International Tribunals as Lawmakers: The Case of Systematic Rape as Crime Against Humanity

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M.A. LONG THESIS

HUMAN RIGHTS

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Aos meus avós, aos quatro: Ângelo e Silvia, Teresinha e Hilário.

Que por graça Divina eu tenho a honra de conviver.

Cujas trajetórias de vida me inspiram em cada passo e cujas orações protegem os meus caminhos, mesmo à distância.

Se chegarei longe é por causa da história de vocês.

[To my grandparents, to them four: Ângelo e Silvia, Teresinha e Hilário.

With whom by God's grace I have had the honour of living.

Whose life experiences inspire each of my steps and whose prayers protect my path, even from afar.

If I ever reach far it will be because of your histories.]

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ABSTRACT

In contemporary International Law, States cannot be perceived as the sole legislators. Rather, many non-State actors, such as NGOs, influence both the lawmaking and interpretation procedures. In this scenario, the role of international tribunals is remarkable. Having functions beyond setting disputes among States, international courts are capable of developing the law in such a manner that can be certainly recognized as lawmaking. This research aims to understand what are the sources that legitimates their lawmaking functions. Furthermore, to comprehend better how courts make law the case of the crime of rape as crime against humanity is analysed. More specifically, the role played by International Criminal Tribunals for the Former-Yugoslavia and Rwanda in developing International Criminal Law serves as example.

List of Abbreviations

ECtHR – European Court of Human Rights

IACtHR – Inter-American Court of Human Rights

ICC – International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

ICJ – International Court of Justice

ICRC – International Commission of the Red Cross

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the Former-Yugoslavia

ILC – International Law Commission

ILO – International Labour Organization

IMT – International Military Tribunal

NGOs – Non-Governmental Organizations

PCIJ – Permanent Court of International Justice

UN – United Nations

UNGA – United Nations General Assembly

UNSC – United Nations Security Council

1.0 Introduction

In the international system the State is usually recognized as the main actor. Although its importance must be recognized, it is also true, and essential to any contemporary analyses that considers this system, that the State cannot claim to be the sole actor: it shares the stage with international organizations, civil society networks, transnational companies, Non-Governmental Organizations, peoples and individuals.[1] In this context, studying the lawmaking process in International Law must consider not solely the role of the State, but understand other mechanisms through which different actors contribute to develop International Law. International tribunals decide a growing number of decisions and by applying law in specific cases they make law.[2] Studying the implications of international tribunals as lawmakers for International Law is the main topic of this thesis.

The making of law in International Law is still formally understood as a prerogative of States. In the famous International Court of Justice (ICJ) decision on the *Legality of Threat or Use of Nuclear Weapons* (*Nuclear Weapons* case) the Court clearly affirms that it cannot legislate.[3] The acceptance (ratification) of treaties is indeed within the scope of States and International Organizations.[4] Tribunals are created by treaty, or by binding decisions of the United Nations Security Council and have a defined jurisdiction that determinates the scope of their work. Therefore, when it is asserted here that tribunals are lawmakers it does not mean that they substitute or play the role of States. Rather, it is a broader understanding of the lawmaking

[1] See further: Antônio Augusto Cançado Trindade, *Direito Das Organizações Internacionais [The Law of International Organizations]* (5th edn, Del Rey 2012); Margaret E Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998); Peter Evans, 'The Eclipse of the State: Reflections on Stateness on an Era of Globalization' (1997) 62; Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (2nd edn, Martinus Nijhoff Publishers 2013).
[2] Daniel Terris, Cesare P. R. Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decides the World's Cases* (1st edn, OUP 2007) 104.
[3] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep 1996 226 (International Court of Justice) [18].
[4] United Nations, 'Vienna Convention on Law of the Treaties between States and International Organizations or between International Organizations'; United Nations, 'Vienna Convention on the Law of Treaties' <http://www.refworld.org/docid/3ae6b3a10.html> accessed 15 March 2016.

process, which perceives that the application of law in practical cases, the clarification of certain treaty provisions and/or the necessity to keep treaties up to date, considering their main object and purpose, implicates the development of International Law in such a manner that it is possible and proper to consider it a making of law. It is in this sense that lawmaking must be understood in this study.

The legal space where judges operate in International Law is different from national jurisdictions. Regarding the first, there is a wider margin of discretion where judges can operate.[5] By margin of discretion one can understand the space that exists in International Law considering its nature and context of operation: generality of many of its provisions, especially of customary International Law; absence of a legislative centralized body; demands of justice; necessity to keep treaties up to date. It is possible to affirm that International Law, in comparison with domestic law, is much more flexible which creates the possibility, and the essential requirement as well, for these tribunals to adapt, to drive its provisions in some directions.[6]

In this sense, this research will focus on the analyses of the importance, and the role of this margin of discretion for the development of International Law and assurance of justice. In other words, what are the implications of this margin of discretion to International Law?

To respond properly to this issue this study must also address parallel questions such as what is the legal source of this margin and where does its legitimacy come from? What are the assurances that it will be save from arbitrariness and/or violations of *nullum crimen sine lege* principle concerning international criminal law?[7] What are its consequences in relation to just outcomes?

[5] Terris, P. R. Romano and Swigart (n 2) 103.
[6] ibid 104.
[7] The *nullum crimen sine lege* principle means "no crime without law", it is the principle of legality.

In this specific research, to answer the above questions, I will analyse the case of international criminal tribunals in the establishment and development of the crime of systematic rape as crime against humanity. Therefore, those questions will be answered in regard to this issue, which seeks to allow some specific conclusions for this thesis.

Finally, it is relevant to notice that the boundaries between international humanitarian law and human rights law are blurred, and, considering the situations that international criminal law is applicable, the dialogue among these branches is inevitable and even natural. Consequently, these three areas will dialogue along the thesis.

1.1 Significance of the study

Considering the research questions presented above, it is important to draw attention to the relevance of this topic for International Law and for International Relations as a broader area. After the Cold War, there was a considerable rise of international tribunals.[8] These courts seek to, by complementing domestic systems, enhance the possibility of access to justice, both for States, and more importantly, for people. Tribunals are established through treaties by States that, for the reason of being sovereigns, consent to an international court mechanism to judge determined actions attributable to them and, in international criminal law, to cooperate in the investigation and judgement of their nationals and/or alleged crimes committed in their territory.[9] When applying law, these tribunals clarify the meaning of treaties and sources of law in relation to a case.[10] In this job, they can use a margin of discretion either by a more restrictive interpretation or a wider one. This difference in approaching cases has a great impact

[8] Karen J. Alter and Cesare P. R. Romano, *The Handbook of International Adjudication* (Y Shany ed, Oxford University Press 2014).
[9] United Nations, 'Rome Statute of the International Criminal Court (Last Amended 2010)' (*Refworld*, 17 July 1998) <http://www.refworld.org/docid/3ae6b3a84.html> accessed 22 May 2016.
[10] Terris, P. R. Romano and Swigart (n 2) 104.

in the law development in the international arena and the achievement of a just outcome. Furthermore, this is also related to legitimacy of international courts.

By researching this topic, it is possible to better clarify the scope of action of international tribunals. This has important implications on the acknowledgment and acceptance of tribunals' jurisdictions and judgments. Therefore, the significance of this thesis regards researching and reflecting on the possibilities of international tribunals to influence, through their margin of discretion, the development of International Law and through that enhance the achievement of justice.

1.2 Hypothesis and probable results

In relation to the questions that will be addressed by this research, the hypothesis considered and probable results are that the existence of a margin of discretion is an essential requirement to the development of International Law and the effectiveness of tribunals, including its ultimate aim of making justice.

Additionally, through the assessment and analyses of sources of the margin of discretion it is plausible to consider that it will be possible to understand its legitimacy within International Law. Regarding the *nullum crimen sine lege* principle, the scope of the margin and its characteristics, may permit harmony between them. Furthermore, on the analyses of risks of arbitrariness, considering the nature of the margin, it is feasible to expect that the margin will not be wide enough to allow great risks or arbitrary rulings.

