHAPTER II – HOW DO INTERNATIONAL CRIMINAL TRIBUNALS MAKE LAW? – THE IMPORT OF NORMS AND THE MATERIAL SOURCES OF INTERNATIONAL LAW

In the previous Chapter, I showed that the law-making process in international law is a complex one. It has a myriad of actors that steer and influence the direction of its development. Nevertheless, since the theme of this thesis is the role of international criminal tribunals in the law-making process of international criminal law, it is time to turn to the question of their actual role. But before going into more detail of the methods used by the tribunals in their reasoning, I think it is prudent to give a couple of guidelines as to which tribunals will be the focus in this Chapter and why that is so.

Chapter II will focus on two tribunals, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). I have chosen these two tribunals for several reasons. First, they are the first international criminal tribunals that came out of the post Cold War world as a response to the atrocities stemming out from the conflicts raging in the former Yugoslavia and in Rwanda. As such, they were faced with the task of enunciating and crystallizing norms of international criminal law that were written some 40 years ago and have had no international applications, in terms of judicial application, since.[1] They were the first international tribunals since WWII that had individuals as defendants in their docket, requiring them to take into account procedural questions that have not been raised since in an international judicial process.

The Chapter does not focus on the International Military Tribunals (IMTs) of the post WWII era for several reasons. One, even though the statutes of IMT at Nuremberg and the IMT for the Far East represent an important first step in the development of international criminal law, nevertheless, there has been a significant progress in international criminal and

[1] It is important to note that, as Chapters II will strive to show, this is not the case, and that these norms have been interpreted and implement by national institutions of different branches including the judicial branch and that, in the early cases at least, they represent a significant guide as to the state of the law to the tribunals.

international humanitarian law since the closing of the post WWII IMTs. This progress has been in the forms of significant enactments in the form of treaties and in the form of evolving customary law. Two, this thesis is about the contemporary role of international (criminal) tribunals in the law-making process in the international system. Therefore, the contemporary international criminal tribunals take the centre stage in this analysis. Three, as I have shown in the previous Chapter, there have been significant changes in the law-making process in international law, from the rise of International Organizations (IOs) to the increasing role of judicial settlement of dispute and the rise of new type of institutions – supranational ones. Consequently, I came to a decision to confine the post WWII IMTs as part of another inquiry in these two Chapters – as material sources of case-law or evolving custom and not as primary subjects of analysis.

Second, the two *ad hoc* tribunals were followed by other international or mixed criminal tribunals, namely the International Criminal Court (ICC), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia, the special Section (I) of the Bosnian Criminal Court on War Crimes, just to name the few. Due to the fact that these later tribunals have been established and have started operating, in some circumstances, almost a decade later than the *ad hoc* tribunals, their case load and case-law has been considerably smaller. Furthermore, since chronologically they come later than the two *ad hoc* tribunals they will be part of the study in Chapter III regarding the export of and acquiescence to the norms created by the two *ad hoc* tribunals.

Third, the two *ad hoc* tribunals have very similar statutes and share the same prosecutor. The structure of both tribunals is virtually the same, separated to Trial and Appeals Chambers where the number of judges sitting on the bench is the same. Furthermore, they share the same Appeals Chamber, which is comprised of five permanent judges from the

ICTY and two permanent judges from the ICTR.[2] Consequently, the expectation is that their ways of reasoning will be similar, not to say uniform, in terms of sources that they use and in terms of the interpretation techniques deployed.

I must also mention one other aspect of my approach in this Chapter. As I have mentioned previously, Chapter II will deal with how these two international tribunals have arrived at their decisions. Consequently, the Chapter will focus on the techniques that the *ad hoc* tribunals have used in their reasoning and not on their specific outcomes. There have been a number of excellent books and textbooks[3] regarding the development and the current state of black letter law in international criminal law, which I do not even strive to mimic, nor is my intention to do so. This Chapter is about the way that the *ad hoc* tribunals have made and reasoned their decisions, about what interpretative techniques they used in order to arrive at those substantive results, what sources, i.e. doctrinal writings and cases from different jurisdictions have they relied on and so on. In short, even thought this is an oversimplification, this Chapter, and more broadly this thesis, deals with the mechanics of judicial deliberations and not with their outcomes.

Consequently, in my analysis presented bellow, I will not review all or even most of the cases decided by the *ad hoc* tribunals since this has already been done in a more masterful way than this thesis can strive for.[4] I have decided that a more appropriate approach would be to focus on a few selected judgments of these tribunals in the hope that it will give me the opportunity to show the reliance on different sources at different times of the tribunals' op-

[2] For more see the web site of the ICTY and the ICTR: http://www.icty.org/sections/AbouttheICTY/Chambers (last visited on June 9, 2009) http://www.ictr.org/ENGLISH/geninfo/chambers.htm respectively (last visited on June 9, 2009).

[3] Antonio Cassese, INTERNATIONAL CRIMINAL LAW, Oxford, Oxford University Press, 2008; M. Cherif Bassiouni ed., INTERNATIONAL CRIMINAL LAW 3RD EDITION, Leiden, Netherlands , Martin Nijhoff Publishers, 2008; William Schabas, GENOCIDE IN INTERNATIONAL LAW, New York, Cambridge University Press, 2000; Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE, Cambridge, Cambridge University Press, 2007; just to name the few.

[4] William Schabas, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE, Cambridge University Press, Cambridge, (2006) as just one example.

eration; to see whether there is consistency over time or whether there is a shift on reliance from external references to internal ones; from external case-law to internal. The cases that I have chosen are not many, but they are evidence of the evolving nature of the *ad hoc* tribunals' reasoning. Consequently, many of the cases chart the first attempts of the tribunals to deal with the overwhelming silences that are in both their statutes and international criminal law. Some references to later cases are for the reason of showing the finished result of this judicial search as well as to show how the judicial reasoning and justification in the written decisions has evolved.

I have decided to divide my analysis in this Chapter into two parts. The first thematic part will deal with the sources that these tribunals use in their reasoning; how much they rely on the previous decisions of national and international courts and their adaptation to the specific circumstances of international criminal law; how much of their reasoning is based on the doctrinal writings of scholars, commentaries to the Geneva and other conventions, reports issued by the International Law Commission and so on; and how much does this conform to the traditional understanding of the sources of international law. The second part will deal with the methods that the judges have used in their application or discovery of these sources. It will focus on the interpretative techniques that the judges have used to answer the arguments brought forward by the prosecution and the defence and to reach their substantive decisions. I have chosen this separation of what is a natural and seamless process of use of sources and interpretative techniques in judicial reasoning as a heuristic tool in order to show both the gears of the expansion of international criminal law by the *ad hoc* tribunals and the trajectory of that expansion.

One cautionary note before I start my analysis of the decisions of these tribunals. There is a chance the discussions in this Chapter will be somewhat repetitive. The problem is clear: how does one deal with the interpretative techniques without mentioning the source or

the text that these techniques are used on? My decision to separate the discussion in such a way was influenced by my desire to show, on one side, the process of importing norms from one regime or from one jurisdiction into another, and, on the other side, to show the specific judicial techniques used by the judges to modify, adapt and expand those same norms once imported. I hope that the reader will find my reason justified and will not find the discussion presented bellow as too repetitive.

2.1 THE IMPORT OF NORMS – THE MATERIAL SOURCES

The ICTY and ICTR were created in a time of post Cold War re-shaping of the international scene. They were seen as a response (for some a weak response) to the mass atrocities that occurred on the territories of the former Yugoslavia and Rwanda. Putting aside the political situation of the time of their creation,[5] the important factor for this thesis is the fact that they were the first international criminal tribunals in almost half a century. Their assigned task, to put it mildly, was herculean. The Report of the Secretary General of the United Nations tasked the ICTY (and later consequently the ICTR) with applying "rules of international humanitarian law which are beyond any doubt part of customary law."[6] In the following twenty-five paragraphs, the Report spelled out what the Secretary General considered to be settled customary law, namely Grave Breaches of the Geneva Conventions (Article 2 of the ICTY statute), Violations of the Laws and Customs of War (Article 3 of the ICTY statute), Genocide (Article 4 of the ICTY statute), Crimes Against Humanity (Article 5 of the ICTY statute) and Individual Criminal Responsibility (Article 7 of the ICTY statute). It is on

[5] For a good account of the circumstances of the creation of the ICTY and the problems with finding and appointing the first prosecutor and starting the first proceedings, *see*: Gary Jonathan Bass, STAY THE HAND OF VENGEANCE – THE POLITICS OF WAR CRIMES TRIBUNALS, Princeton and Oxford, Princeton University Press, 2000, pp. 206-275.

[6] *Report of the Secretary General pursuant to paragraph 2 of Security Council Reso*ion 808 (1993), UN Doc. No. S/25704, May 3, 1993, para. 34 (hereafter Report of the SG).

these twenty-five paragraphs and these five articles that the *ad hoc* tribunals will base most of their case-law.

Just a simple example of the overwhelming silences and the discretionary power that the *ad hoc* tribunals had is the example of the rules and procedures of evidence. In terms of the rules of procedure and evidence, the width and breath of the mandate of the tribunals is staggering. The Report devotes only one paragraph to the rules of procedure and evidence, stating that

> [t]he judges of the International Tribunal as a whole should draft and adopt the rules of procedure and evidence of the International Tribunal governing the pre-trial phase of the proceedings, the conduct of trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.[7]

Consequently, the entire procedural law, in regards to the *ad hoc* tribunals, is judge-made law. Naturally, there are some limitations set out in the Statute itself; the rules on procedure and evidence are not left entirely to the judges themselves. Certain principles, like the right to council in all stages of the criminal process,[8] the protection of victims and witnesses,[9] the process of appeal[10] and so on are laid out in the Statute and Secretary General's Report. The Report also makes it clear that the judges should draw on inspiration from the rights protected in the International Covenant on Civil and Political Rights (ICCPR) when drafting the rules of procedure and evidence.[11]

Nevertheless, the fleshing out of the procedural principles laid out in the Report was left, to a very high degree, on the discretion and the expertise of the judges themselves. Just one note to this effect, the current Rules on Procedure and Evidence of the ICTY has 127 Rules (not counting the *bis*, *ter* and in some cases *quater* additions to certain rules) spelled

[7] *Ibid.*, para. 83.
[8] *Ibid.*, para. 83-124 laying out certain principles for the rights of the accused.
[9] *Ibid*, para. 108.
[10] *Ibid.*, para. 116-120.
[11] *Ibid.*, para. 101 regarding the prohibition of trials in absentia and para. 106 regarding the incorporation of the rights of the accused to a fair trial protected under Article 14 of the ICCPR.

out in 130 or so pages.[12] So far, these same rules have been amended 42 times.[13] The Rules on Procedure and Evidence of the ICTR has 126 Rules (also not counting the *bis*, *ter* and *quater* additions) and has been amended at least 17 times.[14] In a very real sense, they can easily be called judicial edicts.

The way that the Rules on Procedure and Evidence are adopted can vary from tribunal to tribunal. The Rules of Procedure and Evidence of the ICC, for example, are adopted and amended by the Assembly of Parties, as per Article 51 of the Rome Statute.[15] It is understandable that in the ICC, being a separate and self-standing international organization, and not a subsidiary organ of the UN Security Council like the *ad hoc* tribunals, the mode of adopting international instruments follows a more traditional international law approach, albeit with a two thirds majority of the members of the Assembly of Parties to the Rome Statute.[16] For the Special Court of Sierra Leone, the Rules of Procedure and Evidence of the ICTR were adopted as applicable to the Court by specific reference to them in Article 14 of the Agreement establishing the Court.[17] The amendment of the Rules, on the other hand, is left to the discretion of the judges who may be guided by the Sierra Leonean Criminal Procedure Act of 1965.[18]

Fascinating though the examples of the creation of the procedural rules may be, the idea of this discussion was not to delve more deeply on the creation of the international law

[12] *See*: Rules of Procedure and Evidence of the ICTY, UN Doc. No. IT/32/Rev. 42, November 4, 2008 available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev42_en.pdf, (last visited on June 15, 2009).
[13] This applies as of June 15, 2009.
[14] *See*: Rules of Procedure and Evidence of the ICTR, last amended on February 9, 2010 available at: http://www.unictr.org/Portals/0/English/Legal/ROP/100209.pdf (last visited on February 10, 2011).
[15] *See*: Article 51 of the Rome Statute, UN Doc. No. A/CONF.183/9, July 17, 1998 and the Rules on Procedure and Evidence of the ICC, Official Records ICC-ASP/1/3, November 3-10, 2002.
[16] Article 51(1) of the Rome Statute.
[17] Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of August 14, 2000, and especially Article 14(1) "The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court." Available at http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=200 (last visited on June 15, 2009).
[18] Article 14(2) of the Agreement

on criminal procedure. The discussion presented above intended to show just how big the vacuum in rules regarding international criminal law was at the time of adoption of the statutes of the *ad hoc* tribunals and the enormous intellectual task that was before the judges of both tribunals. It was within this vacuum that the judges of the *ad hoc* tribunals would have to make their judgments; and would have to make them on the basis of 5 articles in their Statutes (regarding the substantive international criminal law) and scant references in the Report of the Secretary General to other international documents like the Geneva Conventions, The Genocide Convention, the Hague Regulations, the ICCPR and the decisions of the Nuremberg Tribunals.[19]

Therefore, the question remains what are the sources in the material sense of the word,[20] the foundations that these tribunals use in the reasoning of their judgments. To answer this question I will now turn to the decisions and judgments of these tribunals and look for the references that they make in the texts of their decisions. Even more importantly, I will focus on how the *ad hoc* tribunals used these sources, how they interpreted and modified them and in certain examples, how they displaced and overruled them. For the purposes of clarity, I will separate the sources in a more traditional approach to references to conventions, judgments of national or international courts or other quasi-judicial bodies, doctrinal writings of academics and other sources, such as statements of governments, military manuals and alike.

I choose not to include a specific sub-section on customary international law since, as I showed in the previous Chapter, the making of an international custom is more of a question

[19] *See more specifically*: Report of the SG, para. 33-59.

[20] For some brief idea about the distinction between the formal and the material sources in international law *see* Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, Sixth Ed., Oxford University Press, Oxford, 2003, pp. 3-4; "The consequence is that in international law the distinction between formal and material sources of law is difficult to maintain. The former in effect consist simply of a quasi-constitutional principle inevitable but unhelpful generality. What matters then is the variety of material sources, the all-important *evidences* of the existence of consensus among states concerning particular rules of practices. The decisions of the International Court, resolutions of the General Assembly of the United Nations, and 'law-making' multilateral treaties are very material evidence of the attitude of states toward particular rules, and the presence of absence of consensus." *Ibid,* p. 4.

of process rather than something with a set place in time and space. In a short digression, international custom is defined as "evidence of general practice accepted as law."[21] In order to find international practice one has to look into the speeches of political leaders, in memoranda published by official institutions, of official manuals, diplomatic interchanges, legislative enactments of states (if the enactments follow more or less uniform language) and so on.[22] Similarly as with state practice, *opinio juris* can be found in the speeches of public officials, the memoranda or other legal opinions issued by governmental branches, decisions taken by judges, exchanges between foreign ministries and the enactment of statutes.[23] In other words for evidence of *usus* and *opinion juris* one has to look at the material sources of international law.

One specificity of discovering custom in international criminal law was elegantly pointed out by Judge Cassese in the Decision on the Defence Motion for Interlocutory Appeal in the *Tadic* case. The Court on that occasion said that

> [w]hen attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.[24]

[21] Article 38 of the Statute of the International Court of Justice.
[22] Malcolm N. Shaw, INTERNATIONAL LAW, 5th edn., Cambridge University Press, Cambridge, 2003, p. 74.
[23] *Ibid*, 82-83.
[24] *Prosecutor v Tadic*, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-1, October 2, 1995, para. 99 (hereafter *Tadic Defence Motion* decision). One brief comment to this statement can be made that although it is apparently difficult to ascertain the actual behaviour of troops on the field, it has not stopped the tribunals to undergo this herculean task when arriving at their judgments. One look at a usual Trial Chamber judgment of one of the tribunals and it is immediately obvious that almost 2/3 of the judgment is devoted to discussing the establishment of facts.

Consequently, whenever the ICTY or the ICTR try to discover international custom regarding a specific issue, they refer to texts of treaties that have crystallized into custom by widespread ratification; or to judicial decisions, speeches of government officials, military manuals and so forth. Therefore, it would be repetitive to make a separate sub-section devoted to reference to customs when the process of discovery of customary law is built on referring to other material sources. Nevertheless, whenever this process is in play I will make a special note to it in my discussion.

Another preliminary issue before I undertake the discussion of referencing specific sources, and that is the question of what constitutes part of a convention. Clearly, the text of a convention negotiated and agreed is part of the convention and there can be no confusion about that. The same can be said without much ado about protocols amending the convention as well as reservations accepted by the state parties to it. A slightly more difficult question to answer would be whether the *travaux préparatoires* to a convention are part of the convention, similarly to the question of whether the legislative history of a statute is part of the statute. The obvious answer would be that formally they are not, since the parties to the treaty do not sign nor ratify them but only the text of the treaty. However, given the fact that they are an important tool in interpreting the convention,[25] for the purposes of this thesis, I will consider that whenever a reference is made to the *travaux* of a specific treaty that it was as if the text of the treaty was referenced itself. I will also consider commentaries made to specific treaties, like the comprehensive Jean Pictet Commentaries to the Geneva Conventions issued by the International Committee of the Red Cross (ICRC)[26] to also be references made to a

[25] For instance the Vienna Convention on the Law of Treaties puts the *travaux* in the supplementary means of interpretation in case the plain textual interpretation of the convention "leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable", *see* Article 31(a) and (b) of the Vienna Convention on the Law of Treaties of 1969, United Nations, *Treaty Series*, vol. 1155, p. 331.

[26] The text of the Geneva Conventions, the Three Protocols and their Commentaries are available at: http://www.icrc.org/ihl.nsf/CONVPRES?OpenView (last visited on June 16, 2009).

specific treaty and not to doctrinal writings, even though a significant intellectual effort was put into the creation of these commentaries.

I do not wish to go into a lengthy discussion at this point into the issue of whether judicial decisions can be considered as part of a treaty or are they self-standing legal authorities. I reserve the discussion for a different Chapter of this thesis since it goes to the larger debate of whether international law is taking, more and more, the shape of a common law system of law where case-law is a source of law and where the doctrine of binding precedent applies. Nevertheless, for the sake of clarity, for the purposes of this Chapter, judicial decisions will be viewed and discussed as separate support mechanisms for the reasoning of the judges and not as a strict adherence or reference to one or another source of law, be it treaty, custom or general principle of international law. This is more of a decision regarding a clear presentation of the discussion regarding the question of what the judgments of the ICTY and ICTR are based on and what the judges use in order to support their reasoning and it should in no way be understood at this juncture as a specific stand on my part regarding that issue.

2.1.1 Reference to Conventions

One of the obvious references that the *ad hoc* tribunals make is references to the Geneva Conventions and their Protocols. This is very understandable, since the four Geneva Conventions form the bedrock of international humanitarian law. In addition, we should not forget the fact that Article 2[27] of the ICTY statute is titled "Grave Breaches of the Geneva

[27] Grave breaches of the Geneva Conventions of 1949
The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

Conventions" and Article 4[28] of the ICTR similarly makes direct invocation of Common Article 3 of the Geneva Conventions. Consequently, the judgments of the ICTY and ICTR cannot but refer to the Geneva Conventions. Since it is obvious that whenever the ICTY or ICTR consider whether a person is guilty of a crime under Article 2 or Article 4 respectively of their statutes they make direct references to the Geneva Conventions, I will generally not deal with these types references. Therefore, I will deal with the rather more not so obvious references to the Geneva Conventions.

Let me now start with some examples of how the *ad hoc* tribunals have used conventions as the foundations of their reasoning. In the first decision that the ICTY made, the *Tadic Defense Motion* decision, the Court used the Geneva Conventions to come up with a definition of what constitutes an armed conflict,[29] as well as defining "the temporal and geographical scope of both internal and international armed conflicts".[30] When defining the scope of the conflict, i.e. its temporal and geographical occurrences, the ICTY did not rely on any specific provision, for the very simple reason that the geographical scope of the conventions is

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(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

[28] Article 4: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II
The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) Collective punishments;
(c) Taking of hostages;
(d) Acts of terrorism;
(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) Pillage;
(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;
(h) Threats to commit any of the foregoing acts.

[29] *Tadic Defence Motion* decision, para. 70
[30] *Ibid*, para. 67.

not specifically defined in their text.[31] It rather referred to several provisions supporting its finding that the applicability and consequently the full protection of the Geneva Conventions applies on the whole territory of the belligerent parties and not just in the vicinity where the actual fighting is taking place.[32] The whole discussion ends up with a judicially constructed test of what constitutes an armed conflict according to the Geneva Conventions.[33]

Even more interestingly, when later judgments are passed, it is the test that is being referred to and not the Geneva Conventions. Even in the very next decision that the Court made, the *Tadic* Trial Chamber judgment,[34] when the Court had to decide the question of whether there was an armed conflict in existence at the time the alleged crimes took place, it refers to the test in the *Tadic Defense Motion* decision, and it refers to it as a test, not as a provision of the Geneva Conventions.[35] The Geneva Conventions are not even mentioned.

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[31] "Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities." *Ibid*, para. 68.

[32] For instance the ICTY referred to Article 5 of Geneva (I) Convention and Article 5 of Geneva (III) Convention, relevant to certain classes of protected persons who have fallen in the hands of the enemy power till their final repatriation, as well as in paragraph 68 "Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. This construction is implicit in Article 6, paragraph 2, of the Convention, which stipulates that:

> "[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations." (Geneva Convention IV, art. 6, para. 2 (Emphasis added).)

Article 3(b) of Protocol I to the Geneva Conventions contains similar language. (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, art. 3(b), 1125 U.N.T.S. 3 (hereinafter *Protocol I*).) In addition to these textual references, the very nature of the Conventions - particularly Conventions III and IV - dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose. *Ibid.*, para. 67-70.

[33] *Ibid*, para. 70.

[34] *Prosecutor v Tadic*, Trial Chamber judgment, IT-94-1-T, May 7, 1997(hereafter the *Tadic* Trial Chamber judgment).

[35] "According to the *Appeals Chamber Decision*, the test for determining the existence of such a conflict is that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State". (footnote omitted), The *Tadic* Trial Chamber Judgment, para. 561.

The test devised by the Court becomes the governing authority of the discussion for the decision.[36]

This pattern repeats itself in most, if not all, subsequent judgments. For instance in the *Furudzija*[37] case the Trial Chamber went on to say that "[i]t was not disputed [by the parties] that the test to be applied in determining the existence of an armed conflict is that set out by the Appeals Chamber of the International Tribunal in the *Tadic* Jurisdiction Decision, which states:"[38] (continues by quoting the test). Nowhere in the footnotes do the Geneva Conventions appear. Similarly with the *Aleksovski* case, the Trial Chamber resorted to the *Tadic* test and not to the Geneva Conventions, saying that "[i]n the Tadic Decision, the Appeals Chamber, after having noted the protean nature of armed conflict, defined it to be 'a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'" (footnote omitted).[39] The *Blaskic* case has a similar paragraph in which it just plainly starts with "According to the *Tadic* appeal decision" and continues quoting the test and not discussing the Geneva Conventions at all.[40]

To show that this is not an isolated incident, where the ICTY constructed a specific test that would subsequently be used in further trial judgments, I will now look into several decisions of the ICTY and explain the steps that the Court used to construct tests and definitions for terms in the Geneva Conventions. First, let me start with the example of the test for determining whether internal violence that has broken out in a state has reached the threshold

[36] For a discussion on the use of tests in judicial decisions, especially on their use in US Supreme Court decisions *see*: Mitchel de S.-O.-Lasser, *"Lit. Theory" Put to the Test: A comparative Literary Analysis of American Judicial Tests and French judicial Discourse*, 111 Harv. L. Rev. 689 (1998); Mitchel de S.-O.-Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, Oxford University Press, Oxford, 2004, pp. 62-102.

[37] *Prosecutor v. Anto Furundzija*, Trial Chamber Judgment, IT-95-17/1-T, December 10, 1998 (hereafter the *Furundzija* Trial Chamber judgment).

[38] *Ibid*, para. 59

[39] *Prosecutor v. Zlatko Aleksovski*, Trial Chamber Judgment, IT-95-14/1-T, June 25, 1999 (hereafter *Aleksovski* Trial Chamber judgment).

[40] *Prosecutor v. Tihomir Blaskic*, Trial Chamber Judgment, IT-95-14-T, March 3, 2000, (hereafter *Blaskic* Trial Chamber judgment).

of an armed conflict not of an international character. In the *Tadic* judgment, in paragraph 562 the Court, after quoting the test for an existence to a conflict, says

> [t]he test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law (footnote omitted)[41]

In a subsequent footnote in the same paragraph the Court refers to the Pictet Commentaries to the Geneva Convention, which lists certain indicative "although in no way obligatory […] [but] convenient criteria"[42] for deciding the applicability of common Article 3 to the conflict. In the subsequent five paragraphs, the Court looks at the factual situation to see whether the two criteria it distinguished (intensity of conflict and the organization of the parties) were satisfied.[43]

This finding of the *Tadic* Trial Chamber soon becomes transformed into another judicial test clearly stated in the *Limaj* case where the Trial Chamber, after quoting the definition of an armed conflict discussed previously, says that

> [u]nder this test, in establishing the existence of an armed conflict of an internal character the Chamber must assess two criteria: (i) the intensity of the conflict and (ii) the organisation of the parties. These criteria are used "solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law." The geographic and temporal framework of this test *is also settled jurisprudence*: crimes committed anywhere in the territory under the control of a party to a conflict, until a peaceful settlement of the conflict is achieved, fall within the jurisdiction of the Tribunal. (emphasis added, footnotes omitted)[44]

This transformation from text to commentary to judicial test was best explained by the ICTY Trial Chamber in the *Boskovski* case where it stated that

[41] *Tadic* Trial Chamber judgment, para. 562.
[42] *Pictet Commentaries to Geneva Convention I*, p. 49, available at: http://www.icrc.org/ihl.nsf/COM/365-570006?OpenDocument, (last visited on June 16, 2009).
[43] *Tadic* Trial Chamber judgment, para. 563-568.
[44] *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Trial Chamber Judgment, IT-03-66-T, November 30, 2005 (hereafter *Limaj* Trial Chamber judgment).

> [t]he Trial Chamber in *Tadic* noted that factors relevant to this determination are addressed in the Commentary to Common Article 3 of the Geneva Conventions. These "convenient criteria" were identified by the drafters of Common Article 3 during negotiations of the Geneva Conventions in order to distinguish an armed conflict from lesser forms of violence, although these were rejected from the final text. While these criteria give some useful indications of armed conflict, they remain examples only. The drafters of the Commentary were of the view that Common Article 3 should be applied as widely as possible and could still be applicable in cases where "armed strife breaks out in a country, but does not fulfil any of the above conditions". The Trial Chamber in *Limaj,* after having reviewed the drafting history of Common Article 3, concluded that "no such explicit requirements for the application of Common Article 3 were intended by the drafters of the Geneva Conventions". Consistent with this approach, Trial Chambers have assessed the existence of armed conflict by reference to objective indicative factors of intensity of the fighting and the organisation of the armed group or groups involved depending on the facts of each case. The Chamber will examine how each of these criteria has been assessed in practice. (footnotes omitted)[45]

Another good example of how the ICTY used the Geneva Conventions in its reasoning is its attempt to define torture in the *Furundzija* Trial Chamber judgment. In that case, Anto Furundzija was accused of the crime of torture, which is covered under several Articles of the Geneva Conventions.[46] The problem with the prohibition of torture as a crime was that the Geneva Conventions did not offer any guidance as what the definition of torture would be or what the *actus reus* or *mens rea* of the crime are.

The Trial Chamber first went to look at whether torture is covered by any provisions of the conventions. It also discussed the evolution of the prohibition of torture throughout history starting from the Lieber Code to the adoption of the Geneva Conventions.[47] Finding that the Conventions *per se* outlawed torture, that they have crystallized into customary law and that the Conventions did not define torture, the Court arrived at the conclusion that it had to look elsewhere.[48] The first place that the Court looked was in instruments dealing with international human rights law. It said that "[t]he prohibition of torture laid down in international humanitarian law with regard to situations of armed conflict is reinforced by the body of in-

[45] *Prosecutor v. Ljube Boskovski and Johan Tarculovski*, Trial Chamber Judgment, IT-04-82-T, July 10, 2000 (hereafter the *Boskovski* Trial Chamber judgment).
[46] *Furundzija* Trial Chamber judgment, para. 135 and especially footnote 151.
[47] *Ibid*, para. 137.
[48] *Ibid.*, para. 138-142 and 159.

ternational treaty rules on human rights: these rules ban torture both in armed conflict and in time of peace (footnote omitted; listing all the conventions where torture is prohibited)."[49]

The first Convention on the list of the ICTY's Trial Chamber in discovering the definition of the crime of Torture is the Convention Against Torture of 1984. The Convention, in its Article 1, sets out the definition of torture, which the Court quotes in its entirety. It then concluded that even though the Torture Convention[50] itself states that the definition is "for the purposes of this Convention", it, nevertheless, has an "extra-Conventional effect" contributing to the definition of torture in general international law.[51] The Court said that

> [f]irst of all, there is no gainsaying that the definition laid down in the Torture Convention, although deliberately limited to the Convention, must be regarded as authoritative, inter alia, because it spells out all the necessary elements implicit in international rules on the matter. Secondly, this definition to a very large extent coincides with that contained in the United Nations Declaration on Torture of 9 December 1975, hereafter "Torture Declaration". It should be noted that this Declaration was adopted by the General Assembly by consensus. This fact shows that no member State of the United Nations had any objection to such definition. In other words, all the members of the United Nations concurred in and supported that definition. Thirdly, a substantially similar definition can be found in the Inter-American Convention. Fourthly, the same definition has been applied by the United Nations Special Rapporteur and is in line with the definition suggested or acted upon by such international bodies as the European Court of Human Rights and the Human Rights Committee. (footnotes referring to *inter alia* definition in certain cases in the European Court of Human Rights (ECtHR) and the General Comment on Article 7 of the ICCPR are omitted).[52]

Even though the Court managed to find that the definition of the Torture Convention is authoritative and that it is applicable as a definition for the crime of torture, it still faced a problem. The problem was that the definition spelled out in the Torture Convention is applicable both in times of peace and in times of war.[53] In order for it to apply to situations of armed conflicts, the Court had to modify the definition spelled out in all those human rights

[49] *Ibid.*, para. 143.
[50] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.
[51] *Furundzija* Trial Chamber judgment, para. 160.
[52] *Ibid.*
[53] *Ibid.*, para. 143.

instruments so as to fit in the framework of international humanitarian law. It did so by saying that

> [t]he Trial Chamber considers however that while the definition referred to above applies to any instance of torture, whether in time of peace or of armed conflict, it is appropriate to identify or spell out some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts. The Trial Chamber considers that the elements of torture in an armed conflict require that torture:
>
> (i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
>
> (ii) this act or omission must be intentional;
>
> (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;
>
> (iv) it must be linked to an armed conflict;
>
> (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.* as a de facto organ of a State or any other authority-wielding entity.[54]

The discussion in the Furundzija Trial Chamber judgment offers a good example of how the ICTY uses conventions other than the Geneva Conventions to elaborate on its provisions that are not very clear or even absent. The reasoning started with basing the prohibition of torture on the Geneva Conventions followed by a review of that prohibition throughout the history of warfare concluding that the prohibition has, by 1990s, crystallized into customary international law. When the gap arose as to what constituted the crime of torture, i.e. its specific *actus reus* and *mens rea* the Court had to look elsewhere for its answer. It found that answer in the realm of a kindred branch of international law, international human rights law. It used the definitions set out in other international instruments, and their interpretations, to elaborate on a provision found in the Geneva Conventions.

But it also had to recognize one specific thing; the body of law it was borrowing the definition from was designed to operate in conditions very different from international humanitarian law, those being the conditions of armed conflict. As was echoed in the ICJ's ad-

[54] *Ibid.*, para. 162.

visory opinion in the *Nuclear Weapons* Case[55], the law of armed conflict is *lex specialis*[56] to general international human rights law, and, consequently, has specific requirements that must be taken into account when transposing provisions from other kindred branches of international law.

The test constructed in the *Furundzija* case, unlike the one in the *Tadic* case on armed conflict, did not present the last word on the issue. Fortunately, this allows me to introduce another kind of reasoning in the *ad hoc* tribunals, and that is the modification of the judicial test previously constructed by another tribunal judgment. I will now turn to the reasoning regarding the crime of torture in the *Kunarac* Trial Chamber judgment[57] in the ICTY.

The Court in the *Kunarac* Trial Chamber judgment started out by recognizing the merit of the previous judgments in the *Furundzija* and the *Celebici* Trial Chamber Judgments[58] in terms of their efforts to define torture within the meaning of international humanitarian law. Similarly as with those cases, the Trial Chamber also recognized the use of the Trail Chamber in the *Furundzija* Trial Chamber judgment of the 'instruments and practices developed in the field of international human rights law."[59] Specifically, it said that "[b]ecause of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. With regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law."[60]

It, nevertheless, also recognized, as in the *Furundzija* case, the specificity of international humanitarian law and, consequently, the need for special care when importing rules

[55] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, I.C.J. Reports 1996, p. 226 .
[56] *Ibid.*, para. 25.
[57] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Trial Chamber Judgment, IT-96-23-T& T-96-23/1-T, February 22, 2001 (hereafter the *Kunarac* Trial Chamber judgment).
[58] *Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka "PAVO"), Hazim Delic and Esad Landzo (aka "ZENGA")*, Trial Chamber Judgment, IT-96-21-T, November 16, 1998 (hereafter the *Celebici* Trial Chamber judgment)
[59] *Kunarac* Trial Chamber judgment, para. 467.
[60] *Ibid.*

from other branches of international law.[61] It distinguished the specificity of international humanitarian law (and international criminal law) by using two criteria, saying that

> (i) Firstly, the role and position of the state as an actor is completely different in both regimes. Human rights law is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organised or state-sponsored violence. Humanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities. […]
>
> In the field of international humanitarian law, and in particular in the context of international prosecutions, *the role of the state is, when it comes to accountability, peripheral.* Individual criminal responsibility for violation of international humanitarian law does not depend on the participation of the state and, conversely, its participation in the commission of the offence is no defence to the perpetrator. Moreover, international humanitarian law purports to apply equally to and expressly bind all parties to the armed conflict whereas, in contrast, human rights law generally applies to only one party, namely the state involved, and its agents. […]
>
> (ii) Secondly, that part of international criminal law applied by the Tribunal is a penal law regime. It sets one party, the prosecutor, against another, the defendant. In the field of international human rights, the respondent is the state. Structurally, this has been expressed by the fact that human rights law establishes lists of protected rights whereas international criminal law establishes lists of offences (emphasis added).[62]

Reflecting that the definition given in Article 1 of the Torture convention represents a consensus that embodies customary international law, it, nevertheless, emphasized the restrictive nature of the definition i.e. the fact that it is "for the purposes of this [the Torture] Convention".[63] The Chamber then discussed the definition of torture in the other international documents mentioned previously, emphasizing the fact that those conventions are human rights conventions and that, as such, are designed to operate as a protection of individuals from states. It also emphasized those elements or interpretations where the scope of the conventions was defined broader than the mere protection of individuals from the acts of states and their agents.[64]

[61] *Ibid*, para. 470.
[62] *Ibid.*
[63] Article 1 of the Torture Convention, United Nations, *Treaty Series*, vol. 1465, p. 85.
[64] *Kunarac* Trial Chamber judgment, para. 479-481.

The conclusion of the Trial Chamber was that the definition given in the Torture Convention, although authoritative, is nothing more than an "interpretational aid"[65] in its search for a definition of torture. The Chamber found that

> [t]hree elements of the definition of torture contained in the Torture Convention are, however, uncontentious and are accepted as representing the status of customary international law on the subject:
> (i) Torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental.
> (ii) This act or omission must be intentional.
> (iii) The act must be instrumental to another purpose, in the sense that the infliction of pain must be aimed at reaching a certain goal.
> On the other hand, three elements remain contentious:
> (i) The list of purposes the pursuit of which could be regarded as illegitimate and coming within the realm of the definition of torture.
> (ii) The necessity, if any, for the act to be committed in connection with an armed conflict.
> (iii) The requirement, if any, that the act be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. (footnotes omitted)[66]

One of the biggest misgivings that the Trial Chamber had with the previous definition of torture was with the Torture Convention's requirement that the crime of torture must be committed by the instigation, involvement or with the acquiescence of a public official. It saw that as a part of its duty it "must identify those elements of the definition of torture under human rights law which are extraneous to international criminal law as well as those which are present in the latter body of law but possibly absent from the human rights regime."[67] In the Trial Chamber's view, in international law there are two types of norms: those norms that are addressed to "states and their agents and those provisions which are addressed to individuals."[68] For the Trial Chamber, the human rights norms fall squarely in the first category, while the norms of international humanitarian law are of both or mixed nature. The first set of norms is designed to establish state responsibility, while the other individual criminal respon-

[65] *Ibid.*, para. 482.
[66] *Ibid.*, para. 483-484.
[67] *Ibid.*, para. 488.
[68] *Ibid.*, para. 489.

sibility "regardless of the individual's official status."[69] The Trial Chamber continued its reasoning by giving examples of both kinds of norms set out in the Geneva Conventions concluding that

> [a] violation of one of the relevant articles of the Statute will engage the perpetrator's individual criminal responsibility. In this context, *the participation of the state becomes secondary and, generally, peripheral. With or without the involvement of the state, the crime committed remains of the same nature and bears the same consequences.* The involvement of the state in a criminal enterprise generally results in the availability of extensive resources to carry out the criminal activities in question and therefore greater risk for the potential victims. It may also trigger the application of a different set of rules, in the event that its involvement renders the armed conflict international. However, the involvement of the state does not modify or limit the guilt or responsibility of the individual who carried out the crimes in question. (emphasis added)[70]

The definite conclusion of the Trial Chamber regarding torture was that the element of presence or acquiescence of a state official or *any other authority-wielding figure* in the torture process is not a pre-requisite element of torture. Therefore, according to the Trial Chamber

> in the field of international humanitarian law, the elements of the offence of torture, under customary international law are as follows:
> (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
> (ii) The act or omission must be intentional.
> (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.[71]

The Appeals Chamber deciding on appeal in the same case[72] affirmed the discussion in the case, but also vindicated the discussion in the *Furundzija* case by condoning the divisions of the two types of norms, one relating for states and state responsibility in the realm of human rights and other regarding individual criminal responsibility. It said that

[69] *Ibid*.
[70] *Ibid.*, para. 493.
[71] *Ibid.*, para. 497.
[72] "[T]he Appeals Chamber in the Furundjija case was correct when it said that the definition of torture in the Torture Convention, inclusive of the public official requirement, reflected customary international law." *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeals Chamber judgment, IT-96-23 & T-96-23/1-A, June 12, 2002, para. 146. (hereafter *Kunarac* Appeal Chamber judgment).

> [t]he Torture Convention was addressed to States and sought to regulate their conduct, and it is only for that purpose and to that extent that the Torture Convention deals with the acts of individuals acting in an official capacity. Consequently, the requirement set out by the Torture Convention that the crime of torture be committed by an individual acting in an official capacity may be considered as a limitation of the engagement of States; they need prosecute acts of torture only when those acts are committed by 'a public official...or any other person acting in a non-private capacity'[73]

It, also, confirmed that the

> assertion which is tantamount to a statement that the definition of torture in the Torture Convention reflects customary international law as far as the obligation of States is concerned, must be distinguished from an assertion that this definition wholly reflects customary international law regarding the meaning of the crime of torture generally.[74]

It is my contention that with this statement the Appeals Chamber wanted to stress the need to "tread" lightly and cautiously when adopting definitions set out in conventions that were not designed with the specificities of armed conflict in mind and that both the import and export of norms from international criminal law to international human rights law and general international law should be approached with trepidation. This caution is reflected in the next paragraph of the Appeals Chamber which said that

> [t]he Trial Chamber in the present case was therefore right in taking the position that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention. However, the Appeals Chamber notes that the Appellants in the present case did not raise the issue as to whether a person acting in a private capacity could be found guilty of the crime of torture; nor did the Trial Chamber have the benefit of argument on the issue of whether that question was the subject of previous consideration by the Appeals Chamber.[75]

The definition of rape first started to be a problem of the ICTR. In its first case, the *Akayesy* case,[76] the Trial Chamber had to settle the definition of what constitutes rape in international law since as it became obvious that "there is no commonly accepted definition of

[73] *Ibid.*
[74] *Ibid.*, para 147.
[75] *Ibid.*, para. 148.
[76] *The Prosecutor v. Jean-Paul Akayesu*, Trial Chamber judgment, ICTR-96-4-T, September 2, 1998 (hereafter *Akayesu* Trial Chamber judgment).

this term in international law."[77] It was also found in a sort of a predicament, the different national jurisdiction that defined the crime of rape included different constitutive elements ranging from "non-consensual intercourse […][to] acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual."[78] Consequently, the Trial Chamber was presented with a dilemma, which elements to focus on in its definition?

The path the Trial Chamber chose is somewhat an interesting one. It decided not to define rape in very specific terms, saying that the "central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts."[79] It likened the definition of rape to the definition of torture and other inhumane acts by saying that

> [t]he Convention against Torture […] does not catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[80]

The final result of the Trial Chamber's search for a definition was a rather unsatisfying as we shall see later. It came up with a vague and unworkable definition of the crime of rape by saying that "[t]he Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[81] This definition is simply unworkable as a test or as an instruction, something that can later be followed in other cases. It lacks different stages or prongs, it does not give further explanations as to what and how one should proceed or which steps to take, what elements to look at, which factual events to take into account etc. if one would like to apply this definition to a similar case. For these

[77] *Ibid.*, 596.
[78] *Ibid.*
[79] *Ibid.*, 597.
[80] *Ibid.*
[81] *Ibid.*, 598

reasons, the Trial Chamber's definition did not catch on as settled law nor was it taken seriously in later judgments as I will show in the following paragraphs.

One of the first attempts of the ICTY to define the crime of rape was undertaken by the *Furundzija* Trail Chamber. The Trial Chamber first started its search with the prohibition of rape set in the Geneva Conventions and their Additional Protocols.[82] It then presented a short historical overview of the development of the crime of rape in international humanitarian law, international human rights law and its applicability to the conflict in Bosnia.[83] It then went back to its Statute noting that rape can be prosecuted under all of its substantive criminal provisions, provided that the required elements of specificity be met for the different articles.[84] As with the definition of torture, the Trial Chamber could not find a ready-made definition for the crime of rape in either its Statute or the Geneva Conventions. Consequently, it had to look elsewhere to find its answer.

The references that the Trial Chamber made are from different jurisdictions. It first looked at the Geneva Conventions and concluded that rape is just the most serious, but not the exclusively prohibited, form of sexual assault.[85] It then found its next clue in the discussion presented in the ICTR's *Akayesu* Trial Chamber decision, but found it wanting in terms of its specificity.[86] To alleviate this deficiency it undertook to review the "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."[87] As with importing norms from other international systems, the Trial Chamber in this case also noted the specificity of international criminal law and the need for modification of the imported norms in order to suit the "unique

[82] *Furundzija* Trial Chamber judgment, para. 165.
[83] *Ibid.*, para. 166-171.
[84] *Ibid.*, para. 171-173.
[85] *Ibid.*, para. 175.
[86] *Furndzija* Trial Chamber judgment, para. 176-177.
[87] *Ibid.*, para. 177.

traits"[88] of international criminal proceedings. It put forward two general criteria which would have to be met in order for an import from domestic principles to be regarded as proper by saying that

> [w]henever 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.* (emphasis added)[89]

In the next couple of paragraphs, the Trial Chamber went on to extensively review several criminal justice systems and their definition of the crime of rape.[90] What it found was a wide range of elements of the crime that would or would not be considered rape in different jurisdictions, with one notable sticking point of whether the oral penetration of the penis can be considered as rape.[91] It resolved its doubts by looking at the purpose of international humanitarian law in general and said that

> [t]he essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. 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. 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. (emphasis added)[92]

[88] *Ibid.*, para. 178.
[89] *Ibid.*
[90] *Ibid.*, para. 180-181.
[91] *Ibid.*, para. 182.
[92] *Ibid.*, para. 183.

The ultimate result of the Trial Chamber's deliberations was the construction of a definition/test of the *actus reus* of the crime of rape in international criminal law.[93]

Nevertheless, the *actus reus* of the crime of rape as defined by the *Furundzija* Trial Chamber was a point of tension later by another Trial Chamber in the *Kunarac* judgment.[94] The discussion resulted from the *Furundzija* Trial Chamber's assertion that force or a threat of force to the victim or a third person is the second prong of the *actus reus* requirement for the crime of rape and the *Kunarac* Trial Chamber's disagreement with the narrow interpretation offered by the parties to the case. It said that

> [t]he [*Kunarac*] Trial Chamber considers that the *Furundžija* definition, although appropriate to the circumstances of that case, is in one respect more narrowly stated than is required by international law. In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the *Furundžija* definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim, which, as foreshadowed in the hearing and as discussed below, is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law. (footnotes omitted)[95]

The *Kunarac* Trial Chamber did the same exercise as the *Furundzija* Trial Chamber and reviewed anew the various provisions in domestic criminal jurisdictions regarding the crime of rape and, more specifically, regarding the *principles* behind the requirement of consent by the victim. More specifically, it said that

> In considering these national legal systems the Trial Chamber does not conduct a survey of the major legal systems of the world in order to identify a specific legal provision which is adopted by a majority of legal systems but to consider, from an examination of national systems generally, whether it is possible to identify certain basic principles, or in the words of the *Furundžija* judgement, "common denominators", in those legal systems which embody the *principles* which must be adopted in the international context. (footnotes omitted)[96]

[93] Thus, the Trial Chamber finds that the following may be accepted as the objective elements of rape:
(i) the sexual penetration, however slight:
(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
(b) of the mouth of the victim by the penis of the perpetrator;
(ii) by coercion or force or threat of force against the victim or a third person. *Ibid*, para 185.
[94] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic*, Trial Chamber judgment, IT-96-23-T& IT-96-23/1-T, February 22, 2001 (hereafter *Kunarac* Trial Chamber judgment).
[95] *Ibid.*, para. 438.
[96] *Ibid.*, para. 439.

It concluded the discussion by saying that the basic underlying principle of penalizing rape was the serious violation of the sexual autonomy of the victim.[97] The Trial Chamber backed up its assertion by conducting a renewed extensive review of the various legal domestic provisions regarding rape. It classified the legal systems into three broad but distinct categories:

> (i) the sexual activity is accompanied by force or threat of force to the victim or a third party;
> (ii) the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
> (iii) the sexual activity occurs without the consent of the victim.[98]

In the next several paragraphs,[99] the Trial Chamber reviewed domestic legislation from different jurisdictions based on this categorization. It concluded that the "basic principle which is truly common to these legal systems is that serious violations of sexual autonomy are to be penalised" and that "[s]exual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant."[100] The discussion of the Trial Chamber ended with a modification of the test/definition of rape stating that

> the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[101]

The Appeals Chamber in the same case[102] defended the conclusion of the Trial Chamber elaborating on the requirement of force or threat of force and sought to put to rest the

[97] *Ibid.*, para. 442.
[98] *Ibid.*, para. 442.
[99] *Ibid.*, para. 443-456.
[100] *Ibid.*, para. 457.
[101] *Ibid.*, para. 460.
[102] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic*, Appeals Chamber judgment, IT-96-23 & IT-96-23/1-A, June 12, 2002 (hereafter *Kunarac* Appeals Chamber judgment).

controversies raised by the two seemingly conflicting judgments. More specifically, it said that

> Secondly, with regard to the role of force in the definition of rape, the Appeals Chamber notes that the Trial Chamber appeared to depart from the Tribunal's prior definitions of rape. However, in explaining its focus on the absence of consent as the *conditio sine qua non* of rape, the Trial Chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of nonconsent, but force is not an element *per se* of rape. In particular, the Trial Chamber wished to explain that there are "factors 'other than force' which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim". A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.[103]

The several examples that I presented above is meant to show how judges in the ICTY solved the task of interpreting old, vague or even absent definitions set out in the Geneva Conventions. They accomplished this task by constructing judicial tests/definitions with multiple prongs/stages that have to be followed in order for a specific conclusion to be reached. In my opinion, one reason for this attempt is the need to make the law more predictable and stable. By constructing judicial tests/definitions, the judges create mechanical devices that explain their mode of reasoning but also create pathways or road signs for future Trial Chambers to follow. In this way, the construction of judicial tests/definitions creates the impression that the law is and was settled when the judgment was rendered and that future Trial Chambers, when referencing these same tests/definitions, do nothing but mechanically apply the law.[104] The example of the *Akayesu* Trial Chamber's failed definition of rape gives a very good example of an unworkable test/definition that is not picked up by other Trial Chambers but the judgment itself in these terms is never overturned.

[103] *Ibid.*, para. 129.

[104] An excellent and elaborate account of the use of judicial tests and formal and purposive reasoning is given in the works of Mitchel de S.-O.-Lasser, *"Lit. Theory" Put to the Test: A comparative Literary Analysis of American Judicial Tests and French judicial Discourse*, 111 Harv. L. Rev. 689 (1998); *and*: Mitchel de S.-O.-Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, Oxford University Press, Oxford, 2004.

Furthermore, the *ad hoc* tribunals, more specifically the ICTY, started developing something that I would like to call "rules of import." They specifically designed rules of caution as to what other Trial and Appeals Chambers should look out for, be aware of, when they import norms into the international criminal law system. These rules would better serve the future Trial Chambers and the Appeals Chamber in their search for the proper meaning of the tribunals' statutes. Moreover, as I will show you later, these rules do not exist only for international conventions or national legislation, but for cases and case-law as well.

In the conclusion to Chapter II, I will elaborate more on the use of judicial tests/definitions and the effects that they are designed to make. But first, I need to give some more examples on the import of norms, or the referencing exploits of the *ad hoc* tribunals in their judgments.