1.3 Methodology, scope and limitations

This thesis will depart from the well-established premise that international courts indeed make law.[11] From this assumption, studies that evaluate the role of international courts for the development of International Law, its legitimacy and limits, will be the foundation of the theoretical framework for this research.

Considering that the role of tribunal's margin of discretion in the lawmaking in the case of systematic rape as crime against humanity will be more deeply analysed, it is possible to affirm that this research also contains case study as methodology. In addition, in the case study, three different jurisdictions will be compared; therefore, the study relies upon comparative methodology approach as well.

In this sense, the comparative research will analyse jurisprudence, other trial progresses as well as official documents from the courts (statutes, guidelines) to evaluate the development of systematic rape as international crime. Jurisprudences are a reliable manner to understand the development of International Law because they reflect established International Law and at the same time raise original questions, face unprecedented dilemmas and set up new parameters. Additionally, jurisprudences must be reasoned which permits one to comprehend justifications for a certain development.

Considering the scope this thesis will encompass three jurisdictions namely: International Criminal Tribunal for the Former Yugoslavia (ICTY); International Criminal Tribunal for Rwanda (ICTR); and International Criminal Court (ICC).

The choice of those tribunals is justified both considering general issues of international criminal justice and particular features of those courts. In general, terms, those international

[11] ibid; Armin Von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) 26 49; Beth Van Shaak, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals' (2008) 97 119.

criminal tribunals have judgements on systematic rape charges. The International Military Tribunal after the II World War was practically silent in relation to this crime. Other international tribunals are either hybrid ones - their scope includes domestic law as well, such as The Special Courts for Sierra Leone or Special Tribunal for Cambodia - or focus on certain incidents that are not very useful for this research (Special Tribunal for Lebanon). Additionally, the choice of international criminal law is justified considering the fact that its judicial practice in the international arena is relatively new, thus, they have expanded considerably the field of International Law.[12]

Considering particular characteristics of the chosen tribunals, first, ICTY has unprecedented cases on rape, judging sexual enslavement situations and comprehending rape as torture.[13] Second, ICTR was the first tribunal to define rape in International Law and to understand it as possible means for perpetrating genocide.[14] Finally, ICC is analysing cases with rape as one of the charges against the accused.[15] As the permanent and most recent of the three courts, ICC will allow certain conclusions on the development of International Law in relation to the object of study.

It is also relevant to highlight certain limitations of this research. Although many analyses are going to be in relation to the role of international courts in a general sense, the case analysed regards international criminal law. It can also be said that lessons inferred through this study should have more substantial value to human rights tribunals as well.

[12] Terris, P. R. Romano and Swigart (n 2) 116.
[13] 'Landmark Cases | International Criminal Tribunal for the Former Yugoslavia' <http://www.icty.org/en/in-focus/crimes-sexual-violence/landmark-cases> accessed 28 July 2016.
[14] 'The ICTR in Brief | United Nations International Criminal Tribunal for Rwanda' <http://unictr.unmict.org/en/tribunal> accessed 28 July 2016.
[15] 'Appeal' <https://www.icc-cpi.int/Pages/Appeal.aspx> accessed 28 July 2016.

2.0 International lawmaking by non-State actors

As stated before, the international system is composed by a range of different non-State actors, which, by various means, try to influence the decision-making process, policies formation and so on. Keck and Sikkink study the influence of transnational advocacy networks – characterized by the centrality of principled ideas, which motivates their formation - on international politics and policies, and one can extend their actions to the lawmaking process in International Law.[16] According to them, these networks can influence process by their ability to generate credible information; to use symbols intelligently to communicate with different publics, persuading the public opinion; to influence credible actors and to seek accountability for powerful actors.[17] Regarding specifically the lawmaking process, non-state actors impact on both the international legislative process and in the interpretation of law, as it is going to be clarified below.

2.1 Non-State actors in the international legislative process

There is not, in the international system, a legislative body as the national systems have.[18] Even multilateral organs, with practically universal participation, such as the United Nations General Assembly (UNGA), are not equivalent to national legislative systems. Regularly, the UNGA issues non-binding resolutions, whose impact cannot be neither disregarded nor equated to binding laws.[19] Generally, decisions with force of law are defined by treaties, by the formation of customary law, by decisions of the Security Council under chapter VII and by decisions of international courts on the parties of a litigation.[20] Non-State actors frequently influence this process.

[16] Keck and Sikkink (n 1) 1.
[17] ibid 16.
[18] Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (1st edn, Cambridge University Press 2014) 149.
[19] Michael P. Scharf, 'A Primer on International Law' (Summer Institute for Global Justice, Utrecht).
[20] Vaughan Lowe, *International Law* (Oxford University Press 2007) ch 1; P. Scharf (n 19).

Considering the international legislative process, a non-State actor that clearly is a lawmaker are international organizations. According to the Vienna Convention on Law of the Treaties between States and International Organizations or between International Organizations, International Organizations have legal capacity to conclude treaties.[21] For that reason, it is possible to affirm that they directly take part in the legislative process of International Law.

Non-Governmental Organizations (NGOs) also play a relevant role, usually by attending meetings, commonly with observer status. In the United Nations (UN), in some organs, it is even possible to consider that the NGOs have the right to engage as observers.[22] In this sense, NGOs can have an effect in treaty making conferences, or in the elaboration of soft law documents once they can express their opinions. The drafting process of the International Criminal Court (ICC) is a good example. In this case, NGOs built a coalition to lobby in favour of the creation of the Court and influence its draft. In here it is relevant to cite the Women's Caucus for Gender Justice, which has strongly influenced a formation of a feminist agenda in the ICC preparatory conferences. In fact, the NGOs were able to impact on the final outcome, including on gender issues originally absent in the International Law Commission (ILC) draft.

Another example of non-State actors participating in lawmaking process are indigenous people, which had representatives present in the International Labour Organization (ILO) revision conference of the 107 Convention on Indigenous and Tribal Populations, in 1989.[23] Nowadays the presence of NGOs taking part in international conferences, especially treaty making or revising, is common even expected.

[21] 'Vienna Convention on Law of the Treaties between States and International Organizations or between International Organizations' (n 8) II, section I.
[22] Marjan Slobodan Ajevski, *International Criminal Tribunals as Lawmakers: Challenging the Basic Assumptions of International Law* (Central European University 2011) 55–56.
[23] ibid 52.

2.2 Non-State actors and the interpretation of International Law

How a court attributes meaning to the text of law can change the outcome of the judgement.[24] This can lead to individuals' imprisonment, awarding of reparations to victims or to States, impacts on court's legitimacy and influence the development of International Law, helping to establish customary law, for instance. However, to interpret is not an exact science. Subjective understanding of the world influences judges' interpretation.[25] For this reason, there are general rules that help guiding and regulate the interpretation process. Established in the Vienna Convention on the Law of Treaties these rules affirm that treaties must be interpreted in good faith, considering the ordinary meaning of the words and in relation to their context, and object and purpose of the treaty.[26] The Vienna Convention also recognized that interpretation must take into account any practice related to the application of the treaty, and use supplementary means such as the preparatory work of the treaty and its context, when any provision is unclear, ambiguous or leads to an absurd result.[27] Yet, the Convention cannot avoid subjectivity in the interpretation process. On the contrary, the treaty seems to allow space for creative, but regulated, work.

In this manner, courts must present a juridical rational, clarifying their arguments, not as an exclusive internal psychological process, but as an exercise of justified legal reasoning.[28] Therefore, for the purposes of this work, to interpret is the interpreter's work of giving meaning to words of law in practical cases, observing the rules stated in the Vienna Convention.

Interpretation, nevertheless, remains a discretionary and creative work, once laws usually need clarification, having more than one possible meaning.[29] Hence, participating in the process

[24] Grover (n 18) 2.
[25] ibid 4.
[26] United Nations, 'Vienna Convention on the Law of Treaties' <http://www.refworld.org/docid/3ae6b3a10.html> accessed 15 March 2016, Article 31.1.
[27] ibid, Article 31.3.b, 32.
[28] Grover (n 18) 5–6.
[29] ibid 6.

that drives interpretation is extremely relevant to the outcome, consequently, to interpret is also a lawmaking activity.

Aware of the importance of interpretation, non-State actors also seek to influence it. Depending on the organ or procedure, NGOs can have voice or submit shadow reports, displaying their interpretation of certain provisions, which can be accepted by these organs. An example is the drafting process of General Comments by the UN Human Rights Committee, which includes civil society and NGOs participation on the process of clarifying the meaning of the International Covenant on Civil and Political Rights (ICCPR) provisions.[30] The International Committee of the Red Cross (ICRC) is also an interesting example. Being an international organization known for its *sui generis* status (it is not an inter-governmental organization, but carries typically responsibilities of them), the ICRC releases commentaries on the 1949 Geneva Conventions and its Protocols, aiming to clarify the meaning of its provisions.[31] Therefore, the organization, as a non-State actor, has a relevant impact in the interpretation of international humanitarian law, as their studies on how to update the understanding of the Conventions (even older commentaries) to the 21st Century shows.[32]

Furthermore, in international litigation procedures NGOs can submit *amicus curiae* supporting one side of the process or giving relevant complementary information to the tribunal. In the Inter-American Court of Human Rights (IACtHR), in the Matter of Urso Braco Prison Regarding Brazil, the Institute of Development and Human Rights, a Brazilian NGO, submitted to the Inter-American Commission of Human Rights an *amicus curiae* explaining to them that

[30] Examples of public call for civil society participation: 'General Discussion on GC on Article 9' <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GConArticle9.aspx> accessed 1 August 2016; 'Draft General Comment Article 9' <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx> accessed 1 August 2016.

[31] Gabor Rona, 'The ICRC Privilege Not to Testify: Confidentiality in Action - ICRC' (14:17:10.0) <https://www.icrc.org/eng/resources/documents/article/other/5wsd9q.htm#a2> accessed 29 July 2016.

[32] Jean-Marie Henckaerts, 'Bringing the Commentaries on the Geneva Conventions and Their Additional Protocols into the Twenty-First Century' (2012) 94.

the situation in Urso Branco Prison reflected a general systematic problem of the prison system in Brazil, helping the Commission and then the Court, to perceive the issue as structural one instead of punctual isolated problem.[33] The Inter-American Court also relied on *amicus curiae* in its decision of the case Mendoza et al. v. Argentina, having citing them in its decision:

> On August 29 and September 6, 11, 13 and 14, 2012, respectively, a group of researchers from the Center for the Study of Sentence Execution, the Brazilian Institute of Criminal Science, the Asociación por los Derechos Civiles, Amnesty International, the Colectivo de Derechos de Infancia y Adolescencia de Argentina, and the Human Rights Institute of the University of Columbia Law School, Lawyers for Human Rights together with the Center for Law and Global Justice of the University of San Francisco, submitted Amicus curiae briefs in this case.[34]

Similar situations have happened in other cases, exemplifying non-States actor's participation in influencing a tribunal's understanding of the facts and International Law, impacting the outcome of litigations.[35]

Non-State actors also play a relevant role in advocating in favour of ratification of certain treaty or provision(s). The Human Rights Watch worked towards getting the minimum ratifications necessary so the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence could enter into force.[36] Also, they have an extensive work pressuring the United States government to ratify a wide range of human rights treaties.[37] Amnesty International also sets some examples, playing an important role in advocating for ratifications of the Arms Trade Treaty.[38]

[33] IDDH and Clínica de Direitos Humanos da UNIVILLE, 'Internos Do Presídio Urso Branco vs. Brasil Amicus Curiae [Matter of Urso Braco Prison Regarding Brazil]' <http://www.iddh.org.br/v2//upload/0a12901cf0d90d4a103b5c70f0fcbe58.pdf> accessed 17 February 2016.
[34] *Case Mendoza et al v Argentina* [2013] Inter-American Court of Human Rights serie c 260, para 13.
[35] See also: *Case of Espinoza Gonzáles v Peru Preliminary Objections, Merits, Reparations and Costs - Series C No 289* (Inter-American Court of Human Rights).
[36] Human Rights Watch, 'Europe Treaty on Violence Against Women to Take Effect: Defining Moment' for Women Facing Domestic Violence' <https://www.hrw.org/news/2014/04/24/europe-treaty-violence-against-women-take-effect> accessed 18 February 2016.
[37] Human Rights Watch, 'United States Ratification of International Human Rights Treaties' (2009) <https://www.hrw.org/sites/default/files/related_material/Treaty%20Ratification%20Advocacy%20document%20-%20final%20-%20Aug%202009.pdf> accessed 18 February 2016.
[38] Amnesty International, 'Celebrating the Arms Trade Treaty' <https://www.amnesty.org.nz/celebrating-arms-trade-treaty>.

In this sense, even though they usually do not have explicitly decision-making power in the international legislative process, their influence must not be disregarded. Furthermore, their presence and participation is so strong and relevant, especially in certain areas of International Law, such as human rights law, that it is no longer possible to affirm that lawmaking in International Law belongs exclusively to States. According to Cançado Trindade:

> The expansion of subjects of International Law, displaying wide cultural differences, has in the last decades influenced the transformations of International Law and affected the formal process of its elaboration. (…)
>
> In the World Conferences of our times, States as well as international organizations and entities of civil society have been contributing to the accelerated development and universalization of International Law (…). The intensification of multilateralism was to attach an increasing greater weight to consensus in the formation and crystallization of rules of general International Law. International conventions and general international law have been duly taken into account simultaneously by international case-law.[39]

In this manner, having established that non-State actors have a role in lawmaking, this study will proceed to examine particularly the role of international tribunals to the development of International Law.

2.3 Tribunals as lawmakers

The making of law by international tribunals is understood here, in accordance with the introduction, as the application of law in practical cases, the clarification of certain treaty provisions and/or the necessity to keep treaties up to date that influences the development, the change of International Law.

The strictly positivist approach, on the other hand, would say that international tribunals are not lawmakers, rather, they state the law in specific cases. As already cited here, in the Nuclear Weapons case the ICJ states that it cannot legislate. Additionally, the ICJ Statute also affirms, in Article 59, that the Court's decision is only binding between the parties in dispute, therefore,

[39] Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (n 1) 20–21.

there is no *stare decisis* for the ICJ.[40] In fact, Article 38 of ICJ statute ranks judicial decisions as subsidiary means.[41]

It is possible to affirm, though, that the reality differs considerably from this positivist approach. Contemporary, international courts play a role much greater than the one envisaged to their predecessors. Before the end of the Cold War most international courts were dispute settlement mechanism for States only, actioned by the voluntary will of litigants.[42] The new international courts' style, as Karen J. Alter denominates, are compulsory mechanisms in which non-State actors can initiate litigation.[43] The result is that these courts have more possibilities to proceed with disputes and issue decisions (maybe shifting the meaning of the law) that run counter the will of States.[44] This new style courts work in an international relations environment in which the Rule of Law is the expectation of parties. In other words, parties, especially States, are expected to obey the law regardless of the behaviour of other parties, differently of a contractual approach in which if one side breaks the contract the other one is released from obligations under the agreement.[45] J. Alter explains that formally, international courts still have the same power to issue binding decisions; they are still created by States which also appoint the judges, nevertheless, expectations have changed.[46] This means that courts are perceived as a decisive actor to maintain the Rule of Law. And "Rule of Law politics are often closely related to rights politics. A key legal notion is that rights can only meaningful exist when there are remedies."[47] In this scenario, international courts must offer interpretations of the law that give existence to rights, to point out violations and to specify what respect to

[40] Statute of the International Court of Justice 1945.
[41] ibid.
[42] Karen J. Alter, *The New Terrain of International Law* (1st edn, Princeton University Press 2014) 6.
[43] ibid.
[44] ibid 7.
[45] ibid 6; 18.
[46] ibid 18.
[47] ibid 26.

rights demands.[48] Therefore, international courts contemporary framework accepts and even asks them to push the law in certain directions (not any) to fulfil Rule of Law requirements.