2.1.2 Reference to Cases

The *ad hoc* tribunals have shown a remarkable recourse to cases. They have used cases of both national and international jurisdictions in different ways, sometimes using them as a support for their own reasoning (either as a tool for discovering custom or general principles), while other times distinguishing and disagreeing with them in order to arrive at a different result. In this part, I will give examples of these usages and see whether the pattern of distinguishing cases, which are not international criminal law cases with those that are, in terms of their specificity, repeats itself.

I will start this review with a very clear example of the usage of "foreign"[105] case law to support the conclusion of the judges regarding the definition of Aiding and Abetting in international criminal law. I start my review with a case that has been somewhat extensively

[105] The use of the term foreign in this sentence means case law that is not within the subject matter, temporal or territorial jurisdiction of the Tribunals, i.e. their "own" case law.

referred to in this Chapter, the *Furundzija* Trial Chamber judgment. When the Trial Chamber needed to define aiding and abetting in international criminal law, and under the ICTY Statute in particular, it found both the Statute and the Report of the Secretary General interestingly silent on the matter.[106] The Statute was silent on both the *actus reaus* and the *mens rea* regarding aiding and abetting in international criminal law.

Consequently, as in so many other instances, the Trial Chamber had to look elsewhere. It started its search with the obvious candidates, criminal law cases deciding on individual responsibility regarding war crimes. Its first stop was the cases that came out of WWII. It came as no surprise that the London Agreement,[107] the subsequent Control Council Law No. 10[108] and the Tokyo Charter[109] did not define these terms as well. Therefore, it looked at the cases that were decided in accordance with them. Again, as with the instances of using conventions that do not deal with international humanitarian law, it offered a cautionary note as to what cases should be used and what degree of credence should be assigned to them when transposing their reasoning and findings into the realm of international criminal law. It said that

> [f]or a correct appraisal of this case law, it is important to bear in mind, with each of the cases to be examined, the forum in which the case was heard, as well as the law applied, as these factors determine its authoritative value. In addition, one should constantly be mindful of the need for great caution in using national case law for the purpose of determining whether customary rules of international criminal law have evolved in a particular matter.[110]

[106] The Report of the SG has several paragraphs explaining Article 7 of the Statute, but oddly enough, none of them delve more deeply on what do the words plan, instigate, order, commit, aid or abet, i.e. the basic definitions of individual criminal responsibility, mean; *see* Report of the SG, para. 53-59.

[107] ***Agreement*** *by the Government of the* ***United State of America****, the Provisional Government of the* ***French Republic****, the Government of the* ***United Kingdom of Great Briaton and Northern Ireland*** *and the Government of the* ***Union of Soviet Socialist Republics*** *for the Prosecution and Punishment of the* ***Major War Criminals*** *of the* ***European Axis***, August 8th 1945, available at http://avalon.law.yale.edu/imt/imtchart.asp (last visited on September 18, 2010).

[108] CONTROL COUNCIL Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, available at http://avalon.law.yale.edu/imt/imt10.asp (last visited on September 18, 2010).

[109] Charter of the International Military Tribunal for the Far East, issued as an edict by General Douglas McArthur, Commander of the occupying forces of Japan.

[110] *Furundzija* Trial Chamber judgment, para. 194.

In the next following paragraphs[111] the Trial Chamber set out its reasons on why it will look at certain cases from certain jurisdictions and how much credence it will give to each jurisdiction. For instance, it said, while explaining its decision to rely on judgments passed by US military commissions, that because of the virtually identical provision that these commissions applied to the one used in the London Agreement, the cases that resulted from these commissions were relevant to the case at hand.[112] On the other hand, it awarded the British cases that came out of WWII with less persuasiveness, and this was due to the fact that they employed domestic law that was worded somewhat differently than the wording used in the London Agreement as their substantive law. Nevertheless, it concluded that "[t]he British cases deal with forms of complicity analogous to that alleged in the present case" and that "there is sufficient similarity between the law applied in the British cases and under Control Council Law No. 10 for these cases to merit consideration."[113] It similarly concluded regarding the cases stemming out of Control Council Law No. 10 but decided by the German Supreme Court in the British Occupied Zone, or by German courts in the French Occupied Zone i.e. that they "are also material to the Trial Chamber's analysis."[114]

The Trial Chamber continued in its reasoning to pick the relevant parts of the judgments of the various tribunals, noting issues that, in its view, were pertinent to the discussion at hand. It did not only discuss the cases in the body of the judgment, but it also referred to other similar case in its footnotes, further strengthening its reasoning.[115] In order to pinpoint with some precision the range of acts that an individual needs to perform in order to be considered an aider or abettor the Trial Chamber reviewed not only cases that resulted in conviction but also those that resulted in acquittals as well. For instance, it contrasted the case of the

[111] *Ibid.*, para. 195-198.
[112] *Ibid.*, para. 195.
[113] *Ibid.*, para. 196.
[114] *Ibid.*, para. 197.
[115] For instance *see* footnotes 223-226 of the *Furundzija* Trial Chamber judgment.

Pig-cart parade[116] with the *Synagogue* case,[117] where the accused P was found not guilty because his low rank and stature did not make his presence at the scene of the crime an encouragement to the actual perpetrators to continue with their crime.[118] This was contrasted to the accused in the *Synagogue* case, who was a long time supporter and militant of the Nazi regime and consequently, his presence did offer encouragement to the principals.[119]

Another problem that the Trial Chamber had to face was the fact that in the same way that aiding and abetting was not elaborated in any of the international instruments that it had at its disposal neither were any of the other terms i.e. plan, instigate, order or commit used in the Statute. It, therefore, also had to distinguish aiding and abetting from all the other forms of criminal liability under the Statute.

This was the next line of cases that the Trial Chamber reviewed in its reasoning. The most similar form of individual criminal responsibility to aiding and abetting is co-perpetration or acting as part of a common plan or purpose. The Trial Chamber, therefore had to find cases that dealt with these types of responsibility with a similar interwoven sets of facts and issues. Cases stemming from the Nazi crimes committed in the concentration camps

[116] *Strafsenat. Urteil vom 10. August 1948 gegen L. u. a.* StS 37/48 (*Entscheidungen,* Vol. I, pp. 229 and 234) as quoted in the *Furundzija* Trial Chamber judgment, para. 208, footnote 230.
[117] *Strafsenat. Urteil vom 10. August 1948 gegen K. und A.* StS 18/48 (*Entscheidungen*, Vol. I, pp. 53 and 56), as quoted in the *Furundzija* Trial Chamber judgment, para. 205, footnote 229.
[118] The *Pig-cart parade* case was by the German Supreme court in the British Occupied Zone. The accused P, was a spectator in civilian dress at an SA rally where Nazi political opponents were exposed and humiliated. P was following the crowd as a spectator without participating in the act of humiliation. He was present at the rally by an order of the SA. The German Supreme Court in the British Occupied Zone noted that "[H]is conduct cannot even with certainty be evaluated as objective or subjective approval. Furthermore, silent approval that does not contribute to causing the offence in no way meets the requirements for criminal liability." (as quoted in paragraph 208 of the *Furundzija* Trial Chamber judgment). Furthermore, the Train Chamber noted that "P was found not guilty. He may have lacked the necessary *mens rea*. But in any event, his insignificant status brought the effect of his "silent approval" below the threshold necessary for the *actus reus*.", *Furundzija* Trial Chamber judgment, para. 208
[119] The *Synagogue* case was also decided by the German Supreme court in the British Occupied Zone. The case focused around a devastation of a synagogue in which one of the accused was not directly taking part in its burning. The guilt of one of the accused stemmed from his well known as a Nazi party militant and his intermittent presence at the scene. The Trial Chamber "inferred from this case that an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their co duct, may be guilty of complicity in a crime against humanity."(para. 207 of the *Furundzija* Trial Chamber judgment); *See* discussion presented in 205-207 of the *Furundzija* Trial Chamber judgment.

proved to be a reliable source for the discussion.[120] It concluded that "two separate categories of liability for criminal participation appear to have crystallised in international law – co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other."[121]

In order not to seem repetitive I will just mention that the Trial Chamber continued to review the case law from different jurisdictions regarding the *actus reus* and *mens rea* requirements of aiding and abetting citing both domestic and international decisions most of them related to the crimes stemming out of WWII. The discussion presented in the judgment spans more than 20 pages (out of a judgment of 114 pages), involving more than 50 paragraphs and some 15 or so cases.[122] It concluded with giving the requisite requirements for the legal ingredients of aiding and abetting in international criminal law stating that

> the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the *actus reus* consists of participation in a joint criminal enterprise and the *mens rea* required is intent to participate.[123]

A similar example could be given with the *Tadic* Trial Chamber Judgment when it decided the legal issues of the individual criminal responsibility of the accused Dusko Tadic. For the Trial Chamber the problem did not arise from Tadic's direct engagement in the commission of some of the crimes.[124] The problems arose when Tadic did not *per se* directly en-

[120] *The Dachau Concentration Camp Trial, Trial of Martin Gottfried Weiss and Thirty-Nine Others*, General Military Government Court of the United States Zone, Germany, 15 Nov.-13 Dec. 1945, Vol. XVI, Law Reports, p. 5; and Massenvernichtungsverbrechen und NS-Gewaltverbrechen in Lagern; Kriegsverbrechen. KZ Auschwitz, 1941-1945, reported in *Justiz und NS-Verbrechen,* 1979, vol. XXI, pp. 361-887; discussed *in* the *Furundzija* Trial Chamber judgment, para. 211-215.
[121] *Ibid.*, para. 216.
[122] *Ibid.*, para. 193-249 and the accompanying footnotes.
[123] *Ibid.*, para. 249.
[124] "Where it is found in regard to the charges in the Indictment that the accused directly engaged in the actions alleged, the application of Article 7, paragraph 1, poses little problem." *Tadic* Trial Chamber judgment, para. 673.

gage in the act itself but was present at its commission.[125] Finding that there was no definition of the relevant terms in the Statute or in other international documents it said that

> [t]he most relevant sources for such a determination are the Nürnberg war crimes trials, which resulted in several convictions for complicitous conduct. While the judgments generally failed to discuss in detail the criteria upon which guilt was determined, a clear pattern does emerge upon an examination of the relevant cases. First, there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime. Second, the prosecution must prove that there was participation in that the conduct of the accused contributed to the commission of the illegal act.[126]

The structure of the reasoning that came next followed the structure set in the paragraph above, i.e. it set out to show whether there was intent on the part of the accused and whether there was direct contribution to the crime. Regarding intent, the Trial Chamber sifted through the case of the Nuremberg tribunal and its progeny. It first established knowledge of the crime being committed as the basis for intent in situations of co-perpetration by several cases[127] related to WWII. But, it also found that knowledge did not by itself establish guilt, nor did the mere presence while the crime was being committed. Some form of direct involvement was required.[128] It arrived at this conclusion only after sifting through 14 or so cases spanning several pages of arguments.

The pattern spelled out in the *Furundzija* judgment repeated itself. The Trial Chamber reviewed and quoted the parts that it thought were relevant to the issue at hand trying to establish the principles under which the decisions were made. It came to several conclusions regarding the principles of direct involvement in the perpetration of a crime. It concluded that in order for the Court to find individual criminal responsibility for acts where the accused was present, but did not actually take part in the acts, there needs to be a substantial contribu-

[125] *Ibid.*
[126] *Ibid.*, para. 647.
[127] *See ibid.*, para. 675-676.
[128] *Ibid.*, para. 678-692.

tion to the act itself;[129] that the terms aiding and abetting includes all acts that "lend encouragement or support, as long as the requisite intent is present;"[130] that presence alone is not sufficient if it is ignorant or unwilling,[131] but is of relevance if it offers encouragement of others after previous direct involvement;[132] and that presence is not essential at the perpetration of the crime so long as the "acts of the accused […] [are a] direct and substantial" contribution to the crime.[133]

Hence, the Trial Chamber constructed another judicial test relevant to the co-perpetration or Joint Criminal Enterprise liability this time not using conventions as a starting point (other than noting their total lack of explanatory provisions regarding the issue) but cases and case law decided in other international or national jurisdictions relating to international crimes. Although it lacks the now useful numbering of prongs it is clearly a multi staged, multi pronged test as you may see from the following paragraph of the judgment

> [i]n sum, the accused will be found criminally culpable for any conduct where [1] it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and [2] his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. [3] He will also be responsible for all that naturally results from the commission of the act in question.[134]

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[129] "Even in these [referring to the reviewed] cases, where the act in complicity was significantly removed from the ultimate illegal result, it was clear that the actions of the accused had a substantial and direct effect on the commission of the illegal act, and that they generally had knowledge of the likely effect of their actions", *ibid.*, para. 688.

[130] "The Trial Chamber finds that aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present. Under this theory, presence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it."; *Ibid.*, para. 689.

[131] *Ibid.*

[132] "Moreover, when an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would have an encouraging effect, even if he does not physically take part in this second beating, and he should be viewed as participating in this second beating as well. This is assuming that the accused has not actively withdrawn from the group or spoken out against the conduct of the group", *Tadic* Trial Chamber judgment, para. 690.

[133] *Ibid.*, para. 691.

[134] *Ibid.*, para. 692 stating the test for co-perpetration or Joint Criminal Enterprise (JCE) as it is later know *Tadic* Appeals Chamber judgment (*Prosecutor v. Dusko Tadic*, Appeals Chamber judgment, IT-94-1-A, July 15, 1999 [hereafter *Tadic* Appeals Chamber judgment]); *see* Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925 (2008), pp. 933-943 talking about the victim centred approach and the notion of JCE; Mohamed Elewa Badar, *"Just Convict Everyone!" – Joint Perpetration: From Tadic to Stakic and Back Again*, 6 Int'l Crim. L. R. 293 (2006).

At this point I have to note one thing. The example I just gave above is not the last word when it comes to the notion of co-perpetration in international criminal law, nor in the *ad hoc* tribunals' jurisprudence. The notion of co-perpetration was later re-worked by the *Tadic* Appeals Chamber where the Joint Criminal Enterprise notion was for the first time after Nuremberg formulated and was later re-worked in several other judgments.[135] Therefore, the example given here is only related to the way that the *ad hoc* tribunals have used cases of other jurisdictions in their reasoning, and should in no way be understood as the last word on the subject.

This analysis of the *ad hoc* tribunals' use of case law would not be complete without mentioning the case analysis presented in the *Tadic* Appeals Chamber judgment regarding the question of applicability of Article 2 of the ICTY Statute to the conflict in Bosnia and Herzegovina between the Bosnian Muslims and the Bosnian Serbs. In the Trial Chamber judgment, the Tribunal found that Article 2 of the Statute was not applicable to the conflict since the conflict in question was internal and not international, at least after the formal withdrawal of the Yugoslav Army (*Vojska Jugoslavije, VJ*) from the territory of Bosnia and Herzegovina. The Trial Chamber based its reasoning regarding the (non)international character of the conflict on the authoritative *Nicaragua* effective control test[136] decided by the ICJ.[137]

[135] *See Tadic* Appeals Chamber judgment, para. 185-229 talking about various modes of responsibility; but also *see* Bert Swart, '*Modes of International Criminal Liability' in* Antonio Cassese General Ed., THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, OUP, Oxford, 2009, pp. 83-88; Antonio Cassese, INTERNATIONAL CRIMINAL LAW 2ND ED., OUP, Oxford, 2008, pp. 189-199.

[136] "The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the ***contras,*** the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the ***contras*** in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the ***contras*** without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed." *Military and Paramilitary Activities in and Against Nicaragua*

The Appeals Chamber had a problem. On one hand, it had a decision from the ICJ, which gave a specific test regarding the relationship of a state and organized armed groups in terms of state responsibility. On the other hand, if the *Nicaragua* reasoning was followed to its logical conclusion, as it happened in the *Tadic* Trial Chamber judgment,[138] it would render Article 2 inapplicable to most of the conflict in Bosnia. The solution was obvious, but in no way an easy one. It had to overrule the ICJ and find the applicable test in situations of a seemingly internal conflict that was *de facto* an international one.[139]

The discussion of the applicability of Article 2 started with setting out the two "specific legal ingredients"[140] required by the Statute. It found that those legal ingredients were "the international nature of the conflict" and the status of the victim defined "as 'protected' by any of the four Geneva Conventions of 1949."[141] These requirements were found to be cumulative and only upon the satisfaction of the international nature of the conflict would the reasoning proceed to the second part of the test, the protected status under the Conventions.[142]

The Appeals Chamber ascertained that in order to find the answer to the first part of the test it had to show that, even though the nature of the conflict was on its face an internal one, in reality the Bosnian Serbs acted "as *de iure* or *de facto* organs of a foreign Power, namely the FRY [Federal Republic of Yugoslavia]."[143] Naturally, the Appeals Chamber first examined international humanitarian law as the body of law that is the most relevant to issues of armed conflict. The first place to look was the Geneva Conventions, specifically Article 4

(Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14, (hereafter the *Nicaragua* case), para. 115.
[137] *See Tadic* Trial Chamber judgment, para. 584-588.
[138] *Tadic* Trial Chamber judgment, para. 584-608.
[139] For more on this also *see* Antonio Cassese, *The* Nicaragua *and* Tadic *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 Eur. J. Int'l L. 649 (2007).
[140] *Tadic* Appeals Chamber judgment, para. 80.
[141] *Ibid.*
[142] *Ibid.*, para. 82.
[143] *Ibid.*, para. 87.

of the Geneva (III) Convention on Prisoners of War.[144] What it found was that the only useful guidance in both the Conventions and the Pictet Commentaries was the reference that some sort of link was needed between the party to the conflict and the specific irregular units used by that party in order for those units to be considered as lawful combatants.[145] It said that

> [i]t is nevertheless imperative to *specify* what *degree of authority or control* must be wielded by a foreign State over armed forces fighting on its behalf in order to render international an armed conflict which is *prima facie* internal. Indeed, the legal consequences of the characterisation of the conflict as either internal or international are extremely important. Should the conflict eventually be classified as international, it would *inter alia* follow that a foreign State may in certain circumstances be held responsible for violations of international law perpetrated by the armed groups acting on its behalf. (emphasis in the original)[146]

Finding that international humanitarian law does not contain "any criteria unique to this body of law for establishing when a group of individuals may be regarded as being under the control of a State, that is, as acting as *de facto* State officials" the Appeals Chamber decided to import these norms from rules governing "control by a State over individuals, laid down in general international law."[147] This led the Appeals Chamber to do an extensive review of the ICJ's *Nicaragua* judgment, which spans more than 50 paragraphs and 20 pages. It is not my intention to repeat the Appeals Chamber's masterful case analysis of the *Nicaragua* judgment in all its steps, but rather just the ones that, in my opinion, add to the topic of the discussion in this Chapter, which is the import of norms from other jurisdictions and their modification in order to fit the purposes of international criminal law.

The first problem that the Appeals Chamber faced was the problem of the different framing of the issues by the Prosecutor and the Defence. For instance, the Prosecutor framed the issue of utility of the *Nicaragua* test as not existent since the test was designed to operate

[144] Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 ("Geneva Convention III" or "Third Geneva Convention").
[145] *Tadic* Appeals Chamber judgment, para. 94-97.
[146] *Ibid.*, para. 97.
[147] *Ibid.*, para. 98.

in the setting of state responsibility and not individual criminal responsibility.[148] The Appeals Chamber, on the other hand, saw it differently. For the Appeals Chamber, the question was not one of either state or individual responsibility, but "of the conditions on which under international law an individual may be held to act as a de facto organ of a State."[149]

The other set of problems that arose was the issue of what was the correct interpretation of the standards set by the ICJ in the *Nicaragua* case. Both the Prosecution and the Defence had a different interpretation of what the ICJ's reasoning was in the *Nicaragua* case and especially which test did it apply in terms of control of the US over the *contras* fighting in Nicaragua.[150] Therefore, it had to set out what was, in its view, the correct reading of the *Nicaragua* case.[151]

However, this did not help the Appeals Chamber's case regarding the proper test for control over irregular forces, for even a "correct" reading of the *Nicaragua* case, as applied by the Trial Chamber in the same case, put the threshold too high for the Bosnian Serb forces to be considered as *de facto* organs of FRY.[152] Consequently, if the conflict could not be

[148] *Ibid.*, para. 103.
[149] "Rather, the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international." *Ibid.*, para. 104.
[150] *Ibid*, para. 106; also *see* Antonio Cassese, *The* Nicaragua *and* Tadic *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 Eur. J. Int'l L. 649 (2007), pp. 652-655.
[151] In a nutshell the correct reading of the *Nicaragua* case was set out in paragraph 114 where the Tribunal said that "[o]n close scrutiny, and although the distinctions made by the Court might at first sight seem somewhat unclear, the contention is warranted that in the event, the Court essentially set out two tests of State responsibility: (i) responsibility arising out of unlawful acts of State officials; and (ii) responsibility generated by acts performed by private individuals acting as de facto State organs. For State responsibility to arise under (ii), the Court required that private individuals not only be paid or financed by a State, and their action be coordinated or supervised by this State, but also that the State should issue specific instructions concerning the commission of the unlawful acts in question. Applying this test, the Court concluded that in the circumstances of the case it was met as far as the UCLAs were concerned (who were paid and supervised by the United States and in addition acted under their specific instructions). By contrast, the test was not met as far as the contras were concerned: in their case no specific instructions had been issued by the United States concerning the violations of international humanitarian law which they had allegedly perpetrated." *Ibid.*, para. 107-114.
[152] The Appeals Chamber did not conduct further factual findings, but relied on the factual findings of the Trial Chamber. Its only disagreement was regarding the legal findings and the correct test applicable to the situation: "The Appeals Chamber does not see any ground for overturning the factual findings made in this case by the Trial Chamber and relies on the facts as stated in the Judgement. The majority and Judge McDonald do not appear to disagree on the facts, which Judge McDonald also takes as stated in the Judgement, but only on the legal interpretation to be given to those facts" (footnote omitted), *Tadic* Appeals Chamber judgment, para. 148

deemed to be international then Article 2 would not be applicable. Therefore, the Appeals Chamber had to find arguments for overruling the *Nicaragua* case in this matter and elaborate the "correct" test for state responsibility for irregular forces. It found two grounds for which the *Nicaragua* test was not pervasive:[153] one, that the test "is not consistent with the logic of the law of state responsibility" specifically regarding attributability; and, two, that test "is at variance with judicial and state practice".[154]

When the Appeals Chamber turned towards the logic of the law of state responsibility it found that

> [t]he rationale behind this rule [Article 8 of the Draft on State Responsibility[155]] is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed on the one hand to act de facto through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law.[156]

It also said that "[it] fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished."[157]

In the continuing paragraphs the Appeals Chamber gave several examples of these factual situations where different tests for attributability would apply ranging from: *de jure* and *de facto* agents of the state; to private individuals hired by the state to perform illegal acts; to private individuals who have performed acts which were outside their mandate; to hierarchically structured groups or paramilitary units.[158]

[153] *Tadic* Appeals Chamber judgment, para. 115.
[154] Both are sub-headings of the judgment *see* Table of Contents under part IV of the *Tadic* Appeals Chamber judgment.
[155] *First Report on State Responsibility by the Special Rapporteur J. Crawford*, U.N. Doc. A/CN.4/490/Add.5, 22 July 1998, pp. 16-24
[156] *Tadic* Appeals Chamber judgment, para. 117.
[157] *Ibid.*
[158] *Ibid.*, para. 118-120

This last example, of organized or hierarchically structured groups, was, for the Appeals Chamber, most like the situation that it found to prevail in Bosnia. It saw the distinction in this as relevant especially in this point since

> [...] an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.
>
> This kind of State control over a military group and the fact that the State is held responsible for acts performed by a group independently of any State instructions, or even contrary to instructions, to some extent equates the group with State organs proper.[159]

It found the logic of distinguishing organized groups, such as paramilitary groups, from other private individuals who have been hired by a state to perform specific tasks and have acted *ultra vires* as controlling the legal issue at hand. The Appeals chamber reached the conclusion that where the state uses organized groups and has overall control of their activities it should incur responsibility for their actions regardless of the lack of any specific instructions for those actions.[160]

After deducting the requirement of overall control over organized groups the Appeals Chamber went into review of different cases in order to confirm its logic and to find useful criteria of what factual occurrences would it need to produce in order to see whether there was overall control over organized groups in a given case. The number of cases and the discussion regarding their finer points is very complex and somewhat lengthy to produce in its entirety in this Chapter. All in all the Appeals Chamber reviewed around 16 cases from various jurisdictions dealing focused on the issue of attributability. The range of jurisdictions spans from the ICJ, to the US-Iran Claims Tribunal, to the ECtHR, to the Nuremberg and its

[159] *Ibid.*, para. 120-121.
[160] *Ibid.*, para. 122-123; but *see also* Antonio Cassese, *The* Nicaragua *and* Tadic *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 Eur. J. Int'l L. 649 (2007), pp. 655-663.

progeny judgments, to German and Dutch domestic cases. The review itself is presented on more than 10 pages.[161]

In its discussion, the Appeals Chamber took the standard approach to reviewing cases, i.e. it sifted through them in order to see which test for control did the various courts adhered to and what specific ranges of control did they require in order for the actions of the organized groups to be attributed to the state. It found that international law actually has three specific tests for control regarding attributability of acts of private individuals and organizations to the state depending on the specific factual circumstances at hand.[162] The whole discussion ended with the Appeals Chamber stating that

> the following conclusion may be safely reached. In the case at issue, given that the Bosnian Serb armed forces constituted a "military organization", the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations*. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law. [emphasis added][163]

The conclusion of the whole discussion regarding the nature of the conflict in Bosnia and between the Bosnian Serbs and the government forces of Bosnia and Herzegovina was the application of the principles that it crystallized through the case review to the factual findings regarding the Bosnian war.[164] In effect, the Appeals Chamber re-wrote an existing test set out by the ICJ and designed another one supplementing the authoritative interpretation of the ICJ with its own.

The *ad hoc* tribunals see the use of cases as a justification for its reasoning as a natural and necessary step and have given their reasons for it. The ICTY for example has said that

> [t]he [...] need to draw upon judicial decisions is only to be expected, due to the fact that both substantive and procedural criminal law is still at a rudimentary stage

[161] *See* paragraphs 124-145 and the accompanying footnotes, *Tadic* Appeals Chamber judgment.
[162] *Ibid.*
[163] *Ibid.*, para. 145.
[164] *Ibid.*, para. 146-162.

> in international law. In particular, there exist relatively few treaty provisions on the matter. By contrast, especially after World War II, a copious amount of case law has developed on international crimes. Again, this is a fully understandable development: it was difficult for international lawmakers to reconcile very diverse and often conflicting national traditions in the area of criminal law and procedure by adopting general rules capable of duly taking into account those traditions. By contrast, general principles may gradually crystallise through their incorporation and elaboration in a series of judicial decisions delivered by either international or national courts dealing with specific cases. This being so, it is only logical that international courts should rely heavily on such jurisprudence.[165]

Nevertheless, the question that was on the Trial Chamber's mind was: what value to attribute to this "foreign" case-law? The answer was multilayered. First of all, it did not see these cases as binding precedent (*stare decisis*).[166] They are only there as a tool for evidencing the existence of a rule in international law, nothing more nothing less.[167] Still, the question remained, what value should it ascribe to the different sets of cases?

The Trial Chamber seems to have made a specific order of relevance for different sets of cases. The first line of inquiry for the tribunals is international criminal law cases. Its natural stop is the cases that were settled by the Nuremberg tribunal and its progeny. The second tier of cases is the ones that came out from national jurisdictions but still dealt with the crimes that resulted out of WWII. Cases from other national criminal trials that came out of international crimes also belong to this tier. It seems that only when the tribunals are faced

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[165] *Prosecutor v Zoran Kupreckic, Mirjan Kupreckic, Vlatko Kupreckic, Drago Josipovic, Dragan Papic, Vladimir Cantic*, Trial Chamber Judgment, IT-95-16-T, January 14, 2000, para. 537 (hereafter *Kupreckic* Trial Chamber judgment).

[166] "Indeed, this [*stare decisis*] doctrine among other things presupposes to a certain degree a hierarchical judicial system. Such a hierarchical system is lacking in the international community. Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes. Similarly, the Tribunal cannot rely on a set of cases, let alone on a single precedent, as sufficient to establish a principle of law: the authority of precedents (*auctoritas rerum similiter judicatarum*) can only consist in evincing the possible existence of an international rule. *Ibid.*, para. 540.

[167] "More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior occasion propounded the correct interpretation of existing law. Plainly, in this case prior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight. Thus, it can be said that the Justinian maxim whereby courts must adjudicate on the strength of the law, not of cases (*non exemplis, sed legibus iudicandum est*) also applies to the Tribunal as to other international criminal courts." *Ibid.*

with a question of general international law, as with the instances of the discussion of state responsibility, that it feels comfortable using cases from other branches of law with some ease and without their standard warning of the need for care when importing and adapting norms to fit the international humanitarian law framework.[168] What we have here is another line of "rules of import" only this time relevant to cases and not to conventions and domestic legislation. In this paragraph the trial chamber, aware of difficulties of using cases from different jurisdictions, some of which do not have a close enough resemblance to the tribunals' statutes, started stratifying the different cases into various layers of relevance from which it can draw inspiration from.

There is another very important point that I would like to make of the tribunals' use of cases, now that we have discussed the issue of using "foreign" cases, and that is the use of the tribunals' own cases. It becomes obvious early on in the operation of the tribunals that either a Trial Chamber or an Appeals Chamber judgment previously settled many of the issues that were raised in later cases. Later Trial Chambers referenced these previous judgments in their cases extensively. The following excerpt is from footnotes taken from a single page from a recent Trial Chamber judgment rendered by the ICTY which is a good illustration of tribunals' use of own case-law:

> [1565] *Tadic* Appeals Judgement, para 227*; Krnojelac* Appeals Judgement, para 97, *Vasiljevic* Apprals Judgement, paras 100, 109; *Brdzanin* Appeals Judgement, paras 415, 418.
> [1566] *Tadic* Appeals Judgement, paras 196; 202-203; 227-228.
> [1567] *Tadic* Appeals Judgement, para 227.
> [1568] *Kvocka* Appeals Judgement, para 98.
> [1569] *Kvocka* Appeals Judgement, para 97.
> [1570] *Brdzanin* Appeals Judgement, para 430.
> [1571] *Brdzanin* Appeals Judgement, para 427.

[168] "In sum, international criminal courts such as the International Tribunal must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing law. Moreover, they should apply a stricter level of scrutiny to national decisions than to international judgements, as the latter are at least based on the same corpus of law as that applied by international courts, whereas the former tend to apply national law, or primarily that law, or else interpret international rules through the prism of national legislation." *Kupreckic* Trial Chamber Judgment, para. 542, but also see the discussion in the previous paragraph for a more detailed elaboration on the reasons for this ordering.

[1572] *Krnojelac* Appeals Judgement, para 81.
[1573] *Tadic* Appeals Judgement, paras 220, 228.
[1574] *Tadic* Appeals Judgement, paras 202-203; 227-228.
[1575] *Tadic* Appeals Judgement, paras 204; 227-228; *Kvocka* Appeals Judgement, para 83.
[1576] *Kvocka* Appeals Judgement, para 86.[169]

The first impression that one has from this kind of use of case law is that it is only natural for a court to relay on its own previous judgments when it decides current cases. As the Appeals Chamber of the ICTY noted, while deciding the precedent nature of its own judgments, both Common Law and Continental Law courts, as well as international courts, use their own cases-law in a similar way.[170] The difference being that in Common Law countries there is a firm doctrine of *stare decisis*, which compels courts to devote substantive space in their reasoning to distinguishing cases or giving reasons for the departure from previous settled precedent.[171] On the other hand, the Appeals Chamber found the reasons for adhering to previously settled cases in the necessity of the law for consistency, stability and predictability not on a strict adherence to a *stare decisis* doctrine.[172] This necessity, the Appeals Chamber stressed, is even more acute in criminal law where the principle of a fair trial has coherent value. One aspect "of the fair trial requirement is the right of an accused to have like cases treated alike, so that in general, the same cases will be treated in the same way and

[169] *Boskovski* Trail Chamber judgment, page 171.
[170] *Prosecutor v Zlatko Aleksovski*, Appeals Chamber judgment, IT-95-14/1-A, March 24, 2000 para. 92-97; (hereafter *Aleksovski* Appeals Chamber judgment).
[171] "The Appeals Chamber recognises that the principles which underpin the general trend in both the common law and civil law systems, whereby the highest courts, whether as a matter of doctrine or of practice, will normally follow their previous decisions and will only depart from them in exceptional circumstances, are the need for consistency, certainty and predictability." *Aleksovski* Appeals Chamber judgment, para. 97.
[172] The Appeals Chamber recognises that the principles which underpin the general trend in both the common law and civil law systems, whereby the highest courts, whether as a matter of doctrine or of practice, will normally follow their previous decisions and will only depart from them in exceptional circumstances, are the need for consistency, certainty and predictability. This trend is also apparent in international tribunals. Judge Shahabuddeen observes:

> The desiderata of consistency, stability and predictability, which underlie a responsible legal system, suggest that the Court would not exercise its power to depart from a previous decision except with circumspection… The Court accordingly pursues a judicial policy of not unnecessarily impairing the authority of its decisions.

The Appeals Chamber also acknowledges that that need is particularly great in the administration of criminal law, where the liberty of the individual is implicated. (footnote omitted) *Aleksovski* Appeals Chamber judgment, para. 97.

decided as Judge Tanaka said, 'possibly by the same reasoning' (footnote omitted)."[173] Consequently, "a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice."[174] These cogent reasons were explained to be

> Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been 'wrongly decided, usually because the judge or judges were ill-informed about the applicable law.'[175]

These three listed cogent reasons are in fact rules on overruling a previously settled case-law, the final piece of the puzzle in a precedent based system of law. I would take the term include to mean that there are other examples of cogent reasons that would necessitate overruling.

However, there was one more question that the Appeals Chamber needed to answer and that was as to which parts of a judgments should be followed? A typical judgment by a Trial Chamber, dependant on the complexity of the issues, has more than 200 pages. Almost two-thirds of its discussion is devoted to establishing the facts of the case. An Appeals Chamber judgment is typically larger than 100 pages and answers several points of contention regarding the law or the facts. Consequently, which part of the judgments should be considered relevant for the decision in the case? The *Aleksovski* appeals chamber gave an answer to this question as well. It said that

> [w]hat is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision. There is no obligation to follow previous decisions which may be distinguished for one reason or another from the case before the court.[176]

[173] *Ibid.*, para. 105.
[174] *Ibid.*, para. 107.
[175] *Ibid.*, para. 108.
[176] *Ibid.*, para. 110.

I will discuss the consequences of this decision a bit later in the conclusions of this Chapter. For now, it is sufficient to say for now that the various tests and definitions that were developed by the different Trial Chamber and the Appeals Chamber now became obligatory in all subsequent cases, unless cogent reasons could be shown to warrant a different conclusion.

2.1.3 The Use of Statements of Governments, Organs of International Organizations and Their Officials

Generally, one can view statements of Government or other type of officials in the context of the *ad hoc* tribunals in two ways. One use of statements is during the tribunals' search for evidence of custom, more specifically in their search for *usus* or *opinio juris*. The second use is the statements of officials as help during the tribunals' search for the best interpretation of their statutes. In the following pages, I will shortly present examples of both of these types of usages in order to see if there is anything particular in the way that the *ad hoc* tribunals use statements of officials.

2.1.3.1 The Use of Statements of Governments, Organs of International Organizations and Their Officials as Evidence of Custom

As the Secretary General of the United Nations pointed out in his Report to the Security Council on the establishment of the ICTY, the tribunal is obligated to apply "rules of international humanitarian law which are beyond any doubt part of customary law."[177] Consequently the use of statements of governments and international organizations should be

[177] Report of the SG, para. 34.

somewhat extensive as part of the tribunals' search for evidence of existing customary law. This at least seems to be the case in the early years of the tribunals when they were building up their case law. The use of official statements as evidence of custom, especially *opinio juris*, in international humanitarian law has come to enjoy special prominence since the now famous pronouncement by the ICTY Appeals Chamber in the *Tadic Defence Motion* decision where the Appeals Chamber gave

> a word of caution on the law-making process in the law of armed conflict [...]. [that] [w]hen attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, *reliance must primarily be placed on such elements as official pronouncements of States*, military manuals and judicial decisions (emphasis added).[178]

One prime example of the use of statements in the discovery of international custom is the afore-mentioned *Tadic Defence Motion* decision. The decision itself is laced with statements both regarding the interpretation of the ICTY statute and the discovery of customary law. For instance, when the Appeals Chamber made its decision on the scope of application of Article 3 of the statute, especially regarding its applicability in internal conflicts it supported that decision by recourse to several statements by states or international organizations not limited to the UN. It started its path of discovery of the international customary rules governing conflicts with the conclusion that Article 3 covers violations of Hague Law (specifically mentioned in the Secretary General's Report) and Geneva Law (not mentioned at all) subject to the following limitations

[178] *Tadic Defence Motion*, para. 99.

> [...]Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law.[179]

The pertinent part of the Chamber's reasoning for this thesis is the one that falls under (iii), violations of common Article 3 and other customary rules on internal conflict. At this point, the Chamber had to discover which customary rules of international humanitarian law have actually started applying to internal conflicts. It started its reasoning by giving almost a lecture-like introduction to the reasons behind the division of internal/international conflicts and the political and moral reasons why it should be abandoned.[180] It then went out to discover, in 27 paragraphs of the decision, the principle rules governing international conflict that have made the crossover of applicability to internal ones.[181] The discussion is too long for me to present in full in this thesis; consequently, I will only mention those instances when the Chamber used statements of states and international organizations as part of the discovery process.

The first rule that the Appeals Chamber looked into was the rule of distinction between civilian objects and military objectives and the prohibition of attacks against civilians. The first line of statements start with the statements made by the British Prime Minister related to the Spanish Civil War in 1938.[182] The relevant paragraph reads as follows

> [...]Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions when attacking military objectives. Thus, for example, on 23 March 1938, Prime Minister

[179] *Ibid.*, para. 89.
[180] *See ibid.*, para. 96-99.
[181] *See* discussion under paragraphs 100-127.
[182] *Ibid.*, para. 100.

> Chamberlain explained the British protest against the bombing of Barcelona as follows:
>
> [...] (quotes the statement)
>
> More generally, replying to questions by Member of Parliament Noel-Baker concerning the civil war in Spain, on 21 June 1938 the Prime Minister stated the following:
>
> [...] (quotes the statement)[183]

The Appeals Chamber followed that statement with references to several resolutions of the League of Nations made regarding several ongoing conflicts at the time (the Spanish and the Japanese-Chinese war) and later by the provisions/statements made by the leaders of the Chinese People's Liberation Army to their soldiers during the Chinese Communist Party's takeover of the Chinese government.[184]

The next set of references that the Appeals Chamber made was to the statement of the Prime Minister of the Democratic Republic of Congo, which was made on October 21, 1964. The statement was regarding the acceptance of the Congolese Government to respect certain rules of international humanitarian law, and specifically, to call on the "International Red Cross observers come to check on the extent to which the Geneva Convention [sic] is being respected, particularly in the matter of the treatment of prisoners and the ban against taking hostages".[185] At the time the Democratic Republic of Congo was a State Party to the four Geneva Conventions of 1949. However, the statement that the Congolese Prime Minister made was in relation to the conduct of the civil war and the reference was not limited to Common Article 3, which deals with conflicts of a non-international character.[186] The conclusion that the Chamber made from this statement was that it

[183] *Ibid.*
[184] *Ibid.*, para. 101-102.
[185] Public Statement of Prime Minister of the Democratic Republic of the Congo (21 Oct. 1964) as quoted in the *Tadic Defence Motion* decision, para. 105.
[186] "For humanitarian reasons, and with a view to reassuring, in so far as necessary, the civilian population which might fear that it is in danger, the Congolese Government wishes to state that the Congolese Air Force will limit its action to military objectives.
In this matter, the Congolese Government desires not only to protect human lives but also to respect the Geneva Convention [sic]. It also expects the rebels - and makes an urgent appeal to them to that effect - to act in the same manner.

> [...]indicates acceptance of rules regarding the conduct of internal hostilities, and, in particular, the principle that civilians must not be attacked. Like State practice in the Spanish Civil War, the Congolese Prime Minister's statement confirms the status of this rule as part of the customary law of internal armed conflicts. Indeed, this statement must not be read as an offer or a promise to undertake obligations previously not binding; rather, it aimed at reaffirming the existence of such obligations and spelled out the notion that the Congolese Government would fully comply with them.[187]

The search for customary rules of international humanitarian law applicable to internal conflicts continued and the Appeals Chamber quoted another statement by El Salvadorian rabbles issued in 1988 announcing their readiness to follow the Additional Protocol II and Article 3 of the Geneva Convention in regards to the combat methods that they would use.[188]

The next line of statements present a very interesting example of evidence of *opinio juris* since they were made during the discussion on the adoption of several General Assembly Resolutions regarding the rules of war. During the drafting of the General Assembly Resolution 2444 of 1966 on the respect for human rights in armed conflict, the United States made a statement in the Third Committee taking the position that the principles listed in the Resolution "constituted a reaffirmation of existing international law."[189] The Appeals Chamber used another GA Resolution as a stepping stone in its reasoning, Resolution 2675 of 1970. The important statement for the Chamber was given by the representative of Norway, which co-sponsored the resolution and introduced it to the Third Committee by saying that "the term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not ex-

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As a practical measure, the Congolese Government suggests that International Red Cross observers come to check on the extent to which the Geneva Convention [sic] is being respected, particularly in the matter of the treatment of prisoners and the ban against taking hostages." (Public Statement of Prime Minister of the Democratic Republic of the Congo (21 Oct. 1964), *reprinted* in **American Journal of International Law** (1965) 614, at 616.)" *Tadic Defence Motion* decision para. 105

[187] *Ibid.*

[188] *Ibid.*, para. 107.

[189] "The principles listed in the GA Resolution are: (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) That it is prohibited to launch attacks against the civilian populations as such; (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible." *Ibid.*, para. 110.

tend to all conflicts."[190] For the Appeals Chamber the relevance of these two Resolutions and the statements made by the different states was in the fact that they

> played a twofold role: they were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind and, at the same time, were intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles.[191]

The rise of international organizations also influenced the way in which international courts, and consequently, the *ad hoc* tribunals use collective statements or statements of organs of international organizations in their search for customary law. The statements of the European Community (EC), later the European Union (EU) are a prime example of this. The Appeals chamber in the *Tadic Defence Motion* used several statements of the EU, some issued the EC/EU Council, some by the EC/EU Presidency.[192] The Appeals Chamber saw these stamens not only as statements of a (supra/inter)national organization but as a statement of its member states as well.[193]

The pattern elaborated so far proceeds for the rest of the discussion on the scope of applicability of Article 3 of its statute. The Appeals Chamber continues to use statements by representatives of several governments in relations to different internal conflicts all confirming the view that certain principles of international humanitarian law have become applicable to internal conflicts. Throughout the discussion, the Appeals Chamber elaborates on what these principles are and tries to enumerate them.[194] The cautionary note, now so familiar, regarding the mechanical transposition of norms from one regime into another, was also pre-

[190] *Ibid.*, para. 111.
[191] *Ibid.*, para. 112.
[192] *See* paragraphs 113 (on the conflict in Liberia in 1990), 115 (on the conflict in Chechnya), 120 (on the use of chemical weapons by Iraq on its Kurdish minority 1988) respectively *Ibid*.
[193] Not surprisingly since in most statements the language contains the phrase "the Community and its Member States" or just the "Community/Union"; *ibid.*
[194] *See* the closing paragraph of the discussion "it cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities." *Ibid.*, para. 127.

sent in the Appeals Chamber discussion, noting that there are limitations to the transposition of international humanitarian law principles applicable to international conflicts to internal conflicts by saying that

> [t]he emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.[195]

Of course, at the time the Appeals Chamber came out with its decision one could only speculate what the general essence of those rules would later be, the little hint that was provided in the following paragraph (i.e. paragraph 127) only opened the door for fleshing out those principles through later judgments.

This single example is a typical of how courts are suppose to discover the existence of customary international law, i.e. through the review of state practice and *opino juris* of states. What is typical for international criminal law is the now all too familiar statement made by the Appeals Chamber regarding the heavier weight given to *opino juris* when seeing whether a rule has crystallized into customary norm. Naturally, the Chamber did not rely just on the statements of state officials and international organizations in its argumentation, even though I focused only on this aspect of the Chamber's reasoning to elaborate on the way that statements have been used by the *ad hoc* tribunals.

[195] *Ibid.*, para. 126; as an example of what the Appeals Chamber means when it says that not all of the rules applicable to international conflict we can take the provisions from the Geneva (III) Convention Relative to the Protection of Prisoners of War. The provisions themselves are fairly detailed, including such provisions as "While respecting the individual preferences of every prisoner, the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment.
Prisoners shall have opportunities for taking physical exercise, including sports and games, and for being out of doors. Sufficient open spaces shall be provided for this purpose in all camps (Article 38). Certainly one would not expect that these type of rules also apply in internal conflicts, but that the basic tenets of humane treatment of prisoners is now part of the law governing non-international conflicts.

Finally, there is one thing that I have to mention regarding the example that I just explained, and that is that this example of a detailed search for the existence of customary rules is a unique one for the ICTY. The ICTY has not undertaken such a detailed discussion on state practice and *opinio juris* since the *Tadic Defence Motion* decision. Something that has come close to this type of discussion was the discussion presented during the Appeals Chamber decision in the *Tadic* appeals judgment when it overruled the standard for control over paramilitary groups in order for a conflict which *prima facie* is of an internal character can be deemed to be internationalized.

For sure, the *ad hoc* tribunals do go into a discussion on what constitutes a customary norm and do try to conduct a detailed search and presentation on where they have made that discovery. However, the tribunals relay more heavily on case-law from other tribunals, both the Nuremberg trials and their progeny and from human rights tribunals, and later have shifted their reliance on their own case-law (once they built it up), and on international conventions and their commentaries. The search for widespread *usus* and *opinio juris* seems to have been sidestepped during the tribunals' reasoning.

For instance, when the *Furundzija* Trial chamber went on to discover whether the crime of Torture was prescribed under customary international law, it did not rely, nor did it specifically quote statements by representatives of states or international governmental organizations to back up its claim. The discovery process for the existence of an international custom banning torture in times of conflict was comprised of pointing to the provisions of several documents and treaties, namely the Lieber Code, the Hague Conventions, and especially its Martens Clause, the London Agreement crating the IMT at Nuremberg and Control Council Law No. 10, based on the London Agreement which authorised the prosecutions of Nazi war criminals that were not tried at Nuremberg.[196] However, when it came to the rea-

[196] *Furundzija* Trial Chamber judgment, para. 137.

sons why it though that the provisions on torture in these documents have attained customary status in said that

> That these treaty provisions have ripened into customary rules is evinced by various factors. First, these treaties and in particular the Geneva Conventions have been ratified by practically all States of the world. Admittedly those treaty provisions remain as such and any contracting party is formally entitled to relieve itself of its obligations by denouncing the treaty (an occurrence that seems extremely unlikely in reality); nevertheless the practically universal participation in these treaties shows that all States accept among other things the prohibition of torture. In other words, this participation is highly indicative of the attitude of States to the prohibition of torture. Secondly, no State has ever claimed that it was authorised to practice torture in time of armed conflict, nor has any State shown or manifested opposition to the implementation of treaty provisions against torture. When a State has been taken to task because its officials allegedly resorted to torture, it has normally responded that the allegation was unfounded, thus expressly or implicitly upholding the prohibition of this odious practice. Thirdly, the International Court of Justice has authoritatively, albeit not with express reference to torture, confirmed this custom-creating process: in the *Nicaragua case* it held that common article 3 of the 1949 Geneva Conventions, which *inter alia* prohibits torture against persons taking no active part in hostilities, is now well-established as belonging to the corpus of customary international law and is applicable both to international and internal armed conflicts (footnote omitted).[197]

As you may remember from the discussion on custom and how to find presented in Chapter I, a real discovery into whether torture was now prohibited in times of conflict (for which I have no doubts that it is) should have included a discussion on how many states ratified each of the documents, whether there was and to what extent there were reservations, on which points were those reservations; whether the persistent non ratification of certain states gave them the status of persistent objector etc. Furthermore, the Trial Chamber, for instance, does not offer any evidence when it comes to the statements of states regarding the states' denial of the factual existence of torture but not on its normative bindingness. Consequently, it seems that the use of statements of Governments, organs of IOs or their officials has a sparse and inelegant track record in the tribunals' reasoning as evidence of the material sources of international law. In my limited research on the topic, I have found almost no ex-

[197] *Ibid.*, para. 138.

amples of the proper search, like the one conducted in the *Tadic Defence Motion* decision, of statements of governments, international organizations and their officials.

2.1.3.2 The Use of Statements of Governments, Organs of International Organizations and Their Officials as Heuristic Tools in the Interpretation of the Tribunals' Statutes

The second way in which the tribunals have used statements of government and other officials is as a help in the interpretation of their statutes. As I have mentioned several times in this thesis, the UN Security Council adopted the statutes of the *ad hoc* tribunals though binding Chapter VII resolutions. The adoption of the ICTY statute followed a discussion in the Security Council on a Report[198] prepared by the Secretary General commenting on the various different provisions in the statute. The discussion at the Security Council sessions regarding the adoption of the statutes was instrumental in the interpretation of the provisions of the statutes themselves.[199]

As with the previous section on the use of statements by the tribunals, I will start my discussion with the *Tadic Defence Motion* decision. The question of the scope of applicability of the substantive parts of the statute of the ICTY was very much on the Appeals Chamber's list of arguments to answer. Both Tadic and the Prosecutor appealed certain parts of the Trial Chamber's decision. The Appeals Chamber answered those arguments by using various different techniques of interpretation, which I will discuss later on, and relying on different material sources, among which were the statements made by states sitting on the Security Council as well as the Report prepared by the Secretary General.

[198] Report of the SG.

[199] For a good overview of the interpretative steps taken by the tribunals in their reasoning *see* William A. Schabas, *Interpreting the Statutes of the* Ad Hoc *tribunals*, *in* Lal Chand Vohran, Fasto Pocar, Yvonne Featherstone, Oliver Fourmy, Christine Graham, John Hocking and Nicholas Robson (ed.), MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE, Kluwer Law Interntional, The Hague, 2003, pp. 845-888.

Interestingly enough, the use of statements by the Appeals Chamber in the *Tadic Defence Motion* decisions falls under the subheading in the judgment of teleological interpretation of the statute. It is used to provide context to the issue of whether the statute itself was meant to criminalize acts that occurred in internal conflicts along with the agreements that the warring parties signed under the auspices of the ICRC.[200] The Appeals Chamber used the UN Security Council resolutions and their specific wordings not as evidence of a particular view of the Security Council or its members, but quite the opposite, to their lack of view; to their silence on the issue of the nature of the conflict.[201] The non-specific language of the Security Council resolutions and their use of "catch-all" phrases like "other violations of international humanitarian law,"[202] was evidence for the Appeals Chamber that the intent of the Council if not explicitly to include internal conflicts then at least not to exclude them. The Report of the Secretary General gave a further clue as to the specific non-commitment of the SC and its members as to the nature of the conflict.[203]

The Appeals chamber also used the statements made by several of the SC members during the adoption of the statute, most notably the statement made by Mrs. Albright, the then Secretary of State of the United States, regarding the US's understanding of the applicable law under Article 3 of the statute. The statement itself is not a statement regarding the nature of the conflicts, but is rather more the US's understanding of the kind of law that is encompassed under the term "laws of war" when it comes the Yugoslav conflict. What Mrs. Albright said was that

> [f]irstly, it is understood that the "laws and customs of war" referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory

[200] *Tadic Defence Motion*, para. 72-73.
[201] *Ibid.*, para. 74-75.
[202] *Ibid.*, para. 74.
[203] 'The intent of the Security Council to promote a peaceful solution of the conflict without pronouncing upon the question of its international or internal nature is reflected by the Report of the Secretary-General of 3 May 1993 and by statements of Security Council members regarding their interpretation of the Statute. The Report of the Secretary-General explicitly states that the clause of the Statute concerning the temporal jurisdiction of the International Tribunal was "clearly intended to convey the notion that no judgement as to the international or internal character of the conflict was being exercised."' *Ibid.*, para. 75.

> of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions.[204]

The Appeals Chamber interpreted the statement that it "clearly embraces Additional Protocol II of 1977, relating to internal armed conflict"[205] and that

> [n]o other State contradicted this interpretation, which clearly reflects an understanding of the conflict as both internal and international (it should be emphasized that the United States representative, before setting out the American views on the interpretation of the Statute of the International Tribunal, pointed out: "[W]e understand that other members of the [Security] Council share our view regarding the following clarifications related to the Statute."[206]

The final conclusion on this issue for the Appeals Chamber was clear, that the conflicts in the former Yugoslavia had both international and internal aspects and that

> [...] the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.[207]

One question that arose before the ICTY, regarding statements of government officials or organs of international organizations was regarding what would happen if there was a discrepancy between the text of the statute and a statement made during the adoption of the statute. The issue arose when in the *Tadic* case the Trial Chamber was put at the dilemma of how to interpret Article 5, and especially, whether discriminatory intent was required under all of the paragraphs of Article 5 of the statute or just under paragraph (h), which was the only one that had the specific grounds listed.[208] The Trial Chamber started its interpretative process with tracking historically the development of the crimes against humanity,[209] pro-

[204] Speech of Mrs. Medelin Albright to the UN Security Council, May 25, 1993, UN Doc. S/PV.3217, p.15.
[205] *Tadic Defence Motion*, para. 75.
[206] *Ibid*,. para. 75.
[207] *Ibid.*, para. 77.
[208] *Tadic* Trial Chamber judgment, para. 650-652.
[209] *Ibid.*, para. 618-622.

ceeding with the conditions of application,[210] then elaborating on each condition of application,[211] finishing with a discussion on discriminatory intent.[212]

The discussion related to this issue in the Trial Chamber judgment is an interesting one since the Trial Chamber started with vindicating the view that discriminatory intent was not a general requirement under crimes against humanity, historically speaking. It distinguished two types of crimes of humanity that were prosecuted under the Nuremberg charter, "those related to inhumane acts [...] and [others related to] persecution on political, racial or religious grounds."[213] The Trial Chamber came to the same conclusion regarding the trials under Control Council Law No. 10, as well as the Tokyo Charter., the ILC draft code or the Statute of the ICTR, and even more interestingly in the text of the ICTY statute itself.[214] However, when it came to the crunch, the Trial Chamber decided that

> because the requirement of discriminatory intent on national, political, ethnic, racial or religious grounds for all crimes against humanity was included in the *Report of the Secretary-General*, and since several Security Council members stated that they interpreted Article 5 as referring to acts taken on a discriminatory basis, the Trial Chamber adopts the requirement of discriminatory intent for all crimes against humanity under Article 5 (footnotes omitted).[215]

The commentaries in the Secretary General's Report regarding the whole Article 5 was that "crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[216] The Appeals Chamber in the *Tadic* Appeals Chamber judgment had no doubts about that issue; it was a resounding victory for the text of the statute and its conformity with customary international law. The Appeals Chamber relied on the same sources as the Trial Chamber, emphasis-

[210] *Ibid*., para. 623-626.
[211] *Ibid*., para. 627-649.
[212] *Ibid*., para. 650-652
[213] *Ibid*., para. 651.
[214] *Ibid*., para. 651-562.
[215] *Ibid*., para. 562.
[216] Report of the SG, para. 48.

ing the case law of Nuremberg and its progeny in some very long footnotes.[217] However, when it came to classifying the Secretary General's report and its statement it said that

> [i]t should be noted that the Secretary-General's Report has not the same legal standing as the Statute. In particular, it does not have the same binding authority. The Report as a whole was "approved" by the Security Council (see the first operative paragraph of Security Council resolution 827(1993)), while the Statute was "adopt[ed]" (see operative paragraph 2). By "approving" the Report, the Security Council clearly intended to endorse its purpose as an explanatory document to the proposed Statute. *Of course, if there appears to be a manifest contradiction between the Statute and the Report, it is beyond doubt that the Statute must prevail.* In other cases, the Secretary-General's Report ought to be taken to provide an authoritative interpretation of the Statute." (emphasis added)[218]

Consequently, the result of the Appeals Chamber reasoning was that discriminatory intent is only required for Article 5(h) (persecution) of the ICTY statute and not as a general requirement of Article 5.

A similar fate awaited the statements made by the members of the Security Council during the adoption of the statute as far as regarding the interpretation of Article 5 was concerned. The Appeals Chamber already accredited, in the *Tadic Defence Motion*, some weight to the statements of the Security Council in various resolutions and of governments during the adoption of the Statute. It therefore, could not easily dismiss the statements regarding Article 5 lightly. The approach of the Appeals Chamber was to minimize the value of the statements regarding Article 5 and distinguish them in terms of their clarity and their intent. For instance in relation to the different statements made by several members of the SC the Appeals Chamber said that

> [a]lthough they were all directed at importing, as it were, into Article 5 the qualification concerning discriminatory intent set out in paragraph 48 of the Secretary-General's Report, these statements varied as to their purport. The statement by the French representative was intended to be part of "a few brief comments" on the Statute. By contrast, the remarks of the United States representative were expressly couched as an "interpretative statement"; furthermore, that representative added a significant comment: "[W]e understand that other members of the Council share our

[217] *Tadic* Appeals Chamber judgment, para. 287-292.
[218] *Ibid.*, 295.

> view regarding the following clarifications related to the Statute" including the "clarification" concerning Article 5. With regard to the representative of the Russian Federation, his statement concerning Article 5 was expressly conceived of as an interpretative declaration. Nevertheless, this declaration was made in such terms as to justify the proposition that for the Russian Federation, Article 5 "encompasses" crimes committed with a "discriminatory intent" without, however, being limited to these acts alone. (footnotes omitted)[219]

For the Appeals Chamber, these statements were meant to clarify one point, and that was the necessity of adding the requirements of a need for a "widespread or systematic attack" on a civilian population as part of the definition of Article 5 to the text of the statute. It said that

> [a]rguably, in fact, the main purpose of those statements was to stress that it is the existence of a widespread or systematic practice which constitutes an indispensable ingredient of crimes against humanity. This ingredient, absent in Article 5, had already been mentioned in paragraph 48 of the Secretary-General's Report. In spelling out that this ingredient was indispensable, the States in question took up the relevant passage of the Secretary-General's Report and in the same breath also mentioned the discriminatory intent which may, in practice, frequently accompany such crimes. (footnote omitted)[220]

The Appeals Chamber also managed to exclude these statements from the category of "context"[221] regarding the statutes' adoption; it did not consider them being a specific agree-

[219] *Ibid.*, para. 299.
[220] *Ibid.*, para. 301.
[221] "The Appeals Chamber, first of all, rejects the notion that these three statements – at least as regards the issue of discriminatory intent - may be considered as part of the "context" of the Statute, to be taken into account for the purpose of interpretation of the Statute pursuant to the general rule of construction laid down in Article 31 of the Vienna Convention on the Law of the Treaties. In particular, those statements cannot be regarded as an "agreement" relating to the Statute, made between all the parties in connection with the adoption of the Statute. True, the United States representative pointed out that it was her understanding that the other members of the Security Council shared her views regarding the "clarifications" she put forward. However, in light of the wording of the other two statements on the specific point at issue, and taking into account the lack of any comment by the other twelve members of the Security Council, it would seem difficult to conclude that there emerged an agreement in the Security Council designed to qualify the scope of Article 5 with respect to discriminatory intent. In particular, it must be stressed that the United States representative, in enumerating the discriminatory grounds required, in her view, for crimes against humanity, included one ground ("gender") that was not mentioned in the Secretary-General's Report and which was, more importantly, referred to neither by the French nor the Russian representatives in their declarations on Article 5. This, it may be contended, is further evidence that no agreement emerged within the Security Council as to the qualification concerning discriminatory intent." *ibid.*, para 300.

ment of the parties in relation to the adoption of the statute nor part of its *travaux preparatoires*.[222] The conclusion of the Chamber was that

> [t]he above propositions do not imply that the statements made in the Security Council by the three aforementioned States, or by other States, should not be given interpretative weight. They may shed light on the meaning of a provision that is ambiguous, or which lends itself to differing interpretations. Indeed, in its *Tadic* Decision on Jurisdiction the Appeals Chamber repeatedly made reference to those statements as well as to statements made by other States. It did so, for instance, when interpreting Article 3 of the Statute and when pronouncing on the question whether the International Tribunal could apply international agreements binding upon the parties to the conflict.[223]

The both instances of the Appeals Chamber use of stamens as interpretative tools for the statute tell an interesting story. As it turns out the Appeals Chamber, somewhat clumsily, tried to distinguish its use of statements in its previous decision on the defence motion and the *Tadic* appeals decision. The Appeals Chamber in the *Tadic Defence Motion* decision not only did it use specific statements, but it actually used the *lack* of a specific statement regarding the issue of the nature of the conflict in Bosnia and the former Yugoslavia in general.

On the contrary, in the *Tadic* Appeals Chamber, the Chamber minimized the significance of the statements[224] even though they had a clear language on part of the states issuing them. Not only were they in conformity with the language used in the Secretary General's Report, but they were clear in their language as well. A more honest approach would have

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[222] "Be that as it may, since at least with regard to the issue of discriminatory intent those statements may not be taken to be part of the "context" of the Statute, it may be argued that they comprise a part of the *travaux préparatoires*. Even if this were so, these statements would not be indispensable aids to interpretation, at least insofar as they relate to the particular issue of discriminatory intent under Article 5. Under customary international law, as codified in Article 32 of the Vienna Convention referred to above, the *travaux* constitute a supplementary means of interpretation and may only be resorted to when the text of a treaty or any other international norm-creating instrument is *ambiguous or obscure*. As the wording of Article 5 is clear and does not give rise to uncertainty, at least as regards the issue of discriminatory intent, there is no need to rely upon those statements. Excluding from the scope of crimes against humanity widespread or systematic atrocities on the sole ground that they were not motivated by any persecutory or discriminatory intent would be justified neither by the letter nor the spirit of Article 5." (emphasis in the original), *ibid.*, para. 303.

[223] *Ibid.*, para. 304.

[224] The Appeals Chamber used an approach whereby it created a doubt as to the reasons why the statements might have been made, i.e. by saying that they might have been made because the members of the Security Council wanted to stress "that it is the existence of a widespread or systematic practice which constitutes an indispensable ingredient of crimes against humanity" (para. 301) or "that the intent of the three States which made these declarations was to stress that in the former Yugoslavia most atrocities had been motivated by ethnic, racial, political or religious hatred" (para. 302).

been to acknowledge that the statements made in the Secretary General's Report and in the SC during the adoption of the statute did not reflect customary international law and that the mandate of the ICTY is to use norms that are beyond doubt part of customary international law. The Appeals Chamber hinted at this approach in one of its paragraphs by saying that

> [t]he same conclusion is reached if Article 5 is construed in light of the principle whereby, in case of doubt and whenever the contrary is not apparent from the text of a statutory or treaty provision, such a provision must be interpreted in light of, and in conformity with, customary international law. In the case of the Statute, it must be presumed that the Security Council, where it did not explicitly or implicitly depart from general rules of international law, intended to remain within the confines of such rules.
>
> A careful perusal of the relevant practice shows that a discriminatory intent is not required by customary international law for all crimes against humanity.[225]

Nevertheless, the question still remains, what about the express wording of the statements? They were used as evidence that the requirement of widespread or systematic attack against a civilian population are part of the requirements of the crimes under Article 5 but not the discriminatory intent. The problem is even more obvious when one sees that they were made in the same breath.[226] Why was one used as an indicator of the specific intent of the framers of the statute and the other one not? The Appeals chamber does give an answer to this question, one that is related more the issues discussed in the second part of this Chapter. Its arguments were that the object and the purpose of the statute itself asks for this type of reading so that no classes of persons are left without protection under the statute. Its reasoning was that

> [f]or example, a discriminatory intent requirement would prevent the penalization of random and indiscriminate violence intended to spread terror among a civilian population as a crime against humanity. A fortiori, the object and purpose of Article 5 would be thwarted were it to be suggested that the discriminatory grounds required

[225] *Ibid.*, para. 287-288.

[226] For instance the full relevant statement of the Secretary of State of the United States was "[s]econdly, it is understood that Article 5 applies to all acts listed in that article, when committed contrary to law during a period of armed conflict in the territory of the former Yugoslavia, as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, gender, or religious grounds." while the wording of the Report is "Crimes against humanity refer to inhumane acts of a very serious nature […] committed as part of a widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds."

> are limited to the five grounds put forth by the Secretary-General in his Report and taken up (with the addition, in one case, of the further ground of gender) in the statements made in the Security Council by three of its members. Such an interpretation of Article 5 would create significant lacunae by failing to protect victim groups not covered by the listed discriminatory grounds. The experience of Nazi Germany demonstrated that crimes against humanity may be committed on discriminatory grounds other than those enumerated in Article 5 (h), such as physical or mental disability, age or infirmity, or sexual preference. Similarly, the extermination of "class enemies" in the Soviet Union during the 1930s (admittedly, as in the case of Nazi conduct before the Second World War, an occurrence that took place in times of peace, not in times of armed conflict) and the deportation of the urban educated of Cambodia under the Khmer Rouge between 1975-1979, provide other instances which would not fall under the ambit of crimes against humanity based on the strict enumeration of discriminatory grounds suggested by the Secretary-General in his Report. (footnote omitted)[227]

This discussion gives me the perfect opportunity to seep into the topic of the next part of this Chaper. I have given numerous examples above of how the *ad hoc* tribunals used the material sources that are extrinsic to the text of the statute in order to construct judicial test/definitions. Nevertheless, there is also one further characteristic that I need to present in order for you to get a full picture of to how the tribunals actually "created"[228] law. That characteristic is the tribunals' use of interpretative techniques in its handling of the material sources. Therefore, I will now go on to a discussion of the interpretative methods used by the tribunals.

2.2. THE IMPORT OF NORMS: THE INTERPRETATIVE TECHNIQUES

Recently, the *ad hoc* tribunals have found themselves in the midst of a raging debate regarding their approach to the interpretation of their statutes, especially regarding the issue

[227] *Ibid.*, 286.
[228] I still do not wish to answer the question of whether international courts make law, or more specifically, whether international criminal courts make law, since this would undoubtedly lead to a discussion of the sources of law and the strong text of Article 38 of the ICJ's statute. This is a topic which I reserve for later in one of my other Chapters.

of which interpreting techniques they should have used in their handling of cases.[229] The controversy stems out from the tribunals' mixed mandate and structure, i.e. the fact that they are international courts in both their founding instruments and the substantive law that they were tasked to implement, their technical operation such as staff, funds, immunities etc. and the fact that they are also criminal law tribunals tasked with adjudicating the criminal responsibility of individuals. The potential conflict is clear; what techniques should the tribunals use in their interpretative endeavours when it comes to their own statutes? Should the VCLT rules on treaty interpretation take centre stage or should the tribunals adopt a more domestic law approach to interpretation, one specifically suited to criminal law statutes and their requests for a narrow interpretation?[230]

There is certainly a lot of merit to the issue raised, but regardless of how interesting a problem it presents, this part of the Chapter is not about that. This part of the Chapter is not intended to deal with the question of what *the right approach* to interpretation of the statutes of international criminal tribunals is but of what techniques the *ad hoc* tribunals *did in fact* use in their reasoning. This part of the Chapter is not about the issue of what interpretative approach the *ad hoc* tribunals *should* have taken, but about the actual interpretative approach that they used and how it relates to the their use of sources and their construction or recasting of international criminal law.

2.2.1 What Kind of Tribunals Are We?

[229] A good summary of this debate is found in: Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925 (2008); but also *see*: Beth Van Schaack, Crimen Sine Lege: *Judicial Lawmaking at the Intersection of Law and Morals*, 97 Geo. L. J. 119, (2008); William A. Schabas, *Interpreting the Statutes of the* Ad Hoc *Tribunals*, *in* Lal Chand Vohran, Fasto Pocar, Yvonne Featherstone, Oliver Fourmy, Christine Graham, John Hocking and Nicholas Robson (ed.), MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE, Kluwer Law Interntional, The Hague, 2003.

[230] S*ee*: Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925 (2008), pp. 925-933.

The question is more important than it seems on first glance. The identity that the tribunals had or built for themselves is an important factor in their reasoning. It is this identity that will drive, mostly, the tribunals' choice of techniques regarding interpretation and decision-making.[231] The ICTY for example, was confronted with this question early on in the *Kupreckic* Trial Chamber decision, where it posed for itself the question of what importance should it attach to case law in its legal findings. The relevance of this question can be explained through the answer that it gave; that is that "[t]he value to be assigned to judicial precedents to a very large extent depends on and is closely bound up with the legal nature of the Tribunal, i.e. on whether or not the Tribunal is an international court proper."[232] If the answer to this question is that it is an international court then the value of precedent is that it is not binding and subject to the ICJ's Article 38 and 59 rules regarding the subsidiary nature of judicial decisions.[233]

In fact, the Trial Chamber did confirm that the ICTY, and with it the ICTR since the mechanism of establishment was the same, is an international tribunal proper. It gave three reasons for this conclusion:

> (i) because this was the intent of the Security Council, as expressed in the resolution establishing the Tribunal, (ii) because of the structure and functioning of this Tribunal, as well as the status, privileges and immunities it enjoys under Article 30 of the Statute, and (iii) because it is called upon to apply international law to establish whether serious violations of international humanitarian law have been committed in the territory of the former Yugoslavia.[234]

The third reason is of principle importance for this Chapter, namely the fact that the *ad hoc* tribunals are called upon to apply international law and to punish the most serious violations of international humanitarian law. It is, primarily, international law and its sources that the tribunal is asked to apply[235] and, extending this argument to its logical end, it is the

[231] Generally *see*: *Ibid*.
[232] *Kupreckic* Trial Chamber judgment, para. 538.
[233] *Ibid., para.* 540-542.
[234] *Ibid.*, para. 539.
[235] *Ibid.*

interpretative techniques of international law that would be most suited for the task. Reliance of national law is only incidental; it is only there as evidence of a principle of international law or international criminal law or in the exercise of its incidental jurisdiction.[236] But let me now go briefly into the actual techniques that the *ad hoc* tribunals used in their argumentation.

2.2.2 Interpreting the Statutes

One observer of the *ad hoc* tribunals wrote that it is difficult to make "[…] any general conclusion about an established methodology" of interpretation regarding the tribunals and that "[t]he relative weight of certain principles varies, depending upon the judge."[237] It seems that some judges are more comfortable using the technique offered by the VCLT while others stick to the comfort of the text.[238] This problem of statutory interpretation did surface early on in the operation of the tribunals and one judgment of the ICTY devoted a section of its reasoning to the interpretative techniques that the tribunal should use as aids to their reasoning.[239] It reviewed the canons of construction that are common to both the common law and continental systems in order to stipulate the techniques that it will (or rather has) use(d)

[236] "True, the Tribunal may be well advised to draw upon national law to fill possible *lacunae* in the Statute or in customary international law. For instance, it may have to peruse and rely on national legislation or national judicial decisions with a view to determining the emergence of a general principle of criminal law common to all major systems of the world. Furthermore, the Tribunal may have to apply national law *incidenter tantum*, i.e. in the exercise of its incidental jurisdiction. For instance, in determining whether Article 2 of the Statute (on grave breaches) is applicable, the Tribunal may have to establish whether one of the acts enumerated there has been perpetrated against a person regarded as "protected" under the Fourth Geneva Convention of 1949. To this end it may have to satisfy itself that the person possessed the nationality of a State other than the enemy belligerent or Occupying Power. Clearly, this enquiry may only be carried out on the basis of the relevant national law of the person concerned. The fact remains, however, that the principal body of law the Tribunal is called upon to apply in order to adjudicate the cases brought before it is international law" (footnote omitted), *ibid.*, para. 539.

[237] William A. Schabas, *Interpreting the Statutes of the* Ad Hoc *tribunals*, *in* Lal Chand Vohran, Fasto Pocar, Yvonne Featherstone, Oliver Fourmy, Christine Graham, John Hocking and Nicholas Robson (ed.), MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE, Kluwer Law Interntional, The Hague, 2003, p. 886.

[238] *Ibid.*

[239] *Celebici* Trial Chamber judgment, para. 158-171.

in its deliberations. The conclusion that it reached was interesting and it reflected the broader identity that the *ad hoc* tribunals adopted, i.e. one of an international court proper with a specific mission. This "mission" will guide a lot if not most, of the tribunals' reasoning. It said that

> The International Tribunal is an *ad hoc* international court, established with a specific, limited jurisdiction. It is *sui generis*, with its own appellate structure. The interpretation of the provisions of the Statute and Rules must, therefore, take into consideration the objects of the Statute and the social and political considerations which gave rise to its creation. The kinds of grave violations of international humanitarian law which were the motivating factors for the establishment of the Tribunal continue to occur in many other parts of the world, and continue to exhibit new forms and permutations. *The international community can only come to grips with the hydra-headed elusiveness of human conduct through a reasonable as well as a purposive interpretation of the existing provisions of international customary law.* Thus, the utilisation of the literal, golden and mischief rules of interpretation repays effort. (emphasis added)[240]

I will now show some examples of these techniques and will connect them with the tribunals' use of sources in order to get a clear picture as to the way in which the tribunals constructed a law-making role in international criminal law.

2.2.2.1 Strict Construction of Penal Statutes

The strict construction of penal statutes is not a rule found within the VCLT but is rather drawn from the various national systems of law regarding the construction of criminal provisions by courts.[241] Even though the *ad hoc* tribunals saw themselves as international courts proper and their sources as primarily international law sources, they, nevertheless, found themselves in a vortex of different principles since international criminal law is both an

[240] *Ibid.*, para. 170.
[241] William A. Schabas, *Interpreting the Statutes of the* Ad Hoc *tribunals*, *in* Lal Chand Vohran, Fasto Pocar, Yvonne Featherstone, Oliver Fourmy, Christine Graham, John Hocking and Nicholas Robson (ed.), MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE, Kluwer Law Interntional, The Hague, 2003, p. 852-855.

international law branch, but is also a "penal law regime"[242] and, consequently, laced with principles particular to criminal law.

The strict construction of penal statutes is a consequence of one particular principle of criminal law, namely *in dubio pro reo*, meaning that "[…] any doubt should be resolved in favor of the Defence […]."[243] This principle was also echoed by the ICTR as well, by saying that "[t]he Trial Chamber agrees that if a doubt exists, for a matter of statutory interpretation, that doubt must be interpreted in favour of the accused"[244] and that "[g]iven the presumption of innocence of the accused, and pursuant to the general principles of criminal law, […] the version more favourable to the accused should be upheld."[245]

The Trial Chamber in the *Celebici* case did go into a rather more lengthy discussion on the issue of strict construction of statutes and it is important for this thesis to present a good portion of that discussion *in verbatim*. The discussion takes place under the sub-heading of *Aids to Construction of Criminal Statutes* and it reads:

> 408. To put the meaning of the principle of legality beyond doubt, two important corollaries must be accepted. The first of these is that penal statutes must be strictly construed, this being a general rule which has stood the test of time. Secondly, they must not be given retroactive effect. This is in addition to the well-recognised paramount duty of the judicial interpreter, or judge, to read into the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object. This rule would appear to have been founded on the firm principle that it is for the legislature and not the court or judge to define a crime and prescribe its punishment.
>
> 409. A criminal statute is one in which the legislature intends to have the final result of inflicting suffering upon, or encroaching upon the liberty of, the individual. It is undoubtedly expected that, in such a situation, the intention to do so shall be clearly expressed and without ambiguity. The legislature will not allow such intention to be gathered from doubtful inferences from the words used. It will also not leave its intention to be inferred from unexpressed words. The intention should be manifest.
>
> 410. The rule of strict construction requires that the language of a particular provision shall be construed such that no cases shall be held to fall within it which do

[242] *Kunarac* Trial Chamber judgment, para. 470.
[243] *Prosecutor v. Dusko Tadic, Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence*, Appeals Chamber decision, IT-94-1-A, October 15, 1998, para. 73
[244] *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber judgment, Case No. ICTR-95-1-T, May 21, 1999, para. 103, (hereafter the *Kayishema* judgment).
[245] *Akayesu* Trial Chamber judgment, para. 501.

not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. In the construction of a criminal statute no violence must be done to its language to include people within it who do not ordinarily fall within its express language. The accepted view is that if the legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which should naturally fall within the mischief intended to be prevented, the interpreter is not competent to extend them. The interpreter of a provision can only determine whether the case is within the intention of a criminal statute by construction of the express language of the provision.

411. A strict construction requires that no case shall fall within a penal statute which does not comprise all the elements which, whether morally material or not, are in fact made to constitute the offence as defined by the statute. In other words, a strict construction requires that an offence is made out in accordance with the statute creating it only when all the essential ingredients, as prescribed by the statute, have been established.

412. *It has always been the practice of courts not to fill omissions in legislation when this can be said to have been deliberate. It would seem, however, that where the omission was accidental, it is usual to supply the missing words to give the legislation the meaning intended. The paramount object in the construction of a criminal provision, or any other statute, is to ascertain the legislative intent. The rule of strict construction is not violated by giving the expression its full meaning or the alternative meaning which is more consonant with the legislative intent and best effectuates such intent.*

413. The effect of strict construction of the provisions of a criminal statute is that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of construction fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. This is why ambiguous criminal statutes are to be construed *contra proferentem.* (footnote omitted, emphasis added).[246]

From this, several conclusions can be made but I would like to suggest that for the *ad hoc* tribunals the text of the statutes is the dominant source from which all interpretation should follow. Only when the text of the statute or of the conventions is unclear, can the tribunals proceed with gap-filling in order to fulfil the intent of the legislature.[247] For the sake of argument, one could raise the question of who is the legislature in an international system where there is no central government and where norms are made in a decentralized and, at times, disorganized way.[248] The short answer would be the UN Security Council, and there some credence in that as evidenced by the search for "legislative intent" or "the adoption history" of the ICTY statute through the statements of the members Security Council at the time.

[246] *Celebici* Trial Chamber judgment, para. 408-413.
[247] *Ibid*, para. 412
[248] *See* Chapter 1.

References to the intent of the SC are numerous thought the decisions of the *ad hoc* tribunals, some I have mentioned above.

A discussion presented by Judge Shahabuddeen in his partial dissenting opinion in the Interlocutory Appeal in the *Hadzihasanovic* case[249] presents an illuminating insight into the discussion. The issue arose on the point of whether a new commander can be responsible for the actions of his subordinates before he took over command for which there was no settled jurisprudential answer. For Judge Shahabuddeen this, in and of itself, did not present an obstacle since what was at issue was the existence of a principle and its proper interpretation. His response was that

> There is no question of the tribunal having power to change customary international law, which depends on State practice and *opinio juris*. If State practice and *opinio juris* have thrown up a relevant principle of customary international law, the solution turns on the principle. But that does not bar all forward movement: a principle may need to be interpreted before it is applied. This is illustrated by acceptance by the jurisprudence of the Tribunal that the Tribunal may clarify the elements of a crime. In the process of clarification, the Tribunal has the competence, which any court of law inevitable has, to interpret an established principle of law and to consider whether, as so interpreted, the principle applies to particular situation before it. This is so because a court called upon to apply a principle proceeds on the basis of a finding, express or implied that the principle has a certain meaning, however self-evident that meaning may be. In my view, customary international law in turn proceeds on the basis that, whenever a body is established on the international plane to exercise judicial power, that body corresponds to the central idea of a court as known to States generally; it therefore has competence to interpret a principle of law and to determine whether the particular situation before it falls within the principle as so interpreted. The competence is inseparable from the judicial function; it does not invite to open horizons, but, within disciplined limits, it has to exercised.[250]

It would seem that this is the end of the story when it comes to the interpretative techniques used by the *ad hoc* tribunals. It is not so and that is for a very good reason. The statutes themselves are full of silences; the language is terse, Laconian as one commentator put

[249] *Prosecutor v. Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, Appeals Chamber decision, IT-01-47-AR72, July 16, 2003, (hereafter *Hadzihasanovic* Interlocutory Appeal).
[250] *Partial Dissenting Opinion of Judge Shahabuddeen*, the *Hadzihasanovic* Interlocutory Appeal, para. 9.

it.[251] As I pointed out above, the statute itself may penalize the crime of rape but it in no way defines it. Not even the sources that the Secretary General Report pointed to had a definition of rape and the tribunal had to step in and fill in the gap. The *ad hoc* tribunals had no other choice but to use other techniques of interpretation "to avoid injustice, absurdity, anomaly or contradiction, as clearly not to have been intended by the legislature"[252] and so to fulfil its mandate, its mission. And one of the techniques that found most applicability in its interpretative endeavours was the teleological or purposive approach to the intent of the legislature. And more specifically they found one single purpose to both the statutes and both international humanitarian law and international criminal law.[253] Let us now see what that purpose is.

2.2.2.2 The "Other" Interpretative Techniques – The Vienna Convention Rules on Treaty Interpretation

There is one point that I need to make before I start discussing the tribunals' use of the VCLT rules on treaty interpretation and that is the fact of the difference between the interpretation of the statutes and the interpretation of the conventions that the tribunals are using as sources for the import of norms. For one, the VCLT is specifically tailored with treaties in mind, while the tribunals' statutes are a product of a resolution by the Security Council and, consequently, not a treaty. Therefore, the tribunals' use of the VCLT rules on these specific treaties is, arguably, less controversial than its use on the statutes themselves. Although this

[251] William A. Schabas, *Interpreting the Statutes of the* Ad Hoc *tribunals*, *in* Lal Chand Vohran, Fasto Pocar, Yvonne Featherstone, Oliver Fourmy, Christine Graham, John Hocking and Nicholas Robson (ed.), MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE, Kluwer Law Interntional, The Hague, 2003.
[252] *Celebici* Trial Chamber judgment, para. 162, discussing when it is permitted to depart from the strict construction of statutes.
[253] For more *see* generally: George P. Fletcher and Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. Int'l Crim. Justice 539, (2005); but also *see* Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925 (2008), pp. 933-938.

issue rises important and interesting points for debate, I also must point out that they are not the subject of this thesis. The subject, in relation to the interpretation issue, is how the tribunals used these techniques in their reasoning, and not whether they *should* have used them or whether they used them properly. Consequently, let me now turn to the tribunals' use of the VCLT rules on interpretation and more specifically their use in the construction of judicial definitions/tests.

As I have noted previously in this Chapter, the tribunals have spent some time and many of page space to discussing this very issue. Nevertheless, the identity that the tribunals built for themselves as an international court unavoidably led to the use of the VCLT rules on interpretation as related to the statutes. So what are the VCLT rules?

The VCLT sets out its rules of interpretation in Articles 31-33 and are some of the "most elegantly drafted articles"[254] in the convention. The basic rule is set out in Article 31(1) saying that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[255] This is considered to be the "general *rule* of interpretation" meaning that "[t]he singular noun emphasizes that the article contains only one rule, that set out in paragraph 1."[256] The second and third paragraphs of article 31 follow the logic of the first paragraph and do not create a hierarchy of techniques but rather create one logical progression towards establishing context and the other matters.[257]

As per the general rule in Article 31, the interpretative search should start with the text of the treaty, using its plain and ordinary meaning since it is fair to assume that the text most adequately reflects the intent of the parties. Nevertheless, the ordinary meaning of the text

[254] Anthony Aust, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, Cambridge, 2000, p. 185.
[255] Article 31(1) of the Vienna Convention on the Law of Treaties 1969.
[256] Anthony Aust, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, Cambridge, 2000, pp. 186-187.
[257] *Ibid.*, p. 187.

cannot be determined devoid of its context or inconsistent with the object and the purpose of the treaty. Some commentators argue that the object and purpose of the treaty, since it is so vague and can mean different things to different parties, is usually used to confirm the ordinary and plain interpretation of the text of the treaty.[258]

One of the best examples so far of the tribunals' use of the interpretative techniques set out in the VCLT are presented in the *Tadic Defence Motion* decision and the ICTY's endeavour to give answers to Tadic's challenge of lack of subject matter jurisdiction of the tribunal. When answering the question "does the statute refer only in international armed conflict"[259] the Appeals Chamber used all the techniques available in its VCLT arsenal. It started with the literal interpretation of the statute, then continued with the teleological or purposeful interpretation, (object and purpose) ending up with the logical and systematic interpretation of the statute (providing the context of specific provisions by referencing other provisions within the statute etc.).[260] Needless to say that this is also a rare example of such an extensive use of different techniques to arrive at an answer, even though the Appeals Chamber answered some very important questions along to way to getting to the decision of whether it had subject matter jurisdiction of Tadic's actions. In the following paragraphs, I will refer back to the previous examples of judicially constructed tests to give a clear picture of how the interpretative techniques were used to import norms into the international criminal law system.

Let me first start with the ICTY's construction of the judicial test regarding the existence of an armed conflict and more specifically of the nature of the armed conflict as a pre requisite for jurisdiction for the tribunal. As I said previously in the first part of this Chapter, the ICTY in the *Defence Motion in Tadic* constructed a judicial test regarding the elements

[258] *Ibid.*, p 188 noting that the task of interpretation is "the duty of giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances."
[259] *Tadic Defence Motion* decision, subheading B of heading IV.
[260] *Tadic Defence Motion* decision, para. 71-142.

required for the existence of an armed conflict and it constructed the test using several provisions of the Geneva Conventions. However, several issues followed from that definition, since the Appeals Chamber created a test that fits both internal and international armed conflict. One issue that was high on the agenda of the Appeals Chamber was whether the tribunal only had jurisdiction over crimes committed in international or both international and internal armed conflict. For this, it looked at the text of the statute, the purpose of the Security Council when enacting the Statute and its logical and systematic structure.[261] In terms of the text, the Appeals Chamber shortly noted that Articles 2 and 5 have express provisions that refer to either international or both types of conflict as for Article 3 the conclusion was that it was inconclusive and, therefore, the Chamber proceeded to continue with "consider[ing] the object and the purpose behind the enactment of the statute."[262]

To discover the intent of the Security Council the tribunal referred to several resolutions it adopted regarding the conflict in the former Yugoslavia. In these resolutions, the Security Council condemned the violence but stayed clear of a categorizing the conflict or made ambiguous references that could be interpreted in either way.[263] It concluded that

> [...] the Security Council purposely refrained from classifying the armed conflicts in the former Yugoslavia as either international or internal and, in particular, did not intend to bind the International Tribunal by a classification of the conflicts as international, is borne out by a *reductio ad absurdum* argument. If the Security Council had categorized the conflict as exclusively international and, in addition, had decided to bind the International Tribunal thereby, it would follow that the International Tribunal would have to consider the conflict between Bosnian Serbs and the central authorities of Bosnia-Herzegovina as international. Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as "grave breaches", because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as "protected persons" under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian

[261] *Tadic Defence Motion* decision, para. 71-142.
[262] *Tadic Defense Motion* decision , para. 71.
[263] *Ibid.*, para. 72-75.

> Serbs against Bosnian civilians in their hands would be regarded as "grave breaches", because such civilians would be "protected persons" under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage *vis-à-vis* the central authorities of Bosnia-Herzegovina. This absurdity bears out the fallacy of the argument advanced by the Prosecutor before the Appeals Chamber.[264]

The purpose of the enactment of statute was further elaborated by the statement that

> [...] Contrary to the drafters' apparent indifference to the nature of the underlying conflicts, such an interpretation [of limiting the jurisdiction to international conflicts only] would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict. To illustrate, the Security Council has repeatedly condemned the wanton devastation and destruction of property, which is explicitly punishable only under Articles 2 and 3 of the Statute. Appellant maintains that these Articles apply only to international armed conflicts. However, it would have been illogical for the drafters of the Statute to confer on the International Tribunal the competence to adjudicate the very conduct about which they were concerned, only in the event that the context was an international conflict, when they knew that the conflicts at issue in the former Yugoslavia could have been classified, at varying times and places, as internal, international, or both.
>
> Thus, the Security Council's object in enacting the Statute - to prosecute and punish persons responsible for certain condemned acts being committed in a conflict understood to contain both internal and international aspects - suggests that the Security Council intended that, to the extent possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts.[265]

The discussion in the decision regarding the purpose of the enactment of the statute is interesting for this thesis. The tribunal found that the intent of the drafters was to punish atrocities that were committed on the territory of the former Yugoslavia and with that to protect individuals caught up in the conflict and to deter future atrocities.[266] The purpose of protecting the (future)victims and extending the protection of international humanitarian law to as many categories of individuals is a recurring theme of the tribunals. Allow me to linger a bit more on this theme in the following examples.

[264] *Ibid.*, para. 76.
[265] *Ibid.*, para. 78.
[266] *See ibid.*, para. 72 "In adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region."

A very good example of how the tribunals used the object and purpose technique, in constructing both the statutes and various international instruments that they refer to, is the second part of the discussion regarding the first ground of the prosecutor's cross appeal in the *Tadic Case*. The issue was regarding the question of whether the Bosnian Serb victims could be considered as protected persons under the Geneva Conventions. In the previous part, I presented the discussion regarding the Appeals Chamber's use of case law, namely the ICJ's *Nicaragua* judgment.[267] The second part, after establishing the fact that the conflict in Bosnia at the relevant time was of an international character, was dedicated to establishing the status of the victims as "protected persons" under Article 4 of the Geneva (IV) Convention of 1949.

The Appeals Chamber faced a serious problem. Article 4 of the Fourth Geneva Convention is somewhat unambiguous regarding the issue of who is to be considered a protected person. For the Convention, only persons "who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power *of which they are not nationals*"[268] can be considered protected persons. And, since the Bosnian Serbs were granted citizenship by Bosnia and Herzegovina, it would have been hard to argue that they are protected persons, taking the literal interpretation of Article 4. Clearly, the Appeals Chamber had to find a way out of this predicament since the Trial Chamber in the same case disregarded the applicability of Article 2 and said that

> […] since Article 2 of the Statute is applicable only to acts committed against "protected persons" within the meaning of the Geneva Conventions, and since it cannot be said that any of the victims, all of whom were civilians, were at any relevant time in the hands of a party to the conflict of which they were not nationals, the accused must be found not guilty of the counts which rely upon that Article […][269]

Another Trial Chamber in the *Celebici* judgment came to the opposite but very confusing decision regarding the same issue. It did not agree with the majority ruling in the *Tadic*

[267] *See* the discussion related to footnote 136 and the accompanying paragraphs.
[268] Article 4(1) of the Geneva (IV) Convention relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (emphasis added).
[269] *Tadic* Trial Chamber judgment, para. 608.

Trial Chamber judgment and did consider that the Bosnian Serbs were to be considered protected persons under the convention. Nevertheless, the justification that it used can only be described as messy, since it did not answer the question of the applicability of the *Nicaragua* effective control test, nor did it answer satisfactory the issue of the nationality of the Bosnian Serbs.[270] It used the "effective link" argumentation regarding nationality given by the ICJ in its *Nottebohm case*[271] and the "agency" approach, thus evading the *Nicaragua* line of reasoning, in order to justify its findings. The reasons given by the Trial Chamber were that

> […] The provisions of domestic legislation on citizenship in a situation of violent State succession cannot be determinative of the protected status of persons caught up in conflicts which erisue from such events. *The Commentary to the Fourth Geneva Convention charges us not to forget that "the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests" and thus it is the view of this Trial Chamber that their protections should be applied to as broad a category of persons as possible.* It would, indeed, be contrary to the *intention* of the Security Council, which was concerned with effectively addressing a situation that it had determined to be a threat to international peace and security, and with ending the suffering of all those caught up in the conflict, for the International Tribunal to deny the application of the Fourth Geneva Convention to any particular group of persons solely on the basis of their citizenship status under domestic law. (footnotes omitted, emphasis added)[272]

Further on, one of the next paragraphs is even more illuminative of the evolving identity that the tribunals are building for themselves. The Trial Chamber went on to say that

> This interpretation of the Convention is fully in accordance with the development of the human rights doctrine which has been increasing in force since the middle of this century. It would be incongruous with the whole concept of human rights, which protect individuals from the excesses of their own governments, to rigidly apply the nationality requirement of article 4, that was apparently inserted to prevent interference in a State's relations with its own nationals. (footnote omitted)[273]

The Appeals Chamber in the *Tadic* case came to a more elegant solution than the confusing justification the *Celebici* Trial Chamber came up with, albeit a rather more drastic one. As I said earlier, the Appeals Chamber in the *Tadic* case decided to split the issue of Article 2

[270] *See*, *Celebici* Trial Chamber Judgment, para. 244-266.
[271] *Nottebohm Case (Liechtenstein v. Guatemala) (second phase)*, Judgment of April 6th, 1955 I.C.J. Reports 1955, p. 4.
[272] *Celebici* Trial Chamber Judgment, para. 263.
[273] *Ibid.*, para. 266.

applicability to two cumulative questions: a) the nature of the conflict and b) the status of the victim.[274] While deciding the first part of the question, the Appeals Chamber effectively overruled the ICJ's *Nicaragua* decision regarding state responsibility and international armed conflict for the purposes of the *ad hoc* tribunals.[275]

In the second part of its discussion on the issue of Article 2 applicability, it had to decide whether the Bosnian Serbs were protected persons under the Geneva Conventions. It took a very different path than the one taken by the other Trial Chambers in that, in relation to the issue of protected persons, it stayed firmly on the ground of the Geneva Conventions and disregarded the issue of effective link and nationality. What it argued was that the requirement of nationality was not the cornerstone of protection in the Geneva Conventions but rather more, whether the persons in question could have been expected to owe allegiance to the party of the conflict. It showed the examples of stateless persons in the power of one belligerent,[276] and of refuges in order to come up with the category of people who do not have the benefit of normal diplomatic protection.[277] It found that "those nationals are not "protected persons" as long as they benefit from the normal diplomatic protection of their State; when they lose it or in any event do not enjoy it, the Convention automatically grants them the status of 'protected persons'."[278] The reasons for this switch was elegantly justified by saying that

> This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's

[274] *Tadic* Appeal Chamber Judgment, para. 80.
[275] *Ibid.*, para. 83-145.
[276] *Ibid.*, para. 164,
[277] *Ibid.*, para. 165.
[278] *Ibid.*

> *object and purpose* suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.[279]

This passage of the judgment is telling in the sense that it gives a good example of how the tribunals reason when it comes to the purpose of the statute or the Geneva Conventions or international humanitarian law in general. First, the Appeals Chamber presents the outcome in such a way that it implies that the Chamber is doing nothing more than making a logical extension of the intent of the drafters of the Geneva Conventions by making the claim that the Conventions were designed to offer the broadest protection to individuals who are caught in the hostilities; that the logic of the Convention suggests that their correct interpretation would be better served if it concentrated on substantive links rather than formal bonds.

Second, the justification that the Appeals Chamber implicitly gave is that the step that they are taking is nothing out of the ordinary that the drafters of the Conventions would not take have they been aware of the path of evolution of the nature of conflicts into interethnic ones in the future. And most importantly, and this is taken together with the judgments discussed above, it shows the identity that the tribunals are starting to develop, one that is geared toward offering the best protection to individuals not unlike human rights tribunals.[280] In the following paragraphs, I will give a few more examples of this development.

In the *Kupreckic* Trial Chamber judgment the tribunal was faced with a defence that was implicitly raised by the defendants regarding the issue of reciprocity in international humanitarian law. The defendants claimed that because similar atrocities were committed by the opposing belligerent, under the principle of reciprocity or legitimate reprisals, they were excused from criminal responsibility.[281] The Trial Chamber rejected both lines of arguments

[279] *Ibid.*, para. 166.
[280] Generally *see* Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925 (2008).
[281] "This argument may amount to saying that breaches of international humanitarian law, being committed by the enemy, justify similar breaches by a belligerent. Or it may amount to saying that such breaches, having been perpetrated by the adversary, legitimise similar breaches by a belligerent in response to, or in retaliation for,

relying on the progressive development of international humanitarian law as different from a bundle of bilateral obligations that could be secured by the principle of reciprocity. What it said that because of "[t]he absolute nature of most obligations imposed by rules of international humanitarian law reflects the progressive trend towards the so-called 'humanisation' of international legal obligations,"[282] that line of argument cannot stand. It went on to say that

> The underpinning of this shift was that it became clear to States that norms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals *qua* human beings. Unlike other international norms, such as those of commercial treaties which can legitimately be based on the protection of reciprocal interests of States, compliance with humanitarian rules could not be made dependent on a reciprocal or corresponding performance of these obligations by other States. This trend marks the translation into legal norms of the "categorical imperative" formulated by Kant in the field of morals: one ought to fulfil an obligation regardless of whether others comply with it or disregard it.[283]

When it came to the issue of belligerent reprisals, the Trial Chamber had to answer the argument that since reprisals were a legitimate way in international law to secure the performance of obligations by one party from the other and that they preclude responsibility the defendants were not liable for the acts that they committed. The Trial Chamber, in rejecting this argument, relied, as the tribunals have in several times before, on the nature of humanitarian law and consequently, international criminal law and its relations to international human rights law. What the Trial Chamber said was that

> […] It cannot be denied that reprisals against civilians are inherently a barbarous means of seeking compliance with international law. The most blatant reason for the universal revulsion that usually accompanies reprisals is that they may not only be arbitrary but are also not directed specifically at the individual authors of the initial violation. […]
>
> In addition, the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights. It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred. As a result belligerent re-

such violations by the enemy. Clearly, this second approach to a large extent coincides with the doctrine of reprisals, and is accordingly assessed below. Here the Trial Chamber will confine itself to briefly discussing the first meaning of the principle at issue." *Kupreckic* Trial Chamber judgment, para. 515.

[282] *Ibid.*, para. 518.

[283] *Ibid.*

> prisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts.[284]

The theme of the correlation of the basic premises of international human rights law with international humanitarian and international criminal law is present in many of the early decisions of the tribunals. In the first part of this Chapter, I elaborated on some points that the tribunals made regarding the caution in importing norms from other branches of international law, including international human rights law. The ICTY for example, took great pains to present the two branches, international human rights on one side and international humanitarian and international criminal law on the other, as having a somewhat different focus, one on state responsibility the others primarily on individual responsibility.[285]

Nevertheless, in practically the same judgments, the ICTY also emphasized their similarity of purpose. For instance, the ICTY when discussing when discussing the offences of inhumane treatment in the *Celebici* Trial Chamber judgement, it made several references to the Pictet Commentaries to the Geneva Conventions, emphasizing the protection of human dignity underpinning their provisions. Quoting the Commentaries it said that

> [...] article [27] is the "basis of the Convention, proclaiming ... the principles upon which the whole of the "Geneva Law' is founded" being the "principle of respect for the human person and the inviolable character of the basic rights of individual men and women." The Commentary makes the fundamental significance of humane treatment clear by stating that it is "in truth the *leitmotiv* of the four Geneva Conventions" […]
>
> ... The purpose of this [Geneva IV] Convention is simply to define the correct way to behave towards a human being, who himself wishes to receive humane treatment and who may, therefore, also give it to his fellow human beings. (footnotes omitted)[286]

The theme of human dignity was also echoed in the ICTY's Trial Chamber Judgment in the *Aleksovski* case. When discussing the crimes of outrages upon personal under Article 3 of the ICTY Statute as well as common Article 3 of the Geneva Conventions, it underlined

[284] *Ibid,* para. 528-529.
[285] *See* the discussion presented at Chapter II, footnotes 68-70 and the accompanying text.
[286] *Celebici* Trial Chamber judgment, para. 524.

the singularity of purpose that both international human rights law and international humanitarian law share. It said that

> An outrage upon personal dignity within Article 3 of the Statute is a *species* of inhuman treatment that is deplorable, occasioning more serious suffering than most prohibited acts falling within the *genus*. It is unquestionable that the prohibition of acts constituting outrages upon personal dignity safeguards an important value. *Indeed, it is difficult to conceive of a more important value than that of respect for the human personality. It can be said that the entire edifice of international human rights law, and of the evolution of international humanitarian law, rests on this founding principle.* Protection of the individual from inhuman treatment certainly is a basic principle referred to in the Universal Declaration of Human Rights of 1948 (Article 5), and also finds expression in prohibitions contained in regional and international human rights instruments, culminating in the General Assembly's adoption by consensus of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 10 December 1984. (footnotes omitted, emphasis added)[287]

The shared purpose between international human rights law, international humanitarian law and international criminal law is best put by the ICTYs judgment in the *Furundjija* Trial Chamber judgment. In the discussion regarding the definition of rape, the Trial Chamber was faced with the question of whether forced oral penetration could be considered as rape under the statute. After importing the definition by reviewing national legislation it presented, what in its view, was the ultimate argument, the aim of protecting human dignity inherent in international humanitarian law. It said that

> [...] the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. 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. 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.[288]

[287] *Aleksovski* Trial Chamber judgment, para. 54.
[288] *Furundzija* Trial Chamber judgment, para. 183.