Perhaps, States fear of losing the privilege (and illusory) position as sole legislators might explain such a divergence from theory and reality. Furthermore, it is important to stress again that there is a difference between States possibilities as legislators and the lawmaking by international courts and other non-State actors, as defined in this work. Nevertheless, they do contribute to the development of International Law, and adopting a strict positivist approach is incompatible with reality, prejudicial to International Law and to international actors. It is an anachronistic view of International Law and international relations as a broader area. This is important because has a direct impact in the acceptance of judgements especially by States.

2.4 Conclusion

Despite some obstinate considerations of the international system, non-State actors do make law, either by impacting rule creating process or influencing interpretation of norms. International Courts, particularly, have a meaningful role on this course, once they are the legitimate actors responsible to apply the law in specific cases.

The Rule of Law context which permeates international relations, especially regarding juridical relations, has changed the understanding of international courts role, creating demands for a more active role for them, in which rights are given true existence. In this sense, it is clear and realistic to state that courts are lawmakers.

[48] ibid.

3.0 The legitimacy of lawmaking by international courts

As perceived in the previous chapter, the lawmaking process in International Law is not exclusive to States. In this chapter, it will be analysed the main premise of this thesis: lawmaking by international courts is possible through the existence of a margin of discretion and it is legitimate in International Law.

3.1 Margin of discretion

Margin of discretion is the term used in this thesis to characterize a virtual space or an area of maneuver that exists in International Law because of its own nature and context of operation. This margin allows international courts to push the law in different directions, creating precedents, establishing new patterns and understandings.[49] International tribunals operate their discretion in such manner that it can be considered lawmaking, as demonstrated in the previous chapter.

The nature of International Law referred above is related to the international system. The absence of a legislative centralized body urges the existence of a margin of discretion to assure applicability of the law in various practical cases.[50] This question regards the margin's indispensability to International Law, and will be better discussed on section 3.1.1. By its turn, the context of operation alludes to the fact that international tribunals, frequently, must apply provisions that are general in character, especially, but not only, considering customary law and general principles. Additionally, courts are challenged with the duty to update the understanding of laws and treaties, considering their object and purpose, in order to keep International Law meaningful to contemporary affairs.

[49] Terris, P. R. Romano and Swigart (n 2) 104.
[50] Van Shaak (n 11) 137.

Subsequent to better comprehending what margin of discretion means, it is imperative to understand why it is important and what its legal sources in International Law are.

3.1.1 Margin of discretion as an essential requirement to the proper function of international justice

To better comprehend the existence of the margin of discretion one must first recall the nature of the international system, where the tribunals under analyses operate. The international system does not imitate national ones in the sense of having a centralized legislative body legitimate through periodic elections.[51] Lawmaking in International Law is diffuse. It can be done by treaties, either more specific or general, accepted and ratified in different moments, containing reservations or not. By *opinio juris* with State practice (customary law), which do not require unanimous subscription, might be reflected in a treaty or not and whose content and customary nature might be arguable. Can also be done by few States or with quasi-universal participation, with international organizations participation or not, with more or less engagement of non-State actors, within various contexts.[52] In this sense, the diffuse nature or international lawmaking, leads to a situation in which international actors cannot turn to a specific legislator for support in their demands and that has monopoly over the legitimate means of lawmaking.[53] Accordingly, the formal process of international lawmaking through treaties requires the political will of many different actors, mainly States and is, for various reasons, very slow and costly.[54] The margin of discretion becomes an essential requirement, therefore, of a system that aims to be effective, whose goal is to deliver justice.

[51] Grover (n 18) 149.
[52] To see more on sources of International Law: Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) ch 1.
[53] Grover (n 18) 149; Van Shaak (n 11) 137.
[54] Grover (n 18) 149.

The case of *Loayza Tamayo v. Peru*, of the Inter-American Court of Human Rights, can illustrate well this situation. In it the Court developed the unprecedented concept of "life plan" which considers life options and goals individuals have in order to seek self-fulfilment.[55] By recognizing the concept, the Court allows applicants to make reparation claims for their life plan affected by the violation. This concept enhances the Court's ability to respect individual's right to reparation completely, once it requires full reparation. Additionally, the Inter-American Court cases related to indigenous communities also exemplifies how a Court uses its discretion to assure justice. In the case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* the Court re-interprets the concept of property to align it to the indigenous people cosmo-vision.[56]

> Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. (…) For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[57]

Moreover, one can recall the open denial of the United Kingdom (UK) to give effect to the European Court of Human Rights (ECtHR) judgement on prisoners' right to vote.[58] The UK argues that this right is not clearly established in the European Convention, and that it was invented by the Court, criticizing the living instrument principle, a long established practice of the Court. The UK, by using a strict positivist approach and refusing to implement the judgement, violates international human rights law and undermines the legitimacy of the European Court, harming, in this sense, the main objective of International Law: to serve the human being and assure respect for her/his rights and personal integrity.

The detrimental influence of positivism, as perceived by the UK case for instance, places the States (which ultimately is an abstract construction, contrasting with individuals and peoples)

[55] *Loayza Tamayo v Peru Reparations and Costs Series C No 42* (Inter-American Court of Human Rights) [148].
[56] *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua Merits, Reparations and Costs Serie C No 79* (Inter-American Court of Human Rights).
[57] ibid 149.
[58] Most famous one is Hirst v. UK (No. 2) (*Application no. 74025/01*). Oct 6 2005.

in the centre of International Law and implies that its will, its consent is condition *sine qua non* of the existence of international legal rules. This line of reasoning, is not just false and historically problematic, but dangerous, and relegates international courts to a minimal role of "pronoucers" of the written law.

Historically, International Law was conceived as governing the relations of all peoples (including indigenous peoples and individuals). Nominated *jus gentium*, during the middle ages, started to be associated with the emerging law of nations and aimed to be the law common to all peoples and human beings.[59] In this sense, to the classical works of Francisco de Vitória and Hugo Grotius, the law of nations regarded first peoples and individuals, not exclusively the State, neither it was a project dependent exclusively on the will of the State.[60] Besides, these classical thinkers relied on previous developments, elaborated by Thomas Aquinas for instance, on the concept of *jus gentium*, which could be apprehended by natural reason itself, not depending on a legislator.[61] This natural law was discoverable by right reason and it is superior, with universal application. As Cançado Trindade explains: "Jus gentium purported to regulate human relations on an ethical basis, forming a kind of 'common reason of all nations' in search of realization of the common good."[62] In the roots of International Law, therefore, is a focus on peoples and individuals and the purpose of seeking a common good.

The influence of these ideas and concepts compose International Law. In the Martens Clause, for instance, there is explicit reference to "laws of humanity" and "requirements of public conscience". In addition, the ICJ Statute, Article 38b, enumerates international custom as source of law. Customary International Law does not require explicit State consent to be binding upon them. As Cançado Trindade explains: "To attempt to base customary International Law on the consent of each individual State would 'allow each State to accept

[59] Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (n 1) 11.
[60] ibid 10.
[61] ibid 12.
[62] ibid.

only those rules which suit it and reject others, eventually leading to the very dissolution of the international legal order.' " [63] It is an example of how the corpus of International Law is not exclusively composed by expressed will of the State, as the positivist approach tries to argue. Furthermore, general principles of law are also a recognized source of law. According to Ian Brownlie, general principles of law are "(…) primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer directly connected with state practice.".[64] In this sense, general principles of law are also a legal source that does not need explicit recognition of States, not fitting the positivist criteria as well. Additionally, either customary law or general principles of law (and frequently even positive law) are stated in a general manner, for various reasons, including being applicable to a wide range of cases. The exercise of applying these general sources to practical cases naturally requires a degree of creativity, discretionarily. Again, the positivist premise fails.

One perceives, therefore, the vain and dangerous approach of positivism to International Law, which cannot alone fulfil the needs of the international justice enterprise. International courts, are in part responsible for protecting shared values of the international community, in contrast with narrowly exclusively view of them only setting disputes among States.[65] More appropriate than the strict positivist view, this manner of perceiving international courts as players of the international community is connected to the concept of *jus gentium*, whose roots are close to natural law.[66] Recalling the diffuse nature of the international system, whose lawmaking process cannot be equated to the domestic scenario, it is certain to affirm that courts' margin of discretion is essential to the effectiveness of International Law and its primacy over other means of regulation of international relations (in contrast with war).

[63] ibid 18.
[64] Brownlie (n 52) 18–19.
[65] Von Bogdandy and Venzke (n 11) 64.
[66] ibid.

3.2 Legal sources of the margin of discretion

A source asserting a margin of discretion in International Law is not explicitly found. Actually, many academics and even courts, such as ICJ, stick to the affirmation that international tribunals cannot legislate.[67] In fact, despite the framework presented in the previous chapter, many are still reluctant to admit that States are not the sole legislator in International Law. But, differently from what some affirm in theory, again, International Law has secured space for legitimate discretion of courts. In other words, it is indeed possible to find legal sources granting them a margin of discretion. It is, in reality, through reference to this sources that international courts frequently justify their reasoning. The strict position that courts do not make law is, at least, anachronistic.[68]

One of the most frequent sources used to justify lawmaking by courts in the "living instrument" principle. This principle understands that a treaty in not static on time, but its interpretation must evolve accordingly with society changes. The legal source of the living instrument is the Vienna Convention on the Law of Treaties. [69] On Article 31, it is affirmed that the interpretation must be in conformity with the object and purpose of the treaty. The respect for the object and purpose of a treaty allows courts to push the law in certain directions (**not any direction**) in order to reach the treaties' goals. In this manner, human rights courts, especially, have encompassed such principle in their practise.[70] This approach permits Courts to consider that State parties' obligations under a human rights treaty is the effective protection of human rights, rather the reciprocal rights among State parties.[71] Within this reasoning, it is logical and an

[67] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (n 3); Karl Doehring, 'Law Making of Courts and Tribunals Results in Destruction of Rule of Law' in Rudiger `Wolfrum and Ina Gatzschmann (eds), *International Dispute Settlement: Room for Innovations?* (Springer 2013); *Golder v UK (Application no 4451/70) - Separate Opinion of Judge Sir Gerald Fitzmaurice* (European Court of Human Rights).
[68] Terris, P. R. Romano and Swigart (n 2) 104.
[69] 'Vienna Convention on the Law of Treaties' (n 27), Article 31.
[70] The European Court of Human Rights frequently mentions the 'living instrument' principle in their judgements.
[71] Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (n 1) 430.

essential requirement to update human rights protection to new challenges and understandings which were not foreseen in the drafting of the treaty. As Cançado Tridade affirms:

> (…) the proper interpretation of human rights treaties naturally ensuing from the overriding identity of the object and purpose of those treaties. General International Law itself bears witness of the principle (…) whereby the interpretation is to enable a treaty to have appropriate effect.[72]

Both the European Court and the Inter-American Court of Human Rights have applied this idea frequently. The emphasis on the "object and purpose" seeks to ensures the effective protection promoted by their foundational treaties.[73] The European Court, for example, started this doctrine since the case *Golder v. United Kingdom* and has evolved its interpretation practice into a perception of the substance, essence of the rights affected in the case and assessing morally its value for democracy.[74] The Court has restrained from seeking textualism and originalist interpretation, it even run counter drafter intention in the case *Young, James and Webster v. United Kingdom.*[75] The Inter-American Court, by its turn, has issued similar conclusions in its advisory opinions of *The Right to on Consular Assistance in the Framework of Guarantees of the Due Process of Law* and *Juridical Condition and Rights of Undocumented Migrants,* in which it has extended rights protection for new situations.[76]

Furthermore, the ICJ has also used an interpretation approach focused on "object and purpose" in the *Whaling in Antarctic* case (Australia v. Japan: New Zealand intervening).[77] In here it

[72] ibid 432.
[73] ibid 430.
[74] George Letsas, 'Strasbourg's Interpretative Ethic: Lessons for the International Lawyer' (2010) 21 509, 520; *Golder v United Kingdom (Application no 4451/70)* (European Vourt of Human Rights).
[75] Letsas (n 74) 518; *Young, James and Webster v United Kingdom (Application no 7601/76; 7806/77)* (European Court of Human Rights).
[76] Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (n 1) 432; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law - Series A No16* (Inter-American Court of Human Rights); *Juridical Condition and Rights of the Undocumented Migrants - Series A No18* (Inter-American Court of Human Rights).
[77] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (International Court of Justice).

found Japan in violation of the Whaling treaty (International Convention for the Regulation of Whaling) because its conduct run counter the "object and purpose" of the Convention.[78]

Article 31 of the Vienna Convention is a very relevant source, once courts are founded upon treaties that also define their jurisdiction. Hence, considering the diversity of cases that may arise under certain convention, the use of the living instrument principle, focused on guaranteeing the respect for the "object and purpose", assures a margin allowing **well-founded and reasoned discretion**, in order to assure the effectiveness of a convention.

A second source for the margin of discretion can be traced back to the drafting of the Permanent Court of International Justice's Statute (PCIJ), which is similar to ICJ's one. There jurists were concerned to assure certain discretion to the Court.[79] In this manner, Article 38(1)(c), establishes general principles of law as a non-subsidiary means source, loose enough to assure the Court would have "(…) certain power to develop and refine the principles of international jurisprudence."[80] Ian Brownlie further affirms that international courts choose elements from better developed juridical systems and make it applicable to International Law. The result is a new element of International Law.[81]

During the *Procés-verbaux* of the Advisory Committee of Jurists for the PCIJ, despite the express preoccupation of the American representative to allow the Court jurisdiction strictly on positive law, others have sought to negotiate a wider Statute.[82] For some jurists, allowing the Court to rely only on positive law would harm the interests of justice. In this sense, Baron Descamps has affirmed:

> The first duty of the judge is to render a sentence and he is often obliged by the circumstances to render a sentence based on equity and to use the suggestions of his own conscience and of his reason in order to supply the deficiency of positive

[78] United Nations, 'International Convention for the Regulation of Whaling'.
[79] Statute of Permanent Court of International Justice 1920.
[80] Brownlie (n 52) 16.
[81] ibid.
[82] Advisory Committee of Jurists of the Permanent Court of International Justice, 'Procès-Verbaux on the Proceedings of the Committee' 309-11 and 317.

> law; and the many gaps and imperfections in the law of nations are not of a nature to lessen the difficulties of our task.[83]

Recognizing that legal cases, more frequently than not, pose challenges that are only properly addressed if one considers dictates of the conscience, is a reasoning that recognizes an inherent margin of discretion in International Law. Hence, general principles of law are a source that, through its wide nature, demand a case-by-case discretion. This has happened in the *Corfu Channel* case, when the ICJ affirmed Albania's responsibility to warn the presence of mines on its waters derived from principles of humanity. The same principle played a role in the *Nicaragua v. United States* case.[84]

A third source guaranteeing certain margin of discretion to international courts can be found not in the formal sources of law (treaty or general principles) as the previous two. Rather it is in the *substratum* of juridical norms, in its material source: it lies in the human conscience itself.[85]

The term "conscience" is not ease to define. Although people experience the dictates of their own conscience and, historically, the term permeates human thinking, one can only explain human conscience here as a common minimum understanding that guides humankind towards higher values, such as justice.[86] As Cançado Trindade affirms: "Human conscience – more precisely the universal juridical conscience, - appears as the ultimate material source of International Law, providing the intrinsic foundation of *jus gentium*, in pursuit of the realization of justice."[87] In fact, the idea of a common minimum was already present is the works of Francisco de Vitória, Francisco Suárez and Hugo Grotius, who drew the foundations for International Law.[88] Vitória and Suárez based their understanding in natural law. Following

[83] ibid 48.
[84] *The Corfu Channel case* [1949] ICJ Rep 1949 4 (ICJ) 22; Von Bogdandy and Venzke (n 11) 55.
[85] Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (n 1) 141.
[86] ibid 142–143.
[87] ibid 144.
[88] ibid 143.

them, Hugo Krabbe affirmed a universal legal order for the whole humankind ensued from the "universal juridical conscience".[89] Another author, Léon Duguit, envisage an objective International Law based upon "international juridical conscience", rather than sovereignty of States.[90] Finally, Alfred Verdross argued that general principles of law were recognized by the "universal juridical conscience", that they rise in the moment that are recognized by it.