The sub-heading of this part of the thesis is misleadingly titled *The Vienna Convention Rules on Treaty Interpretation*. It is misleading in the sense that it prepares the reader to expect a discussion regarding the interpretative rules of the VCLT and finds that this is not the case. But that is just one of the points that I want to make regarding the situation in which the tribunals found themselves. They were faced with Laconian (Spartan) statutes, stingy in their use of definitions and somewhat lacking in their guidance regarding the crimes that they sought to punish. Faced with such difficulties the tribunals used all of the techniques at their disposal, most of the times in a messy way, to reach to a conclusion, a justification, for their judgments.

Along the way, they also managed to build or co-opt an identity for themselves. At this point I would like to point to a very perceptive article written by Darryl Robinson, *The Identity Crisis of International Criminal Law*,[289] which discusses this interplay between the normative identity that the *ad hoc* tribunals co-opted from the human rights regime and the interpretative outcomes that they arrived at. Darryl Robinson starts with a perceived tension between the widespread narrative of international criminal law (ICL), i.e. that "ICL adheres to fundamental principles of criminal law, and that it does so in an exemplary manner"[290] and the frequent departures by international criminal law from these same principles. In his paper, he gives examples of these departures through the issue of command responsibility focusing on three principles of criminal law: a) the principle of personal culpability ("namely that persons are held responsible only for their own conduct"),[291] b) the principle of legality (*nullum crimen sine lege*)[292] and c) the fair labeling principle ("the label of the offence should fairly

[289] Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925 (2008).
[290] *Ibid*., p. 926.
[291] *Ibid*., p. 926
[292] *Ibid*., p. 926.

express and signal the wrongdoing of the accused, so that the stigma of conviction corresponds to the wrongfulness of the act)."[293]

After showing ample examples of the mostly *ad hoc* tribunals' departure of these principles related to the issue of command responsibility, he comes to the conclusions that "human rights and humanitarian interpretive techniques are replicated in ICL, fostering broad, victim-focused, dynamic interpretations;"[294] that

> ICL judges, practitioners, and scholars also conflate substantive norms of ICL with those of human rights and humanitarian law, by importing the familiar content from those domains with the confidence that they are simply following precedent, while overlooking the fact that those 'precedents' come from non-criminal domains with structures that focus on improving systems rather than on individual culpability;[295]

and that "ideological assumptions about sovereignty and progress, drawn from human rights and humanitarian law, can lead ICL practitioners to assume that the broadest norms are the most progressive, and that any narrowing must be due to self-interested sovereignty[...]."[296]

His conclusions do not differ very much from my own, when it comes to the approach that the *ad hoc* tribunals have used in their handling of the cases. As I have shown, an overwhelming number of norms and definitions in international criminal law have been adopted to serve the purpose of international criminal law. However, these norms have not been adopted wholeheartedly without modification but have rather been adapted to fit the international criminal law regime using "rules of import". Furthermore, the paper presupposes that there were pre-existing, relatively clear norms and definitions "out there" in international

[293] Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925 (2008), p. 927.
[294] "First, human rights and humanitarian interpretive techniques are replicated in ICL, fostering broad, victim-focused, dynamic interpretations, a tendency which not only conflicts with the principle of legality but also encourages exuberant interpretations that contravene culpability and fair labeling."*Ibid.*, p. 961.
[295] *Ibid.*
[296] "Third, ideological assumptions about sovereignty and progress, drawn from human rights and humanitarian law, can lead ICL practitioners to assume that the broadest norms are the most progressive, and that any narrowing must be due to self-interested sovereignty. The easy conclusions generated by assumptions about sovereignty can forestall important inquiries into compliance with fundamental principles.[296] *Ibid.*

criminal law prior to the adoption of the *ad hoc* statutes and that, somehow, the international criminal tribunals managed to extend them due to their newly built/co-opted identity.

It is at this point that I would like to disagree. It is not that the *ad hoc* tribunals extended the protection of victims in times of conflict or grave violations of human rights on the expense of the perpetrators thanks to a human rights identity for this would presuppose the prior existence of clear, identifiable norms at the time of the adoption of the *ad hoc's* statutes. It is rather more the absence of relatively precise norms and definition (just think of the lack of definitions for rape, torture, inhumane acts, genocidal intent, non-international armed conflict, etc.) that forced the *ad hoc* tribunals to be such open and innovative creators of norms. The identity that the international criminal tribunals built/co-opted for themselves determined the trajectory that this norm creation would take, nevertheless, it was not the main drive behind this norm creation.[297] It is now time to see how the different pieces of the tribunals' self constructed system of reasoning and decision rendering fit together to give a clear picture of the tribunals' role in international law-making.

2.3 Conclusion – A Snapshot of a Judicial Realm

The Oxford Companion to International Criminal Justice in its discussion about sources of international criminal law concluded that, at the moment, judicial precedents are undoubtedly part of the sources of international criminal law.[298] This is an extraordinary claim, one that flies squarely at the face of Article 38 sources of international law. Remarkably, the *Companion* is relatively scarce in explaining that conclusion. For one thing, the *ad*

[297] Nevertheless, I do agree that extending the protection of victims in times of conflicts also comes at the expense of the perpetrators increased mode of liability, which can go against the principle of legality. However, given the acts with which the perpetrators were tried and convicted for, it would somehow be unthinkable that they or at least a reasonable person would find them permissible under any law.

[298] Dapo Akende, *Sources of International Criminal Law*, in Antonio Cassese General Ed., The Oxford Companion to International Criminal Justice, OUP, Oxford, 2009, p. 53.

hoc tribunals have constantly denied that their decisions have relayed on any type of doctrine of precedent. Several judgments have said so unequivocally in their reasoning.[299] Therefore, what would be the argument that now precedent and the doctrine of *stare decisis* has become the norm in international criminal law? Well, we have the pieces of the puzzle presented in the previous two Chapters and it is now time to put them all together to see how they fit.

I started my analysis in this Chapter with the notion of the import of norms from other branches of international law or even from national law. When the *ad hoc* tribunals were faced with overwhelming silences in their statutes and the sources governing international humanitarian law, they were forced to look elsewhere and to import the norms into international criminal law. Nevertheless, they were also aware that international criminal law and the other branches of international law and especially national law, had a different structure. One was an international penal law regime, the others were international regimes dealing mostly with the actions of states, or as national law, had a completely different foundation and justification to them.[300] Consequently, they had to be careful when importing norms from elsewhere and had to modify these norms so as to fit the structural nature of international criminal law.

The *ad hoc* tribunals approached the idea of import of norms very carefully being fully aware of the specifics of international criminal law relative to the other branches of law. Consequently, they created a set of "rules of import" that were applicable dependant on the fact of whether it was a case of international treaty, national legislation or judicial decisions, both national and international. These rules of import were designed around the principles of international criminal law and specifically the principles of individual responsibility, some-

[299] *See Aleksovski* Appeals Chamber judgment, para. 92-115; *Kupreckic* Trial Chamber Judgment, para. 537-542.

[300] Although recently and argument has been put forward that there is a far greater difference between national public and private law than national public (constitutional) law and international law; for more *see* Jack Goldsmith and Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 Harv. L. Rev. 1791 (2009).

thing very different from other "normal" branches of international law. With these rules, the tribunals were able to legitimize their import of norms/definitions from other branches of international law and modify them so as to satisfy the basic principles of international criminal law as a penal law regime.

One form that the modification of these norms took was that of the judicial tests/definitions. Judicial test, or the test method as it has been called, is a form of judicial reasoning. It is a way of constructing the meaning of specific constitutional clauses or statutory provisions in the reasoning of judges.[301] The judicial tests' "fundamental effect is the displacement of apparently controlling, nonjudicial, primary texts. This displacement correspondingly installs specific judicial language as the controlling legal text. The Test Method thus represents a transition from nonjudicial to judicial text."[302] Consequently, the test becomes the legal text that controls later decisions. The following judgments simply refer to the test and not the tribunals' statutes, or the Geneva conventions or any other sources. Even before the *Aleksovski* Appeals Chamber judgment, where the ICTY specifically decided that Trial Chambers should follow the Appeals Chamber judgments and that future Appeals Chamber should not depart from previous Appeals Chamber judgments without good reason,[303] the Trial Chambers referenced previous judgments. For instance, the *Tadic* definition of armed conflict became the *Tadic* test for other Trail Chambers before the *Aleksovski* Appeals Chamber judgment was rendered.

The construction of judicial tests by the tribunals allows for two things: one, the presentation by the tribunals that their decisions are based on nothing more than the text of the statutes systematized in steps that have to be taken in order to arrive at the correct outcome

[301] *See* Mitchel de S.-O.-Lasser, *"Lit. Theory" Put to the Test: A comparative Literary Analysis of American Judicial Tests and French judicial Discourse*, 111 Harv. L. Rev. 689 (1998); Mitchel de S.-O.-Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, Oxford University Press, Oxford, 2004, pp. 62-102.
[302] Mitchel de S.-O.-Lasser, *"Lit. Theory" Put to the Test: A comparative Literary Analysis of American Judicial Tests and French judicial Discourse*, 111 Harv. L. Rev. 689 (1998) p. 702.
[303] *Aleksovski* Appeals Chamber judgment, para. 92-115.

(i.e. the prongs/parts of the test). The consequence of this is that the test/definition becomes controlling in the future judgments and it is the tests/definitions that are followed. In a way, it formalizes the decision making of the Chambers and allows for predictability and stability of the specific area of law that the test/definition controls as if the decisions themselves are direct and logical consequence of the text of the statute and not a judicial construction.[304] Judicial tests would lose their sense in a system where every judicial decision is self-standing and is not binding to future courts; and where future decisions are not obligated to adopt the reasoning of previous judgments. Judicial tests would not make much sense in a system that does not follow the doctrine of precedent.

Furthermore, the judicial test/definition is an excellent tool in the judge's toolkit for justifying their reasoning. In his latest book, *The Strange Alchemy of Life and Law*, Judge Albie Sachc gives and intimate account of his decision making process.[305] In his chapter, *Tock-Tick: The Working of a Judicial Mind*, he explains how he, and in his experience most other judges, come to their decisions. The process that he describes is a somewhat messy endeavour and it never reflects the ordered and structured shape that it is presented in in his judgments. He explains that coming to a solution in a case is done in almost an intuitive way and from that, the justification process starts.[306] What we see in a judicial decision is the justification of the judicial intuitive reasoning and it is presented as if the decision process itself was a structured and organized process with specific steps along the way, each one following in a logical succession from the previous one.

The tribunals' use of statements is a good example of this legitimization process. In a few cases the statements of officials of governments or international organizations were used as a sources of justification for the tribunals specific interpretation, i.e. just a part of discov-

[304] *See* Mitchel de S.-O.-Lasser, *"Lit. Theory" Put to the Test: A comparative Literary Analysis of American Judicial Tests and French judicial Discourse*, 111 Harv. L. Rev. 689 (1998), pp. 718-724.
[305] Albie Sachs, THE STRANGE ALCHEMY OF LIFE AND LAW, OUP, Oxford, 2009, pp. 47-59.
[306] *Ibid*., pp. 48-54.

ery process of the right interpretation to the statute. Sometimes these same statements were disregarded, written off because they were not in compliance with the specific text of the statutes or because they did not fit in with the rest of the material sources that the tribunals were using.

This messy use of statements is a window to this *post hoc* process of justification, of fitting in the different, sometimes conflicting, pieces of an interpretative puzzle into a coherent, understandable and rational judicial decision. The use of as many material sources as possible from conventions, resolutions, cases or national legislation only strengthens the foothold that a judge is trying to rest his decision on. I will go into more detail in Chapter IV which is dedicated to the legitimacy of judicial decisions in international criminal law and how the search for legitimization of the necessary gap filling and expansion of international criminal law resulted in the adoption of a specific judicial discourse and in the adoption of the doctrine of formally binding precedent. For now, let me continue with my argument that there is a doctrine of formally binding precedent.

The judicial test is perfectly suited for this type of deliberative process. It presents an opportunity for organizing the discussion in a judgment in a structured way where a judge starts from a test, or constructing a test and then proceeds in fitting the factual patterns within the framework of the test. In this way, the judicial reasoning seems structured, logical, and the deliberative process seems as if it follows in a succession of steps, one step after another, in a predictable, logical manner. But probably the most important contribution of the judicial test/definition is that it allows for the illusion of predictability. After the first initial shock of the construction of the test, later Trial and Appeals Chamber judgments accept the test/definition as controlling the legal issue at hand and start using it, satisfying what the

Aleksovski Appeals Chamber called "the need for consistency, certainty and predictability."[307]

Furthermore, the use of judicial tests/definitions allows for another type of judicial discourse, one of intent, purpose or policy of international criminal law and humanitarian law. A judicial test/definition, once constructed, is not set in stone. It can be, and often is, changed by later Trial or Appeals Chamber judgments. Just think of the test/definition of rape in international criminal law. It first started with the ICTR's *Akayesu* Trial Chamber judgment, was reviewed and modified by the *Furundzija* Trial Chamber judgment only to be later modified further by the *Kunarac* Trial Chamber, adding or changing an element or prong of the definition. The clear reason for this was that the tests/definitions proved themselves unworkable in some part of their steps; they were either too lose, too liberal or they just did not fit the factual situation that was established by the Trial Chambers. They had to be changed.

Moreover, the way in which they were changed is important for this thesis. The *ad hoc* tribunals used a very specific tool in the modification of these tests/definitions. What they used was the language of intent, of purpose, of the need for reconciling the texts of the statutes and other sources with the lofty ideals of humanitarianism, protection of human dignity, of the protection of the victims of war.[308] This gives us the second idea of what the law is suppose to achieve, of what the main attributes of a system of law is, at least in the eyes of the judges of the *ad hoc* tribunals and that is its ability to serve justice, to achieve justice. In the words of the ICTY, the purpose of prosecuting "persons responsible for serious violations of international humanitarian law" is best served by "an approach which, while recognising the need for certainty, stability and predictability in criminal law, also recognises that there may be instances in which the strict, absolute application of that principle may lead to injus-

[307] *Aleksovski* Appeals Chamber judgment, para. 97.
[308] *See* generally Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925 (2008).

tice."[309] The reasons that an Appeals Chamber may depart from its previously established precedent are the facts that "the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been 'wrongly decided, usually because the judge or judges were ill-informed about the applicable law.'" (footnote omitted).[310]

With this we have the two main elements of a doctrine of *stare decisis*. The first element being the rule which specifies that, in the interest of legal certainty and predictability the reasoning of previous judgments should be followed. The second element being that in the interests of justice, Appeals Chambers alone can depart from established precedent, provided that certain rules are followed. However, the irony of it all is that even this most basic constitutional principle of Common Law systems, not unlike in the Common Law systems themselves, is a judicial construction. The doctrine of *stare decisis* was formalized by the *ad hoc* tribunals in the *Aleksovski* Appeals Chamber judgment and a practice that was becoming common in the international judiciary, but debated by scholars, became the norm in international criminal law.

Moreover, there is good evidence to believe that in *the view of the judges* of the *ad hoc* tribunals, international law is a precedent based system, even though that is firmly denied by the very same reasoning in several cases, to which I pointed to above. The reason why this suspicion arises is because of the fact of the way the *ad hoc* tribunals used "foreign" cases. One just has to recall the great lengths that the *Tadic* Appeals Chamber took to show that the ICJ's *Nicaragua* effective control test was bad law and that the ICJ did not follow the correct line of precedent established by previous cases. In a sense, the Appeals Chamber *overruled* the ICJ's decision in that specific part and substituted it with its own overall control test, a

[309] *Aleksovski* Appeals Chamber judgment, para. 101.
[310] *Ibid*, para. 108.

test that has gained some traction since.[311] The ICTY went so far as to create three different tiers of cases dependant on their reliability, taking great pains to distinguish cases that did not support its argumentation on various different legal grounds never once mentioning their non-binding character as a reason for that distinction or exclusion. As I said, there is a strong argument to be made for this claim. Nevertheless, the only certain claim that can be made is that a system of binding precedent does exist in international criminal law with its own rules of overruling badly settled or old precedents.

Before I finish the Odyssey of this Chapter, I would like to make a couple of caveats. The point that I am trying to make here is not that the *ad hoc* tribunals "made law" through the constructing judicial tests/definitions. Although I have used the test method extensively to show the instances where the *ad hoc* tribunals have created law and modified the law, this is not the only way in which their law making activity was carried out. Quite the contrary. The law making activity of the *ad hoc* tribunals is not achieved only through judicially constructed tests. Nevertheless, the test method is an excellent example of the way that the tribunals used the terse and sometimes outdated sources that they were given. It is also an excellent example of the workings of the judicial mind, the confluence of formality, certainty and predictability in which the justification can be moulded, and the need for intuitive seeking of justice justified by the object, purpose, intent behind the legal text.

Second, it is not my argument that the specific identity that the *ad hoc* tribunals adopted was the main drive in the unavoidability of judicial law-making. The identity of human rights protection, of humanitarian goals is not the reason for the vast expansion of international criminal law by the *ad hoc* tribunals. Rather more, it is a better indicator of the trajectory of that expansion, towards more protection of victims and civilians, towards more individualization of international law, rather than the perpetuation of the centrality of states.

[311] *See* Antonio Cassese, *The* Nicaragua *and* Tadic *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 Eur. J. Int'l L. 649 (2007), pp. 655-663.

That trajectory could have been different. For instance, it could have been less drastic following the principle of strict construction of penal statutes and thereby transferring the responsibility of legal expansion back to states. It could have taken an approach that is more favourable to states, or even more drastically, to rich states – their primary sponsors – by constructing the main principles of humanitarian law in such a way as to give advantages to modern, technically advanced militaries. But the identity of victim protection, of humanization of international law and conflicts led the development of international criminal law in a specific direction, different from the various other alternatives before it.

In the final Chapter of this thesis, I will give and explanation of why the *ad hoc* tribunals have taken on a path of expansion of international criminal and international humanitarian law and why they have chosen a specific mode of argumentation and a specific mode of justification cantered around the judicial decision. This explanation will deal with the specific system in which these tribunals operated the system of international law and sovereign and equal states. In short they could not have but taken this specific step of judicial expansion and of judicial precedents. But first let me shortly explore whether the legal expansion that the *ad hoc* tribunals created is accepted and by whom in my next Chapter.

CHAPTER III – LAW ONLY FOR THE AD HOCS?: ACCEPTANCE OF THE JURISPRUDENCE OF THE AD HOC TRIBUNALS BY THE OTHER ACTORS

3.1 WHERE TO LOOK FOR THE ACCEPTANCE?

In my previous Chapter, I showed that, because of the Laconic language of the statutes of the *ad hoc* tribunals, the relative lack of international jurisprudence in international criminal law and the identity that the *ad hoc* tribunals built for themselves, these tribunals were forced by necessity to construct a precedent based judicial system. This precedent based judicial system is certainly accepted within the self-contained[1] systems of these tribunals.[2] Nevertheless, it is important for this thesis, and especially for the inquiry into the *ad hoc* tribunals' legitimization methods, to show whether or not the solutions that the *ad hoc* tribunals reached have been accepted as "law" governing the specific legal area or problem.

From a methodological point of view, several questions arise namely, where to look for this acceptance; who are the actors that need to accept the jurisprudence of the *ad hoc* tribunals; how far should this search go and where should it stop? There could be several answers to these questions. In relation to where to look or who to look at there are at least three actors that come to mind: scholars, other international courts and bodies and states. There are good reasons for including all of these actors into the discussion. The inclusion of the acceptance of states of the jurisprudence of the *ad hoc* tribunals is rather obvious given the meta-narrative of the centrality of states in international law and international relations.

[1] The reference to self-contained court systems is made by none other than the ICTY itself in its very first decision, the *Tadic Defence Motion* decision; "A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour." *Ibid.*, para. 11.

[2] See *Aleksovski* Appeals Chamber judgment, para. 97-107.

Scholars are also an obvious choice least of all because they are the other subsidiary source under Article 38(1) of the statute of the International Court of Justice. Scholars also have a vested interest in discussing the logical consistency of the jurisprudence of the *ad hoc* tribunals. At the end of the day, it is what scholars do. Therefore, it is my contention that the simple use of the jurisprudence of the *ad hoc* tribunals in the discussion of scholars will not be enough for a convincing proof that their jurisprudence has been accepted "as law", but rather its inclusion and transformation into doctrine and doctrinal text that will matter more at this point.

The reason is simple, scholars like nothing more than to debate the finer points of legal jurisprudence, on whether certain judicial decisions match to the certain perceptions of what "the law is" or should be. This by itself does not mean that scholars accept a certain jurisprudential outcome by a given tribunal. Quite the contrary, they may passionately disagree with it. However, once something is transformed into a doctrinal text then we can say that there is a larger consensus within the scholarly community on the acceptability of that specific jurisprudential interpretation.[3] Consequently, in this Chapter, I will concentrate more on doctrinal, text-book style, scholarly work rather than scholarly work that debates the different philosophical approaches and difficulties of interpretation in international criminal law.

To look at the acceptance of other international tribunals somehow seems very natural, simply because as lawyers we are trained to care about what courts say. But if we take the *obiter dictum* in the *Tadic Defence Motion* decision seriously, that "every tribunal is a self-contained system (unless otherwise provided)"[4] then looking for acceptance by other international tribunals does not really make much sense since the decisions will only, in the best

[3] The Oxford English Dictionary has several explanations on the word "doctrine, ***n***. as 1) the action of teaching or instructing; […] 2) that which is taught a) in the most general sense: Instruction, teaching; a body of instruction or teaching; b) *esp. that which is taught or laid down as true concerning a particular subject or department of knowledge*, as religion, politics, science, etc,; a belief, theoretical opinion, a dogma, tenet …, " as a verb it has the meaning of "doctrine, ***v***. **a.** To teach or instruct (a person); **b.** To teach, give instruction in (a science, etc.)," J.A. Simpson and E.S.C. Weiner (eds.), OXFORD ENGLISH DICTIONARY, 2nd edn., OUP, 1989.
[4] *Tadic Defence Motion* decision, para. 11.

case scenario, be valid within the self-contained system anyway. Furthermore, if we stick to the meta-narrative of international law, that judicial decisions do not have precedential value, that they are only legally binding between the parties to the dispute and only for that specific case and that specific issue, then looking at whether other international courts use the judicial solutions of the *ad hoc* tribunals does not add much to the discussion.

However, part of the point of this thesis is that, at least when it comes to the international criminal law, the meta-narrative of international law and the role that it ascribes to courts does not quite fit. As I have shown in the previous chapters, international tribunals do look at and cite the judgments of other tribunals, even ones outside of their narrow branch of law. Several commentators have noted the almost exponential rise in legalized dispute settlements, and especially in the rise of "fully fledged" courts.[5] This rise in legalized dispute has led to a rise in international case law, the dockets of the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) as ample examples of it. This has opened the door for a cross fertilization of judicial opinions, each reinforcing the legitimacy of the other courts' rulings and strengthening the created or expanded judicial norm.[6] Scholars have even proposed a set of rules for organizing and structuring this judicial interaction in such a way so as to exclude the possibility of forum shopping and several courts, both national and

[5] *See*: Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. Int'l L. & Pol. 709, (1999); but also *see*: Cesare P.R. Romano, *Deciphering the Grammar of the International Jurisprudential Dialogue*, 41 N.Y.U. J. Int'l L. & Pol. 755, (2009); Ruti Teitel, Robert Howse, *Cross-Judging:Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. Int'l L. & Pol. 959 (2009); Suzannah Linton & Dr. Firew Kebede Tiba, *The International Judge in an Age of Multiple International Courts and Tribunals*, 9 Chi. J. Int'l L. 407 (2009); Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 39 Geo. Wash. Int'l L. Rev. 685, (2007); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 Cal. L. Rev. 899 (2005); Jose Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 Tex Int'l L. J. 405 (2003); Jenny S. Martinez, *Towards an International Judicial System*, 56 Stan. L. Rev. 429 (2003); W. Burke-White, *A Community of Courts: Towards a System of International Criminal Law Enforcement*, 24 Mich. J. Int'l L. 1 (2002); Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int'l L. J. 191 (2003);

[6] For a good example of the cross proliferation of the *Soering* Judgment of the ECtHR on the death penalty *see*: CL'Heureux-Dube, *Developments in International Criminal Law, VI. The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 Harv. L. Rev. 2049 (2001).

international, ruling on the same issue.[7] Consequently, looking at the judgments of other international courts and their acceptance might prove to be very important for the outcomes of this thesis. Therefore, I will look at the judgments of other international courts and will structure my inquiry in to two separate parts: one looking at the acceptance of courts specifically dealing with international criminal law as their primary subject matter and the second with the judgments of courts with subject other than international criminal law and their reliance on the outcomes of the *ad hoc* tribunals.

The overall structure of this Chapter will be structured along the lines of three specific parts and a conclusion. The first Part will look at the transformation of the legal outcomes of the *ad hoc* tribunals into doctrinal texts and the acceptance of the scholarly community. The second Part will deal with the acceptance of international tribunals, both within and out of the international criminal law regime. The third part of this Chapter will deal with the acceptance of states of specific outcomes of the *ad hoc* tribunals' jurisprudence and the Chapter will conclude with an overall assessment of the acceptance of the jurisprudence of the *ad hoc* tribunals.

3.2 The Acceptance of Scholars – The Transformation from Jurisprudence to Doctrine

We can say one thing about legal scholars, we are a prolific bunch. A simple search in Westlaw in the World Journals directory covering US, UK, Australia and New Zeeland journals using the terms international criminal law in quotation marks will produce a result of 5591 peer reviewed journal articles.[8] The same search for Lexis Nexis database is 999 arti-

[7] Jenny S. Martinez, *Towards an International Judicial System*, 56 Stan. L. Rev. 429 (2003); W. Burke-White, *A Community of Courts: Towards a System of International Criminal Law Enforcement*, 24 Mich. J. Int'l L. 1 (2002);
[8] As of March 29, 2010.

cles, this being narrowed to only US legal journals.[9] This is just one quick example since it only covers articles that have the phrase "international criminal law" in their text and it is reasonable to assume that there are many articles that have nothing to do with international criminal law but who still have that phrase in their text. It is also reasonable to assume that there could be some articles that discuss international criminal law topics but do not have that exact phrase in their text. Consequently, if a young scholar would want to be thoroughly versed in international criminal law by going over those 5000 plus articles then it would be reasonable to say that that scholar would at least not be considered young when he or she finishes the task.

When I repeated the same search, using the same phrase in quotation marks and used the internet search engine Google, narrowing the search criteria to books only, I received 1033 results, with most of the top 100 results of the books falling in the topical area of international criminal law, while some were on general international law.[10] Therefore, the scholarly material on international criminal law and, consequently, on the jurisprudence of the *ad hoc* tribunals is vast and it would be a thesis in itself to review and discuss the even the top 100 search results on either Google or Westlaw and Lexis-Nexis. Consequently, in the following part I will present the discussion reflected in a relatively small number of doctrinal texts in relation to their use the jurisprudence of the *ad hoc* tribunals in the hope of discovering a pattern in which this jurisprudence is used and presented. The method that I will use is one of textual or literature analysis and I will use short excerpts of books to show how doctrinal texts rely on the jurisprudence of the *ad hoc* tribunals to explain the various institutes of law in international criminal law.

[9] As of March 29, 2010.
[10] The hyperlink to the search is: http://books.google.com/books?as_q=&num=100&lr=&btnG=Google+Search&as_epq=international+criminal+law&as_oq=&as_eq=&as_brr=0&as_pt=BOOKS&lr=lang_en&as_vt=&as_auth=&as_pub=&as_sub=&as_drrb_is=q&as_minm_is=0&as_miny_is=&as_maxm_is=0&as_maxy_is=&as_isbn=&as_issn=; (last accessed March 29. 2010).

I will start my presentation with a short excerpt from the *Oxford Companion to International Criminal Justice*, which is a collection of scholarly texts meant to be a short introductory guide to the different issues of international criminal law. In the Part B: Issues, Institutions and Personalities, under the topic of Internal Armed Conflict and after a short discussion based on the Geneva Conventions this paragraph follows:

> The case law of both International Criminal Tribunals and the creation of the ICC have greatly changed the law of internal armed conflict in the last ten years. The second category of internal armed conflict, in which Common Art. 3 and customary law principles on the protection of civilians from hostilities and on means and methods of warfare apply, has been defined as 'protracted armed violence between governmental authorities between governmental authorities and organized armed groups or between such groups with a state' (Decision on the Defence Motion of Interlocutory Appeal on Jurisdiction, ***Tadic*** (IT-94-1), AC, 2 October 1995, § 70). This definition has been included in the ICCSt. (Art. 8(2)(f)) and is fast becoming the most widely accepted definition of the concept of internal armed conflict. It is generally accepted that internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature fall below the threshold of internal armed conflict (Art. 1(2) APII; Art. Art. 8(2)(f) ICCSt.). The definition provided by the **ICTY** TC is the first definition that spells out some criteria enabling states to distinguish between internal disturbances and internal armed conflict. In order to determine the existence of an internal armed conflict, ICTY and ICTR TCs have looked particularly at the organized nature of the rebel groups and at the duration or intensity of the armed violence between such groups or between governmental authorities and a rebel group (see e.g., Judgment, ***Tadic*** (IT-94-1) TC, 7 May 1997, §§ 561-568; ***Aleksovski*** (IT-95-14/1), TC, 25 June, 1999, §§44-43; ***Jelisic*** (IT-95-10), TC, 14 December 1999, §§ 29-31; ***Furundzija*** (IT-95-17/1), TC, 14 December 1999, § 59; ***Kordic and Cerkez*** (IT-96-14/2), TC, 26 February 2001, §§ 22-31, 160; ***Kunarac*** (IT-96-23&23/1), TC, 22 February 2001, §§402 and 567-569; ***Delalic and others*** (IT-96-21), TC, 16 November 1998, §§ 183-192; ***Stakic*** (IT-97-24), TC, 31 July 2003, §§ 566-574; ***Limaj*** (IT-03-66), TC, 30 November 2005, §§ 83-174 and Decision on Motion for Judgment of acquittal, ***Milosevic***, (IT-02-54-T), TC, 16 June 2004, §§ 23-24; 30-31). In assessing the duration and intensity of the conflict, TC have looked at various factors such as (i) the seriousness of attacks and their recurrence; (ii) the spread of those armed clashes over territory and time; (iii) whether various parties were able to operate from a territory under their control; (iv) an increase in the number of governmental forces; (v) the mobilization of volunteers and the distribution of weapons among both parties to the conflict; as well as (vi) whether the conflict had attracted the attention of the UN SC and whether any resolution on that matter had been passed.[11]

[11] Antonio Cassese Editor in Chief, THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, OUP, Oxford, 2009, p. 380.

One can find similar paragraphs in the *Oxford Companion* on other legal definitions like Genocide,[12] War Crimes (International Armed Conflicts),[13] War Crimes (Non-International Armed Conflicts),[14] Joint Criminal Enterprise.[15] It seems understandable that in order to explain a certain institute of international criminal law, one has to go through the decisions of the *ad hoc* tribunals since they, to a large extent, have elaborated and in some cases have created the definitions to these institutes. But allow me to present other examples of the reliance of the jurisprudence of the *ad hoc* tribunals by other doctrinal texts.

Textbooks on international criminal law are another piece of doctrinal texts that extensively use the jurisprudence of the *ad hoc* tribunals. If one opens a textbook on international criminal law, especially in the part on substantive law, one will be faced with extensive references to the case-law of the ICTY and ICTR. More specifically, the explanation of the *mens rea* or the *actus reus* of a crime is presented overwhelmingly through the case-law of the *ad hoc* tribunals, together with the elements of crimes of the ICC and its recent decisions and other doctrinal texts. If we take the text book of one of the most renowned scholars on international criminal law, Antonio Cassese, as an example we can see that, when it comes to the elaboration of the elements of crimes the discussion focuses on the jurisprudence of the ICTY and the ICTR. For instance, under the objective elements of Crimes against Humanity he writes:

> 2. *Extermination;* that is mass or large-scale killing, as well as 'the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of the population' (Article 7(2)(b) of the ICC Statute).
>
> The ICTR has defined the notion of extermination in a few cases.[30] A Chamber of the ICTY offered a better definition in *Krstic*. It held that:
>
> for the crime of extermination to be established, in addition to the general requirements for a crime against humanity, there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to

[12] *Ibid.*, pp. 332-336, focusing on cases from the *ad hoc* tribunals.
[13] *Ibid.*, pp. 566-568, although I have to note that when it comes to International Conflicts the case law of the ICTY is intermixed with those from the IMTs.
[14] *Ibid.*, pp. 568-570, presenting the case law of the *ad hoc* tribunals.
[15] *Ibid.*, pp. 391-396.

conditions of life calculated to bring about the destruction of a numerically significant part of the population (§ 503).

The TC also specified that 'In accordance with the *Tadic* (AJ), '[...] it is unnecessary that the victims were discriminated against for political, social or religious grounds' (§499).[31]

It is submitted that one ought not excluded from this class of crimes extermination carried out by groups of terrorists *for the purpose of spreading terror*. (Of course, the necessary condition that the terrorists atak extermination a group of persons be part ofa a widespread or systematic attack, must be fulfilled.) See also *infra*, **8.6**.

30 *Akayesu* (§§589-2), *Kambanda* (§§141-7), *Kayishema and Ruzindana* (§§141-7), *Rutaganda* (§§82-4), *Musema* (§§217-19). The ICTR has held that the requisite elements of the offence are as follows: the accused or his subordinate participated in the killing of certain named or described persons; (ii) the act or omission was unlawful and intentional; (iii) the unlawful act of omissions must be part of a widespread or systematic attack; and (iv) the attack must be against the civilian population. This definition does not seem to be satisfactory fo it is lose and does not indicated the unique objective features of the crime.

31 In the same case the TC found that the accused was guilty of extermination (§§504-5). [16]

Similar paragraphs can be found throughout his textbook. The following is an excerpt from the section on the objective elements of Genocide:

While the definition of the four classes of group is an intricate problem that requires serious interpretative efforts (see *infra* 6.6.1), the various classes of action falling under genocide seem to be relatively clear. They were to a large extent spelled out in *Akayesu* (TJ), as well as other judgments of the ICTR:

(i) as for killing members of the group, 'killing' must be interpreted as 'murder' i.e. voluntary or intentional killing;[15]

(ii) as for causing serious bodily or mental harm, these terms 'do not necessarily mean that the harm is permanent and irremediable': *Akayesu* §§502-4; *Gacumbitsi* TJ, §291. As an ICTY TC put it in *Krstic*:

In line with the *Akayesu* Judgment [§502], the Trial Chamber states that serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life. In subscribing to the above case-law, the Chamber holds that inhumane treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury (§513).

See also ICTY, *Blagojevic and Jokic*, TJ, §645. The harm may include acts of bodily or mental torture, sexual violence, and persecution (*Rutaganda*, TJ, §51).

15 *Akayesu* (§§500-1). See also *Semanza* (TJ), at §319) and *Kayishema and Ruzindana* (AJ), §151.[17]

[16] Antonio Cassese, INTERNATIONAL CRIMINAL LAW, 2nd edn., OUP, Oxford, 2008, pp. 109-110.
[17] *Ibid.*, p. 133.

Interestingly enough, the reliance on the jurisprudence of the ICTY and ICTR is far less when it comes to an older category of international crimes, War Crimes. When Cassese writes about the objective elements of war crimes, his reliance is both on the jurisprudence of the *ad hoc* tribunals as well as the cases that have come out of the WWII. The following is a typical example of a paragraph in the War Crimes section of Cassese's book related to classes of war crimes:

> 1. Crimes committed *against persons not taking part, or no longer taking part, in armed hostilities.* In practice by far the most numerous crimes are committed against civilians,[10] or armed resistance movements in occupied territory,[11] and include sexual violence against women.[12] In particular, they are perpetrated against persons detained in internment or concentration camps.[13] They are also committed against prisoners of war.[15]

10 See, for instance, *von Falkenhausen and others* (at 867-93), *Bellmer* (at 541-4), *Lages* (at 2-3), *Wagener and others* at (148), Sch, O. (at 305-7), *Sergeant W.* (decision of 18 May 1966, at 1-3; decision of 14 July 1966 at 2). For fairly recent cases see for instance *Major Malinky Smuel and others* (at 10-137), *Calley* (at 1164-84), *Tzofan and others* (*Yehuda Meir* case) at 724-46, *Sabic and others* (at 37-135).

11 See, for instance, the *SIPO Brussels* case (at 11518-26), *Allers and others* (at 225-47).

12 In this respect it is worth mentioning two cases brought after the Second World war before the Dutch Temporary Court Martial in Batavia (Indonesia). The first is *Washio Awochi*. The accused, a Japanese civilian who managed a club for Japanese civilians in Indonesia, had procured or arranged the procurement of girls and women for the club's visitors, forcing them into prostitution; they were not free to leave the part of the club where they had been confined. The Court held that the defendant was guilty of the war crime of 'forcing into prostitution' and sentenced him to 10 years' imprisonment (at 1-15). In *Takeuchi Hiroe* the accused, a Japanese national, had used violence or threats of violence against a young Indonesian woman, and had forced her to have sexual intercourse with him. The Court found him guilty of war crime of rape and sentenced him to five years' imprisonment (1-5).

13 Among the numerous cases on this matter, one may recall various ones concerning the ill-treatment of persons detained in the concentration camps instituted in Poland, such as Auschwitz (see *Mulka and others*), in Germany, at Dachau (see *Martin Gottfreid and others*), by the German occupying troops in Majdenek (see *Gotzfrid*, at 2-70), in camps in Belgium (see, for instance, *Kopperlmann* as well as *K.W.* (at 565-7) and *K.* (at 653-5), in Amersfoort (Nederlands) (see for instance *Kotalla*), or in Bolzano (Italy) (see, for instance, *Mittermair*, at 2-5, *Mitterstieler*, at 2-7, *Lanz*, at 2-4, *Cologna*, at 2-9, *Koppelstatter* and others, at 3-7) or the Italian camp of Fossoli (see *Gutweniger*, at 2-4), or in internment camps in the former Yugoslavia (see, for instance, *Saric*, 2-6). Such crimes may even be perpetrated by internees against other internees (see, for instance, *Ternek*, at 3-11, and *Enigster*, at 5-26).

14 See, for instance, some cases brought after the First World War before the Leipzig Supreme Court: *Heynen* (at 2543-7), *Muller* (at 2553-6). See also other cases, relating to the Second World War: *Malzer* (at 53-5) *Feurstein and others* (1-26), *Krauch and others* (at 668-80), *Weiss and Mundo* (at 149), *Gozawa Sadaichi and others* (195-228), *General Seeger and others* (*Vosages* case), at 17-22; *St Die* case, at 58-61; *La Grande Fosse* case, at 23-7; *Essen Iynching* case, at 88-92.[18]

[18] *Ibid.*, pp. 88-89.

One simple explanation for this could be the fact that there are a lot of cases that came out of the trials in Nuremberg and their progeny compounded that the crime of War Crimes was an established international crime significantly before WWII. Consequently, in the field of war crimes the *ad hoc* tribunals themselves did not have to add too much to flesh out the basic notions, like in Crimes against Humanity and Genocide, which shows in the writings of scholars.

Other authors and other textbooks do follow this pattern, even those that do not strictly aspire to be textbooks. I now turn my focus to another doctrinal text with the title *International Criminal Law: A Critical Introduction*,[19] a book written by two scholars, one affiliated with the ICTY. The following is a paragraph is a section of the General Requirements of Common Article 3 offences:

> **Protected Persons**
>
> Common Article 3 protects more than the 'protected persons' of the Geneva Conventions III and IV, that is, there is no requirement that persons, in order to be considered protected, should have 'fallen into the power of the enemy' or should find themselves 'in the hands of a party to the conflict.'
>
> As this extended notion of protection was a feature of Common Article 3 in its original application to internal armed conflict, it must undoubtedly be carried over to international armed conflict when Common Article 3 is accepted as a universal prohibition in accordance with the current tendency.[49]
>
> The test applied by the *Tadic* Trial Chamber was to ask whether, at the time of the offence, the victim was directly taking part in hostilities, that is, the hostilities in the context of which the alleged offences were committed. If the answer is negative, the victim was protected by Common Article 3.[50] This is preferable to asking whether the victim was a civilian, for a civilian may intermittently take part in hostilities (whereupon he or she becomes a combatant), only to return to long stretches of being a civilian.[51]
>
> 49 Cf, *Delalic et al.* appeal judgment, paras 171-2.
> 50 *Tadic* trial judment, paras 615-616. Followed by *Blaskic* trial judgment, para. 177.
> 51 As implied by Articles 51(3) and 13(3) of Additional Protocol I and II, respectively.[20]

In the next paragraph I will present only the footnotes to two pages of the section of the book titled Crimes against Humanity and 'ethnic cleansing' that discuss two elements of

[19] Alexander Zahar & Goran Sluiter, INTERNATIONAL CRIMINAL LAW: A CRITICAL INTRODUCTION, OUP, Oxford, 2008.
[20] *Ibid.*, p.119.

the crimes, Extermination and Deportation and forced transfer. The footnotes are somewhat typical of the discussion in the book, especially when discussing the *mens rea* or the *actus reus* of the crimes, although they are more interlaced with references to other cases or other scholarly works:

> 78 *Krstic* trial judgment, para. 492.
> 79 *Akayesu* trial judgment, paras 591-2.
> 80 *Krstic* trial judgment, para. 498.
> 81 Ibid., para 501.
> 82 *Vasiljevic* trial judgment, fn. 587.
> 83 Ibid., para. 229.
> 84 Ibid., para. 232.
> 85 *Krajisnik* trial judgment, para. 716. See also *Ntakirutimana* appeal judgment, paras 516,522, 542; *Stakic* appeal judgment, para. 260
> 86 *Krajisnik* trial judgment, para. 720.
> 87 Ibid., para. 698.
> 88 Geneva Convention III, Art. 19; Geneva Convention IV, Art. 49; Additional Protocol II, Art. 17.
> 89 *Krajisnik* trial judgment, paras 723-6.
> 90 *Stakic* appeal judgment, paras 278, 300, and Judge Shahabuddeen's partially dissenting opinion.[21]

Other types of doctrinal writings also use the case-law of the *ad hoc* tribunals in their explanation of the various issues that they are writing about. Commentaries to the ICC Statute are one prime example of this. In one recent publication titled *Commentary on the Rome Statute of the International Criminal Court* is one such example. The following is taken from the commentaries to Article 6, Genocide, and is in the subheading of Relationship to Crimes against Humanity:

> Whit respect to cumulative convictions for genocide and crimes against humanity, there is much authority for the proposition that genocide is an aggravated form of crimes against humanity[106]. But it has been held that convictions for both genocide and for crimes against humanity are permitted because they have materially distinct elements[107]. In *Musema*, the ICTR Appeals Chamber held that convictions for genocide and for extermination as a crime against humanity, based on the same set of facts, are persmissible[108]. According to the Appeals Chamber, genocide requires proof of intent to destroy, in whole or in part, a national, ethnic, racial or religious group, whereas the crime against humanity of extermination requires proof that the crime was committed as part of a widespread or systematic attack on a civilian population[109]. The ICTY Appeals Chamber upheld and developed this conclusion in *Krstic*, overturning the Trial Chamber that has refused to enter cumulative convictions for genocide and crimes against humanity because it considered that "both require that the killings be aprt of an extensive plan to kill a substantial part of a civilian population"[110]. The Appeals Chamber said that such an "extensive plan" had

[21] *Ibid.*, pp. 216-217.

been held not to constitute an element of either genocide or crimes against humanity. Moreover, according to the Appeals Chamber, genocide need not be committed as part of a widespread or systematic attack, nor must genocide be limited to a "civilian population"[111].

106 For the various authorities, see: W. A. Schabas, GENOCIDE IN INTERNATIONAL LAW 11 (2000).
107 *Supra* note 104, *Prosecutor v. Musema*, paras. 369-370; *supra* note 101: *Prosecutor v. Ntakirutimana et al*., para. 864; *Prosecutor v Nahimana et al.*, para 1090. See : F. M. Palombino, *Should Genocide Subsume Crimes Against Humanity?, Some Remarks in the Light of the Krstic Appeals Judgment*, 3 J. INT'L CRIM. JUST. 778 (2005).
108 *Supra* note 104, *Prosecutor v. Musema*, paras.369-370.
109 *Supra* note 104, *Prosecutor v. Musema*, para. 366.
110 *Supra* note 25, *Prosecutor v. Krstic*, paras. 219-227; *supra* note 28, *Prosecutor v Kayishema & Ruzindana*, para. 577-578, 590.
111 Supra note 6, *Prosecutor v. Krstic*, paras. 219-227.[22]

Similarly as with the other doctrinal writing set out above, the *Commentary* relies heavily on the case law of the *ad hoc* tribunals when it comes to the elements of crimes i.e. the *mens rea* and the *actus reus*. In the next excerpt, I will present such an example using the commentaries to the general requirements of criminal responsibility set out in Article 25 of the ICC Statute:

The subsequent case law has confirmed the broad concept of aiding and abetting developed in Tadic, Celebici and Furundzija[95]. The Sleksovski Trial Chamber required an "effet important" on the main act[96] and allowed the act of support to be given at any time[97]. As to the issue of a causal relationship between the aiding and the final criminal result, the Trial Chambers in Aleksovski, Blaskic, Krnojelac, Vasiljevic, and Neletirilic & Martinovic followed Furundzija renouncing this aruirement[98]. Presence at the scene of the crime would (only) be sufficient if the accused had an "autorité incontestée" that encourages the direct perpetrator to commit the crime[99]. At a minimum, the presence of a superior constitutes a "probative indication" in this respect[100].

95 *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment, Trial Chamber, 25 June 1999, paras. 60 *et seq.*; *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment, Trial Chamber, 3 Mar. 2000, para. 245; *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23-T and IT-96-23/1-T, Judgment, Trial Chamber, 22 Feb 2001, paras. 391-3; *supra* note 19, *Prosecutor v. Kordic & Cerkez*, paras. 395 *et seq*.; *supra* note 19, *Prosecutor v. Krnojelac*, paras. 88 *et seq*.
96 *Supra* note 95, *Prosecutor v. Aleksovski*, paras. 60-61.
97 *Ibid*. para. 62. See also *supra* note 95, *Prosecutor v. Blaskic*, para. 284.
98 *Supra* note 95, *Prosecutor v Aleksovski*, para. 61; *supra* note 95, *Proscutor v. Blaskic*, para 284; *supra* note 19, *Prosecutor v. Krnojelac*, para. 88; *supra* note 19, *Prosecutor v. Naletilic & Martinovic* para 63; *supra* 19, *Prosecutor v. Vasiljevic*, para. 70; *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para. 48; *supra* note 19, *Prosecutor v. Blagojevic & Jokic*, para. 726.
99 *Supra* note 95, *Prosecutor v. Aleksovski*, para. 63 *et seq.* (65); similarly *supra* note 19, *Prosecutor v. Krnojelac*, para 89: "significant legitimizing or encouraging effect"; also *supra* note 19, *Prosecutor*

[22] Otto Triffterer, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 2ND ED., C.H.Beck-Hart-Nomos (2008), p. 157.

v. Vasiljevic, para 70; supra *note* 19, *Prosecutro v. Blagojevic & Jokic*, para. 726, fn. 2177: "Mere presence' at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant encouraging effect on the principal offender".
100 *Supra* note 95, *Prosecutor v. Blaskic*, para. 284; conc. *supra* note 19, *Prosecutor v. Naletilic & Martinovic*, para 63. In *supra* note 98, *Prosecutor v. Blaskic*, Case No. IT-95-14-A, the Appeals Chamber explicitly left open the possibility that "in circumstances of a given case, an omission may constitute the *actus reus* of the aiding and abetting (para. 47).[23]

The examples I just gave above are typical of the type of doctrinal work that can be found on the library shelves of most universities on the topic of international criminal law. When going through the pages of these books in the library one gets the sense that the scholarly community has accepted most outcomes of most of the judgments that have come out of the *ad hoc* tribunals. One can certainly find a lot of discussion on the shortcomings of certain specific judicial outcomes. This is understandable given the fact that despite the large number of cases that these tribunals have disposed of not all questions have been answered completely or coherently and consistently. Consequently, there are certainly a lot of specific judicial solutions that are in dispute and members of the scholarly community are forwarding their own views on how these specific solutions should be amended, augment or a specific jurisprudential line strengthened.[24]

Nevertheless, there are certainly a great number of jurisprudential solutions that are beyond dispute by the scholarly community at large and find their way into doctrinal writings as settled law. To get a clearer picture on just how much the discourse in international criminal law in international criminal law scholarship has changed through the jurisprudence of the *ad hoc* tribunals, I must linger on a little bit more on giving examples of doctrinal writing in international law but one that was published prior to 1995. For this, I turn to a well acclaimed edition of books in international criminal law, now in its 3rd edition, *International Criminal*

[23] *Ibid.*, p. 755.
[24] Just as an example see: Shane Darcy, *Prosecuting the War Crime of Collective Punishment: Is it Time to Amend the Rome Statute?*, 8 J. Int'l Crim. Just. 29, (2010); William A. Schabas, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 2nd edn., Cambridge University Press, Cambridge, 2009, Chapter V – The Mental or *Mens Rea* of Genocide; William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. Crim. L. & Criminology 953, (2008); Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925 (2008).

Law edited by M. Cherif Bassiouni, first published in 1986 and especially Volume 1 titled: Crimes, i.e. the substantive part of international criminal law.

The book is divided into two parts: Part one-History, Scope and Content and Part two-International Crimes. Part two on international crimes is further divided into five chapters, elaborating on the Crimes Against Peace,[25] Armed Conflict and War Crimes,[26] Crimes against Fundamental Human Rights,[27] Crimes of Terror Violence[28] and Crimes against Social Interests.[29] At first glance, it is not surprising that the book does not talk about any international system for the suppression of international crimes, something that has only recently been established with the ICC. The next thing that is noticeable, even from the table of contents, is the inclusion of a far greater list of crimes than what is now seen as normal. For instance the crimes of apartheid, drug trafficking, slavery are also part of the discussion on almost equal footing with the now more traditional, war crimes, genocide, crimes against humanity. In fact, the crimes against humanity seem to have been divided into the crimes of genocide, slavery and the slave trade, apartheid, torture and unlawful human experimentation under the guises of crimes against fundamental human rights. The crimes against humanity as we now know them, as widespread or systematic attacks on a civilian population do not seem to figure into the list as even today there is no single convention on the subject, if we discount Article 7 of the Rome Statute.

However, probably the most interesting aspect of the book is the almost complete reliance on treaties or draft-treaties and their commentaries or the discussion during their drafting as the fundamental material sources of law. For instance, in the oldest category of international crimes, war crimes proper, the book starts its explanation with the various different pe-

[25] Chapter I of Part II *in* M. Cherif Bassiouni ed., INTERNATIONAL CRIMINAL LAW, VOLUME I – CRIMES, Transnational Publishers, INC., Dobbs Ferry, New York, 1986.
[26] Chapter II of Part II *in Ibid.*
[27] Chapter III of Part II *in Ibid.*
[28] Chapter IV of Part II *in Ibid.*
[29] Chapter V of Part II *in Ibid.*

nal aspects of international humanitarian law presented through the different conventions on the subject beginning with the Declaration of St. Petersburg of 1868 all the way to the contemporary Geneva Conventions and their commentaries.[30] There is hardly any mention of cases at all in the discussion although some mention of the London Charter adopted by the Allies of WWII is made.

The crime of Genocide is another example of this reliance on conventions and commentaries as material sources. In the part devoted to genocide as a crime there is not discussion as to the definition of the crime, nor to the "small" problems of protected group, ways of committing genocide, the mental element required for its commission and alike. For one of the authors it seemed a more interesting topic to write about the various possibilities of how to "enforce the prohibition."[31] In another essay devoted to genocide, *Introduction to the Genocide Convention*, Bassiouni also focuses more on the enforcement part of the convention rather than on the practical elements of *mens rea* or *actus reus*, talking more about the jurisdiction of the ICJ or the abolishment of immunities for senior officials.[32] The excerpt taken from the Eichmann trial in front of the Israel District Court of Jerusalem is again dedicated more towards the issue of the possibility and the morality of having people prosecuted in domestic or international courts for genocide or genocide related crimes rather than the definitional aspects of the crime.[33] It seems that for the authors of the book, the more important aspects of international criminal law, even when it comes to the issues of crimes, is the actual possibility of prosecutions, the issues of jurisdiction, the legal foundation these prosecutions and their moral justification. The more practical problems of definitions of crimes is not quite present. The fact that the authors were more concerned with the legal justifications, the pos-

[30] *Ibid.*, pp. 232.
[31] Lous Rene Beres, *Genocide and Genocide-like Crimes* in *Ibid.*, p. 272: Thus at least two initial problems arise, namely how to define these crimes and how to enforce the prohibition (and implicitly, how to prevent the prohibited conduct).
[32] M. Cherif Bassiouni, *Introduction to the Genocide Convention*, in *Ibid.*, pp. 281-286.
[33] *Ibid.*, pp. 284-286.

sibilities for trials etc. is even further re-enforced by the presence of no less than seventeen appendixes of different conventions or draft conventions related to international crimes.

This short comparison of doctrinal texts, from different authors and from different time periods shows us the transformation that the establishment of the *ad hoc* tribunals as well as the various internationalized criminal tribunals and the ICC. For one thing, there is no longer such doubt of whether we can have prosecutions for international crimes and in front of which forum can those prosecutions be. It seems not only that we are more and more confident that we can have prosecutions for international crimes but that the question of the right forum is no longer that important.

The almost "normalcy" of prosecuting international crimes has developed a different type of discourse, one that is devoted to the more "mundane" tasks of which conduct falls under a specific *actus reus*, or what elements does one need to show in order to prove the required intent for the specific crime. The definitions and tests that the *ad hoc* tribunals have developed over the course of their case-law not only do they seem to be widely used and discussed but widely accepted by the scholarly community as "the law" in international criminal law. Certainly, as the articles I cited above show, not every aspect of the case-law of the *ad hoc* tribunals is beyond dispute. Nonetheless, and to a large extent, I would be confident in claiming, for example, that the *Tadic* test for the existence of armed conflict is "the law" that governs that issue and I would most certainly have doctrinal writing to back up my claim to that.

3.3 What of Other International/Internationalized Criminal Courts?

After the creation of the *ad hoc* tribunals it took several years before other international criminal courts was established. Even though the Rome Statute was adopted in 1998, it

did not come into force until 2002 subject to the ratification of 60 states.[34] The International Criminal Court (ICC) did not start its first investigation until December 2003, when the Ugandan president decided to refer the situation in Uganda for investigation.[35] It has yet to fully complete a case from one of its Trial Chambers.

Other international criminal, or more precisely internationalized criminal courts, have been created or are as we speak becoming functional,[36] but only one, the Special Court of Sierra Leone (SCSL), has had the opportunity to bring their trials to some advanced stage of completion, i.e. a Trial Chamber or an Appeal Chamber judgment.[37] Whit this relative lack of access to advanced cases I have decided that one sub-section of this part of the Chapter will largely be devoted to these two international/ized criminal tribunals and their use of the jurisprudence of the *ad hoc* tribunals, more specifically the ICC and the SCSL.

However, these are not the only international tribunals proper in operation at the moment, as evidenced by the 2004 synoptic chart[38] prepared by the *Project for International Courts and Tribunals*, and a worthwhile endeavour would be to see whether some of these tribunals have recourse to the jurisprudence developed by the *ad hoc* tribunals. Given the fact that there are more than twenty fully fledged judicial bodies operating at the moment and that

[34] *See* Article 126 of the Rome Statute; but for more on the negotiations of the Rome Statute and its entry into force; also *see*: William A. Schabas, THE INTERNATIONAL CRIMINAL COURT : A COMMENTARY ON THE ROME STATUTE, OUP, Oxford, 2010; Otto Triffterer ed., COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT : OBSERVERS' NOTES, ARTICLE BY ARTICLE, C.H. Beck, München, 2008; M. Cherif Bassiouni ed., THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT, Transnational Publishers, Ardsley, N.Y., 2005.

[35] *See*: http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc?lan=en-GB (last accessed April 12, 2010).

[36] Cesare P.R. Romano, André Nollkaemper, and Jann K. Kleffner eds., INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS : SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA, OUP, Oxford, 2004; oddly enough this series does not mention Section I of the Bosnian Criminal Division within the Bosnian court system, which is a domestic tribunal applying national law but with international presence. The judgment of this court will be scrutinized more thoroughly in the next part of this Chapter when dealing with the acceptance of the *ad hoc* tribunals' case-law by states.

[37] *See* the docket of the Special Court of Sierra Leone and its three major trials available at: http://www.sc-sl.org/CASES/tabid/71/Default.aspx (last accessed, April 12, 2010).

[38] According to the synoptic chart prepared by the Project for International Courts and Tribunals, as of 2004, there are more than 20 entities that are still in existence and are not dormant that fall under the category of international judicial bodies, *see* the PICT Synoptic Chart (2004) available at: http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf (last accessed, April 12, 2010).

most do not have any connecting points to international humanitarian or international criminal law, compounded with the limited scope of this thesis, not all of the courts will be examined in the second subsection of this Chapter.

The tribunals that will be under scrutiny will be the International Court of Justice, the European Court of Human Rights and the Inter-American Court for Human Rights. The relatively close ideological bases and the shared identity between international human rights bodies and the international criminal courts has been a line of controversy in recent years[39] and there is almost an expectation that these bodies will follow closely what the *ad hoc* tribunals have been doing. Furthermore, as I have shown in the previous Chapters, there has been some spill-over from human rights tribunals/bodies to the jurisprudence of the *ad hoc* tribunals and this would be a perfect opportunity to see whether this spill-over works in both directions. Consequently, this part of the Chapter will be divided into two sub-sections: one examining the impact of the *ad hoc* tribunals within the international criminal law system of courts with the focus on the SCSl and the ICC, while the second sub-section examining the other international tribunals, or other international quasi judicial bodies mostly focused on those dedicated to human rights protection.

3.3.1 The Special Court for Sierra Leone and the Legacy of the *Ad Hoc* Tribunals

Following a brutal conflict in Sierra Leone and a peace agreement brokered by the UN, the Special Court for Sierra Leone was established via a special agreement between the UN and the Government of Sierra Leone.[40] Its mandate is to prosecute those most responsible

[39] For more on this *see*: Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925, (2008).
[40] For a copy of the agreement go to:
http://www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176 (last accessed April 12, 2010).

for the most serious violation of humanitarian law during the conflict.[41] The caseload of the Court is a relatively small one – it has no more than half a dozen cases – compared to the several dozen of the ICTY and the ICTR. Nevertheless, during its operation it has had to face some challenging complexities one specifically rutted in the nature of the conflict and its cultural surrounding.[42] As of the beginning of 2010, it has managed to close three of its most challenging cases, the trials of the leaders of the RUF[43], CDF[44] and AFRC[45] each of them with over 500 pages long Trial Chamber judgments.

Nevertheless, it seems that it is not the law or its clarity that presented the toughest challenges to the judges, but the complexity of applying them to a specific cultural background.[46] When it comes to the issue of the law that fits within the jurisdiction of the SCSL and its details and meaning, the Trial Chambers had no problem with finding ready-made definitions of the *actus reus* or the *mens rea* of specific crimes or the contextual elements like existence of an armed conflict, the need or lack of thereof for a nexus between the armed conflicts and the acts in question etc.

We have to look no further than the first few paragraphs of the section of the *CDF* Trial Chamber judgment titled Applicable Law in order to come to that conclusion. For instance, at the beginning of the discussion on the applicable law, under the heading of *Customary Status of Crimes under International Law*, one finds the following sentence "[t]he Chamber concurs with the reasoning of the ICTY Appeals Chamber in *Tadic* on the issue of

[41] See the Court's mission statement available at: http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx (last accessed April 12, 2010).
[42] For more *see*: Tim Kelsall, CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONE, Cambridge University Press, Cambridge, 2009.
[43] *Prosecutor v. Sesay, Kallon and Gbao*, Appeal Chamber Judgment, Case No. SCSL-04-15-A, October 26, 2009 (hereafter the *RUF* Appeals Chamber judgment).
[44] *Prosecutor v. Fofana and Kondewa*, Appeal Chamber Judgment, Case No. SCSL-04-14-A, May 28, 2008 (hereafter the *CDF* Appeal Chamber judgment).
[45] *Prosecutor v. Alex Tamba Brima (aka "Gullit), Ibrahim Bazzy Kamara and Santigie Borbor Kanu (aka "Five-Five")*, Appeals Chamber Judgment, Case No. SCSL-2004-16-A, February 22, 2008 (hereafter *AFRC* Appeals Chamber judgment).
[46] Generally *see*: Tim Kelsall, CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONE, Cambridge University Press, Cambridge, 2009.

the evolution of Common Article 3 and Additional Protocol II from conventional into customary international law, where it held:" (continues to quote several paragraphs from the judgment).[47] In the next paragraph, the argumentation continues with the words "[t]he Chamber is also mindful of the finding of the ICTR Trial Chamber which relied on *Tadic* and examined specifically Article 4(2) of Additional Protocol II. It held:" (continues to quote several paragraphs from the judgment).[48] The pattern continues in the following paragraphs. When, for instance, when the Trial Chamber outlines the applicable law in relation to the attack on a civilian population and the perpetrators involvement in it, it writes:

> 120. The requirement that the acts of the Accused must be part of the attack is satisfied by the "commission of an act which, by its nature or consequences, is objectively part of the attack."[138] This is established if the alleged crimes were related to the attack on a civilian population, but need not have been committed in the midst of the that attack.[139] A crime which is committed before or after the main attack or away rom it could still, if sufficiently connected, be part of the attack. However, it must not be an isolated act. "A crime would be regarded as an 'isolated act' when I is so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack"[140] Only the attack, not the individual acts, must be widespread or systematic.[141]
>
> 138 *Kunarac et al.* Appeal Judgment, para. 99 ; *Kunarac et al.* Trial Judgment, para. 434. See also *Limaj et al.* Trial Chamber Judgment para. 188; *Tadic* Appeal Judgment, para. 271.
> 139 *Kunarac et al.* Appeal Judgment, para 100 ; *Limaj et al.* Trial Judgement, para. 189.
> 140 *Kunarac et al*, Appeal Judgment, para. 100 referring to *Kupreckic* Trial Judgment, para. 550, *Tadic* Trial Judgment, para 649 and *Prosecutor v. Mrksic, Radic and Sljivancanin*, IT-95-13-R61, Review of the Indicment Pursuant to Rule 61 of the Rules of Procedure and Evidence (TC), 3 April 1996, para. 30 [*Mrksic* Rule 61 Decision]; see also *Limaj* et al. Trial Judgment, para. 189; *Tadic* Appeal Judgment, para. 271; *Kunarac et al.* Appeal Judgment, para. 100.
> 141 *Limaj et al.* Trial Judgment, para. 189 ; *Tadic* Appeal Judgment, para. 251; *Kordic and Cerkez*, Appeal Judgment, para. 94.[49]

The judgments of the Appeals Chamber is no different when it comes to the discussion on the applicable law to the case at hand. In the appeal judgment in the same case, one can find the following paragraph:

> 71. Although not specifically raised in this appeal, the Appeals Chamber is of the view that it is necessary to determine whether, as a matter of law, words of encour-

[47] *Prosecutor v. Fofana and Kondewa*, Trial Chamber Judgment, Case No. SCSL-04-14-J, August 2, 2007, para. 96 (hereafter *CDF* Trial Chamber judgment).
[48] *Ibid*., para. 97.
[49] *Ibid*., para. 120.

agement and support may have a "substantial effect" even though they were spoken at a time and place that are temporally and geographically removed from the commission of the crimes. The Trial Chamber held that the *actus reus* of aiding and abetting may occur before, during, or after the perpetration of the crime and at a location geographically removed from the place where the crime is committed, if the act of the aider and a better has a substantial effect on the perpetration of the crime.[154] In this regard, the Trial Chamber relied on the ICTY Appeals Chamber decision in *Blaskic* which found that the acts of aiding, and abetting "may occur before, during, or after the principal crime has been perpetrated, and that the location at which the *actus reus* takes place may be removed from the location of the principal crime." [155] Further, it is recognized in the jurisprudence of other ad hoc Tribunals that "encouragement" and "moral support" are two forms of conduct which may lead no criminal responsibility for aiding and abetting a crime.[156]

154 *CDF* Trial Chamber, para. 229, referring to *Prosecutor v. Blaskic*, IT-95-14-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgment, 29 July 2004, paras 47-48 [*Blaskic* Appeal Judgment]
155 *Blagkic* Appeal Judgment, para. 48.
156 *Tadic* Appeal Judgment, para. 229; *Prosecutor v. Aleksovski*, IT-95-14/1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 24 March 2000, para. 162 *Aleksovski* Appeal Judgement]; *Prosecutor v. Vasiljevic*, IT-98-32-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 25 February 2004, para. 102 [*Vasiljevic* Appeal Judgement]; *Blaskic* Appeal Judgement, para. 48; *Prosecutor v. Kvocka et al.*, IT-98 30/1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 28 February 2005, para. 89 [*Kvocka* Appeal Judgement]; *Prosecutor v. Simic*, IT-95-9-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 28 November 2006, para. 85 [*Simic* Appeal Judgement]; *Prosecutor v. Brdanin*, IT-99-36-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 3 April 2007, para. 77 [*Brdanin* Appeal Judgement]; *Prosecutor v. Kayishcma and Ruzindana*, ICTR-95-1-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 1 June 2001, paras 201-202.[50]

This kind of writing, this kind of reliance on the jurisprudence on the *ad hoc* tribunals as settled law, is not isolated to the *CDF* case. The fact that that the statute of the SCSL was modelled closely after the statutes of the ICTY and ICTR also helped to ease this acceptance of their jurisprudence. In a previous Trial Chamber decision the Court seemed to say, in respect to crimes against humanity, that Article 2 of it statute

> […]differs from similar provisions found in the governing statutes of other International Tribunals. Notably, Article 2 does not specifically require such crime to have been committed "during armed conflict" (unlike its ICTY counterpart), or "on national, political, ethnic, racial or religious grounds" (unlike its ICTR counterpart), or with the perpetrator's "knowledge of the attack" (unlike its ICC counterpart). While recognising *that the jurisprudence emanating from the various International Tribunals regarding crimes against humanity is as varied as their respective Statutes and that it should be carefully applied taking into account the differences,* the Trial Chamber endorses the view recently expressed by Trial Chamber I of the Spe-

[50] *Prosecutor v. Fofana and Kondewa*, Appeals Chamber Judgment, Case No. SCSL-04-14-A, 28 May 2008, para. 71.

> cial Court in *Prosecutor v. Sam Hinga Norman et. al*. that under the Statute of the Special Court for Sierra Leone, a crime against humanity is committed where the perpetrator commits one or more of the offences stipulated in Article 2 knowing that it is part of a widespread or systematic attack against a civilian population. (footnotes omitted, emphasis added)[51]

Nevertheless, when it came to expanding on the definition of crimes against humanity and the various elements that it was comprised of, the Trial Chamber relied extensively on the jurisprudence of the two *ad hoc* statutes. If one just scrolls further down at the same decision one can see the extensive reliance on the jurisprudence of the ICTY and ICTR regarding the elements of the *actus reus* or *mens rea* of crimes against humanity. One can easily find paragraphs like this one:

> (a) There must be an attack:
> An attack in this context is not synonymous with "an armed conflict"[35] or "a military attack" as defined in international humanitarian law.[36] Instead it refers to a campaign, operation or course of conduct directed against a civilian population and encompasses any mistreatment of the civilian population. The attack need not involve military forces or armed hostilities' [37] and may even be non-violent in nature.[38]
>
> 35. *Tadic* Appeals Chamber Judgment, *supra* note 33, para. 251.
> 36 Article 49(1) of the Additional Protocol I defines "attacks" within the military context as "acts of violence against the adversary, whether in offence or defence."
> 37 Kunarac Appeals Chamber judgement, supra note 33, paras. 16-20.
> 38 Akayesu Appeals Chamber judgement, supra note 33, para. 581. [52]

Furthermore, the SCSL did not only accept the jurisprudence of the *ad hoc* tribunals that was more or less connected to their statutes, but also those that create concepts that were not, strictly speaking, part of the statutes of the ICTY and ICTR. The example of Joint Criminal Enterprise (JCE) is a case in point. The concept of JCE was not part of the ICTY or ICTR statutes but, nevertheless, the ICTY used it in its cases as part of customary international law.[53] The SCSL picked up this judicial innovation and used it in the RUF trial. When some of the accused appealed the judgement, on the grounds of error in law of whether one

[51] *Prosecutor v. Brima, Kamara, Kanu Decision for Defense Motions for Acquittal Pursuant to Rule 98*, Trial Chamber decision, Case No. SCSL-04-16-T, 31 March 2006, para. 41.
[52] *Ibid*., para. 42, but also look at the rest of paragraph 42 and paragraph 43 and their accompanying footnotes.
[53] For a good critic of the way the ICTY created and used the concept of JCE *see*: Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925 (2008), pp. 938-943.

can attach criminal liability for crimes committed by non-members of the JCE, the Court had to determent what the correct "law" on the subject was.[54] In doing so, it quoted extensively from the various ICTY decisions on the subject. For instance, one can easily find similar paragraphs[55] within the judgment to the following paragraphs of the judgment:

> (c) Discussion
>
> 397. At the outset, the Appeals Chamber does not consider Kallon's references to United States conspiracy law helpful because conspiracy and JCE are legally distinct concepts. Most obviously, conspiracy is an inchoate offence whereas JCE is a mode of liability. As explained by the ICTY Appeals Chamber on two occasions: (quotes from *Milutinovic et al*. Decision on Jurisdiction – JCE, para. 23, *affirmed in Krajisnik* Appeal Judgment, para. 659)
>
> 398. In *Brdjanin*, the ICTY Appeals Chamber examined both post-World War II jurisprudence[969] and ICTY case-law[970] which it found persuasive as to the ascertainment of the contours of JCE liability in customary international law.[971] On that basis it concluded that: […] (quotes from *Brdjanin* Appeal Judgment, para. 410.)
>
> With respect to the third category of JCE, the ICTY Appeals Chamber held: […] (quotes from *Brdjanin* Appeal Judgment, para. 411).
>
> 399. The ICTY Appeals Chamber went on to find that: […] (quotes from *Brdjanin* Appeal Judgment, para. 413).
>
> 400. Based on the legal authorities and reasoning provided for these holdings, and considering that they have been consistently affirmed by the subsequent jurisprudence of both the ICTY and the ICTR,[975] the Appeals Chamber is satisfied that the holdings reflect customary international law at the time the crimes in the present case were committed, and on that basis endorses them. Kallon's submission that JCE liability cannot attach for crimes committed by principal perpetrators who are not proven to be members of the JCE is therefore dismissed.
>
> 401. Kallon fails to develop whether, and if so how, the above holdings in *Brdjanin* are contrary to his position that the accused must be shown to have participated "causally" in at least one element of the *actus reus* by the principal perpetrator.[976] Although the accused's participation in the JCE need not be a *sine qua non*, without which the crimes could or would not have been committed,[977] it must at least be a significant contribution to the crimes for which the accused is to be found responsible.[978] As *Brdjanin* makes clear, this standard applies also where the accused participates in the JCE by way of using non-JCE members to commit crimes in furtherance of the common purpose.[979]
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> 968 *Milutinovic et al*. Decision on Jurisdiction – JCE, para. 23, *affirmed in Krajisnik* Appeal Judgment, para. 659.
> 969 *Brdjanin* Appeal Judgment, paras 393-404.
> 970 *Brdjanin* Appeal Judgment, paras 405-409.
> 971 *Brdjanin* Appeal Judgment, para. 410.
> 972 *Brdjanin* Appeal Judgment, para. 410.
> 973 *Brdjanin* Appeal Judgment, para. 411.
> 974 *Brdjanin* Appeal Judgment, para. 413. *See* also *Brdjanin* Appeal Judgment, para. 430.

[54] *RUF* Appeals Chamber judgment, para. 394-395.
[55] For instance *see Ibid*., para. 414-415, 474-475, 1139-1141 etc.

975 *Martic* Appeal Judgment, paras 168-169; *Limaj et al.* Appeal Judgment, para. 120; *Krajisnik* Appeal Judgment, paras 225-226; *Milutinovic et al.* Trial Judgment, Vol. I, paras 98, 99; *Zigiranyirazo* Trial Judgment, para. 384.
976 Kallon Appeal, para. 48.
977 *Kvocka et al*. Appeal Judgment, para. 98; *Tadic* Appeal Judgment paras 191, 199.
978 *Krajisnik* Appeal Judgment, para. 675; *Brdjanin* Appeal Judgment, para. 430.
979 *Brdjanin* Appeal Judgment, para. 430.
980 *See supra*, para. 305.[56]

This short overview of the SCSL's case-law was presented with special intention in mind. The Court is what is called a hybrid court, a court that has both international and national elements to it, either in the applicable law or in the national composition. Nevertheless, because of the lack of incorporation of the Geneva Conventions or other international treaties dealing with international crimes, the Court has mostly applied international law that was customary at the time of occurrence of the offenses.[57] Given that the time of the occurrence of the crimes was only just a couple of years later than the conflicts in the former Yugoslavia and Rwanda, it is reasonable to say that the law that was customary at the time of those two conflicts was also customary at the time of the Sierra Leonean civil war. If we also have in mind the fact that the trials did not start in earnest before late 2004, well after most of the standard setting judgments of the ICTY and ICTR were made, then the heavy reliance on their case-law should not come as a surprise.

I say it should not come as a surprise if we have a sense of the changing meta-narrative in international criminal law. In the earliest decision of the ICTY, the Appeals Chamber saw the international court system as one comprised of self-contained systems,[58] each court with its own jurisdiction and its own founding instruments and servicing specific needs. This is re-enforced with another branch of the meta-narrative – the lack of (binding)[59]

[56] *Ibid*., para. 397-401.
[57] Generally *see*: *CDF* Trial Chamber judgment, para. 87-88 and the accompanying footnotes.
[58] *Tadic Defence Motion* decision, para. 11
[59] One can question as to whether there can be another type of precedent other than binding, *see* Raj Bhala, *The Myth About* Stare Decisis *and International Trade Law (Part One of a Trilogy),* 14 Am. U. Int'l L. Rev. 845, (1999), pp. 916-936.

precedent and *stare decisis* in international law.[60] Even if we take the highly authoritive book about precedents in the ICJ, *Precedent at the World Court* by judge Shahabuddeen, we can instinctively say that what he writes about is the possibility of a precedent based system *within* the ICJ deliberative sphere. As the author himself puts it "[t]he range of admissible precedential material is wide. However, as has been pointed out in the first paragraph of chapter 1, these lectures treat only the precedential value of the Court and its predecessor."[61]

Yet what we can see here is something more than just a simple use of cases as material sources of law, as "evidence of law" as per Article 38 of the ICJ statute would make us believe. Not only does the SCSL not go into the elaboration of its own statute in light of the applicable conventions or the "general practice accepted as law,"[62] but it interprets its statute in light of the jurisprudence of the ICTY and the ICTR, even when that jurisprudence has little to do with the text of the statute, like the judicial innovation of JCE.

At this point, I would like to put forward two conclusions, one a more narrow and with a caveat, and the other a more bold one. For the first conclusion, it would seem that, for the SCSL, the validity of the jurisprudence of the *ad hoc* tribunals is beyond reproach. The SCSL does not want to question the various, and sometimes innovative, interpretations that the *ad hoc* tribunals have come up with. It simply does not go into a discussion with the jurisprudence of the ICTY and the ICTR on the correct definitions of the *actus reus* and *mens rea* of international crimes. Consequently, the legitimization system that the *ad hoc* tribunals used in their deliberations has worked, at least as it concerns the SCSL and, based on the previous part, scholars.

The second, more bold one, has elements of both a conclusion and a hypothesis. The second conclusion is that within the branch of international criminal law, a precedent-based

[60] *Aleksovski* Appeals Chamber judgment, para. 97-107.
[61] Mohamed Shahabuddeen, PRECEDENT IN THE WORLD COURT: HERSCH LAUTERPACH MEMORIAL LECTURES, Grotius Publications, Cambridge University Press, Cambridge, 2007, p. 39. But also see his general discussion on using cases as material sources and having a formal precedent system of law, especially *Ibid*. Chapter 7.
[62] Article 38(1)(b) of the ICJ Statute.

system is beginning to emerge with the potential of a *stare decisis* doctrine. The contours of this system would look something like this: the *ad hoc* and the hybrid tribunals will act as lower bench courts, setting the majority of the precedents regarding international criminal law with the ICC Appeals Chamber at the top and the final arbitrator on the issue of the applicable law. The ICC Trial Chamber might have the role of filtering the issues for the Appeals Chamber, translating the legal issues of the *ad hoc* and hybrid tribunals to ones addressed in the Rome Statute. Even though the ICC Appeals Chamber will not re-try any of the cases that came before these tribunals it will still have the last word on whether the judicial solutions that they have arrived at are "good law."

The network of criminal courts dealing with international criminal law is not a new idea; Anne-Marie Slaughter has put forward a similar idea in her book *A New World Order* where the ICC sits at the top of a vertical network of national courts dealing with international crimes, having the last word on the different issues.[63] This is not that kind of a system; it does not involve national courts at all, nor does it entertain the possibility of the ICC reviewing the past cases of these tribunals *de novo* in case it feels that justice has not been done. Nevertheless, one can imagine a system where the ICC, looking upon the judgments of its predecessors and deciding on their validity. It would be at the top of a system because of the way it was formed, through an international treaty mechanism and because it is a permanent judicial body tasked with applying international criminal law. I will now go into testing these two conclusions on the limited case-law of the ICC in the following sub-chapter.

3.3.2 What Does the ICC Have to Say on the Subject?

[63] Anne-Marie Slaughter, A NEW WORLD ORDER, Princeton University Press, Princeton and Oxford, 2004, especially Chapter II.

Before I go into the approach of the ICC to the jurisprudence of the *ad hoc* tribunals, I wish to stress one caveat. Even though the Rome Statute has been in force since July 1, 2002, there have been relatively few cases on the Court's docket. Currently there are four situations refereed to the ICC: Uganda, Democratic Republic of Congo, Sudan (Darfur) and the Central African Republic. However, there have only been three cases that have started against four suspects.[64] Consequently, any conclusions that I may make in the following section have to be seen in the light of these relatively scarce sources; the fact that it is possibly too early to arrive at any conclusions and that as time progresses the ICCs approach to the jurisprudence of the ICTY and ICTR is likely to change. With that, I would ask the reader to take what is written in the following pages with a healthy dose of scepticism.

The ICC certainly had some important things to learn from the workings of the *ad hoc* tribunals, from the more practical aspects of the proper work of the Registry, ways of cooperation with national governments etc. to the handling of cases, inclusion of victims as more than witnesses and alike.[65] Certainly, there are considerable structural differences between the *ad hoc* tribunals and the ICC. For one, the structures conforming with the idea of the separation of powers between the legislature and the court is more pronounced in the Rome Statute. The Statute envisages the existence of the Assembly of Parties that has a wide latitude of powers,[66] like to adopt the Elements of Crimes which "shall assist the Court in the interpretation and application of"[67] the crimes in the Statute, to adopt the Rules of Procedure

[64] *Prosecutor v. Thomas Lubanga Dyilo, Decision on the Confirmation of Charges No. ICC-01/04-01/06-803*, Pre-Trial Chamber Decisions, Case No. ICC-01/04-01/06, January 29, 2007 (here after the *Lubanga* Pre-Trial decision); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui Decision on the Confirmation of Charges No. ICC-01/04-01/07-717*, Pre-Trial Chamber decision, Case No. ICC-01/04-01/07, September 30, 2008 (hereafter the *Katanga* decision); *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-trial Chamber Decision No. ICC-01/05-01/08-424, Case No. ICC-01/05-01/08, June 15, 2009 (hereafter the *Gombo* decision).

[65] Benjamin N. Chiff, BUILDING THE INTERNATIONAL COURT, Cambridge University Press, Cambridge, 2008, pp. 42-67.

[66] For the Assembly's enumerated powers *see* Article 112 of the Rome Statute, A/CONF.183/9 of 17 July 1998, (hereafter the Rome Statute).

[67] Article 9(1) of the Rome Statute.

and Evidence,[68] to elect judges,[69] appoint the prosecutor,[70] etc. Nevertheless, both the Office of the Prosecutor and the Judges of the ICC are independent of the Assembly of Parties once elected or appointed.[71]

The structure of the ICC is important for the ICC's approach to the jurisprudence of the ICTY and the ICTR for several reasons. One, unlike the ICTY and the ICTR, the ICC was founded through a negotiating process of around 160 states in a meticulous and sometimes exhausting process.[72] The *ad hoc* tribunals were founded by the UN Security Council with a Statute drafted by the legal officers of the Secretary General. This has led to more control of the state parties to the ICC, especially over its applicable law, than the member states of the UN over the *ad hoc* tribunals.

Two, the Rome Statute is far more detailed than the statutes of the *ad hoc* tribunals, both in terms of substantive law and in procedural law. The Assembly of Parties with the Elements of Crimes (EoC)[73] and the Rules on Procedure and Evidence[74] has significantly fleshed out the substantive and procedural aspects of the Rome Statute and consequently has significantly limited the judges' discretion in interpreting the statute. Consequently, as I will show further down in this Chapter, the judges of the ICC have, for the most part, consistently tried to base their decisions on the Rome Statute or the EoC. They use the jurisprudence of the ICTY and the ICTR as a supportive argument of their correct interpretation of the applicable law under the statute. Nevertheless, when the statute and the EoC have proven to be

[68] Article 51 of the Rome Statute
[69] Article 36 of the Rome Statute.
[70] Article 42 of the Rome Statute.
[71] For an explanation of the problems that have befallen the ICTY and the ICTR and the lessons that the ICC has learned from them *see*: Benjamin N. Chiff, BUILDING THE INTERNATIONAL COURT, Cambridge University Press, Cambridge, 2008, pp. 46-54.
[72] For more *see*: Philippe Kirsch and John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 A.J.I.L. 2 (1999).
[73] ICC, Elements of Crimes of the Rome Statute, ICC-ASP/1/3 (part II-B), adopted and entered into force on September 9, 2002.
[74] ICC, Rules of Procedure and Evidence, ICC-ASP/1/3 (Part II-A), adopted and entered into force on September 9, 2002.

silent on a specific issue, the judges turn to the cases of the ICTY or the ICTR for support as settled law.

In its first decision of the ICC, for instance, the Pre-Trial Chamber had to decide whether the Prosecutor had sufficient evidence to proceed with the trial of Thomas Lubanga Dyilo for the crimes of using child soldiers in international and non-international conflicts.[75] The ICTY and the ICTR did not have this specific offence in their statutes and, consequently, could not build case-law on this specific issue. Consequently, there was nothing that the ICC could look for in this regard.[76] Nevertheless, the ICC had to resort to the ICTY and ICTR jurisprudence when it found silences in its statute and EoC.

For instance, when the ICC needed to define the nature of the conflict, it could not fall back on the ICC statute or the EoC because they were silent on the matter.[77] Consequently, following Article 21(b) of the statute[78] the Pre-trial Chamber started examining the Geneva Conventions and their Protocols for the appropriate rules on the matter. However, the Geneva Conventions and their commentaries did not provide the detailed answer that the Pre-Trial Chamber sought for and, consequently, it turned to the *Tadic* Appeals Chamber Judgment, especially for a definition of an internal conflict that has become international.[79] But what is

[75] *See* the *Lubanga* Pre-Trial Chamber decision, para. 242-285.
[76] However, the SCSL did have in its statute this specific crime and it did elaborate on the specifics of the elements of this crime, especially the difference between conscription and serving and its relation to the specific crime of using child soldiers. For the discussion *see*, the *Lubanga* Pre-Trial Chamber decision, para. 242-248.
[77] *Ibid*., para. 205.
[78] Article 21 (Applicable law)
1. The Court shall apply:
(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
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.
[79] The *Lubanga* Pre-Trial Chamber decision, para. 207-209.

most interesting for this thesis is that the entire discussion in the *Tadic* Appeals Chamber Judgment, and its rejection of the effective control test set up by the ICJ in the *Nicaragua* judgment, was accepted without much controversy or discussion in one simple paragraph stating that

> Regarding the second alternative [of internal conflict becoming international], the ICTY Appeals Chamber has specified the circumstances under which armed forces can be considered to be acting on behalf of a foreign state, thus lending the armed conflict an international character. *Tadic*, the Appeals Chamber set out the constituent elements of the "overall control" exercised by a foreign State on such armed forces: (continues by quoting from the *Tadic* Appeals Chamber Judgment)[80]

In the following paragraph, the Pre-Trial Chamber even refers to the overall control test as a test and specifically says that it "will be used to determine whether armed forces are acting on behalf of the first State."[81] When the same issue rose again in the *Katanga* decision, the Pre-Trial Chamber simply referred back to the other Pre-Trial Chamber's decision in *Lubanga* as a settled issue by quoting the entire paragraph containing the requisite elements of distinguishing an international conflict.[82] No issue regarding the controversy over the then recent judgment of the ICJ in the *Bosnia Genocide* case[83] and its dismissal of the *Tadic* Appeals Chamber overall control test ever arose.

In a similar manner, when the Pre-Trial Chamber needed a definition of an internal armed conflict it underwent the same procedure, with examining the texts of the Geneva Conventions, Protocol II and its commentaries and then turning to the ICTY jurisprudence to have the final word.[84] The Pre-Trial Chamber accepted, rather unceremoniously, the ICTY's construction of what elements one needs to look at when deciding whether a conflict is non-

[80] *Ibid.*, para. 210.
[81] *Ibid.*, para. 211.
[82] "Relying on a decision of the International Court of Justice ("the ICJ") in the case of the Democratic Republic of Congo v. Uganda, the Chamber held in the Lubanga Decision that: (continues by quoting paragraph 209) (footnotes omitted)." *Katanga* Pre-Trial Chamber decision, para. 238.
[83] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, General List No. 91, February 26, 2007.
[84] The *Lubanga* Pre-trial Chamber decision, para. 232-234/

international or not, despite the extra element of territorial control required by Additional Protocol II.[85]

Furthermore, in its second decision, the *Katanga* decision, the ICC made another wholehearted adoption of a test designed by the *ad hoc* tribunals. When the ICC encountered a similar situation in response to whether individuals can be considered protected persons under the Geneva Convention even though they are nationals of the party to the conflict that has committed the crimes it referred back to the solution of the ICTY in which (perceived) allegiance to a party to the conflict was the demonstrative test.[86] The discussion is interesting in the fact that discussion is almost absent. While the *Tadic* Appeals Chamber went to extraordinary length to arrive at this particular solution, even after the failure of other Trial Chambers to do so, the ICC simply accepted the decision of the ICTY as settled law. It simply said:

> 290. The ICTY Appeals Chamber in the Tadic case found that "nationality", as provided for in article 4 GC IV, is not the crucial test for determining whether an individual civilian has protected status under GC IV. According to the ICTY Appeals Chamber:
>
> > [...] not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggests that allegiance to a Party to the conflict and correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.
>
> 291. This Chamber also adopts the approach that the term "nationals" in article 4 GC IV, which was drafted in 1949, reflected, at that time, the perceived importance of nationality in determining the allegiances of individual civilians. Although the nexus between nationality and allegiance remains an important factor in determining protected status for persons involved in international armed conflicts, as the ICTY jurisprudence demonstrates, it is no longer the definitive test. (footnote omitted)[87]

[85] Art 1. Material field of application
1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party *between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*(emphasis added). But also *see Ibid*., para. 233.

[86] See *Katanga* Pre-Trial Chamber decision, para. 289-292.

[87] The footnote following the quote of the ICTY Appeals Chamber is quite extensive, quoting from further ICTY judgments and taking up most of the page, *Katanga* decision, para. 290-291.

It is now time for me to demonstrate another aspect of the ICC's use of the *ad hoc* tribunals' use of their jurisprudence in relation to their statutes. Antonio Cassese, in the second edition of his book, *International Criminal Law*, has several pages devoted to the discrepancies between the, what he calls, general international law, customary law or customary international criminal law and the Rome Statute in relation to the substantive parts of the law.[88] This can be most evident in the discussion related to crimes against humanity, since apart from the Rome Statute, they are not convention based crimes, but dwell wholly in the realm of customary international law.

The first time that the ICC dealt with the issue of the definition of crimes against humanity was in the *Katanga* decision. The element of crimes that is specifically mentioned in the Rome Statute, but was discarded by the ICTY and ICTR as not *required* but desirable,[89] is the need of a specific state or organizational plan or policy as an element of the crimes. In this respect, the ICC had to "go it alone", follow its statute and elaborate on the plan-or-policy requirement. Falling back on the EoC, the ICC gave examples of what more specifically the plan-or-policy requirement would entail. It specifically said that

> Accordingly, in the context of a widespread attack, the requirement of an organisational policy pursuant to article 7(2) (a) of the Statute ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources. Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population.[507] The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised - as opposed to spontaneous or isolated acts of violence - will satisfy this criterion.[508]
>
> 507 See e.g. 1991 Draft Code, commentary on art. 21, para. 5: "Private individuals with de facto power or organized in criminal gangs or groups"; ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-40-T, Trial Judgment, 2 September 1998, para. 580; ICTY, *The Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T, Trial Judgment, 26 February 2001, para. 179; ICTY, *The Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, para. 94; ICTR, *The Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 123;

[88] *See* Antonio Cassese, INTERNATIONAL CRIMINAL LAW, 2nd edn., OUP, Oxford, 2008, pp. 73-74, 94-97, 123-126, 146-147.
[89] For more *see Kupreckic* Trial Chamber judgment, para. 551-555.

United Nations General Assembly, Report on the International Law Commission to the General Assembly, 51 U.N. GAOR Supp. No. 10 at 94, United Nations DocumentA/51/10 (1996).
508 WERLE, G., *Principles of International Criminal Law*, The Hague. TMC Asser Press, 2005, p. 227, para. 660.[90]

This idea of a plan-or-policy requirement was further developed by the ICC in the *Gombo* decision, where the Pre-Trial Chamber referred back to the *Katanga* decision and the *dicta* there.[91] What is interesting, however, is that, again, when the Rome Statute and the EoC are silent on specific matters on the points of the law, the ICC has recourse to the jurisprudence of the *ad hoc* tribunals in an almost uncritical fashion.[92]

I would like to end the discussion of this section of the present Chapter with two preliminary conclusions. My first conclusion has to do with the emerging pattern of what the ICC seems to see as "the law" applicable to its cases. As pursuant to Article 21 of its statute "the law" for the ICC emphasized by the words shall, is, in the first place, the Rome Statute, the EoC and the Rules on Procedure and Evidence; in the second place, "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict"[93]; and what could be summarized as general principles of criminal law.[94] From the way that the ICC uses the jurisprudence of the ICTY and the ICTR, I would like to put forward the idea that, so far, the jurisprudence of these two tribunals would fall under the arm of Article 2(1)(b), i.e. rules and principles of international law including the established principles of the law of armed conflict.

However, I would again like to stress that, given the relatively small case law of the ICC, numbering in only three decisions of the Pre-Trial Chambers, this idea that the ICC would start regarding the *ad hocs'* case-law as part of the rules and principles of international law could be nothing more than crystal ball gazing. Yet, having in mind the experience of the

[90] The *Katanga* Pre-Trial Chamber decision, para. 396.
[91] See *Gombo* Pre-Trial Chamber decision, para. 82-83.
[92] *See* the following paragraphs of the *Gombo* Pre-Trial Chamber decision, para. 83-89.
[93] Article 21(1)(b)
[94] Article 21(1)(c).

ad hoc tribunals, it would not be difficult to imagine such a situation. What will be interesting to follow in the coming years, as the case load of the ICC increases, would be to see whether the stress of following and quoting the jurisprudence of the ICTY and the ICTR will be replaced with the following of its own jurisprudence, for which there is a special allowance in Article 21(2).[95]

My second conclusion, and this has more relevance to my thesis, is the fact that the ICC has accepted the jurisprudence of the ICTY and the ICTR as authoritative when it comes to filling in gaps within its first tear sources, i.e. the Rome Statute the EoC and the Rules on Procedure and Evidence. So far, the ICC has accepted them wholeheartedly and uncritically, even where there are potential conflicts with the decisions of other international tribunals like the ICJ. A question may arise in the future as to the status of the jurisprudence of the *ad hoc* tribunals within the ICC system especially when it conflicts with the ICC statute, like the issue of plan-or-policy for crimes against humanity.[96]

So far, I have looked at the question of whether the *ad hoc* tribunals' jurisprudence has been accepted by the other international/internationalized criminal tribunals. It is now time to see whether the legitimizing method that these tribunals employed has worked on other courts of international law and whether there is acceptance of the jurisprudence as "the law" on the specific issue.

3.4 What of Other International Courts?

3.4.1 The ICJ v. ICTY – Self-contained Systems?

[95] Article 21(2): The Court may apply principles and rules of law as interpreted in its previous decisions.
[96] *See* Antonio Cassese, International Criminal Law, 2nd edn., OUP, Oxford, 2008, pp. 94-97.

It was unavoidable that at some point the two courts would clash on the issue of state responsibility, since as I pointed out in Chapter II, the ICTY practically overruled the ICJ when it came to the issue off imputability of actions of individuals on behalf of another state.[97] This eventually happened during the ICJ's judgment regarding Bosnia's application against Serbia under the Genocide convention.[98] The ICJ issued a lengthy judgment covering some 471 paragraphs and a good number of those paragraphs involved findings of the ICTY either on issues of fact or on issues of international criminal law.[99] It has specifically said

> 223. In view of the above, the Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight.

However, when it came to issue of attribution of state responsibility, the ICJ did not accept the ICTY's remodeling of the *Nicaragua* test and stood firm on its own decision issued more than 20 years ago. It reasoned this move by distinguishing the *Tadic* Appeals Chamber judgment as one that deals with issues related to international criminal and international humanitarian law and, therefore, is taxed with establishing individual criminal liability and not state responsibility.[100] In the view of the ICJ, the ICTY overreached itself when it

[97] *Tadic* Appeals Chamber judgment, para. 102-105.

[98] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment, (Bosnia and Herzegovina v Serbia and Montenegro)*, General List No. 91, February 26, 2007, (hereafter the *Bosnia Genocide* case).

[99] Especially *see ibid.*, para. 231-376 accepting both the factual pattern that was established by the ICTY but also the legal finding regarding the scope of the crimes in relation to individual criminal responsibility; for the use of criminal law concepts in the ICJ reasoning *see* the comment made by Antonio Cassese, *On the Use of Criminal Law Notions in Determining State Responsibility for Genocide*, 5 J. Int'l Crim. Just. 875 (2007).

[100] The *Bosnia Genocide* case, para. 403. "The Court has given careful consideration to the Appeals Chamber's reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber's view. First, the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it."

deemed itself fit to pronounce on issues of general international law, which are its purview alone.[101] It furthermore said that "[i]nsofar as the "overall control" test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable".[102] However, when it came to issues of general international law and to state responsibility in particular, the ICJ found the *Tadic* "overall control" test as "unpersuasive."[103]

The reasons for this unpersuasivness are somewhat murky in the reasoning of the ICJ.[104] It relied on two arguments, one: that the issues of state involvement in a conflict through its proxy agents for the determination of the existence of an international conflict and the determination of state responsibility are somehow different due to the difference in their underlying logic.[105] The second argument of the ICJ put forward was that the *Tadic* "overall control" test broadened the "the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf."[106]

Regardless of whether the ICTY or the ICJ "got it right" in their respective tests, since a discussion on that is beyond this thesis, what is important for this thesis is the way that the ICJ uses the cases of the ICTY in its reasoning. What is important to remember out the ICJ judgment in the *Bosnia Genocide* case is that the ICJ gives full deference to the outcomes of

[101] *Ibid.*
[102] *Ibid.*, para. 404.
[103] "On the other hand, the ICTY presented the "overall control" test as equally applicable under the law of State responsibility for the purpose of determining – as the Court is required to do in the present case – when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive." *Ibid.*, para. 404
[104] For more on the objections to the lack of reasoning *see* Antonio Cassese, *The* Nicaragua *and* Tadic *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 Eur. J. Int'l L. 649 (2007), pp. 650-651.
[105] The *Bosnia Genocide* case, para. 405. Although the ICJ never does say what the different logic that underpin the two systems is, except for the fact that one is a system of individual responsibility and the other one a system of state responsibility.
[106] *Ibid.*, para. 406.

the ICTY regarding issues of international criminal law, but, is however, reluctant to relinquish its power over issues that concern general international law. It seems that in the ICJ's view, international courts are not just "self-contained systems" of the *Tadic* Defence Motion Decision variety, where all international courts have the possibility to decide on all issues of international law related to their case. In the ICJ's view international courts are now "self-contained systems" with specific specialities and the value/usefulness that can be attributed to the courts' reasoning is almost proportionally related to the issues' proximity to the courts' primary jurisdiction, and not its argumentative merit.

The endorsement of this view, of international courts as "self-contained systems", has an impact on the possibility of establishing a system of *stare decisis* in international law, as I will argue in Chapter V. What it means for now is that, with this system of highly independent courts, there is no system or institutional solution in place, except for judicial prudence, that can stop the coexistence of different legal solutions to the same issues in different branches of international law.

3.4.2 Human Rights Tribunals and the *Ad Hocs*: One of Many Argumentative Voices

3.4.2.1 The European Court of Human Rights and the Ad Hocs

There should have been many occasions for the interpretative paths of the *ad hoc* and the human rights tribunals to cross since, in the words of the ICJ, the rules of war are in times of conflict a *lex specialis* to human rights norms.[107] Moreover, the jurisdiction of the human rights tribunals and the protection of the human rights conventions does not cease in time of

[107] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, para. 25.

conflict.[108] In addition, as has been pointed out by Darryl Robinson, human rights and international criminal tribunals do share most of the interpretative assumptions regarding the basic sources that they are taxed to apply.[109] Victim protection seems to be high on the agenda of both types of tribunals. However, the recourse that the human rights tribunals have had to the interpretative outcomes of the *ad hoc* tribunals has been scant at best. In this subsection, I will try see if any pattern exists in the human rights tribunals' recourse to the case-law of the *ad hoc* tribunals. Because of their visibility and because of their accessible and advanced case law, my limitation due to time and scope, I have chosen to focus on two international tribunals, the European Court for Human Rights (ECtHR) and the Inter-American Court for Human Rights (IACtHR).

As I have said, because of the ideological closeness between these two types of tribunals, one would suspect that a much wider recourse to each others' interpretative outcomes. However, in the 15 years of its existence, the acronym ICTY has been directly used in 18 cases or decisions (as of September 10, 2010) of the ECtHR. Those case or decisions roughly fall in three categories, 1) a direct challenge to the fair trial rights protection offered by the ICTY including the detention by the Netherlands while the trial is ongoing; 2) recourse to the interpretative outcomes of the ICTY that are related to general international law and; 3) recourse to the interpretative outcomes of the ICTY's own statute i.e. recourse to international criminal law in general.

The first group of cases have been decided either with the reference to the fair trial protection guaranties set out in the ICTY's statute[110] or to the ECtHR's previous decisions of lack of jurisdiction over subsidiary bodies of the UN Security Council based on the

[108] *Ibid.*
[109] Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925 (2008).
[110] *Neletilic v. Croatia*, Admissibility Decisions, (Application no. 51891/99), May 4, 2000.