Moreover, the universal juridical conscience is not arbitrary and subjectivist. On the contrary, it calls for an objective International Law in the sense that it up holds its inherent goals: the fulfilment of the needs and aspiration of humankind as a whole.[91] It is paramount to recognize that universality of International Law cannot be achieved without recognition of pluralism and diversity, as well as the existence of common aims of humanity.[92]

The recognition of universal juridical conscience as the material source of International Law supports the existence of court's margin of discretion, of an area of maneuver, which courts must use to assure that the ultimate aims of law are being fulfilled. In other words, the fundamental goals of law, including International Law, which is to seek the welfare of humankind, to serve the human beings needs and aspirations, can only be fully achieved if courts perceive the foundation of their work in the human conscience, something which the exclusive reliance on positivist law is incapable of doing.[93] Hence, the universal juridical conscience supports and legitimates the existence of a margin of discretion oriented towards the realization of the aspirations of humankind as a whole.

It is possible to see the presence of human conscience in treaty law. This helps to assure that the interpretation of the treaty will not put aside the universal juridical conscience, but use, if

[89] ibid 146.
[90] ibid.
[91] ibid 144–145.
[92] ibid 144.
[93] ibid 145–147.

required by the situation, the courts' margin of discretion to assure the fulfilment of human needs, to guarantee justice. The preamble of the Rome Statute of the International Criminal Court refers to the "conscience of humanity".[94] The Inter-American Convention on Forced Disappearance of Persons mentions "the conscience of the Hemisphere".[95] The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction alludes to "conscience of mankind".[96] Additionally, during the *travaux preparatoire* of the Vienna Convention on the Law of the Treaties, while referring to *jus cogens,* many delegations expressed that it reflected the legal conscience of mankind.[97] In fact, there are several references to this conscience during the preparatory works. The statement of the delegation of México (Suárez), alluding to the founders of International Law, summarized well this point:

> In international law, the earliest writers, including the great Spanish forerunners and Grotius, had been deeply imbued with the principles of the then prevailing natural law. They had therefore postulated the existence of principles that were derived from reason, principles which were of absolute and permanent validity and from which human compacts could not derogate. Without attempting to formulate a strict definition suitable for inclusion in a treaty, he would suggest that the rules of *jus cogens* were those rules which derived from principles that the **legal conscience of mankind** deemed absolutely essential to coexistence in the international community at a given stage of its historical development.[98]

This references to a universal juridical conscience come from delegation from different parts of the world, having diverse juridical and cultural background.[99]

Finally, the Martens clause, which is undoubtedly part of *jus cogens* norms, makes reference to the "requirements of public conscience". Even further, it is possible to affirm that the

[94] 'Rome Statute of the International Criminal Court (Last Amended 2010)' (n 9).
[95] Organization of the American States, 'Inter-American Convention on Forced Disappearance of Persons'.
[96] United Nations, 'Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction'.
[97] Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (n 1) 148.
[98] United Nations, 'United Nations Conference on the Law of the Treaties - First Session' 294, emphasis added.
[99] Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (n 1) 149.

Martens clause is in itself a source of general International Law. In this way, the "requirements of public conscience" become part of the realm of *jus cogens.*[100]

3.3 The *nullum crimen sine lege* principle

Considering that part of this thesis concerns International Criminal Law it is very relevant to exam the principle of *nullum crimen sine lege*, or legality principle, once it works as a limit to judicial discretion. Although the precise content of the principle varies in different national systems it is secure to affirm that it requires that no conduct can be punished if it is not prohibited by law.[101] In the International Law field, however, law also means customary law, which may not be written. In this sense, it might be more appropriate to speak of *nullum crimen sine jure,* which includes non-positive law.[102]

The *nullum crimen sine jure/lege* principle is in fact reflected as a human right, being present in the Universal Declaration of Human Rights (Article 11.2), the International Covenant for Civil and Political Rights (ICCPR) (Article 15), the Inter-American Convention on Human Rights (Article 9), the African Charter on Human and Peoples' Rights (Article 7.2) and the European Convention on Human Rights (Article 7).[103] In fact, this principle enjoys wide recognition and can be considered a customary norm.[104] More than that, it does not allow any derogation, including in times of armed conflict.[105] Nonetheless, this principle should not be

[100] ibid 152.
[101] Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter of the International Criminal Court.* (1st edn, Intersentia 2002) 18.
[102] Van Shaak (n 11) 161–162.
[103] United Nations, 'The Universal Declaration of Human Rights'; United Nations, 'International Covenant on Civil and Political Rights' <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; Organization of American States, 'Inter-American Convention on Human Rights'; African Union, 'African Charter on Human and Peoples' Rights'; Council of Europe, 'European Convention on Human Rights'.
[104] Grover (n 18) 135.
[105] ICRC, 'Convention (IV) Relative to the Protection of Civilian Persons in Time of War - Commentary of 1958' <https://www.icrc.org/ihl/COM/380-600168?OpenDocument> accessed 14 July 2016.

interpreted as a procedural barrier to the prosecution of atrocities that "deeply shock the conscience of humanity".[106]

The existence of this principle serves to protect individuals from States' arbitrary prosecution, but, as affirmed in the ICCPR: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the **general principles of law** recognized by the community of nations."[107] Recalling that general principles of law, as analysed in the previous section, are a legal source that grants courts' discretion, it is part of the international courts job to assess if certain conduct was prohibited by law (national or international; written or customary) at the time it took place.

The European Court of Human Rights has developed certain criteria to evaluate if there is or not an infringement of the principle of legality. The case of *S.W. v. United Kingdom* is a good example. In this case, a men convicted for raping his wife argued that he could not be prosecuted for raping his wife because of common law marital immunities. Here, the Court highlights the dynamic social changes, relying in an object and purpose interpretation, it concludes that the applicant could not reasonably expects not to be prosecuted for rape.

> The essentially debasing character of rape is so manifest that (…) the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7 of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment. What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was **in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.**[108]

[106] 'Rome Statute of the International Criminal Court (Last Amended 2010)' (n 9) Preamble.
[107] United Nations, 'International Covenant on Civil and Political Rights' <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, emphasis added.
[108] *SW v United Kingdom - App no 20166/92* (European Court of Human Rights) [44], emphasis added.

The above conclusion is based on the Court's perception that any system of law requires inevitably a degree of judicial interpretation. In other words, a strict application of the principle of legality is unfruitful, contrary to the aims of the principle itself:

> "(…) 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."[109]

In this sense, the existence of the *nullum crimen sine lege/jure* principle does not ceases courts' margin of discretion. It is actually part of the legal rational of any judge working with criminal law and in some circumstances discretion is paramount to define what in fact falls upon the principle's scope.