Behrami[111] decision.[112] However, in the *Milosevic v. The Netherlands* case the ECtHR, having no recourse to the *Bahrami* decision at the time, reasoned that the applicant did not use all the available domestic remedies.[113]

There is one observation that has to be made regarding the position of the ICTY judgments in these cases and it is the fact that the ECtHR puts them under the heading of "The Facts" in the case. The ECtHR puts the case law of the ICTY in the same footing with other international and national provisions that are beyond its scope of interpretation, as something that can only be taken note of but not interpret or re-interpret.[114]

The recourse to the interpretative outcomes of the ICTY regarding general international law are somewhat more interesting. In the *Al-Adsani* case, for instance, the ECtHR had to review a challenge to the UKs granting of sovereign immunity to Kuwait from civil proceedings by the applicant, Al-Adsani, regarding the injuries he suffered by the authorities of Kuwait.[115] The ECtHR decided that, even though the prohibition of torture has reached the status of *jus cogens* under international law,[116] citing the *Furundjia* Trial Chamber judgment among others, it is not enough for it to trump sovereign immunity claims.[117] The joint dissenting opinion had the opposite idea regarding the sovereign immunity trump, however.[118]

[111] *Behrami & Behrami v. France and Sarmati v. France, Germany and Norway*, Admissibility Decision, Application Nos. 71412/01 & 78166/01, May 2, 2007, para. 121. (hereafter the *Bahrami* case)
[112] *Galic v. The Netherlands*, Admissibility Decision, (Application no. 22617/07), June 9, 2009; *Blagojevic v. The Netherlands*, Admissibility Decision, (Application no. 49032/07), June 9, 2009.
[113] *Milosevic v. The Netherlands*, Admissibility Decision, (Application no. 77631/01), March 19, 2002.
[114] Malcolm N. Shaw, INTERNATIONAL LAW, 6th edn., Cambridge University Press, Cambridge, 2008, pp. 136-137 but also *see* "From the standpoint of International Law and of the Court [PCIJ], which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures." *Certain German Interests in Polish Upper Silesia (Merits)*, Judgment, Series A, No. 7, p. 19.
[115] *Al-Adsani v. The UK*, Judgment, (Application no. 35763/97), November 21, 2001.
[116] *Ibid*., para. 60-63.
[117] "The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State." *Ibid*., para. 66.
[118] *See*, Joint dissenting opinion of Mr. Rozakis and Mr. Caflisch joined by Mr. Wildhaber, Mr. Costa, Mr. Cabral Barreto and Mrs. Vajić in *Ibid.*

Nevertheless, the focus of this thesis is not to debated the finer points of the law in regards to the issue of whether the majority of judgment "got it right", but point out of the way that the ECtHR uses the case-law of the *ad hoc* tribunals. As in the previous judgment, the ECtHR puts the case law of the ICTY under the heading of facts of the case, more specifically paragraph 30 where the other relevant national and international instruments regarding torture are.[119] However, when it discusses the arguments put forward in *Furundzija* and the other cases of the ICTY regarding torture it measures the persuasiveness of their findings and their conformity with general international law as it sees it.

Noting that Article 6 of the European Convention on Human Rights "should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity,"[120] the ECtHR then goes on to discover and interpret what those rules on state immunity are.[121] In this interpretation, the case law of the ICTY are just one authoritative element in the discussion, a precedent whose interpretation has to be taken note of and followed as a good representation of what the law is on the given subject. However, the ECtHR, rather than entering into an interpretative argument with the ICTY case law and its view on the *jus cogens* nature of the prohibition of torture, it distinguishes its findings as relevant to individual criminal responsibility and not state immunity.[122] It did not dispute the ICTY's findings of law, but it did dispute that applicability of the case due to the different nature of the international criminal law regime.

We can find a rationale for this type of use of ICTY case law in the *Demir and Baykara v. Turkey* case.[123] The case originated as a question of the right of association, trade union membership, collective bargaining and the right to strike of municipal employees.[124]

[119] *Ibid*., para. 25-31.
[120] *Ibid*., para. 55.
[121] *Ibid*., para. 54-66.
[122] *Ibid*., para 61.
[123] *Demir and Baykara v. Turkey*, Grand Chamber judgment, (Application no. 34503/97), November 12, 2008.
[124] *Ibid*., para. 14-33.

The issue of the case that is of relevant to this topic was the Turkish government's objection to the method of interpretation of Article 11 of the European Convention on Human Rights (ECHR). The Chamber of the Court interpreted the Convention in light of other international instruments, including ones that Turkey was not part of.[125]

The Grand Chamber then went on to set the principles of interpretation of the Convention, namely the ones enshrined in Articles 31-32 of the VCLT on the Law of Treaties. It garnished this basic approach with the principles of interpretation that "renders its rights practical and effective, not theoretical and illusory",[126] as well as the reading of the "Convention […] as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions."[127] It also reiterated its approach that the Convention must be read as part of international law and that "it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties"[128] It finished with its often remarked phrase that "the "living" nature of the Convention, which must be interpreted in the light of present-day conditions, and that it has taken account of evolving norms of national and international law in its interpretation of Convention provisions"[129]

The Grand Chamber then gave examples where it used other international instruments, including court judgments, to help in its interpretation of the Convention in light of norms of international law.[130] It is here where the case law of the ICTY comes in, i.e. the *Furundzija* Trial Chamber and other judgments regarding the *jus cogens* nature of the prohibi-

[125] *Ibid*., para. 53.
[126] *Ibid*., para. 65.
[127] *Ibid*., para. 66.
[128] *Ibid*., para. 67.
[129] *Ibid*., para. 68.
[130] *Ibid*., para. 69-73.

tion of torture.[131] The use of case law of the international criminal tribunals seems to be summarized by the court in the following telling paragraph which says that

> The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.
>
> […] It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies […][132]

It seems that when it comes to using the case law of the ICTY or any other international criminal tribunal, the ECtHR will view that case law as something that is extrinsic, something that is not part of its regime but as another element of international or national law. It has the full force of law for that specific regime and certainly has a level of deference to its findings. However, the ECtHR does not accept as binding within its jurisdiction other judgments that are set down in other international branches.

A third set of cases that arise within the ECtHR are the ones dealing with Article 7 jurisprudence, namely the *nullum crimen sine lege* principle. After the fall of the Berlin Wall, European governments chose to prosecute atrocities that happened either during WWII but were carried out by the forces of the Soviet Union or during the Cold War and were carried out by the communist governments supported by the Soviet Union.[133] Other judgments directly concern conflicting interpretations of international crimes between the ICTY and na-

[131] *Ibid*., para. 73.
[132] *Ibid*., para. 85-86.
[133] *Streletz, Kessler and Krenz v. Germany*, Judgment, (Applications nos. 34044/96, 35532/97 and 44801/98), March 22, 2001; *Kolk and Kislyiy v Estonia*, Admissibility decision, (Application nos. 23052/04 and 24018/04), January 16, 2006; *Korbely v. Hungary*, Grand Chamber judgment, (Application no. 9174/02), September 19, 2008; *Kononov v Latvia*, Grand Chamber judgment, (Application no. 36376/04), May 17, 2010.

tional governments,[134] for instance, or interpretation of national law which is inconsistent with international standards.[135] What is important to note here is that unlike most other provisions in the ECHR, the ECtHR can and does go into the interpretation of national and international law, in so far as it is accessible and foreseeable, even through judicial interpretation/law-making.[136] Consequently, the ECtHR has had the possibility to pronounce on the correctness and consistency of the interpretation of the *ad hoc* tribunals with their statutes.

However, there is one thing that can be said about the ECtHR application of substantive international criminal law notions in its reasoning, and that is that it is a messy and inelegant practice that, at times, produced somewhat confusing results.[137] For instance, if one reads the *Korbely v. Hungary* Grand Chamber judgment he/she would be able to see a mix-up in requirements and terminology that the ECtHR made regarding Common Article 3 of the Geneva Conventions and crimes against humanity in a sense continuing the Hungarian courts' confusion that basic knowledge of international criminal law could easily dispel.[138] However, the ECtHR has tried to improve its record regarding issues of international criminal and humanitarian law, more specifically the effort made during the *Kononov v. Latvia* Grand Chamber judgment.[139]

There are other ECtHR Article 7 judgments that do not deal with crimes that have happened during the Cold War period but with more recent crimes. One such case is the *Jorgic* case,[140] a case concerning Germany's conviction of Jorgic for the crime of genocide dur-

[134] *Jorgic v. Germany*, Judgment, (Application no. 74613/01), July 12, 2007.
[135] *M.C. v. Bulgaria*, Judgment, (Application no. 39272/98), December 4, 2003.
[136] *See* for instance *S.W. v. the United Kingdom*, Judgment, Case No. 47/1994/494/576, November 22, 1995, para. 34-36.
[137] For one critic on the problems that the ECtHR has faced in using international criminal law notions *see* Antonio Cassese, *Balancing the Prosecution of Crimes Against Humanity and Non-Retroactivity of Criminal Law*, 4 J. Int'l Crim. Just. 410 (2006).
[138] For instance, the ECtHR perpetuated the confused legal categorization created by the Hungarian courts by equating the provisions of Crimes Against Humanity as found in Article 6 of the London Charter, Article 5 of the ICTY statute, Article 3 of the ICTR statute and Article 7 of the ICC (Rome) statute with War Crimes as understood to fall under Common Article 3 of the Geneva Convetnions, *see Korbely v. Hungary*, para. 78-85.
[139] *Kononov v. Latvia*, para. 196-233.
[140] *Jorgic v. Germany*, Judgment, (Application no. 74613/01), July 12, 2007.

ing the war in Bosnia and Herzegovina. Jorgic filed an application for protection of his Article 5, 6 and 7 rights. It is ECtHR's Article 7 review that is of importance for this thesis. Namely, a problem arose when the German courts and the ICTY diverged in their interpretations of the necessary elements of the crime of Genocide. The ICTY specifically, took note of the German judgment in the *Jorgic* case, but however, chose a different interpretative path.[141]

For the ECtHR, the question was not whether there would exist an interpretative dilemma regarding the "true" interpretation of the crime of genocide or whether parallel interpretative paths regarding the intent to destroy. The question for the ECtHR was whether the German courts, at the time when the case was decided and given the available materials, arrived at a reasonable interpretation of the crime of genocide.[142] Even though the ECtHR was faced with an interpretative dilemma it saw as beyond its task to settled and it was quite happy to accept the ICTY's interpretation of the crime of genocide as authoritative.

I would also like to mention another case that appears in the ECtHR decision where it specifically references the case law of the ICTY and that is the case of *M.C. v. Bulgaria*.[143] In this case the ECtHR was faced with a complaint regarding the questionable interpretation of Bulgaria of its criminal law provision regarding the element of force in the crime of rape.[144] The crime did not involve an international crime. As with the other cases that did not involve Article 7 challenges, the ECtHR used the case law of the ICTY as a fact,[145] something that it has to take note of but cannot change, even though it is part of international law. In this case, the ECtHR used the findings of the ICTY and other domestic jurisdictions regarding the definition of rape in order to conclude that, at least when it concerns Europe, physical resistance

[141] *Ibid*., para. 99.
[142] *Ibid*., para. 110-113.
[143] *M.C. v. Bulgaria*, Judgment, (Application no. 39272/98), December 4, 2003.
[144] *See* facts of the case *Ibid*., para. 9-71.
[145] The explanation of the case law of the ICTY is put in the section titled "Relative Comparative and International Law and Practice", *Ibid*., para. 88-108.

has faded out as a requirement of rape.[146] Consequently, the steps that the Bulgaria undertook during the prosecution fell short of the positive obligations under Articles 2 and 8 of the Convention.[147]

The ECtHR has also been able to rely on the case law of the ICTY when elaborating on principles of criminal law. In the case of *Scoppola v Italy*,[148] the ECtHR's Grand Chamber had to decide on whether the principle of *lex mitior* was now incorporated as part of the Article 7 protections under the Convention. The question was complicated by the fact that the Commission previously in *X v. Germany* decided that it was not.[149] Consequently, the Grand Chamber, after reviewing international and national practice came to the conclusion that

> [S]ince the *X v. Germany* decision a consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law.[150]

The Grand Chamber came to this conclusion after reviewing national and international law and practice on the matter and, in the part devoted to the Facts, quoted several paragraphs from the ICTY's *Nikolic*[151] case.[152]

One conclusion that can be drawn from the discussion above is that the ECtHR sees the case law of the ICTY as given, as facts of the case before it, as one interpretative line of arguments that it can take in to account, which it can agree or disagree with. The ECtHR, however, has somewhat accepted the outcomes of the case law of the ICTY, or like in the *Al-Adsani* case, distinguish the findings due to a difference in regimes. It seems that, in the true spirit of the "self-contained systems" in the *Tadic* Defence Motion judgment,[153] the ECtHR is

[146] *Ibid*., para. 154-166.
[147] *Ibid*., para. 187.
[148] *Scoppola v. Italy*, Grand Chamber judgment, (Application no. 10249/03), September 17, 2009 (hereafter *Scoppola v. Italy*).
[149] *X v. Germany*, No. 7900/77, Commission decision of 6 March 1978, Decisions and Reports (DR) 13.
[150] *Scoppola v. Italy*, para. 106.
[151] *Prosecutor v. Dragan Nikolic*, IT-94-2-A, Appeals Chamber judgment, February 4, 2005, para. 79-86.
[152] *Scoppola v. Italy*, para. 41.
[153] *Tadic* Defence Motion Decision, para. 11.

happy to accept as fact the interpretative outcomes of other international and national tribunals. It is happy to accept them as evidence of an evolving or present standard either in international or national law, as the current state of the law in the matter. Furthermore, it puts them on the same footing as other international and national documents (laws, treaties, and case law), as Judge Albie Sachs would put it, just one more line of argument in the production of the judgment.[154]

3.4.2.2 The Inter-American Court for Human Rights

The Inter-American Court for Human Rights has not had much recourse to the case law of the *ad hoc* tribunals, even though it has had several cases dealing with, mostly, internal conflicts. A typical example, if there is one, is the case *of Case of Almonacid-Arellano et al v. Chile*, where the IACtHR had to decide the compatibility of self-enacted amnesties with the fair trial provisions in the American Convention on Human Rights.[155] In this case, the IACtHR reasoned that international humanitarian law had outlawed the use of amnesties.[156] Therefore, the IACtHR had to look into whether the actions of the agents of the government in question amounted to crimes against humanity.[157] The IACtHR underwent a stringent historical explanation of the development of the notion of crimes against humanity. However, given the fact that it was not required to pronounce on the guilt of innocence of an accused, it did not go into the stringent fact-finding as an international criminal tribunal would.

Strangely enough, when it comes to relying on the elements of crimes, the IACtHR does not use, nor goes into much detail as to what are the elements of crimes. It seems to gloss over the proof needed for the stringent requirements for establishing a wide spread or

[154] Albie Sachs, THE STRANGE ALCHEMY OF LIFE AND LAW, OUP, Oxford, 2009, pp. 113-120 and 140-154.
[155] *Case of Almonacid-Arellano et al v. Chile*, Judgment on Preliminary Objections, Merits, Reparations and Costs, September 26, 2006, Series C, No. 154.
[156] *Ibid.*, 105-114
[157] *Ibid.*, 93-104.

systematic attack on a civilian population, maybe because the government did not dispute the perpetration of crimes against humanity by the previous Pinochet regime. When it quotes, for instance the *Tadic Defence Motion* decision, it does so for the purpose of establishing that even if an accused has committed a single act of murder within the context of widespread or systematic attack then that person commits crimes against humanity.[158] What it does is to focus on the moral repugnancy and condemnation of crimes against humanity and supports it with quotes from several jurisdictions,[159] one of which is the *Erdemovic* Trial Chamber judgment.[160]

The IACtHR has had, for instance, to use the ample case law of the *ad hoc* tribunals when it decided the case of *Bueno-Alves v. Argentina*, a case involving challenges under Article 5 of the American Convention.[161] In that case, the IACtHR defined what falls under the definition of torture.[162] However, when fleshing out the definition of torture, it did not use the *ad hoc* tribunals' abundant case law on the issue. Rather more, it used the Inter-American Convention to Prevent and Punish Torture, and deducting the elements of torture on the ground of the convention and its previous case law.[163] This approach has been criticized as being too narrow, since it leaves out instances of torture by non-state actors, for instances.[164]

The IACtHR, even though it has had several cases dealing with international humanitarian law issues, has not had a significant recourse to the case law of the *ad hoc* tribunals. Its recourse is more to the general trend of striving for impunity rather than for any substantive

[158] *Ibid.*, 96.
[159] *Ibid.*, 105-114, citing numerous UN General Assembly Resolutions (para. 106 and accompanying footnote), UN Security Council Resolutions including the one establishing the Special Court for Sierra Leone (para. 107-109), and obligations under the American Convention.
[160] *Ibid.*, 105.
[161] *Case of Bueno-Alves v. Argentina*, Judgment on Merits, Reparations, and Costs, May 11, 2007, Series C, No 164.
[162] *Ibid.*, para. 75-80.
[163] *Ibid.*, para. 78-79;
[164] Concurring Opinion of Judge Cecilia Medina Quiroga, *Gonzalez et al.* (*Cotton Field") v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, November 16, 2009, Series C, No. 205, relying on the case law of the *ad hoc* tribunals to argue that the requirement of state involvement would leave out torture perpetrated by private individuals i.e. non-state actors, para. 13-18.

reliance on the *ad hocs'* reasoning. Furthermore, like the ECtHR it uses the case law of the ICTY and the ICTR as something that it can bolster its arguments with, but not something it can re-interpret or change. It is one more in the line of "self-contained systems",[165] rather than a unified court system of international law.

3.5 Preliminary Conclusions – Scholars and Courts: Different Spectacles for the Same Law

There are two conclusions related to this Chapter that I would like to make at this point. The first conclusion is directly related to the purpose of this Chapter, i.e. to see whether there is wide acceptance of the interpretative outcomes of the *ad hoc* tribunals. The second conclusion seems to almost force itself by analyzing the discourse of samples of scholars and samples of cases from different jurisdictions and that is that scholars and courts have different views of international law. But first, let me focus on the first conclusion.

There is little doubt that the normative outcomes of the *ad hoc* tribunals have been accepted by the scholarly community at large. International criminal law, international humanitarian law and international law scholars have widely accepted the law-making/normative outcomes (not the fact of judicial law-making itself however) of the *ad hoc* tribunals. The new international or internationalized criminal courts have interpreted their own statutes in light of the case law of the *ad hocs*. Other international courts have put the interpretative outcomes of the *ad hoc* tribunals in the parts of their reasoning that deals with facts, something that cannot be changed, modified, or re-interpreted, only accepted. For the first conclusion, it seems that the legitimization technique that the *ad hoc* tribunals used has worked, and the normative outcomes of the *ad hoc* tribunals have, for the most part, been accepted as law. It

[165] *Tadic Defence Motion*, para. 11.

should also mean that, arguably, some sort of mechanism of control is in place to constrain the normative power of judges, since there is no widespread outcry against the normative role that the international criminal courts have played.

Secondly, there is one marking difference that I have observed while I have been writing this Chapter. That stunning difference is between how scholars view international law from their "ivory towers" and how courts view it from their "elevated" benches. Where scholars see a unity of law, i.e. international law as one all encompassing law with different branches, like international human rights or humanitarian or criminal law as a branch of law; courts see different systems, systems that are outside of their scopes or jurisdiction, systems that they can draw inspiration from, but cannot change, interpret or re-interpret. Where scholars see dissonance between interpretative outcomes, rough edges that need to be polished and smoothed out in this unified law, courts are very happy to leave different branches to live with interpretative outcomes different from their own. A group of scholars has said that:

> In one sense every international court is a world unto itself, but in another, each court is an island in the same sea of international law. Significant evidence indicates that, lack of formal coordination notwithstanding, courts are engaged in a sort of jurisprudential dialogue whose grammar still needs to be deciphered.[166]

Do not get me wrong, international courts do borrow arguments from each other. They do this in very much the same way that national judges/courts adopt arguments from other national jurisdictions.[167] Furthermore, like national judges, international judges are also happy to discount the interpretative outcomes of other international courts as something foreign, almost echoing the lament of Justice Scalia in his dissent in *Lawrence v. Texas*.[168]

[166] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, p. 104

[167] Albie Sachs, THE STRANGE ALCHEMY OF LIFE AND LAW, OUP, Oxford, 2009, pp. 113-120 and 140-154

[168] "In any event, an "emerging awareness" is by definition not "deeply rooted in this Nation's history and tradition[s]," as we have said "fundamental right" status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on "values we share with a wider civilization," *ante*, at 16, but rather rejected the claimed right to sodomy on the ground that such a right was not " 'deeply rooted in *this Nation's*

Unlike the almost overruling nature of the discussion in the *Tadic* Trail Chamber judgment regarding the *Nicaragua* test, international courts are happy to "stick" to their own founding documents and develop their case law dependant on the internal logic of the "self-contained system"[169] than search for integrity of the international legal system as a whole.

Let us not forget the way that the *ad hoc* tribunals saw international law. They borrowed extensively from other branches of international law and interpreted and re-interpreted their rulings and adapted them to fit the branch of international criminal law as they saw it. In most cases where the *ad hoc* tribunals disagreed with other courts' jurisprudence, they did not dismiss it out of hand because it was a ruling from another "self-contained"[170] system that had a different foundation to it, but they rather entered into a reasoned discussion with it while offering competing arguments for a different view of interpretation.

It is not that international scholars and institutions have not been aware of this problem before. Quite the contrary, the ILC established a working group to research the phenomenon of fragmentation of international law. The working group issued a report titled *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*,[171] in which tried to tackle this problem. One of the suggestions that it put forward was the principle of "systemic integration" of international law.[172] The principle of systemic integration refers to the requirement of an international tribunal to interpret a given provision in a treaty in light of "any relevant rules of international law applicable in the

history and tradition,' " 478 U.S., at 193—194 (emphasis added). *Bowers*' rational-basis holding is likewise devoid of any reliance on the views of a "wider civilization," see *id.*, at 196. The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court … should not impose foreign moods, fads, or fashions on Americans." *Foster* v. *Florida*, 537 U.S. 990, n. (2002) (Thomas, J., concurring in denial of certiorari)." (emphasis in original) Justice Scalia dissenting in *Lawrence v. Texas* 539 U.S. 558 (2003), p. 598; also *see* Sujit Choudhry *Migration as a New Metaphor for Comparative Constitutional Law* in Sujit Choudhry ed., THE MIGRATION OF CONSTITUTIONAL IDEAS, Cambridge University Press, Cambridge, 2006.

[169] *Tadic Defence Motion*, para. 11.

[170] *Tadic Defence Motion* decision, para. 11.

[171] Report of the Study Group of the International Law Commission titled *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, International Law Commission, Fifty-eight session, A/CN.4/L.682, April 13, 2006.

[172] *Ibid*., para. 410-480.

relations between the parties."[173] Nevertheless, it seems that international courts are reluctant to accept that challenge, even thought the ECtHR, for instance, has said that

> The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, *mutatis mutandis*, *Loizidou v. Turkey* (merits), judgment of 18 December 1996, *Reports* 1996-VI, p. 2231, § 43). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.[174]

However, when it comes to the applying principles established in other jurisdictions, the *Al-Adsani* judgment itself was happy to distinguish the interpretative outcomes in that case to the outcomes of other international tribunals as being from a different system of international law. Let us not forget that in the same manner, using exactly the same line of reasoning, the ICJ later also distinguished the *Tadic* overall control test as not applicable to the branch of state responsibility but only to individual responsibility in the more visible *Bosina Genocide case*.

And this is not confined only to relations between international criminal courts and other international courts. One only has to have in mind the difference in approach of the European Union's two courts, the Court of First Instance (CFI) and the European Court of Justice (ECJ) in the *Kadi* case.[175] The cases revolved around, the possibility of the EU to evaluate the legality of UN Security Council regulations adopted under Chapter VII of the Charter. The stance of the CFI was that it can, but not under community law but under inter-

[173] Article 31(3)(c)Vienna Convention on the Law of Treaties of 1969, but also *see* the Report of the Study Group of the International Law Commission para. 413.
[174] *Al-Adsani v. United Kingdom*, para. 55.
[175] Joined cases C-402/05P & C-415/05P *Kadi & Al Barakaat International Foundation v. Council and Commission*, judgment of the Court of Justice of the European Communities (Grand Chamber), September 3, 2008 for the ECJ (hereafter the *Kadi* Grand Chamber judgment); and Case T-315/01 *Kadi v. Council and Commission* 2005 E.C.R. II-3649 (hereafter *Kadi* CFI judgment); and Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council and Commission* 2005 E.C.R. II-3533 (hereafter *Yusuf* CFI judgment) for the cases in front of the CFI.

national law, of which the EU was a part of.[176] On the contrary, the ECJ reasoned that the EU Treaties themselves did not confer on it the power to review resolutions of the UN Security Council, but only acts of the Communities and the Union. Consequently, the fate of the EU implementing measures would survive or not on their compatibility with EU law, not international law.[177] It based this approach on the idea of the "rule of law"[178] where the Community represents a legal order separate from international law, much like national legal order would be. In the words of Advocate General Maduro

> Thus, it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.[179]

The logic seems a little bit flawed if one does not accept the idea of separate legal systems, i.e. something similar to national v. International system. On the other hand, if one sees the Community legal order as part of the international legal order then there is no reason to not to review the legality of UN Security Council resolutions under the rules of international law and not only the rules of Community law. There is a real danger of the "self contained

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[176] Maria Tzanou, *Case-note on Joined Cases C-402/05 P & C-415/05 P* Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities, 10 German L. J. 123 (2009), pp. 128-130.

[177] Generally *see*, *Ibid*., especially the remarks regarding the rule of law approach that the ECJ took in relation to the UN Security Council resolutions.

[178] This approach was much advocated by Advocate General Maduro in his opinion for the *Kadi* case, *Opinion of Advocate General Poiares Maduro* delivered on 16 January 2008, *Case C-402/05 P Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*; also *see* Maria Tzanou, *Case-note on Joined Cases C-402/05 P & C-415/05 P* Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities, 10 German L. J. 123 (2009), pp.

[179] *Opinion of Advocate General Poiares Maduro* delivered on 16 January 2008, *Case C-402/05 P Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, para. 24.

systems" of international law to become exactly that, self contained and self sufficient. It seems that, without clear hierarchical rules of the road[180] or something like a "supreme court" of international law, the different branches of international law are still in a very real danger of drifting apart.

[180] A similar argument was voiced by the *Kupreckic* Trial Chamber judgment, para. 540.

CHAPTER IV – LEGITIMACY AND JUDICIAL LAW-MAKING IN INTERNATIONAL CRIMINAL LAW[1]

4.1 WHY DOES IT MATHER IF INTERNATIONAL COURTS MAKE LAW?: ASKING THE RIGHT QUESTIONS

This thesis is about the master narrative of international law. More specifically, it is about the master narrative as it is related to international criminal courts and their law making endeavours. A master narrative is extremely important for legitimizing purposes. In a sense, a source of law or a law-making exercise is legitimate because it conforms with, fits-in, and complies with, this master narrative. The narrative does not have to be a long and complex story. Quite the contrary, it is usually short, simple and condensed.[2] Nevertheless, this narrative "founds or establishes the legitimacy of that system for those who operate within it."[3] In that sense, legitimacy, since it is based on a master narrative, is always self-referencing. A legitimate action is what the system says it is.[4] Therefore, the question that presents itself is what is the master narrative for the international system? What role does this narrative assign to judges and courts? What makes judicial decisions legitimate in international law?

In Chapter I, I presented the law-making process in international law, an extended version of the international law master narrative. I presented the narrative in two ways, one: the traditional approach dominant in the international system up until WWII; and two: the various developments that have occurred and have changed this more traditional view or approach to international law-making. This rather more traditional model follows the centrality of states as the main actors in the law-making process. States are sovereign and equal under

[1] Some parts of this Chapter are taken from a paper presented at the 4th Biannual ESIL Conference, titled "Judicial Law-making in International Criminal Law – The Legitimacy Conundrum."
[2] *Ibid.*
[3] *Ibid.*
[4] *Ibid.*, 38.

international law and cannot be bound by it without their consent. In a sense, all international law has to emanate from the states blessed by their freely given consent. Otherwise, these norms will not be binding and will be delegated to the status of non-binding "soft" law. Consequently, treaties are agreements entered into by states through their representatives; custom is state practice coupled with the *opino juris* of states, and general principles of law are the general principles of law found in the national legal systems of states.

Nevertheless, I have also shown in Chapter I that in the last 50 years the centrality of states has become eroded by political, economic, technological and other circumstances. The rise of international organizations, beginning with the United Nations (UN), but following with the European Union (EU) and the Council of Europe (CoE), has modified this traditional model of the international system by adding another subject in the international arena with law-making powers. International organizations, within limits of their functional subjectivity, are subjects rather than mere objects of international law. Consequently, they can enter into treaties with other subjects, their practice, to a certain extent, can be instrumental to the creation and discovery of custom. Furthermore, they are instrumental to treaty making in other ways, most notably as forum for negotiation, as mediators for dispute or as (albeit quasi) dispute settlers.[5] The UN Security Council has become, in certain occasions, a world legislature by enacting binding resolutions to all while at the same time not attaching expiration dates to them.[6]

Other actors have joined the law-making process in international law, albeit not as subjects of law but as ones that exert significant influence on the process. Non-state actors, especially since the end of the Cold War, have risen in prominence. They have a tremendous

[5] Jose E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, Oxford University Press, Oxford, New York, 2005; Jose Alvarez, *Governing the World, International Organizations as Lawmakers*, 31 Suffolk Transnat'l L. Rev. 591 (2008); Jose Alvarez, *International Organizations: then and now*, 100 A.J.I.L. 324, (2006).

[6] The Al-Qaida and Taliban Sanctions Committee established by a UN Security Council Resolution on October 15, 1999, UN Doc. S/RES/1267 (1999).

influence in the drafting and interpretation of international treaties through lobbying and advocacy in various fora.

When it comes to international courts and the sources of international law, the discussion among international law scholars revolves around the question of whether international courts make law or not. In short, under Article 38 of the International Court of Justice statute, which is accepted as a codification of the sources of international law, judgments are subsidiary sources evidencing the existence of law, but they are not the law as such. One of the more sophisticated arguments about the role of courts in international law is the seminal book of Judge Shahabuddeen, *Precedent in the World Court*.[7] Judge Shahabuddeen has devoted his entire book to the possibility of precedent in the ICJ. However, even though he admits that over time the ICJ can make law, or more specifically help in the development of law to the point of eventually creating it,[8] he cannot find a system of biding precedent in international law nor in the operation of the court. For Judge Shahabuddeen, there is no rule in international law, nor within the ICJ system for that matter, that creates a system of *stare decisis*.[9]

Regardless of whether international law scholars agree or not on the issue of judicial law-making in international law, they nevertheless, agree on the issue of the non-existence of a system of *stare decisis* in international law. In this they are unanimous, there is no system of *stare decisis* in international law and no place for the notion of a binding precedent.

International courts themselves echo this master narrative. The ICJ for example has said that

> It is clear that the Court cannot legislate […] Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and

[7] Mohamed Shahabuddeen, PRECEDENT IN THE WORLD COURT: HERCH LAUTERPACHT MEMORIAL LECTURES, Cambridge University Press, Cambridge, 1996.
[8] *Ibid.*, pp. 69-96.
[9] For this specifically *see* Chapter 8, *ibid.*, pp. 97-109.

> does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.[10]

Moreover, international judgments have a limited legal effect and are only binding for the parties in the dispute and for the specific issue that was resolved. Early on, the Permanent Court of International Justice (PCIJ) has noted the limited effect that international judgments have in international law by saying that "Article 59 of the Statute, […] does not exclude purely declaratory judgments. The object of this article is simply to prevent legal principles accepted by the court in a particular case from being binding upon other States or in other disputes."[11]

Other courts have echoed this master narrative and have embraced their law-discovering role in international law. Even the international criminal tribunals have stated this general preposition. The ICTY, for instance, has said that

> Being international in nature and applying international law *principaliter*, the Tribunal cannot but rely upon the well-established sources of international law and, within this framework, upon judicial decisions. What value should be given to such decisions? The Trial Chamber holds the view that they should only be used as a "subsidiary means for the determination of rules of law" […] Hence, generally speaking, […] the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries. […] Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes. Similarly, the Tribunal cannot rely on a set of cases, let alone on a single precedent, as sufficient to establish a principle of law: the authority of precedents (*auctoritas rerum similiter judicatarum*) can only consist in evincing the possible existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior occasion propounded the correct interpretation of existing law. Plainly, in this case prior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight. Thus, it can be said that the Justinian maxim whereby courts

[10] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 18.
[11] *Case Concerning Certain German Interests in Upper Silesia, (Germany v. Poland),* PCIJ Rep Series A No. 7. p. 19.

> must adjudicate on the strength of the law, not of cases (*non exemplis, sed legibus iudicandum est*) also applies to the Tribunal as to other international criminal courts.[12]

In Chapter II, however, I showed that, at least when it comes to the operation of the *ad hoc* criminal tribunals, this master narrative has, by and large, missed the point. By tracking the discourse presented through the judgments of the *ad hoc* tribunals, I showed that, not only are the ICTY and ICTR lawmakers in their own right, but that they have also constructed a precedent based system within their jurisdiction. Using various techniques and at times messy interpretative methodologies, they have managed to fill in the enormous silences that have existed in international criminal and international humanitarian law, to a point where it is the precedents, often in the form of tests, that are followed and not the texts of the conventions or their statutes.

Furthermore, the *ad hoc* tribunals have pointed out another interesting feature of courts. Both international and national courts, regardless of the general legal family that they operate in, perform in very similar ways.[13] Courts, as presented in the *Aleksovski* Appeals Chamber judgment, are watchful of two, sometimes conflicting principles, legal certainty and responsiveness to societal change.[14] This may have been best put by the House of Lords itself when it elaborated more on its doctrine of *stare decisis* by saying

[12] *Prosecutor v. Zoran Kupreckic et al.*, Trial Chamber judgment, IT-95-16-T, January 14, 2000, para. 540 (hereafter *Kupreckic* Trial Chamber judgment); but also see *Prosecutor v. Zlatko Aleksovski*, Appeals Chamber Judgment, Case No. IT-95-14/1-A, March 24, 2000, para. 92-115 (hereafter *Aleksovski* Appeals Chamber judgment).

[13] "The Appeals Chamber recognises that the principles which underpin the general trend in both the common law and civil law systems, whereby the highest courts, whether as a matter of doctrine or of practice, will normally follow their previous decisions and will only depart from them in exceptional circumstances, are the need for consistency, certainty and predictability. Judge Shahabuddeen observes:

> The desiderata of consistency, stability and predictability, which underlie a responsible legal system, suggest that the Court would not exercise its power to depart from a previous decision except with circumspection… The Court accordingly pursues a judicial policy of not unnecessarily impairing the authority of its decisions.

The Appeals Chamber also acknowledges that that need is particularly great in the administration of criminal law, where the liberty of the individual is implicated." Aleksovski Appeals Chamber judgment, para. 97.

[14] Generally *see* Mitchel de S.-O.-Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, Oxford University Press, Oxford, 2004.

> [...] the use of precedent [...][is] an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
>
> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.[15]

The European Court of Human Rights has gone on to say a similar thing when dealing with challenges under Article 7 (nullum crimen sine lege) of the Convention. It has said that

> 71. 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 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 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 (see *Jorgic v. Germany*, no. 74613/01, §§ 100-101, 12 July 2007; *Streletz, Kessler and Krenz*, cited above, § 50; and *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom*, judgments of 22 November 1995, Series A no. 335-B, pp. 41-42, §§ 34-36, and Series A no. 335-C, pp. 68-69, §§ 32-34, respectively). (emphasis added)[16]

This passage shines a small spotlight on what can be said is the main source of misunderstanding between the two major legal systems on which international law is based on, Common Law and Continental Law. Part of the master narrative of the two major systems is the proper role that courts should have *vis a vis* the other branches of government, and unsurprisingly, this difference shapes the discussion around international courts as lawmakers. To understand the discussion of international courts as lawmakers is to understand the semantic

[15] Practice statement issued by the House of Lords, [1966] 1 WLR 1234.
[16] *Korbely v. Hungary*, Application no. 9174/02, Grand Chamber judgment, September 19, 2008, para. 71.

difference between judicial interpretation and judicial law making as seen through the optics of the two systems' master narratives.

What I will show in this Chapter is that there is more than one alternative when it comes to methods of legitimization of judicial decisions and that these methods are contingent on the specific national conception of the proper role of the judiciary, the system's master narrative if you will.[17] What I will also show is that this master narrative of the proper role of the judiciary also requires a specific structural/systematic setting that is at variance with the structural setting of the international system. Consequently, international tribunals have adopted and adapted the specific modes of legitimization creating an interesting mix that, as I showed in Chapter III, enables acceptance of their outcomes.

4.2 Judicial Interpretation v. Judicial Law Making and Models of Legitimizations: How They Operate and Why They Matter

When it comes to their basic function, courts pretty much do the same thing regardless of the legal family that they operate in. Simply put, they decide cases and settle disputes. Of course in reality the story is much, much more complicated than that. Courts have an enormous normative power and it is this normative power that has to be managed. However, first let me make a small distinction in definitions. Regardless of whether we say that courts are lawmakers or whether they are normative managers, in essence they do pretty much the same thing. They decide cases and during this case-settling they interpret, expand, change, and/or direct the law, sometimes in small increments and sometimes on an earth shattering scale. Nevertheless, different legal systems have different concepts about this judicial function.

[17] Mitchel Mitchel De S.-O.-L'E. Lasser, *Transforming Deliberations* in Nick Huls, Maurice Adams and Jacco Bomhoff (eds.), The Legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond, T.M.C Asser Press, The Hague, 2009, pp. 37-48.

Some national systems have a concept of courts and judges as non law-making but rather exercising normative management,[18] while others give the full force of the law to judicial decisions. This is because these legal traditions have a different concept of what falls in the category of law; not better concepts, not inferior concepts, not more advances and less advanced concepts, just different.[19] Some systems, not unlike international law, have a second tier of normative sources that are not exactly law but are *authorities.*[20] It is because of these varying concepts of what constitutes as law that we need to switch the debate from whether international courts are law-makes or not, since jurists from one tradition will see the role of courts as normative managers, while jurists from a different tradition will see the exact same behaviour as judicial law-making.

It is here were the master narratives come to their own. Due to historical development, Continental Law systems have a deep seated mistrust of judges and courts. Seen as the delayers of reform during by the XVIII century French revolutionaries, courts and judges were divested of their powers. From now on they were suppose to only apply the law, be its "mouthpiece" to put it in Montesquieuan terms.[21] Only the results of the political branches can be called law; hence the sources of law are statutes, regulations (issued by the executive) and custom.[22] The consequence of this is that it is assumed that there is a complete legislative coverage of most of the situations that can arise in real life. If law can only be made by the political branches, then the law thus created usually in the form of codes, has to be assumed that they are "complete, coherent, and clear. If a judge were required to decide a case for

[18] *Ibid.*, p. 43.
[19] Mitchel De S.-O.-L'E. Lasser, *"Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse*, 111 Harvard L. Review 689, (1998).
[20] Mary Ann Glendon, Michael Wallace Gordon and Christopher Osakwe, COMPARATIVE LEGAL TRADITIONS: TEXTS MATERIALS AND CASES ON THE CIVIL AND COMMON LAW TRADITIONS, WITH SPECIAL REFERENCE TO FRENCH, GERMAN, ENGLISH AND EUROPEAN LAW, 2ND ED. , West Publishing Co., St. Paul, Minn., 1994, pp. 192-210.
[21] John Henry Merryman, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA, 2nd edn. Stanford University Press, Stanford, 1990, pp. 23-25.
[22] *Ibid.*, pp. 23-24.

which there was no legislative provision, he would in effect make law and thus violate the principle of separation of powers."[23] When it came to the role of the judge

> It is assumed that whatever the problem that may come before him, the judge will be able to find some form of law to apply – whether as a statute, a regulation, or an applicable custom. He cannot turn to books and articles by legal scholars or to prior judicial decisions for the law.[24]

However, despite the assumptions of complete legislative coverage, the codes and other law created by the legislature is not always so clear nor coherent nor complete. Gaps, new facts situations, conflicting legislative intentions etc. are commonplace.[25] Consequently, judges have to venture-out in more than just law application, but into law interpretation. Nevertheless, for the Continental Law layer even this interpretation is not law making and

> Many writers have sought to prove that judicial interpretation is not really in conflict with the legislative supremacy and a strict separation of powers. Those interested in defining the limits of interpretation have been concerned with certainty in the law and the prevention of judicial tyranny and irresponsibility.[26]

Consequently, because of this deep-seated mistrust of courts and judges, the Continental Law master narrative has found excuses to the natural tendency of courts to fill in gaps and shape the law. This excuse has come in the form of creating a wide concept of interpretation that is always different from judicial law making. Consequently, Continental Law courts interpret the law, even in the so-called "evolutive interpretation."[27] Evolutive interpretation takes place where a court modifies an existing interpretation of a statute with a new one that is more in line with the changing societal needs.[28]

On the other hand, the Common Law is seen as the

[23] *Ibid*., p. 29.
[24] *Ibid*., p. 24.
[25] *Ibid*., pp. 40-47.
[26] *Ibid*., p. 42.
[27] *Ibid*., p. 45.
[28] *Ibid*., p. 45-46, but especially this passage "[c]onsequently there is general agreement in civil law jurisdictions that judges do have the power to interpret evolutively. The discussion thus shifts from the legitimacy of this function to the question of its justification and its proper limits. Predictably, the traditional scholarship on this problem of interpretation is concerned primarily with proving that the judge, in interpreting evolutivley, does not really make law." p. 46.

> [...] unsystematic accretion of statutes, judicial decisions, and customary practices [...], has deep historic dimensions and is not the product of a conscious revolutionary attempt to make or to restate the applicable law [...]. There is no systematic, hierarchical theory of sources of law: legislation, of course, is law, but so are other things, including judicial decisions.[29]

Although, theoretically there may be a hierarchy of statue, regulations and judicial decisions, respectively, but in practice things are messier than that and Common lawyers tend not to have such rigidity to the issue of the proper hierarchy of norms or their origin.[30]

When it comes to the way that courts operate, the *Aleksovski* Appeals Chamber was particularly able to grasp the matter and show that, in practice Common Law and Continental Law courts behave in very similar fashions.[31] Courts behave in a similar fashion because they have to provide the legal system with two sometimes conflicting principles: legal certainty and adaptation to legal change.[32] It is because of this that courts acts as like lawmakers; they take care of legal certainty by deciding like case alike and, therefore, build a coherent system of case-law/jurisprudence. However, they also change and shape the law to fit the changing societal landscape. This is especially so when faced with largely unwritten law, or law that can only be changed, like in international and constitutional law,[33] through a cumbersome mechanisms by the political branches. Marryman has put it bluntly and succinctly by saying that

> Otherwise thoughtful civil lawyers frequently ignore the widespread use of precedents by their own courts, just as equally thoughtful common lawyers frequently oversimplify and misrepresent the use of precedent by common law courts. The important distinctions between the civil law and the common law judicial processes does not lie in what courts in fact do, but in what their dominant folklore tells them they do. In the orthodox civil law tradition, the judge is assigned a comparatively minor, inglorious role as a mere operator of a machine designed and built by scholars and legislator.[34]

[29] *Ibid*., pp. 24-25.
[30] *Ibid*., p. 25.
[31] *Aleksovski* Appeals Chamber judgment, para. 92-94.
[32] John Henry Merryman, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA, 2nd edn. Stanford University Press, Stanford, 1990, pp. 44-46.
[33] For a comparison of the similarities of international and constitutional law *see* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 Harv. L. Rev. 1791, (2009).
[34] John Henry Merryman, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA, 2nd edn. Stanford University Press, Stanford, 1990, p. 47.

In short, courts, once they have been accepted as the final arbitrators in a legal system, have an enormous normative weight on the shape of the law. They are simply lawmakers. The main distinction that we should look for in these two systems is the issue of the way that that normative power of judges is constrained, and this is because it is one of these different methods of constraint and legitimization that the international judicial system is shaping itself on. Finding out the structural background and support that these methods operate in will give us a clue as to why the international judicial system has taken a distinctive shape in terms of judicial argumentation, writing of judgments, aspects of procedure, and other modes of legitimization that coincide with the courts as lawmakers model.

4.2.1 The French System of Republican Institutionalism: the Non-law Tradition

It would not be surprising to Continental Law lawyers were I to say that the doctrine of sources set in Article 38 of the ICJ Statute is, at least when court judgments and the opinions of scholars are concerned, a reflection of the Continental Law doctrine of sources. We on the Continent like to say that judicial decisions (jurisprudence) and the writings of scholars are, in the words of Gény, *authorities.*[35] It is because of this that I now turn to France to see what role the doctrine of sources plays in the legitimization of the normative power of judicial decisions. I chose France because it is on the more extreme end in the stringent application of this doctrine. Consequently, it will allow me to show the function that this doctrine

[35] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, p. 173; but also *see* Mary Ann Glendon, Michael Wallace Gordon and Christopher Osakwe, COMPARATIVE LEGAL TRADITIONS: TEXTS MATERIALS AND CASES ON THE CIVIL AND COMMON LAW TRADITIONS, WITH SPECIAL REFERENCE TO FRENCH, GERMAN, ENGLISH AND EUROPEAN LAW, 2ND ED. , West Publishing Co., St. Paul, Minn., 1994, pp. 207-210; Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, Appendix C, pp. 248-251.

of sources plays in a Continental Law system and the systematic requirements to meet its desired goal of restraining judicial normative pull.

However, this doctrine of sources is only one part in an entire institutional setting that has been shaped to control the normative pull of judicial decisions. The French legal system constrains the normative pull of courts on two broad fronts. On the one hand, the French constrain the normative pull of courts by denying their outcomes, i.e. judicial decisions, the status of law, and on the other hand, by constraining judges in an institutional setting that forms them in a specific French Republican mould. In short

> The French system functions on the basis of an institutional and republican conception of judicial control and legitimacy. This system aims to select, educate, and train a small corps of elite, representative, and state-sanctioned jurists to manage their judicial decisionmaking in an enlightened and coherent fashion. The French pursue this goal by: (1) entrusting the judiciary with the task of handling legal controversies in such a way as to promote the general interest and the public good; and (2) constraining judges by placing them, throughout their careers, in a reliably meritocratic and hierarchical institutional framework. Accordingly, the traditional French system grants its judges a privileged and sequestered deliberative space in which to engage in particularly frank, communal, and highly substantive debates that, by virtue of their very seclusion, are intentionally denied the force and status of law. (footnotes omitted)[36]

In order to understand the way that French highest courts operate I have to point out that the French highest courts, the *Cour de Cassation* especially, operate on two different discursive planes, a public discourse represented by the published, short, official judicial decisions and the internal, secluded dialogue that goes on between the different institutional actors. The French highest courts issue short, terse and enigmatic judicial decisions. The written opinions are constructed in such a way as to give the reader the impression that the solution of the specific issue flows directly from the codified law.[37] The language of the French judicial decisions is a judicial syllogism composed of a major premise (the legislative provision), a minor premise (the facts of the case) and the conclusion, which is the direct logical com-

[36] Mitchel De S.-O.-L'E. Lasser, *The European Pasteurization of French Law*, 90 Cornell L. Rev. 995 (2005), p. 1002.
[37] *Ibid*, but also *see* Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, pp. 30-38.

mand of the major premise.[38] The decisions are structured in such a way so as to present as if the final solution of a case could not have been any different, since the statute has already determined the outcome beforehand.[39] The judge is not even an intermediary between the statute and the judgments; the judge has no discretion, she is only, in the true Montesquieuan idea of the judge, the mouthpiece of the Law.[40]

The reason for this specific French judicial dialogue can be traced back to the French revolution and their dislike of the *ancient regime*, where the French regional courts, called *Parlements*, could refuse to implement royal legislation, thereby forestalling reform.[41] The French revolution ushered in a new political concept of both the law as an expression of the general will and the role of the state, which had major consequences for the judiciary. A series of laws were enacted that regulated the proper function of judges. In short

> The five fundamental legislative rules [regarding the proper role of the judiciary] state the following:
> 1. "The courts may not directly or indirectly take any part in the exercise of the legislative power, nor prevent or suspend the execution of the decrees of the Legislative Branch . . . under pain of forfeiture."
> 2. "Judicial functions are distinct and will always remain separate from the administrative [executive] functions. Judges may not, under pain of forfeiture, disturb, in any way whatever, the operations of the administrative [executive] bodies. . . ."
> 3. "It is forbidden for judges to make pronouncements [to rule] by means of general and regulatory provisions on the cases submitted to them."
> 4. "The authority of the matter adjudged only relates to that which has been the object of the judgment. The petition must be the same; it must be founded on the same cause; it must be between the same parties, and formulated by and against them in their same capacities."
> 5. "The judge who refuses to judge, under pretext of the silence, obscurity or insufficiency of the law, will be subject to prosecution for denial of justice." (footnotes omitted)[42]

[38] *Ibid*, p. 34.
[39] "The American judge is somehow expected to judge, really to judge. In France, the Code is supposed to have already judged", Jean-François Lyotard as quoted in Mitchel De S.-O.-L'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 Yale L. J. 1325 (1995), p. 1236.
[40] *Ibid*., pp. 1342-1343.
[41] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, pp. 35-36.
[42] Mitchel De S.-O.-L'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 Yale L. J. 1325, (1995), pp. 1334-1335.

The first two provisions quoted above are from Articles 10 and 13 of the organic law on the organization of the courts[43] and they were enacted specifically to curtail the previous prerogatives of the pre-revolutionary *Parlements* and especially the practices of: "(1) [the] passing of regulation, and (2) the suspension (and thus effective veto) of pieces of royal legislation […]".[44] With these provisions, the French legal system secures the prerogatives of law making to the political branches and safeguards parliamentary sovereignty in the very Rousseauian idea of the general will expressed through the elected representatives as the source of all law.[45]

The other three provisions quoted above are taken from articles 5, 1351 and 4 respectively of the French Code Civil[46] and their general interpretation is that they are there to prevent judges from exercising normative power in the sense of a building and maintaining a constant binding jurisprudence through their reasoning.[47] Article 1351 of the Code Civil is very much reminiscent of Article 59 of the ICJ Statute, which has been interpreted by the PCIJ to mean that it is there "simply to prevent legal principles accepted by the court in a particular case from being binding upon other States or in other disputes."[48]

The official portrait of the French judiciary presents us with a picture of "the French civil judge as the faithful agent of the statutory law."[49] The law enacted through statutes flows directly from its text to the final recipient of justice, the parties of a case, with the judge

[43] Code de l'organisation judiciare title II, Articles 10 and 13, August 16-24, 1790
[44] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, p. 35.
[45] *Article 6*--The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents., The Declaration of the Rights of Man and of the Citizen, Adopted by the French National Assembly on August 26, 1789, and reaffirmed by the constitution of 1958.
[46] Code Civil, Articles 5, 1351 and 4.
[47] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, p. 36-37.
[48] *Case Concerning Certain German Interests in Upper Silesia, (Germany v. Poland)*, PCIJ Rep Series A No. 7. p. 19.
[49] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, p. 37.

simply as the "mechanical mouth"[50] through which the commandments of the law flow. In short, the French civil judge, seen through the published decisions of the *Cour*, is a "syllogism machine".[51]

Nevertheless, it is important to note that this official portrait of the French civil judiciary has been constructed, maintained and rigorously policed by the French judiciary themselves. The *Cour de Cassation* has struck down judgments that have had the air of judicial law-making by, for instance, relying on judicial scales for the compensation of damages or have based their reasoning of previous *Cour* judgements without referencing the specific statutory provision.[52] In short, French judges themselves, much like their international counterparts, wholeheartedly refuse to accept the existence of the notion of binding jurisprudence.[53] It is the statutory law (*loi*) that controls the issue before the *Cour* and not prior judicial rulings.

However, there is an entire other plain of discourse that occurs behind or parallel to this official discourse that is very much hidden from the public view. In order the maintain the supremacy of the elected branches and to safeguard the principle of the *loi* as the expression of the general will, yet still achieve consistency, predictability and individual justice,[54] the French judiciary maintains an unofficial, hidden dialogue with various institutional actors most notably the Advocates General and the Reporting Judge.[55]

While a case is being heard before the French highest courts, a hidden dialogue emerges between the two institutional actors I just mentioned. A Reporting Judge prepares a detailed report, sometimes up to 50 pages, before every case. In her report, among other

[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*, pp. 36-37.
[53] *Ibid.*, p. 37.
[54] *Ibid.*, pp. 44-46; but also *see* Mitchel De S.-O.-L'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 Yale L. J. 1325 (1995), pp. 1346-1353.
[55] For more *see* Mitchel De S.-O.-L'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 Yale L. J. 1325 (1995), pp. 1355-1403.

things, the judge tracks the procedural history of the case, the decisions of the lower courts, the view of the academic doctrine on the issue at hand and the specific line of cases that have dealt with the issue previously. In this report, the Reporting Judge also proposes a specific solution, sometimes alternative solutions, in the form of draft judgments to the case.[56] The Judge, in this unofficial dialogue, is fully aware of the normative effect of previous jurisprudence and, furthermore, seeks to either reinforce it, or change it.

The Advocate General, or her counterpart at the *Conseil d'État*, the Commissaire du Gouvernement, receives the report of the Reporting Judge and also prepares her own views on the matter. She too conducts a legal analysis of the issues in the case from both an academic doctrinal and jurisprudential perspective, taking into account policy and equity. The role of the Advocate General, and her *Conseil d'État* counterpart, is to act as a sort of official amicus that is there to represent, not the Governments views, but the interests of society at large.[57] The Advocate General is also present at the closed deliberations but does not take part in the judgment and does not have the right to vote.[58] Neither the report of the Reporting Judge nor the opinion of the Advocate General are published as a mater a practice. The entire dialogue stays secluded with the privacy of the judicial deliberations.

However, there is another institutional actor that joins this institutional dialogue, the French academic. The French academic influences the views of the judges in at least two ways, one the conveying of information on the state of the law, and two as a line of argumentation that has to be presented and argued with by the judges in their unofficial discourse. As I have said previously, the French official decisions are short, terse and somewhat completely

[56] *Ibid.*

[57] For a discussion of the role of the Advocates General in the French legal system *see see* Mitchel De S.-O.-L'E. Lasser, *The European Pasteurization of French Law*, 90 Cornell L. Rev. 995 (2005); and Mitchel De S.-O.-L'E. Lasser, JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE, OUP, Oxford, 2009.

[58] There have been some changes in the way that the Advocates General participate in the deliberations of the Cour de Cassation and the almost unchanged participation of the *Commissaire du Gouvernement* at the *Conseil d'Etat* under the pressure of the ECtHR but also generally *see* Mitchel De S.-O.-L'E. Lasser, *The European Pasteurization of French Law*, 90 Cornell L. Rev. 995 (2005); and Mitchel De S.-O.-L'E. Lasser, JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE, OUP, Oxford, 2009.

useless when it comes to conveying the state of the law on a specific matter. It takes a different actor to contextualize the more important decisions of the French highest courts and this is where the French academic steps in.[59]

One way in which the unofficial discourse can be glimpsed by the juridical public is the academics' case notes published in the French case reports.[60] Important cases of the French highest courts are usually followed by a case note written by the French academics as addenda to the case or as a separate article in the same issue of the volume.[61] These case notes can represent the basic sources through which jurists in the French system can make sense of the French judicial decisions.[62] When the official, published judicial discourse is so specifically designed to be lacking in information as to the legal foundations of the decisions (other than the article in the different Codes), the French academic can have a vast influence on shaping the information passed on through the decisions.

At this point it may come as to no surprise that, in France, but as we have seen in international law as well, the opinions of scholars and judicial decisions share the same step in the normative ladder; they are *authorities* but neither, by themselves, can make law.[63] In a sense, they are placed in a constant dialogue, presenting arguments in their own respective ways, sometimes agreeing on a specific outcome and sometimes disagreeing. However, with each new case the dialogue continues, or can change direction and a new input in the dialogue is put forward, thus creating a dyalectic relationship between these two institutional actors.[64]

[59] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, p. 191-200.
[60] *Ibid.*, p. 40.
[61] *Ibid.*
[62] *Ibid.*
[63] Mary Ann Glendon, Michael Wallace Gordon and Christopher Osakwe, COMPARATIVE LEGAL TRADITIONS: TEXTS MATERIALS AND CASES ON THE CIVIL AND COMMON LAW TRADITIONS, WITH SPECIAL REFERENCE TO FRENCH, GERMAN, ENGLISH AND EUROPEAN LAW, 2ND ED. , West Publishing Co., St. Paul, Minn., 1994, pp. 192-210.
[64] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, pp. 190-200.

However, this is not the end of the story of constraining the normative weight of judicial decisions. It is now time to turn to the specific institutional constraints that are in place in the French legal system. As I hinted earlier, the French system after the Revolution has created a specific institutional setting that puts further constraints on judges and other actors. These constraints operate through, one: the education system, which is free and open to all French citizens, and two: through the specific organizational setting of the French judiciary.

One of the products of the French revolution was the setting up of a rigid, meritocratic educational structure that forms French citizens and, through it the French judiciary. Not only are the French judicial actors "formed",[65] moulded in the French Republican ethos, through the French educational system, but French academics as well.[66] The French Civil *magistrats*

> [...] (especially the sitting judges and advocates general) are nonetheless all state-formed and state-sanctioned specialists who debate and resolve legal disputes with the general interest in mind, and do so over the course of their entire careers. Like their ENA [École Nationale d'Administration] – trained administrative cousins, they constitute a corps of elite players who compete to gain entry into their particular institution, train to learn its ways through a proper education and apprenticeship "formation", and rise through its ranks in an orderly and relatively meritocratic fashion. [...]
>
> In the French civil context, the *doctrinal* writers constitute a tremendous elite group of specialists, who – very much like their judicial counterparts – go through long, elaborate, and state-run "formation" and promotion process before performing their crucially important interpretative functions. [67]

Given the fact that the French educational system is free, public and open, the French judiciary and the French academic system has the opportunity to be representative, in a very real sense, of the whole of French society.[68] Moreover, not only does it have the potential for full representatives, the French education system is very good at transferring ethical norms in the sense of French Republican values,[69] the well known *Egalite*, *Liberté* and *Fraternité* and

[65] Mitchel De S.-O.-L'E. Lasser, *The European Pasteurization of French Law*, 90 Cornell L. Rev. 995 (2005), pp. 1012-1013.
[66] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, pp. 190-200
[67] *Ibid*., p. 191.
[68] *Ibid*., pp. 332-337.
[69] *Ibid*., pp. 332-334.

especially the "unity of the French Nation, the French people and French culture"[70] to its participants. It is somewhat because of this "formation" of the French judiciary in the French Republican ethos that this small but elite corps of institutional actors are trusted with the task of "normative management" of legal norms.

The French judiciary is constrained in this normative management in another institutional way, through their collegial decision-making and meritocratic advancement through a hierarchical, bureaucratic organization of the judiciary.[71] In his book, Damaska gives two ideal models of organizing officialdom especially within the judiciary, a hierarchical ideal and a coordinate ideal of officialdom, each with its own specificities.

The hierarchical ideal is characterized by "permanently placed officials [who] carve out a sphere of practice which they regard as their special province"[72] thus creating a specific identity and the notion of insiders and outsiders.[73] "Long terms of office create the space for routinization and specialization of tasks"[74] Out of this routinization of tasks one method becomes a habitual one.[75] A "schism between [the] office and its occupant promotes institutional thinking [...] [j]udgments become pronouncements of an impersonal entity (a curia) even where a single individual is entrusted with their rendition."[76]

This ideal of organizing authority is further characterized with a strict hierarchical ordering, where officials are organized into several hierarchical "echelons [where] power comes from the top, trickling down the levels of authority." [77] Disputes among echelons cannot be resolved by compromise and accommodation at the horizontal level – they must be

[70] *Ibid*., p. 333.
[71] For more on a bureaucratic organization of the judiciary and the consequences that it has on professional behaviour or on legal procedure *see* Mirjan R. Damaska, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS, Yale University Press, New Haven and London, 1986, pp. 16-23 and 47-56.
[72] *Ibid*., p. 18
[73] *Ibid*.
[74] *Ibid*., p. 19
[75] *Ibid*.
[76] *Ibid*.
[77] *Ibid*.

referred higher up the pyramidal level. "It is only at the top of the authority pyramid [...] that clashes of opinion are necessarily resolved by accommodation."[78] "[I]deally, all [in this pyramid] are to march to the beat of a single drum."[79] Furthermore

> [by] necessity, subordinates must be empowered to make first-order decisions, or, to use characterising Continental terms, to decided 'in the first instance.' But the logic of strict hierarchization requires that such decisions be subject to superior review on a regular and comprehensive basis: wide distribution of unreviewable authority to lower levels would strain the animating assumptions of the whole authority structure. Understood in this sense, official discretion is anathema.[80]

However, if incapacitation of decision making at the higher level echelons is to be avoided, due to their smaller numbers relative to the lower echelons, then the lower level echelons are expected to "schematize the complexity of matters they are called upon to decide"[81] The higher the decision is taken, the further away the decisionmaker is from "the messy details of life"[82] and are, therefore, more free to "concern themselves with correcting inconsistencies in low-level decisions and with cultivation of broad ordering schemes for decision making.[83]

Damaska organizes his research along the lines of ideal models of organization of authority and the role of the state in a Weberian approach to his subject of research.[84] However, if we plot the organization of the French judiciary on an axis with the two ideal models (hierarchical and coordinate) as polar opposites, the French judiciary would be far closer to the hierarchical ideal of officialdom than the coordinate model. If a French law student would like to pursue a career in the judiciary, she would have to enrol to law school on a meritocratic basis, graduate from law school and then again pass an entrance exam to the ENM

[78] *Ibid.*
[79] *Ibid.*, p. 20.
[80] *Ibid.*
[81] *Ibid.*
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*, pp. 8-15.

(*École Nationale de la Magistrature*)[85] and graduate a rigorous examination, the *concours.*[86] However, the examination of present and future magistrates does not end with entrance in the ranks of the judiciary. Thanks to the bureaucratic, hierarchical organization of the judiciary, a French civil judge is constantly examined from her more senior colleagues. Moreover, except in very minor cases, judicial decisions are made by a panel of judges,[87] which when coupled with the collegial, unsigned decisions, further limits the normative effect that any single judge can have on an issue.[88] In addition, the meritocratic advancement model, where one's advancement is based on one's performance, which is constantly evaluated by one's senior peers, further constrains the normative "escapades" of individual judges.[89] The institutional part of the normative constraint of the judiciary can be summarized in the following way

> This unitary self-conception, inculcated for generations through the sate-controlled French education system, combines with the meritocratic ethos and procedures of the French educational and administrative system to yield a powerful image of the highly representative link between the French state and *le peuple français*. If the French citizenry is made cohesive through proper educational formation, and if the French civil service is culled by meritocratic means from the very best of the student ranks, the state's institutional elites – including the judiciary – bear the imprimatur of republican legitimacy. They are physically representative (they are drawn from an inclusive body the French populace) and intellectually representative (they are the quality-tested vehicles for the transmission and execution of the French state's inherently representative republican will).[90]

However, what about the doctrine of sources that I started the argument with? In France, the doctrine of sources is but a one of the elements in the mechanisms of restraining the normative force of courts. As I shall show later in this chapter, a widespread Common

[85] There is a separate counterpart for the administrative branch, the ENA (École nationale d'administration) which serves the same function as the ENM.
[86] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, pp. 183-184.
[87] Mitchel De S.-O.-L'E. Lasser, *The European Pasteurization of French Law*, 90 Cornell L. Rev. 995 (2005), p. 1012.
[88] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, pp. 307-309.
[89] *Ibid.*, 308.
[90] *Ibid.*, 333-334.

Law notion of judicial decisions is that they have the force of law, that they are law-making.[91] However, this would be a wrong assumption to make regarding the French legal system, for the simple reason that the French legal system operates under a different master narrative. The French master narrative has a different conception of the sources of law, period. Again, not a better one, not a more primitive one that is a vestige of an earlier bygone era of the legal formalism,[92] but a different one; one that is designed to fit into the specific political notion of the French state and the French legal system.

It is not that French scholars deny the normative pull of judicial decisions. Quite the opposite, French scholars fully acknowledge the normative weight that judicial decisions have on the legal system.[93] Nevertheless, they are assigned the status, together with the writings of scholars, the *doctrine*, to the step on the ladder of *authorities*. Consequently, the difference that French and other Continental scholars[94] adamantly point out when it comes to the issue of precedent, is the difference between *de facto* and *de jure* binding precedent. In France as well as in most other Continental Law countries, there is no notion of a binding precedent, merely an authorative one.[95] As a result, Continental Law systems have not felt the need to develop a comprehensive system of *stare decisis*, a system of formal rules governing the process of overruling a previously valid precedent, since the precedent itself is not binding as such.

In summary

> This characteristic French notion of the "sources of the law" therefore serves a fundamental mediating function in the French legal system. It recognizes the creative normative role played by the French judiciary, while simultaneously denying the resulting judicial norms the *status* of "law". This difference in status between judicial

[91] *Ibid*., pp. 171-172.
[92] Brian Z. Tamanha, BEYOND THE REALIST-FORMALIST DIVIDE; THE ROLE OF POLITICS IN JUDGING, Princeton University Press, Princeton and Oxford, 2010, pp. 15-63.
[93] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, pp. 171-174.
[94] For the different Continental views on the issue of binding and non-binding precedent generally *see* D. Neil MacCormick and Robert S. Summers eds., INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, Ashgate Publishing & Dortmouth Publishing, Aldershot, Broofield USA, 1997.
[95] General *see Ibid*.

> norms and legislated law *allows for judicial norm creation precisely because it denies such norms the status of law.* This mediation maintains French legislative supremacy and the strict separation of powers while recognizing and even encouraging a legitimate, *de facto* judicial role in the creation and development of legal norms. (emphasis in the original).[96]

What is important from the discussion I presented above is for the reader to understand that the question of whether judicial decisions are law or not is mistakenly bound up in the question of whether prior judicial decisions are formally recognized to have the status of law or not, and that, in my opinion, is the wrong question.[97] In a sense, it does not matter particularly that much whether judges follow previously decided decisions because they feel that they are formally or factually bound by them. What matters is that they do, and they do so in an overwhelmingly omnipresent fashion across legal systems.[98] Moreover, the doctrine of binding precedent in Common Law systems, more specifically in the US and the UK, is exactly that, a doctrine and a judicial doctrine at that.[99] It is not mandated by either a constitution or a statute; it simply is a judicial choice.

It is not that judges are not lawmakers, or normative managers, in the now famous statement of Chief Justice Roberts of the US Supreme Court given at his confirmation hear-

[96] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, p. 174.

[97] As to the notion of this Common law/Continental law divide into the judges as lawmakers and the rule of *stare decisis* in international law *see* Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, stating that the notion that international courts do not make law has now generally seem to be outdated, pp. 102-130; for a very Common law view on international law *see* Raj Bhala, *The Myth About* Stare Decisis *and International Trade Law (Part One of a Trilogy)*, 14 Am. U. Int'l L. Rev. 845 (1999).

[98] Generally *see* D. Neil MacCormick and Robert S. Summers (eds.), INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, Ashgate Publishing & Dortmouth Publishing, Aldershot, Broofield USA, 1997.

[99] *See*: Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 Wash. & Lee L. Rev. 411, (2010), p. 412; Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of* Stare Decisis *Require Adherence to the Supreme Court's Current Doctrine of* Stare Decisis*?*, 86 N. C. L. Rev. 1165 (2008), p. 1171; Zenon Bankowski, D. Neil MacCormick and Geoffrey Marshall, *Precedent in the United Kingdom* in D. Neil MacCormick and Robert S. Summers eds., INTERPRETING PRECEDENT: A COMPARATIVE STUDY, Ashgate, Dartmouth, 1997, pp. 323-324; Robert S. Summers, *Precedent in the United States (New York state)* in D. Neil MacCormick and Robert S. Summers eds., INTERPRETING PRECEDENT: A COMPARATIVE STUDY, Ashgate, Dartmouth, 1997, pp. 356-359.

ing that "judges are like umpires. Umpires don't make the rules; they apply them".[100] My claim is quite the opposite, judges have an enormous normative power in shaping the law. However, the important issue is not whether judicial decisions in one system or another is pigeonholed in the law or non-law category since this is up to the master narrative of the system, but what is the method of accountability, control and restraint that specific legal systems have adopted. Translated to this thesis, the question is what method, in fact through the operation of the various courts, has the international system chosen for its accountability and control? Nevertheless, before I go into answering this question, I must present an alternative system of judicial accountability and control that lies on the opposite end of the scale of the French legal system in terms of judicial decisions having the status of law.

4.2.2 "The Law" Tradition – In Pursuit of Judicial Candour

For historical reasons, the US and other Common law countries have recognized that courts and judges do make law. They have done so even before the emergence of the Legal Realists' critic of formal or "mechanical jurisprudence".[101] Regardless of statements, like the one made by now Chief Justice there is a general agreement in the US that one, precedents have a binding character in a doctrine of *stare decisis* with specific rules on overruling bad or outdated precedents[102]; and two, that courts and judges are honest-to-goodness lawmakers.[103]

[100] Charles Babington and Jo Becker, Washington Post Staff Writers, *'Judges Are Not Politicians,' Roberts Says*, The Washington Post, Tuesday, September 13, 2005 available at http://www.washingtonpost.com/wp-dyn/content/article/2005/09/12/AR2005091200642_pf.html, (last visited August 10, 2010).

[101] For the argument that the division between legal formalism and realism has largely missed the point in the US and has created an unsustainable division *see* Brian Z. Tamanha, BEYOND THE REALIST-FORMALIST DIVIDE; THE ROLE OF POLITICS IN JUDGING, Princeton University Press, Princeton and Oxford, 2010; for the term mechanical jurisprudence and some of the critique of formalism and scientific law *see* Roscoe Pound, *Mechanical Jurisprudence* 8 Colum. L. Rev. 605, (1908).

[102] For the rules on overruling a previous precedent *see* Justice A. Scalia dissenting in *Lawrence v Texas*, 539 U.S. 558 (2003), "Today's approach to *stare decisis* invites us to overrule an erroneously decided precedent (including an 'intensely divisive' decision) if: (1) its foundations have been 'eroded' by subsequent decisions, ante, at 15; (2) it has been subject to 'substantial and continuing' criticism, ibid.; and (3) it has not induced 'individual or societal reliance' that counsels against overturning, ante, at 16."

Given the fact that the US, as other Common law legal systems, recognizes the status of law of judicial decisions it has developed a radically different method of constraining the normative force of courts. This method focuses on "judicial control by publicly discursive means."[104] In Damaska's terms, the US functions on the Coordinate officialdom side of the sliding scale.[105]

Several characteristics typify the coordinate ideal of organization of authority. In contrast to the hierarchical ideal, the coordinate ideal is populated by lay officials, "amateurs who are called upon to perform authoritative functions *ad hoc*, or for a limited time."[106] Consequently, there is no time to develop institutional identity or exclusivity.[107] Due to the limited term of officials, "routinization of activity has little chance to develop" and "[w]ith no discontinuity between personal and official spheres, institutional thinking is quite rudimentary."[108] Furthermore,

> Verdicts, judgments, or other authoritative determinations, whether individual or collective, are not conceived as pronouncements of an agency independent of the individuals comprising it, and remain highly professional, In fact, the demand that individual opinions be repressed or forgone for the sake of a single overall view seems to invite spineless attitudes, and is tantamount to an affront to the personal dignity of the lay officials. When unified into panels, they thus retain their individual voices, even if the result implies – as in Pirandello's plays – that there is no single, official story of the group. Nor does a lone dissenter from the majority opinion – a protestant – feel bound by this opinion in the future: he feels free to repeat his dissent over and over again.[109]

Moreover, this organization of authority "envisages a wide distribution of authority among roughly equal lay officials: with no one clearly superior to others, there is essentially a single stratum of authority."[110] To safeguard from breakdown due to "centrifugal forces" the

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[103] Generally *see* Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004
[104] *Ibid.*, pp. 311-315.
[105] Mirjan R. Damaska, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS, Yale University Press, New Haven and London, 1986, pp. 57-66.
[106] *Ibid.*, p. 24.
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*
[110] *Ibid.*, p. 25

coordinate organization of authority must rely on external forces to achieve cohesion.[111] In a system of overlapping jurisdictions where one official can frustrate the "fruits of one another's efforts"[112] securing coordination is crucial. The creation of "guidelines or standards in certain spheres" or imposing regulations from outside, like legislation, are some of the ways in which to achieve cohesion. Nevertheless, "[a] certain amount of disorder must be accepted as the price of fundamental commitment to a wider distribution of power."[113]

However, for such an ideal type to have any relevance to real world scenarios it has to suffer an adaptation by adding a "modicum of subordination"[114] but at the same time leaving the first instance decision makers with considerable latitude.

> Original decision makers are like Olympian gods – free and powerful, albeit loosely subordinate to Zeus: positions of sub- and superordination are not sharply delineated; higher and lower officials are essentially homologues with similar prestige and power. Indeed they can be the same persons changing roles. The absence of distinctive rank removes pressure for submission generated by the prospect of hierarchical promotion and demotion: one is not climbing up or down a ladder. [...] There are few pressures to simplify decision making and to disregard particulars for the purpose of making the task of audit and review [by superior authorities] easier.[115]

If we similarly plot the US system on a axis with Damaska's ideal models as polar opposites, the US model would be closer to the coordinate model of authority than the hierarchical. Consequently, unlike its French counterpart the US does not have anything similar to the institutional model of judicial moulding through the education system. Even though if one looks at the biographies of the Justices of the US Supreme Court one can see that almost all of the Justices have been educated at either Harvard, Yale or Columbia Law Schools,[116] there is no such conception of a career, bureaucratic judiciary. Judicial service is a second ca-

[111] *Ibid.*
[112] *Ibid.*, pp. 25-26.
[113] *Ibid.*, p. 26
[114] *Ibid.*
[115] *Ibid.*
[116] For the biographies of the US Supreme Court Justices serving in the 2010-2011 term visit the official US Supreme Court web pages available at http://www.supremecourt.gov/about/biographies.aspx (last visited on August 12, 2010).

reer.[117] The path to the US judiciary can be windy and unexpected. Most judges do have a law degree and do get judicial training once they arrive at the bench,[118] and federal judges go through an appointment procedure that involves the US Senate and President, which can be excruciating and highly politicized.[119] However, to claim that this represents a significant institutional constraint on judges would be an overstatement. "The American judicial system usually cannot bring to bear the kind of professional carrots and sticks that characterize its French counterpart."[120] Consequently, given the fact that in the US, as well as other Common law countries, the judiciary is an open lawmaker and the institutional mechanism set in place, compared to the French model, do not seem adequate to the task of constraining the normative pull of judges, the question then emerges, are US judges unconstrained lawmakers?

The short answer to that question is no, they are not. The US has fashioned, as one would expect, a completely different model of judicial constraint, one that sets the whole weight of constraint on the notion of "public disclosure of judicial discourse."[121] The public disclosure of the judicial discourse starts with the publication of not only the judicial decisions themselves, but of the individual voting results, including, individually signed separate and dissenting opinions. The US system requires that judges fully disclose the reasons behind their opinions. In a sense, the judge herself is individually responsible for the judicial opinion and its reasoning.[122] It is her opinion, one of several, and one that she has to fully justify.

The judge, in the outcome of her deliberative process, is expected to show that she has listened to and answered all of the grievances and arguments put forward to her by all inter-

[117] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, pp. 311-312.
[118] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, p. 311.
[119] For the idea of the lay judiciary *see* Mirjan R. Damaska, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS, Yale University Press, New Haven and London, 1986, pp. 44-46.
[120] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, p. 311.
[121] *Ibid*., p. 312.
[122] *Ibid*., p. 312.

ested parties. By this, the judge assures the interested parties that she has taken into account all of the relevant information and has arrived at an opinion for which she takes on full responsibility.[123] Consequently, the judge, through her individually signed opinions, takes part but also leads the public dialogue. She is also only one, albeit a very important one, voice in the debate. Other voices can come from appellate judicial decisions, from academic or other professional bodies like the Bar associations, the public at large, but also from one's own colleagues on the bench as well.[124] Sometimes, the dissenting opinions of one's own brethren can be very prickly indeed, let alone that today's dissents can be tomorrow's law.[125] What is more, the focal point of this debate is cantered at the judicial opinion itself and the reasons it puts forward.[126]

The result of this requirement of judicial candour[127] is the integration of both open-ended arguments and strict adherence to a form set out in specific judicial opinions.[128] As in the judgments of the international criminal tribunals, a lot of the time in US Constitutional debates is spent on the exposition and satisfaction of judicially constructed tests.[129] The judicial opinions take the shape of the specific tests with the reasoning focused on the issues of whether the facts of the case fit into the specific prongs of the tests, and where tests are judicially crated and remodelled presenting the appearance of following the constitutional or statutory mandated requirement.[130] The US judicial discourse balances between both formal-

[123] *Ibid*., p. 312.
[124] *See* Albie Sachs, THE STRANGE ALCHEMY OF LIFE AND LAW, Chapter II – The Working of a Judicial Mind OUP, Oxford, 2009, pp. 47-59
[125] One good example of this is the decades long dissents by two justices, Oliver Wendell Holmes and Luis Brandeis, on issues of free speech.
[126] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, p. 313.
[127] Scott Altman, *Beyond Candor*, 89 Mich. L. Rev. 296 (1990); Gail Heriot, *Way Beyond Candour*, 89 Mich. L. Rev. 1945 (1991); Scott C. Idleman, *A Prudential Theory of Judicial Candour*, 73 Tex. L. Rev. 1307, (1995).
[128] Robert F. Nagel, *The Formulaic Constitution*, 84 Mich. L. Rev. 165, (1985).
[129] Mitchel De S.-O.-L'E. Lasser, *"Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse*, 111 Harvard L. Review 689, (1998).
[130] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, pp. 314-315.

ism, in the sense of strict adherence to the "word of the law" and unfettered realism, in the sense of substituting the individual judge's personal preferences for the letter of the law.[131]

This requirement of public justification of the judge's reasons for arriving at a certain decisions also serves a larger purpose, one of signalling or disclosing information about the current state of the law. If as a scholar, I would want to familiarize myself with a certain branch of law in the US, I would not only have to look at the statutory framework in a specific area, but would also have to look at the prevailing court precedents starting from the US Supreme Court. If I were to defend a newspaper in a libel case, I would, most likely, be held responsible of negligence if I did not structure my defence along the prongs of the *New York Times v Sullivan*[132] test. The judicial decision itself (or a line of decisions), unlike in the French legal system, is sufficient enough to stand alone as source of information on the current state of the law. No further interpretation from academics in academic case notes is required, although can prove very useful when confronted with the weight of overwhelming numbers of precedents. One author came to the conclusion that "it seems clear that elite legal academics are spending more time speaking to one another than they are speaking to the highest court in the land."[133]

To summarize,

> the American judicial system generates judicial control from the confluence of two factors: (1) the requirement that judges justify and thus give good reasons for their decisions, and (2) the requirement that they do so publicly in individually signed judicial opinions. This form of judicial work grants past judicial efforts the power to impact upon, hem in, or at least frame current interpretive efforts which, thanks to the American judicial publicity requirement, will themselves produce a similar effect on the next case down the line. Public judicial justification thus pro-

[131] Brian Z. Tamanha, BEYOND THE REALIST-FORMALIST DIVIDE; THE ROLE OF POLITICS IN JUDGING, Princeton University Press, Princeton and Oxford, 2010.
[132] *New York Times* Co. *v. Sullivan*, 376 U.S. 254 (1964).
[133] For more on the decline in citations of law reviews in opinions of the US Supreme Court *see* Louis J. Sirico, Jr., *The Citing of Law Reviews by the Supreme Court: 1971-1999*, 75 Ind. L.J. 1009, (2000); but see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, (1992).

> vides the material for present and future judicial work even as it ensures individual judicial responsibility and accountability.[134]

The two models of judicial control and legitimization are by no means the only models in operation throughout the world's legal systems. However, one can say that they represent the two polar opposites on a sliding scale of the control of the judicial normative power. Furthermore, what is important for this thesis is the understanding that, whatever the model of judicial constraint, the doctrine of sources is but small part in it and is tied up to a specific set of institutional, discursive, education and other avenues of constraint. The doctrine of sources, as anything else in a legal system, whether historically determined or not, has a function to play. Consequently, it may be time to stop asking ourselves of whether judges make law or whether they just discover it, but to ask ourselves what is the current model of judicial constraint that is in operation in international law.

4.3 THE MODEL OF LEGITIMIZATION AND NORMATIVE CONSTRAINT OF JUDGES IN INTERNATIONAL CRIMINAL LAW

Tracking the model of normative constraint in international criminal law will, inadvertently lead to a comparison with the two models of constraint shortly explained above. It comes as no surprise given the fact that for some time now legal scholars have debated the issue of whether international criminal law, mostly in terms of in criminal procedure but in substantive law as well, is more closely related to its Continental law or its Common law cousins.[135] International law in many ways is an amalgam[136] of national legal systems. Judge Cassese has masterfully pointed out that

[134] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, p. 315.

[135] For a sample of the various ways in which hybridity is being discussed in the context of international criminal law *see* for instance Bert Swart, *Damsaska and the Faces of International Criminal Justice*, 6 J. Int'l

> […] A note of warning about importing national concepts "lock, stock and barrel" into the international field, was sounded by such eminent international judges as McNair and Fitzmaurice. Both judges were referring to private law concepts. Their view should *a fortiori* apply to criminal law. International criminal procedure results from the gradual decanting of national criminal concepts and rules into the international receptacle. However, international criminal procedure does not originate from a uniform body of law. It substantially results from an amalgamation of two different legal systems, that obtaining in common-law countries and the system prevailing in countries of civil-law (although for historical reasons, there currently exists at the international level a clear imbalance in favour of the common-law approach). It is therefore only natural that international criminal proceedings do not uphold the philosophy behind one of the two national criminal systems to the exclusion of the other; nor do they result from the juxtaposition of elements of the two systems. Rather, they combine and fuse, in a fairly felicitous manner, the adversarial or accusatorial system (chiefly adopted in common-law countries) with a number of significant features of the inquisitorial approach (mostly taken in States of continental Europe and in other countries of civil-law tradition). This combination or amalgamation is unique and begets a legal logic that is qualitatively different from that of each of the two national criminal systems: the philosophy behind international trials is markedly at variance with that underpinning each of those national systems.[137]

Consequently, regardless of however much international criminal law has borrowed from national legal systems, it, nevertheless, has to operate in a specific environment that is different from any national environment. As a result, international criminal law will have to find and has found its own model of judicial constraint.

4.3.1 Institutional Constraints

As part of an international system, international law has its own institutional constraints. One of the first institutional constraints that we have to be aware of is the makeup of

Crim. Just. 87, (2008); Nina H. B. Jørgensen, *The Right of the Accused to Self-Representation before International Criminal Tribunals*, 98 A.J.I.L. 711, (2004).

[136] The view of Judge Cassese is certainly pertinent here "[international criminal procedure] substantially results from an amalgamation of two different legal systems, that obtaining in common-law countries and the system prevailing in countries of civil-law (although for historical reasons, there currently exists at the international level a clear imbalance in favour of the common-law approach)." Separate and Dissenting Opinion of Judge Cassese, *Prosector v. Drazen Erdemovic*, Appeals Chamber Judgment, IT-96-22-A, October 7, 1997, para. 4.

[137] *Ibid*., concluding that unless expressly or implicitly commanded by the very provisions of international criminal law - it would be inappropriate mechanically to incorporate into international criminal proceedings ideas, legal constructs, concepts or terms of art which only belong, and are unique, to a specific group of national legal systems, say, common-law or civil-law systems.

the international system itself. At the risk of sounding repetitive, the international system is a horizontal one. It is built around the principle of sovereign and equal states. Malcolm Shaw puts it best when he says

> While the legal structure within all but the most primitive societies is hierarchical and authority is vertical, the international system is horizontal, consisting of over 190 independent states, all equal in legal theory (in that they all possess the characteristics of sovereignty) and recognising no one in authority over them. The law is above individuals in domestic systems, but international law only exists as between the states. Individuals only have the choice as to whether to obey the law or not. They do not create the law. That is done by specific institutions. In international law, on the other hand, it is the states themselves that create the law and obey or disobey it. This, of course, has profound repercussions as regards the sources of law as well as the means for enforcing accepted legal rules. (footnotes omitted)[138]

This horizontal system, when translated to courts, exerts its pressure in several ways. One clear way in which the international system constrains judges is by the fact that, due to its horizontal nature, there is no central governing authority that would enforce the opinions of courts. Certainly, the judgments of international courts, at least those that come under the PICT chart as international tribunals proper,[139] are legally binding judgments to the parties in a specific case. Moreover, states in most occasions and for most of the time, regardless of the reasons why put forth by scholars,[140] do obey international law.[141]

However, when courts do make their decisions they have in mind the unquestionable truth that the enforcement of international criminal law lays with the states themselves. The ICTY has stressed this on few occasions by saying that

> International trials exhibit a number of features that differentiate them from national criminal proceedings. All these features are linked to the fact that international criminal justice is dispensed in a general setting markedly different from that of national courts: international criminal courts are not part of a State apparatus functioning on a particular territory and exercising an authority of which courts partake. In-

[138] Malcolm N. Shaw, INTERNATIONAL LAW, 6th edn., Cambridge University Press, Cambridge, 2008, p. 7.
[139] *See* The International Judiciary in Context: A Synoptic Chart prepared by Cesare P.R. Romano, Project on International Courts and Tribunals, version 3.0 (2004), available at http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf (last visited on 14 August, 2010).
[140] For an excellent overview of the theories of the mechanism behind states compliance with international law *see* Harold Hongju Koh, *Why Do Nations Obey International Law?, 106 Yale L.J. 2599*, (1997).
[141] Malcolm N. Shaw, INTERNATIONAL LAW, 6th edn., Cambridge University Press, Cambridge, 2008, pp. 5-11.

> ternational criminal courts operate at the inter-State level. They discharge their functions in a community consisting of sovereign States. The individuals over whom these courts exercise their jurisdiction are under the sway and control of sovereign States. Many important consequences follow from this state of affairs. Here I shall confine myself to stressing only the most striking one: an international criminal court has no direct means at its disposal of enforcing its orders, summonses, and other decisions; to compel individuals under the sovereignty of a State to comply with its injunctions, it must rely on the cooperation of that State. To lose sight of this fundamental condition, and thus simply transplant into international law notions originating in national legal systems, might be a source of great confusion and misapprehension. The philosophy behind all national criminal proceedings , whether they take a common-law or a civil-law approach, is unique to those proceedings and stems from the fact that national courts operate in a context where the three fundamental functions (law-making, adjudication and law enforcement) are discharged by central organs partaking of the State's direct authority over individuals. That logic cannot be simply transposed onto the international level: there, a different logic imposed by the different position and role of courts must perforce inspire and govern international criminal proceedings.[142]

Consequently, international courts, an especially international criminal courts, have to keep in mind that the implementation of their decisions ultimately lays in the hands of the states themselves. There is virtually nothing that courts can do, save for the fact of confirming the state(s) non-compliance and issuing a call to the state(s) in question to comply or asking for other states or international organizations to help in enforcement to compel a state to comply with its judgment.[143]

Therefore, judges, when they write the opinions of their respective Courts, try hard to avoid being put into a situation where they would go against the grain of the great majority of states or at least against the most powerful states. Take as an example two advisory opinions of the ICJ. The ICJ agreed to issue an opinion on the matter of legality of nuclear weapons only after it was cornered to do so by the UN General Assembly, having successfully shrugged off the same question that was posed two years earlier by the World Health Organi-

[142] Separate and Dissenting Opinion of Judge Cassese, *Prosector v. Drazen Erdemovic*, Appeals Chamber Judgment, Case No. IT-96-22-A, October 7, 1997, para. 5.
[143] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, p. 157-159.

zation.[144] The second opinion itself, gave satisfaction to both sides of the issue, refusing to issue a blanket ban on nuclear weapons, appeasing the nuclear weapons states, but at the same time limiting the situations in which they can legally be used so as to render them virtually useless as a weapons systems other than in sabre-rattling.[145]

This does not mean, however, that an international court would shy away from taking bold actions in pushing the development of the law forward. However, they would not go out of their way in searching for such opportunities, but would rather wait for such opportunities to present themselves.[146] As I have shown in Chapters II and III, the *ad hoc* tribunals have significantly pushed forward the development of international humanitarian law, at times despite the objections of several powerful states.[147] Nevertheless, judges do have in mind that they are somewhat dependant on the good will of states, especially in instances of compliance with judgments and filing of cases.

The disparity of power between stats and courts in the international system is another mechanism that is complementary to the enforcement deficit in international law. States can, not only disobey international tribunals, they can also disband them or make them obsolete due to disuse. States, in the international system, have the power of the purse; they are the ones that allocate funds for international tribunals and this is especially true for international criminal tribunals. For instance, the *ad hoc* tribunals have had problems during the start of

[144] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, p. 66
[145] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, I.C.J. Reports 1996, p. 226.
[146] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, pp. 160-164.
[147] Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 Vand. L. Rev. 1 (2006).

their operation to secure enough funds to hire the proper staff to start working on cases,[148] while today they face ongoing criticism of their costs.[149]

Furthermore, courts and judges are aware that, aside from denying them funds, states can still assign them to the history books by simply deciding not to use them at all. International courts, for the most part, rely on states as repeat players for their existences. If a specific court neglects its primary function of settling cases and ventures out in excessive normative design, then states can simply bypass that specific court and use other avenues of dispute resolution.[150] In a very real sense, judges have to be aware that whenever they issue a specific decisions they are toying with the very existence of the institution in which the serve. In a domestic settings, if a judge or a court overreaches, the judge may or may not step down, but the court itself continues. In an international setting, a single judgment can mean a thorn bird song for the entire court. In a sense "international judges who, knowingly or inadvertently, cross the line between interpreting the law as is and writing law, put at risk the future of the court itself, if not the whole edifice of international law."[151]

Another very direct way in which states can constrain the normative power of judges is by the appointment system itself. For a judge to be elected on the bench of any of the international courts, she has to be nominated by her home state. There is no uniform process of nomination even within a specific court, since it is left to the internal mechanisms of the state itself to perform the pre-selection of its nominee(s). There is generally no rule regarding the profile of the nominee(s); they can be selected from the national judiciary, the diplomatic

[148] Gary Jonathan Bass, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS, Princeton University Press, Princeton and Oxford, 2000, pp. 220-223

[149] For the cost and the problems of securing funds by international tribunals also *see* Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, pp. 160-164..

[150] For an argument of semi-dependant international tribunals *see* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 Calif. L. Rev. 1, (2005); but also *see*: Laurence R. Helfer & Anne-Marie Slaughter, *Why States Crate International Tribunals: A Response to Professors Posner and Yoo*, 93 Cal. L. Rev. 899 (2005).

[151] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, p. 130.

corps, the national civil service or from the ruling party's own ranks.[152] Consequently, there is no inherent mechanism for filtering out the unsuitable candidates since third states are very reluctant to question the qualifications of the other states' nominee(s), although it has been known to happen.[153] Commentators have said that "[i]t is undeniable that the principle of judicial independence – and more importantly, the perception of judicial independence – is jeopardized by the fact that procedures are, with very limited exception, neither open nor accountable."[154]

Furthermore, different international tribunals have different rules regarding the appointment of judges. For instance, the ICJ has 15 judges, selected in a process in which both the General Assembly (GA) and the Security Council (SC) participate.[155] As a rule, the permanent five members of the SC always have a national on the bench, the other judges are elected by an unofficial regional representation scheme.[156] A similar arrangement exists for the International Criminal Court and the International Tribunal for the Law of the Sea, adjusted to the fact that not all members of the UN are parties to the conventions establishing the courts.[157] On the other hand, in some regional organizations like the Council of Europe and the European Union, every member-state has the right to have one of its nationals serve on the bench.[158]

For the *ad hoc* tribunals, the appointment system tends to follow the UN regional representation model with a few modifications of not selecting judges who are nationals of states that are under the territorial jurisdiction of the tribunals or strong allies and/or neighbours. For instance, even though Russia is a permanent member of the UN SC has never had a na-

[152] *Ibid.*, pp. 23-26.
[153] *Ibid.*, p. 23.
[154] *Ibid.*, p. 24.
[155] Articles 4-12 of the ICJ Statute available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (last visited on August 17, 2010).
[156] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, p. 32.
[157] *Ibid.*
[158] *Ibid.*, pp. 33-35

tional serving on the bench of the ICTY because of its close ties to Serbia.[159] In general, Western nations are overrepresented at the *ad hoc* tribunals, which reflects the level of their financial, military and diplomatic involvement.[160]

In addition, an appointment to the international bench is never a lifetime one; judges serve a certain number of years as a term, with different courts having different rules on re-election. One of the challenges that judges face is the problem of national engagement after their international appointment. The lack of retirement scheme after a judge serves her term on the international bench means that she is less likely to antagonize her own government during her time on the bench fearing reprisals when returning home.[161] Personal influence from home governments is also not unheard of in the international judiciary as some commentators point out. The authors of the book *The International Judge* retell an instance where a judge received a phone call from the president of a big country threatening the judge that if the court and the judge personally did not vote a certain way then the president would issue damaging statements about the court itself.[162]

Moreover, "[g]overnments […] can sometimes regard international courts as yet another international institution, vulnerable to the push and pull of diplomacy and politics."[163] Some academics have voiced the same argument stating that courts should stick to what they were designed to do – dispute resolution mechanisms; "simple, problem solving devices".[164] Consequently, international courts should be more dependent on the member states of the

[159] *Ibid*., p. 33
[160] *Ibid.*; but also *see* Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925, (2008).
[161] *Ibid.*
[162] *Ibid*., p. 156; also *see* Erik Voeten, *The Politics of International Judicial Appointments*, 9 Chi. J. Int'l L. 387, (2009).
[163] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007.
[164] Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 Calif. L. Rev. 1, (2005), p. 6.

particular system. The voice from the bench is a resounding support for greater judicial independence, however.[165]

Another institutional constraint of the judiciary is the normative requirement repeated so often in this thesis that international tribunals, theoretically, are not suppose to make law. This is the normative constraint that is spelled out clearly in Article 38(1)(d) of the ICJ statute, which says that "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."[166] Article 59, cements this view by stating that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."[167] The view of Baron Deschamps, one of the members of the Advisory Committee of Jurists for the establishment of the PCIJ in 1920, brings the meaning of the two provisions to their full light at the moment of their drafting by saying that "[d]octrine and jurisprudence no doubt do not create law; but they assist in the determining rules which exist. A judge should make use of both jurisprudence and doctrine, but they should serve only as elucidation."[168]

This view has evolved over the years as the reality of adjudication in an international setting has taken root. Consequently, the current debate has shifted, not from the issue of whether international courts make law, in the sense that they shape and expand the law, but to the issue of whether there is a system of *stare decisis*, or binding precedent, in international law.[169] I have written on this issue previously in this Chapter, however, I wish to point out

[165] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, pp. 156-157.
[166] Article 38(1)(d) of the ICJ Statute available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (last visited on August 17, 2010).
[167] Article 59 of the ICJ Statute available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (last visited on August 17, 2010).
[168] Baron Descamps as quoted in Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2007, p. 267.
[169] *See* Mohamed Shahabuddeen, PRECEDENT IN THE WORLD COURT: HERCH LAUTERPACHT MEMORIAL LECTURES, Cambridge University Press, Cambridge, 1996, pp. 69-109; Raj Bhala, *The Myth About* Stare Decisis *and International Trade Law (Part One of a Trilogy)*, 14 Am. U. Int'l L. Rev. 845 (1999); Guido Acquaviva and Fausto Pocar, *Stare Decisis* in Rüdiger Wolfrum General Ed., THE MAX PLANCK

that my position on this debate is that it is largely irrelevant and that it is fuelled by the different views of the dominant streams[170] of the two legal cultures regarding the proper role of the judiciary. The international criminal law system, given the institutional and human capital constraints, has created and is reshaping its own mechanism of the proper role of the judiciary and of normative constraint on courts.

4.3.2 The Institutional Constraints in Practice

It is time to see what effect the institutional settings have on the normative constraint of judges in international criminal law. Let me start with one of the obvious ones, the issue of money and resources. Despite the *ad hoc* tribunals' early problems with finding resources and staff, it seems that the situation has greatly improved, so much so that authors have started commenting that "the criminal tribunals seem to be 'awash in money.'"[171] There certainly have been some comments regarding the enormous expense of international trials, however, it is also important to note that international criminal tribunals are responsible for an entire criminal process, from the pre-investigative stage to the trial, sentencing and execution of the sentence. In addition, complex and high-profile trials take a longer time and simply tie up more resources than ordinary trials.[172]

Moreover, the early onset of lack of resources did not seem to curtail the normative power of the judges sitting on the ICTY or ICTR bench. The dedication and tenacity of the people in key positions at the ICTY, for instance, managed to secure, through lobbying and

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ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW, Max Planck Institute for Comparative Public Law and International Law, November 2007.

[170] I say the dominant streams because there are voices on both sides of the legal cultures that critic this dominant view of one's own legal system, as examples *see* Brian Z. Tamanha, BEYOND THE REALIST-FORMALIST DIVIDE; THE ROLE OF POLITICS IN JUDGING, Princeton University Press, Princeton and Oxford, 2010; Mitchel De S.-O.-L'E. Lasser, JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE, OUP, Oxford, 2009.

[171] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, p. 161.

[172] *Ibid.*

dedicated work, resources and public support from key states, especially the ones involved in the peace process and peacekeeping activities in Bosnia.[173] It would have been difficult to imagine the success of the ICTY without the help of key players in the peace process in the former Yugoslavia and especially the US and other UNPROFOR/SFOR contingents. Without the help of SFOR troops in the hunt for suspects in Bosnia, it would have been difficult for the ICTY to have a steady stream of cases.[174]

Contrary to this, the ICTR had a different and shakier start, especially in the choice of its initial leading personnel and the "turf war" that ensued between the proper functions of the Office of the Prosecution (OTP) and the President of the Court.[175] It has also had more problems with securing funding as well as suitable offices for conducting their mandated functions. In the start of its operation, the ICTR has had a problem with conflicts between its chambers and the Registrar, which ended with the dismissal of the later.[176] However, the dedication of the people working at the tribunal has managed to overcome these obstacles.[177]

At the present, it does not seem a significant problem to secure money or cooperation from states regarding operation of the international criminal tribunals. To the contrary, the *ad hoc* tribunals, and the ICTY especially, seem to have managed to elicit the support of key states and organizations, like the EU. The constant pressure from the ICTY's OTP regarding the (non)cooperation of former Yugoslav states, backed by some member states of the EU, have secured compliance from both Croatia and Serbia when it comes to surrendering suspects or requested documents.[178] Furthermore, as I have shown in Chapter IV, both scholars

[173] Gary Jonathan Bass, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS, Princeton University Press, Princeton and Oxford, 2000, pp. 246-271.
[174] *Ibid.*, although the peacekeeping force in Bosnia and the ICTY did not always have a smooth relationship, this has improved from the initial bad start, again, thanks to the dedication of certain individuals, pp. 251-270.
[175] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, pp. 82-83.
[176] *Ibid.*, 82-83.
[177] *Ibid.*, pp. 161-163.
[178] *Croatia says war crimes row will not delay EU bid*, Reuters News Agency, February 25, 2009, available at http://uk.reuters.com/article/idUKTRE51O3GW20090225 (last visited August 17, 2010); and *U.N. prosecutor*

and other courts have largely accepted most of the advancements in the law that the ad hoc tribunals accomplished.