Regarding specifically the international criminal tribunals, the first two ad hoc ones were created under the concerns of the UN Secretary General in which he voiced, in reference to ICTY, that the tribunal should only apply internationally recognized rules of humanitarian law that are customary beyond any reasonable doubt.[110] The ICC, by its turn, has expressly affirmed the legality principle in its Statute (Article 22).[111] Although it is difficult, still, to evaluate the practical application of it in the new tribunal, in relation to the ad hoc ones it is possible to affirm that they have followed a reasoning similar to the European Court's one. In the *Hadžihasanović and Kubura* case, the Trial Chamber, on the Decision on Joint Challenge to Jurisdiction, followed an object and purpose argument, citing the reasons enumerated by the Security Council for the creation of the tribunal, especially the expectation to assure accountability for grave human rights violations.[112] Furthermore, at least in the realm of

[109] ibid 36.
[110] The Secretary General, 'Report of Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808' para 34.
[111] 'Rome Statute of the International Criminal Court (Last Amended 2010)' (n 9).
[112] *Hadžihasanović & Kubura (IT-01-47) - Decision on Joint Challenge to Jurisdiction* (International Criminal Tribunal for the Former Yugoslavia) [97]; Van Shaak (n 11) 142.

international humanitarian law, the ICTY has affirmed that, the object and purpose approach, grating them a margin of discretion is allowed by the Martens Clause, which opens the possibility to go beyond strict positivism, using sentiments of humanity.[113]

In the *Mucić et al.* case, the ICTY recalls the aims of the *nullum crimen sine lege* principle and clarifies better its application: "The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission."[114] In this sense, the Court seems to agree with the "essence of the prohibition" approach as adopted by the European Court.

The international criminal courts appear to be mindful of the persistent indeterminacy and open language model of treaties defining international crimes (e.g. "other inhumane acts"; "wilfully causing great suffering"), as well as concerned of the explicit lack of individual responsibility issuing from some relevant treaties (e.g. The Hague Conventions) and have taken this as an invitation for a more active judicial lawmaking.[115] In the words of Beth Van Shaak: "These tribunals accept the applicability of the [*nullum crimen sine lege*] principle to proceedings before them; however, they have rejected, or impliedly denied, the absolute positivistic version of the principle in favour of the general applicability of the values underlying the principle."[116] Hence the existence of the *nullum crimen sine lege* principle does not prevent a legitimate margin of discretion use by international criminal tribunals. The principle is one of the many defendants' rights which a criminal court must consider.

[113] Van Shaak (n 11) 148.
[114] *Mucić et al (IT-96-21) - Trial Judgement* (International Criminal Tribunal for the Former Yugoslavia) [313].
[115] Van Shaak (n 11) 137; 'Hague Convention (II) with Respect to the Laws and Customs of War on Land'; 'Hague Convention (IV) of Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land.'
[116] Van Shaak (n 11) 141.

3.4 Discretion v. Arbitrariness

The principle of legality, as demonstrated in the above sub-chapter, is indeed important for International Law. More generally, the ability of International Law subjects to comply with it is connected to the clearness and certainty of the law and its application. A common concern connected to courts' discretionary powers is that it may lead to arbitrary decisions, thus, harming the international justice certainty principle and ultimately the Rule of Law in international relations. However, a flexible approach capable to deal with different treaties and varied circumstances should not mean arbitrariness. When one speaks of margin of discretion it does not mean that courts' have free permission to legislate in a vacuum. It is important to recall that there are several limitations to circumscribe their discretion possibilities.

Firstly, there is the treaty's text itself and the context where it is inserted. They already delimit courts' discretionary possibilities, once there are, in fact, **limited** law applications possibilities derived from them. International judges work in an environment where many laws and principles are already determined.[117] Once more, this work is describing the legitimate existence of a **margin**, an area of maneuver, not a free permission to create and de-create law.

Secondly, whatever the outcome a court might have reach it still has to write a convincing reasoning for it. Judgements must be legally justified. This is another security against arbitrariness.[118]

Thirdly, international courts decisions are mainly done by a group of judges. This can be perceived as another guarantee against individual arbitrariness in international courts. Judges must convince their colleagues (at least the majority) of their reasoning to have it adopted.[119]

[117] Stanley Fish, 'Fish v. Fiss' (1984) 36 1325–1332.
[118] Von Bogdandy and Venzke (n 11) 50.
[119] Albie Sachs, 'Tock-Tick: The Working of a Judicial Mind', *The Strange Alchemy of Life and Law* (1st edn, Oxford University Press 2009) 50–51.

Fourthly, judges are elected by member States of an international organization or regime. This process entails a minimum of accountability, once States are the ones which indicate their candidates and, in some cases. there is the possibility of re-election.[120]

Besides, even though this entails costs, States have the possibility to create and amend treaties, reforming the state of International Law.[121] In the ICC, for instance, the Assembly of State Parties meet annually to discuss Court's matters and may call a Review Conference.[122] Therefore, States Parties can frequently consider if the Court's need of any reform.[123] In this sense, circumscribing courts' discretionarily margin is within States powers.

Furthermore, specifically related to International Criminal Law, in modern tribunals defendants have the right to appeal.[124] Having their case re-examined by different judges who have sat in the trial phase contributes to assure non-arbitrariness.

The concern with courts' arbitrariness indeed is plausible, although not as worrisome as many voice it to be. Van Shaak as affirmed, in relation to International Criminal Law:

> Although the Nuremberg and Tokyo proceedings have been critiqued as one-sided victors' justice, in general, there is little tradition in ICL [International Criminal Law] of over-reaching or arbitrary prosecutions. Instead, the problem historically has been the chronic under-enforcement of ICL.[125]

Additionally, there is a heavy concern with the arbitrary risks arising from international courts, but much less alarm with States arbitrariness. As Cançado Trindade affirms:

> To positivists and political "realists", resort to the universal juridical conscience may appear somewhat difficult to demonstrate, if not metajuridical. They have, accordingly, sought support for their own views mainly in the "will" of States. **They seem indifferent to recourse to conscience, which aimed at setting up**

[120] Ingo Venzke and Armin Von Bogdandy, *In Whose Name? A Public Law Theory of International Adjudication* (1st edn, Oxford University Press 2014) ch 4.
[121] Grover (n 18) 146; 149.
[122] ibid 146.
[123] ibid.
[124] 'Rome Statute of the International Criminal Court (Last Amended 2010)' (n 9), Article 81; Statute of the International Criminal Tribunal for Rwanda 1994, Article 24; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia 2009, Article 25.
[125] Van Shaak (n 11) 147.

necessary limits and controls to the arbitrariness in the "will" of States. This is overlooked by them.[126]

In this sense, relying strictly only is positive law leaves International Law strongly vulnerable to the arbitrary "will" of States, and the humankind has many times suffered from the unlimited arbitrary power of States (e.g. Syria civil war since 2011; the holocaust during II World War; uncountable nuclear bomb tests and so on). Therefore, it is possible to affirm that Courts' arbitrary risks are not as unsettling as their critics allege it to be.

3.5 Conclusion

The analyses done in this chapter leads to the conclusion that lawmaking by courts is, in fact, legitimate. This is because there is, secure through International Law sources, a margin of discretion that allow activist position of courts, pushing the law, interpreting the law in such a way that can be understood as lawmaking.

The sources that foresee this margin are the Vienna Convention on Law of the Treaties, through Article 31 which demands treaty interpretation to be done accordingly to "object and purpose" of treaties. The general principles of law, as stated in ICJ's Statute, and which are wide enough to request use of discretion in its applicability. Finally, the immaterial source of universal juridical conscience, expressed in the Martens Clause and in many treaties, seeking to assure that humanity's common goals and aspirations will not be disregarded.

The existence of the margin of discretion is indispensable to International Law. As shown, the nature of the international system, with lack of a world legislator, and the context of International Law, with the presence of general rules and a duty to update treaties in line with societies' change, require a discretion margin to guarantee both effectiveness and justice in the international realm.

[126] Cançado Trindade (n 38) 147, emphasis added.

In conclusion, as debated in this chapter, the margin of discretion does not harm the principle of *nullum crimen sine lege,* neither it can be confounded with a permission for arbitrariness. The legality principle is one of many defendants' rights that must be observed by criminal courts, and as the works of the European Court of Human Rights demonstrate, it can be harmonized with the evolvement of criminal law. Regarding arbitrariness there are enough guarantees in the manner international courts are organized to reasonably refrain courts from making arbitrary decisions.