The nomination and election process also does not seem to overly constrain the normative position of judges. There seems to be no straight path into the international judiciary, nor to the international criminal tribunals as such.[179] There are certain criteria for the election of judges at the ICC[180] and they are somewhat more detailed than the ones for the *ad hoc* tribunals. Nevertheless, one cannot say that there is a specific track that one needs to take in order to be nominated and elected to the bench of an international criminal tribunal. Even though this resembles the election of judges in the US system, and it certainly resembles a system of coordinate officialdom,[181] there is an overwhelming difference in this case; candidates are not required to give testimony before a body such as the US Congress and face the gruelling questions put before them.[182] The election of judges in international courts seems to be a hit and miss affair, and there certainly have been some misses in international criminal tribunals.[183]

The fear of angering the community of states also does not seem and overly effective element in curtailing the normative effect of judges. The possibility of angering the community of states to such a degree as to lead to the abolishment of the specific court may look like a formidable threat. However, given the difficulty of coming to an agreement in a diverse community as the community of nations and the significant reputation costs that a nation can

says Croatia still has work to do, Reuters News Agency, February 28, 2010, available at http://www.reuters.com/article/idUSTRE64R4B120100528 (last visited August 17, 2010).

[179] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, pp. 15-38.

[180] As for the criteria for the selection of judges at the ICC see the latest call for nominations by state-parties *see* for instance: Note Verbale of 13 May 2009, ICC-ASP/8/S/20, giving an overview of the requirements for nomination of judges.

[181] Mirjan R. Damaska, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS, Yale University Press, New Haven and London, 1986, pp. 16-23 and 47-56.

[182] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, pp. 21-38.

[183] For the case of the 'sleeping judge' and other lapses at the *ad hoc* tribunals *see* Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, pp. 202-204.

incur if it is seen as anti-judicial, the threat of abolishment seems more like a last-option scenario than a viable threat. Moreover, the dedication of people working in the international criminal law institutions is certainly a counter to this wrath-of-states problem. The first prosecutor at the ICTY has certainly commented, regarding the possibility of

> incurring the Security Council's wrath: [Goldstone had said:] obviously it would be naïve not to take into account all realities. But it was really done as, if you like, as an academic exercise. Because our duty was clear. We weren't going to be dissuaded from doing it by any prognostications – good or bad – as to what effect it would have.[184]

The normative constraints have had somewhat a mixed success. In a sense, they have certainly made judges publicly state their adherence to the idea of judgments as law discovering rather than law making.[185] Undoubtedly, the ICTY, in its earlier decisions has echoed this same idea.[186] The *ad hoc* tribunals have certainly made an extraordinary effort to pigeonhole the solutions that they have come up with regarding specific substantive issues into one of the other three sources mentioned in Article 38 of the ICJ, namely treaty, custom or general principles of law. For instance, the definition of torture was presented as stemming out from the various torture conventions and declarations, adapted to the specificities of international criminal law;[187] the definition of rape was presented as stemming out of the general principles of criminal law as found in national systems also modified to suit the international criminal law system,[188] and so on.

[184] Gary Jonathan Bass, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS, Princeton University Press, Princeton and Oxford, 2000, p. 230.
[185] See as an example *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, 226, para. 18 "It is clear that the Court cannot legislate […] Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.",
[186] *Kupreckic* Trial Chamber Judgment, para. 540.
[187] See Chapter II.
[188] *See* Chapter II.

However, as I have shown in Chapters II and III, the *ad hoc* tribunals have also been un-bashful lawmakers.[189] Even more than that, they have constructed a system of *stare decisis* within their own jurisdictions,[190] and have started to use the language of overruling in their deliberations. For instance, Judge Shahabuddeen has warned his fellow colleagues from the bench on the proper use of the mechanism of overruling a previous precedent by saying that "I am not clear as to which are the 'cogent reasons' that peremptorily 'demand' a 'departure' from the 'majority opinion in *Celebici*'. A court may be in a position to effect a departure; yet not every disagreement (however strongly felt) with previous case law requires a departure."[191] He strengthens his argument by referencing to statement of Lord Hoffmann to the effect that a simple disagreement with a previous precedent does not give rise to overruling less the "rule of law itself […] be damaged and there will be no stability in the administration of justice."[192]

What we must remember, regarding the normative constraints through the doctrine of sources is that, as in the French system, it is designed to complement other institutional constraints in order to achieve its desired result. The doctrine of sources has a function that is shares with other institutional constraints and that is to allow for normative management by courts, but still secure the prominence of law-making to the political branches, namely states.[193] The doctrine of sources resigns judicial outcomes to the plane of *authorities*, together with academics, or in the words of Article 38, publicists. In the Continental sense of this categorization, they are not law, full stop.

[189] Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 Vand. L. Rev. 1 (2006).
[190] *Aleksovski* Appeals Chamber Judgment, para. 92-115; Antonio Cassese Ed. in Chief, THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, OUP, Oxford, 2009, p. 53; Guido Acquaviva and Fausto Pocar, *Stare Decisis* in Rüdiger Wolfrum (General Ed.), THE MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW, Max Planck Institute for Comparative Public Law and International Law, November 2007.
[191] *Declaration of Judge Shahabuddeen*, *Prosecutor v. Zoran Zugic*, Appeals Chamber decisions, Case No. IT-98-30/1-A, June 26, 2006, para. 2.
[192] Footnote too in Judge Shahabuddeen's Declaration cited *ibid*.
[193] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004.

However, it is hard to imagine that the institutional constraints that I presented above can have any sort of comparable effect to the normative constraint of judges that the French system has. For one, in the international system judges and academics do not share the same educational background,[194] they are not formed to follow a specific set of normative values like French Republicanism.[195] If anything, the international system is, if not value neutral, then value plural and each judge brings with herself the gifts and the burdens of her own specific legal and other culture.[196]

Furthermore, even though the number of journals that specialize in covering doctrinal issues of international law and international criminal law have risen[197] there is no comparable level of judicial – academic dialogue as the one we have seen in France or other Continental law countries. Academics do publish case notes, or case critics, they summarize the work of courts in text book forms and they debate the issues in which courts have left a gap[198] or have had an unsettled, divergent view, on a specific issue.[199] They do not, however, present a window to the internal deliberation rational of the judges for a very simple reason – the judgment issued by the court already provides that.

As I have shown throughout this thesis, the international criminal tribunals, issue fairly substantial and extensively reasoned judgments. The section of a Trial Chamber judgment that is usually put under the heading "the applicable law" can extend, especially for the

[194] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, pp. 16-21.
[195] *see* Mitchel De S.-O.-L'E. Lasser, *The European Pasteurization of French Law*, 90 Cornell L. Rev. 995 (2005).
[196] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, pp. 62-79.
[197] There is now a dedicated journal to issues of international criminal justice, the Journal of International Criminal Justice published by Oxford University Press, and there are other international law journals, like the European Journal of International Law, founded by the European Society of International Law.
[198] Shane Darcy, *Prosecuting the War Crime of Collective Punishment: Is it Time to Amend the Rome Statute?*, 8 J. Int'l Crim. Just. 29, (2010).
[199] William A. Schabas, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 2ND ED., Cambridge University Press, Cambridge, 2009, Chapter V – The Mental or *Mens Rea* of Genocide; William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. Crim. L. & Criminology 953, (2008).

early judgments, between something of 40-100 pages in length.[200] Furthermore, as discussed in Chapter IV, scholars present and argue the applicable law in textbooks through the case-law of the *ad hoc* tribunals without the need to go through hundreds of case notes.[201] A text-book writer on international law, at least when it comes to the substantive parts of the three crimes, can find most of her information on the applicable, black-letter law in the *ad hoc* tribunals' judgments themselves.

Consequently, international judgments stand on their own when it comes to transmitting the information on the applicable in any given case. This is not to say that they have banished all uncertainty regarding legal issues of law. Quite the contrary, there are still areas of law where the international criminal tribunals have not settled the disputes between different interpretations, and I have mentioned a few issues previously. The ICC, for instance, has relied extensively in its early Pre-Trial Chamber decisions on commentaries of the Rome Statute. However, they have, in most circumstances, quoted those same commentaries together with the case-law of the *ad hoc* tribunals.[202]

It is with this that I have come to what I claim to be the most significant cog in the method of constraint of the normative power of judges in international criminal law. It is because of this element in the system that the other elements can produce result, and I believe that it is because of this element that the normative outcomes of the *ad hoc* tribunals have

[200] The *Celebici* Trial Chamber judgment has a discussion on the applicable law that spans 149 pages from page 62-210.
[201] *See* the discussion presented in Chapter IV, Sub-heading 4.2.
[202] For instance see this footnote "1CC-01/04-01/06-803-TEN, para. 69. See also BEHRENS, H.J. "The Trial Proceedings", in LEE, R.S. (Ed.), The International Criminal Court • The Making of the Rome Statute, The Hague, Kluwer Law International, 1999, p. 246 according to this commentator on the Rome Statute, "[t]here is therefore a close link between paragraphs 7 and 8. Whereas a violation of internationally recognized human rights in principle qualifies as a ground for exclusion of evidence, a violation of national laws on evidence does not. The reason for that is that the Court should not be burdened with decisions on matters of purely national law." The Appeals Chamber of the ICTY has also already stated in ICTY, *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Appeals Chamber, Decision on the Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 19 that "there is no reason to import such rules into the practice of the Tribunal, which is not bound by national rules of evidence. The purpose of the Rules is to promote a fair and expeditious trial, and Trial Chambers must have the flexibility to achieve this goal". See also ICTY, *The Prosecutor v. Naser Oric* , Case No. IT-03-68-T, Trial Chamber, Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, 21 October, 2004, para. 8." *Katanga* Pre-Trial Chamber decision, footnote 127.

produced such a level of acceptance. What I am talking about is the practice of publicity, of providing extensive reasoning for every normative decision taken in a judgment. Similarly with the US and other Common Law systems that require public disclosure of a judge's reasons for arriving at a certain conclusion,[203] the international criminal law system also allows for and provides extensive explanation of a judge's reasons and reasoning for the specific normative course taken. In the next part of this Chapter I will explain further how this mechanism that Lasser terms "judicial control by publicly discursive means"[204] works in the international criminal law setting and how it has eased the creation of a *stare decisis* system of precedent within the *ad hoc* tribunals.

4.3.3 Judicial Control by Publicly Discursive Means – the International Criminal Law Experience

Before I go into explaining the way this model is adapted to fit the requirements of international criminal law, I would first like to make a few caveats. Firstly, I do not claim that the public discourse model is exactly the same as the one described by Michel Lasser in his book, *Judicial Deliberations.* On the contrary, there are some differences that are striking since, for one, Lasser is talking about a national constitutional system, while I am talking about an international one with all the specificities that I summarized in Chapter I. That is why I do not claim that the models are the same, but that they are strikingly similar in many respects.

Secondly, there is an issue of how much reasonable comparison can be made between two legal systems that operate under different assumptions regarding the environment that they exist in, i.e. national v international environment. However, recent scholarship has un-

[203] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, pp. 311-315.
[204] *Ibid.*, p. 311

derlined the uncanny similarities between the issues that constitutional and international law face on a theoretical basis, like for instace the problem with compliance.[205] Consequently, I believe that there are sufficient mutual points between international law and constitutional law to arrive at a meaningful comparison and cross-pollination.

Thirdly, there has certainly been a chance for this cross-pollination throughout the operation of the international criminal tribunal. As it has been pointed out elsewhere,[206] there has been an enormous influence of scholars from western countries, and especially from the US. For instance, in the ICTY, ending with 2007, three US nationals have served on the bench, two of which were Presidents of the tribunal.[207] The first two Prosecutors, Goldstone and Arbour, come from Common Law countries, South Africa and Canada respectively,[208] and the US has certainly been instrumental in the setting up of the *ad hoc* tribunals with significant assistance in both people and material.[209]

The concept of public discourse as a way of judicial control is an easy one to grasp. It, as a model, requires that judges give extensive reasoning for the decisions that they make. This extensive reasoning should be found in the text of the judgment itself. In the judgment, the judge is suppose to summarize the positions of the two parties and the arguments that they have put forward and then give her own view on the matter backed up by extensive justification. This way any person reading the judgment, even without a substantive legal background, will have a good idea of what the issues that were brought before the judge were, what were the arguments used and what were the ultimate reasons why the judge decided the

[205] For this line of argument *see* Jeremy Waldron, *Are Constitutional Norms Legal Norms?*, 75 Fordham L. Rev. 1697, (2006); Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 Harv. L. Rev. 1791, (2009), drawing parallels between the issues that plague both international law and constitutional law.

[206] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007; Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925, (2008).

[207] Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES, OUP, Oxford, 2007, pp. 168.

[208] Short resumes of the former prosecutors are available on the web page of the ICTY http://www.icty.org/sid/101 (last visited on August 18, 2010).

[209] *Ibid.*, 165-166.

way she decided. This model, naturally, presupposes the existence of several elements, and also, creates some consequences that I will go on to explain the following paragraphs and back them up with a few examples.

As the reader may remember from the analysis of the discourse by the *ad hoc* tribunals presented in Chapter II, these presuppositions can be found in their judgments. One presupposition of this public accountability for one's judicial opinion is that there is a possibility to put forward and one's judicial opinion.[210] In the system of international criminal law, this is achieved through the practice of publishing the written judgments of the tribunals. The publicity and transparency does not stop there, however. Not only are the written opinions published, but the court proceedings are streamed on the internet in real time as well and the court records, transcripts and evidence, subject to limitation due to privacy, state secret, protection of witnesses and alike, are available at a simple click of a mouse.[211]

Moreover, the requirement of publicity and transparency is further strengthened by the obligation of issuing signed, individualized opinions.[212] International criminal tribunals have had the practice of issuing judgments signed by the individual judges themselves. Each judge signs her own name at the end of the judgment, therefore taking public responsibility for everything that is contained within it. If a judge does not agree with the majority decision, she is allowed to issue her own separate or dissenting opinion. For instance, in the appeals chamber judgment in the *Erdemovic* case,[213] the judges could not agree on any of the issues raised in the appeal. Consequently, the judgment itself is only signed by Judge Cassese,[214] and all of

[210] Mitchel de S.-O.-Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, Oxford University Press, Oxford, 2004.
[211] For instance, all of most of the material produce during the trial of the first defendant in front of the ICTY, Dusko Tadic are available on the web site of the Tribunal, including the judgment, summary of the judgment, the Appeals Chamber judgment and summary, decisions and orders of both the Trial and the Appeals chamber and the orders of the President, available at http://www.icty.org/case/tadic/4 (last visited on August 19, 2010).
[212] Mitchel de S.-O.-Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, Oxford University Press, Oxford, 2004.
[213] *Prosecutor v Drazen Erdemovic*, Appeals Chamber Judgment, Case No. IT-96-22-A, , October 7, 1997, (hereafter the *Erdemovic* Appeals Chamber judgment).
[214] *See* page 18 of the *Erdemovic* Appeals Chamber judgment.

the judges issued separate and dissenting opinions.[215] The dispositive of the judgment looks like this

> IV. DISPOSITION
> THE APPEALS CHAMBER
> (1) Unanimously **REJECTS** the Appellant's application that the Appeals Chamber should acquit him;
> (2) By four votes (Judges Cassese, McDonald, Stephen and Vohrah) to one (Judge Li) **REJECTS** the Appellant's application that the Appeals Chamber should revise his sentence;
> (3) By four votes (Judges Cassese, McDonald, Stephen and Vohrah) to one (Judge Li) **FINDS** that the guilty plea entered by the Appellant before Trial Chamber I was not informed;
> (4) By three votes (Judges McDonald, Li and Vohrah) to two (Judges Cassese and Stephen) **FINDS** that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings and that, consequently, the guilty plea entered by the Appellant before Trial Chamber I was not equivocal;
> (5) By four votes (Judges Cassese, McDonald, Stephen and Vohrah) to one (Judge Li) **HOLDS** that the case must be remitted to a Trial Chamber, other than the one which sentenced the Appellant, so that the Appellant may have the opportunity to re-plead in full knowledge of the nature of the charges and the consequences of his plea; and
> (6) **INSTRUCTS** the Registrar, in consultation with the President of the International Tribunal, to take all necessary measures for the expeditious initiation of proceedings before a Trial Chamber other than Trial Chamber I.[216]

Furthermore, the text of a judgment follows a specific pattern. A usual Trial Chamber judgment stars with an introduction, then continues into presenting the facts as determined during the course of the trial, discussing the testimony of witnesses and experts, which is followed by a section usually titled "as to the law" or the "applicable law" (the sections dedicated to the facts or the applicable law can change places in different judgments but they are always there), followed by the legal findings in the specific case, followed by a short dispositive. Moreover, the discourse within the judgments follow another predictable pattern. Both in the discussion about the facts and the applicable law, the judgment tends to summarize the positions of the defendant and the prosecutor and then gives its own view on the issue usually

[215] Judges Vorah and and McDonald issued a Joint Separate and Dissenting opinion, while Judges Cassese, Stephen and Li issue individual Separate and Dissenting opinions.
[216] Dispositive of the *Erdemovic* Appeals Chamber judgment.

titled as discussion. It finishes with summarizing the findings of the discussion. A typical judgment would have a structure like this:

It is within the subheading of discussion where the judge(s) present their extensive reasons for the specific outcome that they have arrived at, and consequently, it is within in this subsection that one can find most of the normative/law-making exploits of the *ad hoc* tribunals.

What is fascinating regarding the practice of extensive public disclosure of one's reasons for a specific decision, however, is the fact that this requirement is never found in any specific, legally binding document, like the statutes of the tribunals. One may say that the obligation to give a reasoned opinion stems from the general fair trial rights entrenched in various human rights documents[218] and that it is an omnipresent assumption that an unreasoned judgment is an arbitrary judgment. However, it is by no means a given that a judgment has to

[217] The Table of Contents of the *Celebici* Trial Chamber judgment, p. ii.
[218] For instance Article 19 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights which are part of the requirements of the *ad hoc* tribunals statutes enshrined in Article 21 and Article 20 of the ICTY and ICTR statutes respectively.

be extensively reasoned. The short, terse and cryptic judgments in the French legal system, and most other Continental Law systems, are also considered reasoned judgments. Nevertheless, the official judgments in the French legal system go at great length to portray the direct link of their reasoning to an Article in the *Code Civil*, *Code Pénal* or other statutes. They also go at great length to hide the extensive internal open-ended arguments of the inner, secluded discourse.[219]

One of the reasons why the international criminal law system does not have such a bifurcated discourse, a short, terse, formalistic public one and a secluded, hidden, open-ended one despite having the same doctrine of sources, is the lack of an intricate institutional support that the French and other Continental systems have. There is no corpse of international criminal law academics, in the sense of the French academics, specifically taxed to open a glimpse at the inner reasoning of the judges, putting important decisions in the context of other important decisions. It is not a given that international law academic enter into a dialogue with the courts. Quite the opposite, because of the requirement of publicity, it is no longer necessary for one to go through text books in order to find out about the state of the law in international criminal law. One only has to read the judgments of the tribunals in order to find out what the state of the law, for the most part, is in the field. This is not to say that academics have no place in international law discourse. To the contrary, they are invaluable when it comes to systematizing the scattered snippets of law found in different judgments, in offering a critical view on the state of the law and proposing specific changes, most of the time aimed at the judges themselves as the actors of change.

Furthermore, judges are not formed through their education process in the specific values of the international system, if such values were to exist. For one, there is no education

[219] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004; *see* Mitchel De S.-O.-L'E. Lasser, *The European Pasteurization of French Law*, 90 Cornell L. Rev. 995 (2005); Mitchel De S.-O.-L'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 Yale L. J. 1325 (1995).

system to prepare them for a service on the bench that would instil such values in them, even if such shared values existed in the international system. This is not to say that the judges on the bench of the international criminal tribunals do not share any common values as institutions. Quite the contrary, as I have pointed out, they very much do.[220] However, this does not mean that the values that they collectively share are the same ones that the international system as a whole shares. In a sense, the judges of the international criminal tribunals, because of the erratic hit and miss system of judicial appointments cannot be trusted out of hand. Therefore, any normative step that they take has to be thoroughly and extensively reasoned so that it can be analyzed, critiqued and discussed. In that sense, the judges can only offer an opinion, albeit a very authoritative one, one that has the last word in a given case, in an ongoing debate about the state of the law.[221]

This unwritten requirement of extensive reasoning, of judicial candour,[222] has produced visible consequences in the texts of the international tribunals. As I have noted in Chapters II, the *ad hoc* tribunals have used a combination of purpose-driven argumentation, structural uniqueness of the international criminal law system and test-method formulas to expand the law. Furthermore, the unwritten requirement that judges state and explain what the state of the law is in a given judgment has also lead to the extensive reliance on previously decided cases, even though the state of the law was, in many instances, created by the judges themselves. In addition, because of the requirements that judicial decisions are evidence of the law and not the law itself, the *ad hoc* tribunals have, in the beginning of their operation, perpetuated the perception that they do not make law, but merely discover it.[223] This has latter been discarded as a system of *stare decisis* has been put in its place. As Judge

[220] Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925, (2008).
[221] Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004, pp. 312-313.
[222] Scott Altman, *Beyond Candor*, 89 Mich. L. Rev. 296, (1990); Gail Heriot, *Way Beyond Candour*, 89 Mich. L. Rev. 1945, (1991); Scott C. Idleman, *A Prudential Theory of Judicial Candour*, 73 Tex. L. Rev. 1307, (1995).
[223] *See* for instance the *Kupreckic* Trial Chamber judgment, para. 540.

Shahabuddeen's Separate and Dissenting Opinion shows, the *ad hoc* tribunals have started using the language of *stare decisis* and overruling. Consequently, it is time to ask what does a system of *stare decisis* mean in international criminal law and how does it operate?

4.4 *STARE DECISIS* IN INTERNATIONAL CRIMINAL LAW

Before I go into explaining the system of *stare decisis* in international criminal law, I would like to point out one thing. *Stare decisis* is but one form of using prior decisions in judicial reasoning. As one scholar pointed out decades ago

> *Stare decisis* is a peculiar and legal adaptation of the common practice of relying on past experience. It is based on the idea that a series of precedents should not be departed from. This natural and perhaps unavoidable tendency approaches legal usage when precedents are deemed to be authority. It reaches its apogee when a single precedent is considered to be a "binding" authority. But the concepts of the value of prior experience, respect for precedents, and *stare decisis*, must be kept distinct.[224]

As this passage suggest, the doctrine of *stare decisis* is best understood as the apex of a specific mode of reasoning and using previous cases. It starts from viewing prior decisions as authority and citing them *en masse* as a line of precedents in order to cement the judges' argument and ending with a doctrine where a single precedent can be considered as binding and cannot be departed from, save having "cogent reasons"[225] for doing so. In the US, those cogent reasons have to fall into three distinct categories as explained by Justice Scalia in his Dissenting Opinion in *Lawrence v. Texas*

> Today's approach to *stare decisis* invites us to overrule an erroneously decided precedent (including an 'intensely divisive' decision) if: (1) its foundations have been 'eroded' by subsequent decisions, ante, at 15; (2) it has been subject to 'substantial and continuing' criticism, ibid.; and (3) it has not induced 'individual or societal reliance' that counsels against overturning, ante, at 16."[226]

[224] Frederick G. Kempin, Jr., *Precedent and* Stare Decisis*: The Critical Years, 1800 to 1850,* 3 Am. J. Legal Hist. 28, (1959), p. 29.
[225] *Aleksovski* Appeals Chamber judgment, para. 107-108.
[226] Justice A. Scalia Dissenting in *Lawrence v Texas*, 539 U.S. 558 (2003),

Having a system of *stare decisis* is not a logical end to a process that starts by using prior decisions as part of the justification process of judges. Judges in Continental Law countries use prior decisions to bolster their reasoning in a similar way to Common Law judges.[227] However, it would be wrong to think that Continental Law countries, given time, would reach a stage where precedents, in the form of a single judicial decision, would be considered binding law. As I mentioned previously in this Chapter, there is a conceptual difference, for whatever historical reasons, between Common law and Continental Law countries, which is embedded in the larger master narrative of their respective legal systems.

That difference, giving the status of law only to the outcomes of the political branches (i.e. the legislative power in whatever form), relegates judicial decisions, together with academic writings, to the status of authorities.[228] Consequently, a system of *stare decisis* is always one that is constructed by the judiciary[229] and accepted by other actors. I have only found one statutory mandated *stare decisis* system, that of the State of Georgia in the US.[230] The act was passed, according to one author, because the "doctrine of stare decisis had obtained such firm allegiance in public opinion, as personified by the legislature, that it was imposed as a rule on the court."[231]

Nevertheless, there are a few preconditions for a system of *stare decisis* to emerge. Kempin in his paper put the absence of four preconditions for a system of *stare decisis* to emerge:

[227] D. Neil MacCormick and Robert S. Summers (eds.), INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, Ashgate Publishing & Dortmouth Publishing, Aldershot, Broofield USA, 1997.
[228] Mitchel Mitchel De S.-O.-L'E. Lasser, *Transforming Deliberations* in Nick Huls, Maurice Adams and Jacco Bomhoff (eds.), THE LEGITIMACY OF HIGHEST COURTS' RULINGS: JUDICIAL DELIBERATIONS AND BEYOND, T.M.C Asser Press, The Hague, 2009.
[229] "The doctrine, which involves a *court's choice* to stand by a precedent notwithstanding suspicions (or worse) about its wrongness, enjoys lofty status as the emblem of a stable judiciary" (emphasis added, footnote omitted), Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 Wash. & Lee L. Rev. 411, (2010), p. 412.
[230] Frederick G. Kempin, Jr., *Precedent and* Stare Decisis*: The Critical Years, 1800 to 1850,* 3 Am. J. Legal Hist. 28, (1959), p. 42.
[231] Frederick G. Kempin, Jr., *Precedent and* Stare Decisis*: The Critical Years, 1800 to 1850,* 3 Am. J. Legal Hist. 28, (1959), p. 43.

> 1. English law has classically operated on the theory that cases are not law, but rather only the best evidence of what law is.
> 2. The authority of the reporters of cases, not being officially appointed by the courts, was such that the reported cases could be discounted by judges on the basis of inaccuracy, inadequacy, or unintelligibility.
> 3. The English court system to the middle of the nineteenth century was such that conflicting decisions could and did exist side by side.
> 4. That law is not precedents, but general principles.
> The fourth reason may be disregarded for, as Goodhart pointed out in his article, it is virtually indistinguishable from the first. The other three reasons, however, require examination. (footnotes omitted)[232]

In short and as explained by Kempin in his article, the preconditions for constructing a *stare decisis* system can be summarized as 1) having reliable case reporting system; 2) having a court system that has some sort of hierarchical order with a single court body on top that can put an end to conflicting case-law interpretations (whether it is called Supreme Court, House of Lords, Privy Council, Constitutional Court etc.); and 3) operating under the assumption that courts can also play a law-making function. However, it is necessary to point out that arriving at a system of *stare decisis* is a process not a single event. It is a process because most of the mainstream legal actors in that system have to accept the new rules of the game, i.e. the rule that a single case can create binding law. I suspect that it is this process that is unfolding in international criminal law at the moment. I will now turn to see whether these preconditions are present in the international criminal law system.

For almost a century now, we have had a reporting system for international judicial decisions, either in the Cambridge edited *International Law Reports,*[233] the *Oxford Reports on International Law*[234] or the *Oxford Companion to International Criminal Justice*,[235] or the

[232] Frederick G. Kempin, Jr., *Precedent and* Stare Decisis*: The Critical Years, 1800 to 1850,* 3 Am. J. Legal Hist. 28, (1959), p. 31.
[233] For more on the reports *see* http://www.justis.com/data-coverage/international-law-reports.aspx or http://www.cambridge.org/uk/browse/browse_highlights.asp?subjectid=1148993 (last visited August 23, 2010).
[234] For more *see* http://www.oup.com/online/us/law/oril/ (last visited August 23, 2010).
[235] Antonio Cassese (Ed. in Chief), THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, OUP, Oxford, 2009.

Max Plank Encyclopaedia on International Public Law,[236] or in the American Journal of International Law which regularly publishes case notes of different jurisdictions connected to international law.[237] Furthermore, almost all international courts now publish their judgments, either in paper publication in a journal form or more recently, electronically on the internet. Consequently, one can now reasonably claim that there are sufficient reliable sources of information regarding the factual background and the reasoning of cases both within and without the international criminal law system.

The second precondition is also plainly obvious when it comes to the *ad hoc* tribunals. Their own statutes create the system of courts with its own hierarchy. For instance, the ICTY is organized to work within three trial chambers and one appeals chamber. A case is heard for the first time in one of the trial chambers and can then be appealed to the appeals chamber as per Article 25 of the Statute. The appeals chamber is comprised of seven permanent judges, five of which are judges from the ICTY two of the ICTR. Only five judges sit on one case on appeal.[238] In the *Aleksovski* Appeals Chamber judgment the Appeals Chamber strongly stated that

> a proper construction of the Statute requires that the *ratio decidendi* of its [the Appeals Chamber] decisions is binding on Trial Chambers for the following reasons:
> (i) *the Statute establishes a hierarchical structure in which the Appeals Chamber is given the function of settling definitively certain questions of law and fact arising from decisions of the Trial Chambers.* Under Article 25, the Appeals Chamber hears an appeal on the ground of an error on a question of law invalidating a Trial Chamber's decision or on the ground of an error of fact which has occasioned a miscarriage of justice, and its decisions are final;
> (ii) *the fundamental mandate of the Tribunal to prosecute persons responsible for serious violations of international humanitarian law cannot be achieved if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the applicable law*; and
> (iii) the right of appeal is, as the Chamber has stated before, a component of the fair trial requirement, which is itself a rule of customary international law and gives rise to the right of the accused to have like cases treated alike. This will not be

[236] For more on the online encyclopaedia *see* http://www.mpepil.com/ (last visited August 23, 2010).
[237] For more on the International Legal Materials *see* http://www.asil.org/ilm/ilmindx.htm (last visited last visited August 23, 2010).
[238] For more information regarding the organization of the ICTY chambers *see* http://www.icty.org/sections/AbouttheICTY/Chambers (last visited on August 23, 2010).

> achieved if each Trial Chamber is free to disregard decisions of law made by the Appeals Chamber, and to decide the law as it sees fit. *In such a system, it would be possible to have four statements of the law from the Tribunal on a single legal issue - one from the Appeals Chamber and one from each of the three Trial Chambers, as though the Security Council had established not a single, but four, tribunals*. This would be inconsistent with the intention of the Security Council, which, from a plain reading of the Statute and the Report of the Secretary-General, envisaged a tribunal comprising three trial chambers and one appeals chamber, applying a single, unified, coherent and rational corpus of law. The need for coherence is particularly acute in the context in which the Tribunal operates, where the norms of international humanitarian law and international criminal law are developing, and where, therefore, the need for those appearing before the Tribunal, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more pronounced. (emphasis added)[239]

As for the decisions of the trial chambers themselves "[t]he Appeals Chamber consider[ed] that [the] decisions of [the] Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive."[240] Consequently, a hierarchical court system exists where there are several coordinate bodies and one supervisory body that is there to oversee, coordinate and manage the disputes of these coordinate bodies. It is not surprising that scholars look for systems of *stare decisis* within the courts systems of the European Court of Human Rights (separate chambers with a Grand Chamber for the possibility of appeal) and the WTO Dispute Settlement Understanding with its Appellate Body.[241]

It is at the precondition of how courts see the previous decisions of their piers that the issue becomes a bit murky. I have presented the theoretical viewpoints regarding the issue of whether previous court decisions are binding[242] and I do not wish to repeat them at this time. However, what I can emphasize from the discussion of Chapter I is that the international sys-

[239] *Aleksovski* Appeals Chamber judgment, para. 113.
[240] *Ibid*., para. 114.
[241] Guido Acquaviva and Fausto Pocar, *Stare Decisis* in Rüdiger Wolfrum General Ed., THE MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW, Max Planck Institute for Comparative Public Law and International Law, November 2007.
[242] See Chapter I, Sub-heading 1.4.

tem is in a state of transition and the international law master narrative is in a state of flux. It is in this environment that the model of legitimization and control that is in operation in international law that has allowed a smooth transition into a *stare decisis* system. It was the fact that the *ad hoc* tribunals operated with a type of discourse that is similar to the one found in Common law countries that made the transition look so seamless, although Judge Shahabuddeen's Declaration[243] shows that there are some bugs in the comprehension of how the system should work. It seems that the type of legitimization/control method that the *ad hoc* tribunals used allowed for the transition into a *stare decisis* system that cemented the legitimization method of control through public discourse, which further reinforced the *stare decisis* nature of the system, which entrenches the public discourse legitimization/control model.

It is in this loop that the final strengthening of the model occurred and I think I can safely say that, at least until the closure of the ICTY and the ICTR, a system of *stare decisis* will operate in international criminal law. As for the ICC, only time will tell. One thing is for certain and that is that the same preconditions that allowed for the creation of a *stare decisis* system are there for the ICC as well. One of the reasons why we have a discussion at all in the *Aleksovski* Appeals Chamber judgment of what value should the ICTY put to its own judgments is because one of the parties asked the question.[244] A similar question will most likely need to be asked of the ICC before it can actually set the groundwork on the issue. Furthermore, given the fact that the ICC is a permanent court, and that as more states join in the more it will be difficult to amend the statute it is reasonable to expect that the court itself will become the major driving force in further development of international criminal law and, hence, the need to put on the mantle of lawmaker.

There is one more conclusion regarding s*tare decisis* in general international law that we can make from the discussion above. In general international law, the wisdom of the *Ta-*

[243] Declaration of Judge Shahabuddeen, *Prosecutor v. Zoran Zugic*, Appeals Chamber decisions, Case No. IT-98-30/1-A, June 26, 2006.
[244] *Aleksovski* Appeals Chamber judgment, para. 84-88.

dic Interlocutory Appeal decision still holds true, international courts are "self-contained systems".[245] Consequently, without an established system of hierarchy and a court at the top that will have the power to review and settle interpretative differences, it would be very difficult to construct a system of binding precedent. Without a clear roadmap or some kind of agreed-upon rules as to the supremacy of the opinion of one court, it would be hard to imagine such a system in operation.

[245] *Tadic* Defence Motion Decision, para. 11.

CONCLUSIONS

Judicial lawmaking is never an easy topic to approach. This is exceptionally true regarding international law. International law has long been guided in its approach to the proper role of courts by the language of Article 38 and the Continental Law notion of judgments as authorities. The *Kupreckic* Trial Chamber put the origin of this notion as far back as Justinian's Code.[1] It is not easy to go against a millennium and half worth of grain. In the first Chapter of this thesis I elaborated on the international law master narrative, which tells us of the centrality of states in the international system. It is because of this centrality of states that the sources of law are supposed to be the direct results of the consent of states. Consequently, international treaties are agreements freely entered by states, where obligations for third states cannot be created without that states consent; customs are state practice coupled with the *opinio juris* of states and general principles of law are the principles of law found in most national legal systems. On the other hand, judgments and the opinions of scholars are only evidence of the law, but never are the law.

This master narrative has been under severe strain in the post WWII and especially the post Cold War world. International organizations have risen in prominence to the point where scholars have started talking about world governance.[2] Regional integration has moved us into a world or supranational orders defined not just as ever-closer political and economic integration through European-Union-like structures, but as regional developments with supranational courts without the supporting EU-like structures,[3] like the European Court of Human Rights, or the Inter-American Court of Human Rights. Some scholars also talk about

[1] *Prosecutor v. Zoran Kupreckic et al.*, Trial Chamber Judgment, IT-95-16-T, 14 January 2000, para. 540 (hereafter *Kupreckic* Trial Chamber judgment).
[2] *See* for instance Jose E. Alvarez, *Distinguished Speaker Series: Governing the World: International Organizations as Lawmakers*, 31 Suffolk Transnat'l L. Rev. 591 (2008).
[3] For instance *see* Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, *107 Yale L. J. 273*, (1997); but also *see* Laurence R. Helfer; Anne-Marie Slaughter, *Why States Crate International Tribunals: A Response to Professors Posner and Yoo*, 93 Cal. L. Rev. 899 (2005).

the layers of normativity that have been created by these recent structural changes of the international system and trying to classify new phenomena like "soft law".[4] It is within this master narrative that courts have to operate in and it is here where the big misunderstanding about the proper role of courts stems from.

In Chapter II, I showed overwhelming examples of how the *ad hoc* tribunals used their somewhat laconic statutes to fashion a developed branch of international law. When confronted with overwhelming silences in terms of definitions of crimes and modes of criminal liability they turned to other branches of international law and national law to arrive at their conclusions. They imported and modified various notions that existed in other branches of law in order to deal with the tasks they were assigned by the UN Security Council.

However, they completed this task in a very specific way. They fashioned and refashioned judicial tests thus allowing them to cast their normative advances in structured, formulaic ways. The thus structured judicial tests were perpetuated through constant use by later Trail and Appeals Chambers. Furthermore, constructed judicial tests allowed for one more specific feature of the international criminal tribunals' discourse, and that is its flexibility. Flexibility in the international criminal system was achieved by modifying the existing prongs of the tests, allowing for adjustments of the law to the evolving international society. The *ad hoc* tribunals chose to argue in terms of judicially constructed tests, in terms of object and purpose of the law, in terms of what shocks the consciousness[5] of the modern international community and so on. They chose to extensively reason their judgments, to summarize the arguments of the parties and give answers to them. In a sense, they shaped the current

[4] Prosper Weil, *Towards Relative Normativity in International Law*, 77 A.J.I.L. 413 (1983) talking about the blurring of the normative threshold brought on by the notion of *jus cogens*; but also *see* Dinah Shelton, *Normative Hierarchy in International Law*, 100 A.J.I.L. 291, (2006); and Samantha Besson, *Theorizing the Sources of Law* in Samantha Besson & John Tasioulas eds., THE PHILOSOPHY OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2010; and David Lefkowitz, *The Sources of International Law: Some Philosophical Reflections* in Samantha Besson & John Tasioulas eds., THE PHILOSOPHY OF INTERNATIONAL LAW, Oxford University Press, Oxford, 2010.

[5] Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J. Int'l L. 925 (2008).

form of international criminal law using the ideology of human rights and victim protection, while constructing a developed branch of international law, albeit with considerable rough edges. These practical developments of international criminal law have raced ahead, however, of the more theoretical developments about its nature, function and consistency with democratic and liberal theories.

In Chapter III, I examined the natural question of whether the normative advances that the *ad hoc* tribunals made was accepted by different actors in the international system. I chose to look at whether scholars, other international/ized criminal tribunals and other international courts accepted the normative outcomes of the *ad hoc* tribunals. What I found was both expected and unexpected. I expected that the wider scholarly community would have accepted most of the normative outcomes of the ICTY and the ICTR and I showed that the substantive part of international law taught in text-book format is presented in light of the *ad hocs'* case law. Other international courts, mostly the international criminal courts, have accepted the normative outcomes of the *ad hoc* tribunals and have relied on their reasoning when it comes to issues of international criminal law. Some courts, like the European Court for Human Rights (ECtHR) have even put the case-law of the ICTY and ICTR in the part of their judgments that deal with the facts of the case, together with national case-law, and not as part of the law governing the case.

It is at this point that I uncovered something unexpected regarding the way that international courts interact with each other. International courts are starting to see themselves more and more as part of "self-contained (and I would add self-sustained) regimes."[6] It is my premise, and possible future research, that international courts begin to see the jurisprudence of other international courts as foreign law, in a similar way that US scholars and judges saw the international and national case law cited in recent US Supreme Court cases as foreign

[6] *Prosecutor v Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Appeal Chamber Decision, Case No. IT-94-1, October 2, 1995, para. 11; Bruno Simma. *Self-contained regimes*. 16 Netherlands Yearbook of International Law 111 (1985).

law.[7] If this appears to be the case, then the question would arise as to the integrity of international law, since, regardless of the fact that different international courts have different mandates as stipulated in their different founding documents, they are, nonetheless, part of the same international law and work in the same international environment. Seeing each other as foreign courts does raise the kind of fears that have been raised in the Report of the United Nations' International Law Commission regarding the fragmentation of international law.[8] However, due to the limited nature of my research in this field, I am in position, however, to offer any definitive conclusions at this point.

In Chapter IV, I explain the issues regarding the legitimacy of international judicial law making. As I have written, courts have to accomplish two, sometimes conflicting functions during their primary function of settling cases. They have to take care of legal certainty, and they accomplish this by deciding like cases alike,[9] but they also have to adapt the law to the changing societal requirements. In a sense, the text of a Code (e.g. *Code Civil*) may stay the same for over two centuries, but the judicial results stemming from those same Code provisions can change drastically over those same two centuries.[10]

What I have also shown is that the doctrine of sources as such, has its own function to play in different legal systems. In the French system, for example, it is part of an elaborate system of both institutional and normative constraint of the normative power of judges. Because it is only one element of this holistic constraint of the normative power of judges, it

[7] "The evening (after oral argument in Roper, but before it was handed down) presented a rare opportunity for clarification. Although Breyer and Scalia both referred to foreign law, their focus appeared to be on comparative materials – that is, either judgments of other national courts, or international courts interpreting treaties not binding on the United States (e.g. the European Court of Human Rights, interpreting the European Convention on Human Rights) – as opposed to international legal materials which do bind the United States." Sujit Choudhry *Migration as a New Metaphor for Comparative Constitutional Law* in Sujit Choudhry ed., THE MIGRATION OF CONSTITUTIONAL IDEAS, Cambridge University Press, Cambridge, 2006.

[8] Report of the Study Group of the International Law Commission titled *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, International Law Commission, Fifty-eight session, A/CN.4/L.682, April 13, 2006

[9] *Aleksovski* Appeals Chamber judgment, para. 92-111.

[10] Mitchel De S.-O.-L'E. Lasser, JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE, OUP, Oxford, 2009, 116-149.

cannot be relied completely as way of effective constraint in international law. Consequently, international criminal courts, but other international courts as well, have chosen to intermix this normative constraint, (i.e. the denial of judgments the power of law on a categorical level), with one that is found in Common law jurisdictions, the requirement of openness and public discursiveness.[11]

This model of constraint works by forcing judges to accept public responsibility for their written word, to accept the scrutiny of the public eye not just to the process of conducting a trial but to the process of deliberations. The judges are required to lay bare the process of their internal deliberations, even though that process might be shown somewhat in the reverse order.[12] Furthermore, this process of legitimization, by requiring the writing of individually signed opinions of judges working in a coordinate model of organizing judicial authority also has the consequence that it gives the appearance that a judgment is only one single voice, a judge's opinion, albeit a very important one. As one former judge has put it

> Yet I feel far more comfortable with the less exalting idea that all I am doing is using the tools of the law as I understand them, trying my best in a particular context at a particular moment to deal honestly and openly with the issues before me. I try to make my voice as legally clear, true and harmonious as possible. But I cannot help but see it as one voice among many. The fact that it will have consequences does not make it right. To my mind, the objective of the judge is not to pronounce the one and only correct answer to the question at issue. It is to contribute and honest voice to the ceaseless striving for the best expression of the law in relation to a particular case at a particular moment. And the criteria I use are those that have

[11] Generally *see* Mitchel De S.-O.-L'E. Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, OUP, Oxford, 2004.

[12] "[…] every judgment I write tells a lie against itself. As a new judge on the Constitutional Court I would always smile inwardly when first reading the printed version of a judgment of mine. It told its story in such an orderly, clear, sequential narrative form. The opening would state the issues raised. It would then set out the history of the litigation and elucidate the specific questions to be determined. Next it would outline the relevant legal principles involved, apply them to the facts of the case and arrive at an appropriate conclusion. There would be a simple forward progression – tick-tock – the rick always coming before the tock. Yet in reality the tock had often long preceded the tick. Indeed, it was not unusual for the very last sentence I wrote to be the opening statement declaring what the case would be all about. My judgments in fact emerge from an inchoate – even chaotic – mental firmament quite different from that suggested by their ultimate assured expression. Mixed in what the formal logic there has invariably been an enormous amount of random intuitive searching and a surging element of unruly, free-floating sensibility. A times I almost feel a sense of indignation that the apparently serene, relatively bland and cool document is all that remains of the actual warm and agitated process involved in its production." Albie Sachs, THE STRANGE ALCHEMY OF LIFE AND LAW, OUP, Oxford, 2009, pp. 47-48.

> been legitimated by the thinking and practice of the legal community to which my judgment will be addressed.[13]

Judges in international criminal law have taken the path of taking personal responsibility for their opinions. They have chosen to endure scrutiny from their fellow colleagues in terms of debates within the chambers prior to issuing the judgments as well as separate and dissenting opinions as part of the judgment, but also in terms of public scrutiny as well. In this method of legitimacy and control, a judge's best tool for acceptance is her persuasiveness, understood differently from mere rhetoric.[14]

This method of legitimization and control of judicial normative power allowed for something else, the construction of a *stare decisis* system in international criminal law. *Stare decisis* is not a natural progression of using previous courts judgments in judicial reasoning.[15] It is a judicial construction that culminates with the decision of a court to follow even one single precedent as binding law on the given subject.[16] It presupposes the existence of structural elements that have to be present in order for a system of *stare decisis* to be constructed. The structural elements, as I have described them in Chapter IV, present in the *ad hoc* tribunals allowed for the *Aleksovski* Appeals Chamber to construct a system of binding precedent.

However, it is also because of the lack of one very important element in the international system that seems unlikely, save major structural change, that a system of *stare decisis* will start to operate between the various international courts. The lack of rules of the road, of a tribunal with the hierarchy will make it impossible for a doctrine of *stare decisis* to develop in international law. This does not mean, on the other hand, that an unavoidable fragmentation of international law will ensue. However, it does mean that a coherent system of international law will depend more on judicial comity and cooperation between courts than anything

[13] *Ibid*., p. 145.
[14] Albie Sachs, THE STRANGE ALCHEMY OF LIFE AND LAW, OUP, Oxford, 2009, pp. 113-119 and 143-147.
[15] Frederick G. Kempin, Jr., *Precedent and* Stare Decisis*: The Critical Years, 1800 to 1850,* 3 Am. J. Legal Hist. 28, (1959).
[16] Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 Wash. & Lee L. Rev. 411, (2010).

else. International courts are doomed to co-exist in the same normative sphere and, therefore, their greatest weapon against oblivion is the quality of the reasoning of their judgments, their ability to persuade according to the accepted norms and legal tools of a society and their ability to foresee the limits of their normative power.

Furthermore, a system of *stare decisis* is never a pre-ordained result, despite the fact that the systematic preconditions for the existence of *stare decisis* are in place. *Stare decisis* is, as I have mentioned before, a judicial doctrine.[17] Consequently, even if the preconditions were present in a system it does not mean that the doctrine of *stare decisis* is the natural progression. It is just but one way of using previously judicial experience,[18] one of a whole range of possibilities that are in operation today in different national systems.[19] As a result, even if the systematic requirements in international law were to appear, i.e. even if international rules of the road were established, or even if a Supreme International Court were to be established, a system of *stare decisis* would not necessarily emerge. If and only if were such a doctrine spelled out and then accepted by the courts themselves, can a system of *stare decisis* emerge.

The question of whether there is a system of binding precedent in international law[20] or whether courts are mere law discoverers[21] is very much obscured by the different viewpoints that scholars bring from their own national master narratives. Scholars from the US or the UK will see the different courts' citation of previously decided cases as a precedents based system, one where courts are lawmakers. For them, the familiar way that judges argue in their reasoning, the reliance on judicial tests, the simple fact that judges issue individually

[17] Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 Wash. & Lee L. Rev. 411, (2010).
[18] Frederick G. Kempin, Jr., *Precedent and* Stare Decisis*: The Critical Years, 1800 to 1850,* 3 Am. J. Legal Hist. 28, (1959), p. 29.
[19] D. Neil MacCormick and Robert S. Summers eds., INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, Ashgate Publishing & Dortmouth Publishing, Aldershot, Broofield USA, 1997.
[20] Raj Bhala, *The Myth About* Stare Decisis *and International Trade Law (Part One of a Trilogy),* 14 Am. U. Int'l L. Rev. 845, (1999).
[21] *Kupreckic* Trial Chamber judgment, para. 540.

signed opinions, the fact that they enter into a public discourse with their colleagues and other actors are signs of this common law nature of international law.

On the other hand, German and other Continental Law scholars will see the open citation of previously decided cases as something normal, something that the requirement of legal certainty compels courts to do, and something that their own courts naturally do.[22] They will point to the doctrine of sources enshrined in Article 38 of the ICJ and claim, rightly, that judgments, together with the opinion of scholars, are not law but merely the evidence of the law. For them what is to be deemed as law is only what is a product of the political branches of the constitutional system.[23] In the international system that would be states and to some extent, international organizations, not courts. The outcomes of courts are not law they are *authorities*, and hence, do not enter into the category of law. For them, this does not mean that courts do not have normative power, i.e. the power to shape the law. However, judicial outcomes, no matter how much normative force they have, are simply not law.

Consequently, it is at this point that would like to propose a different viewpoint for investigation into the problems of international law. As one judge has noted, albeit talking about international criminal procedure, international law is an amalgam of the various different national systems,[24] or as I would also called them of the various different master narratives. However much international law has borrowed from the more advanced national systems, it nevertheless, is a separate legal system with its own particularities. Furthermore, as a separate legal system, it can be compared on an equal footing with other national constitu-

[22] *See* for instance the discussion on comparative examples of how national courts use previously decided cases in the *Aleksovski* Appeals Chamber judgment, para. 92-111; but also *see* D. Neil MacCormick and Robert S. Summers eds., INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, Ashgate Publishing & Dortmouth Publishing, Aldershot, Broofield USA, 1997.
[23] Mitchel de S.-O.-Lasser, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY, Oxford University Press, Oxford, 2004.
[24] Separate and Dissenting Opinion of Judge Cassese, *Prosector v. Drazen Erdemovic*, Appeals Chamber Judgment, IT-96-22-A, October 7, 1997, para. 4.

tional systems[25] in where international law can learn from the debates and views of constitutional scholars as much as from the views and debates from international relations scholars. The international system is a political system, and the political science that deals with this system is the science of international relations. However, given the thickening of law in the relations between states and given the fact that international law is a legal system that regulates the outward expression of sovereignty while constitutional law is the system of the inward regulation of sovereignty[26] international law can and should also learn from its sister legal branch, constitutional law. It may be time for international law scholars to also become constitutional law scholars.

[25] One such attempt at comparison of the problems that international law and constitutional law face can be found in Jack Goldsmith and Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 Harv. L. Rev. 1791 (2009).
[26] *Ibid*., pp. 1862-1868.

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