4.0 The case of systematic rape as crime against humanity

This chapter will present briefly the development of the crime of systematic rape as crime against humanity. The main objective is to analyse if and how international courts have influenced the recognition of the crime, the elaboration of its elements, the pathways to prosecute it internationally and other features. In other words, this case study aims to illustrate how international criminal courts have used their margin of discretion to legislate about rape as a crime against humanity. Additionally, it will be possible to draw some conclusions on the importance of the role played by the tribunals to assure victims, and in general women, justice.

4.1 Women in International Law

To understand how rape was recognized and constructed as crime against humanity, it is paramount to comprehend the place of women in International Law, once the great majority of rape victims are women and girls. International Law, as a subject, claims to be gender neutral.[127] Law derives its authority from the assumption that, differently of politics, it operates on the basis of abstract rationality, being non-discriminatory.[128] Feminist analyses challenges this assumption by claiming that the discipline genders its subjects and is biased in favour of men, letting issues of core concern for half of the world population, women, to be set at side in its agenda. Mapping the silences of International Law helps one to perceive how power works in the international system towards privileging certain groups: it still reflects the concerns of western white men. The feminist claim is not isolated among the critics on how International Law is constructed and perceived. Interests of the developing world, social and racial considerations also rank low in the priorities of the discipline, if they rank at all. One good example is the enterprise on promoting democracy worldwide. Fernando Teson, for instance,

[127] Hilary Charlesworth, 'Feminists Critiques of International Law and Their Critics' (1995) 13 Third World Legal Studies 1 <http://scholar.valpo.edu/twls/vol13/iss1/1>.
[128] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 The American Journal of International Law 613, 613.

criticizes feminism affirming that we should get rid of the tyrants before dealing with gender discrimination.[129] To a group that has been historically excluded from political participation, like women, a focus in democracy, without challenging gender discrimination, will not be as life changing as necessary.[130]

Feminism, in spite of its diversity, seeks to create an International Law discipline that is truly humanized, more able to speak universally. Therefore, a better comprehension of the feminist approach of International Law must start by recalling some of its premises. First, feminism highlights, as already present in the works of Simone de Beauvoir, that gender is a social construction: none is born a woman, but rather, becomes one.[131] Second, most societies organize their understanding of gender in a dualist relationship between feminine and masculine, and they are hierarchical and interdependent.[132] Third, feminism observes that the feminine is allocated in the private sphere of life, which is less regulated by the State, and ranks lower compared to the public sphere. This last one is the domain of masculine, and in contrast, it is more valuable and highly regulated by the State.[133]

The feminist approach perceives the silences within the discipline, and claims that "(…) women are systematically marginalized by the masculine standards and conceptions of the regime and therefore not constituted as fully human (…)"[134]. As Dianne Otto affirms, the sources of International Law play a significant role in (re)producing and naturalizing social practices, including gender discrimination and women's oppression.[135] Some even argue that law works to make inequalities seems natural.[136]

[129] Charlesworth (n 127) 7.
[130] ibid 7–8.
[131] Dianne Otto, 'Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law' in Anne Orford (ed), *International Law and its Others* (Cambridge University Press 2006) 319.
[132] ibid 320.
[133] Charlesworth, Chinkin and Wright (n 128) 627.
[134] Otto (n 131) 318.
[135] ibid 319–320.
[136] Charlesworth, Chinkin and Wright (n 128) 613.

Additionally, it is relevant to emphasize that feminist theories and approaches are as diverse as the experiences of women worldwide. Therefore, feminism is better described as a way to approach life, asking certain questions and seeking answers than a conceived fixed set of ideas.[137] For this reason, the goal of feminism critics to International Law is to construct a discipline that does not excludes most of women's voices.[138]

4.2 Historical background

Crimes of sexual nature committed during the war are not a contemporary problem. Raping women was a sign of victory, success and proof of soldiers' masculinity.[139] It is even feasible to argue that initially rape was something many male soldiers expected as "payment" for their bravery to go to war.[140] Rape could only be understood as a domestic crime, and it did not concern International Criminal Law. However, rape, in International Law, is differently motivated than it in the domestic scenario. Furthermore, the acknowledgement of it as a weapon of war, and not solely as a crime exclusively from the internal domain of States, took a long way, being only finally explicitly recognized in the ICTY Statute in 1993.[141]

One of the first attempts to codify the prohibition of rape and other war crimes happened in 1863, in the Lieber Code.[142] These instructions were directed at the American soldiers but have influenced other military codes worldwide.[143] Despite the long roots of the prohibition of rape and other crimes committed during armed conflicts the first major turn point for modern International Criminal Law was the Nuremberg and Tokyo trials.

[137] ibid 614.
[138] ibid 621.
[139] Alona Hagay-Frey and Hilly Moodrick-Even Khen, 'Silence at Nuremberg Trials: The International Military Tribunal at Nuremberg and Sexual Crimes against Women in the Holocaust' (2014) 35 Women's Rights Law Reporter 43, 55.
[140] Larrry May, *Crimes Against Humanity: A Normative Account* (1st edn, Cambridge University Press 2005) 98.
[141] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (n 124).
[142] Francis Lieber, 'Instructions for the Government of Armies of the United States in the Field (Lieber Code)' <https://ihl-databases.icrc.org/ihl/INTRO/110> accessed 29 July 2016.
[143] Edoardo Greppi, 'The Evolution of Individual Criminal Responsibility under International Law' 531.

The International Military Tribunal (IMT) Charter and the Nuremberg judgments were silent on the crime of rape, although a couple of prosecutors brought evidence of it to the trials.[144] This fact supports the feminist claims on the exclusion and marginalization of women from International Law, especially because several cases did take place during the II World War, particularly in the concentration camps.[145]

The Nuremberg and Tokyo tribunals were based mainly on customary International Law. They created, still, the new category of crimes against humanity, which gathered customary crimes and crimes already prohibited by domestic laws.[146] At this point, crimes against humanity were treated as accessory of war crimes or crimes against peace.[147] In relation to it, the Martens Clause, from the preamble of 1899 Hague Conference played an important role.[148] It reads:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.[149]

Since the IMT was the first serious attempt to seek international responsibility for individuals, not leaving it to the States alone, there is an inevitable level of creativity in the construction of the Charter.[150] The elaboration of the concept of crimes against humanity reflects this situation, and the absence of explicit reference to sexual crimes, such as rape, is remarkable. It would be possible to argue, though, that the language of the IMT Charter still could allow for rape

[144] Richard J Goldstone and Estelle A Dehon, 'Engendering Accountability: Gender Crimes Under International Criminal Law' (2003) 19 121, 123.
[145] Hagay-Frey and Moodrick-Even Khen (n 139) 44.
[146] Michael R. Marrus, *The Nuremberg War Crimes Trial 1945-46: A Documentary History* (Beddford Books 1997) 39–57.
[147] Boot (n 101) 460.
[148] 'Hague Convention (II) with Respect to the Laws and Customs of War on Land' (n 115).
[149] 'Hague Convention (IV) of Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land.' para Preamble (it contains a similar language from The Hague Convention of 1899).
[150] Hagay-Frey and Moodrick-Even Khen (n 139) 48.

prosecutions, because it extends the crime to "other inhumane acts". According to Article 6 of the Nuremberg Charter, crimes against humanity includes:

> (…) murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[151]

Unfortunately, the state of International Law at that point did not gave violations of sexual nature its deserved attention. Therefore, the Nuremberg trials did not account for women' specific suffering: not just as Jews under a racist regime, but as women in a sexist context.[152] Therefore, victims' testimony presented during the trial relied on men experiences. Women testified solely when the question regarded violations perpetrated by doctors experimenting on people. In this case, when the harm was specifically to their biological function: reproduction.[153]

In the Tokyo judgements, by its turn, the concept of crimes against humanity differed in some aspects. Persecution on religious grounds and reference to "civilian populations" were absent.[154] Additionally, differently of Nuremberg, there were rape charges brought against defendants, once atrocious crimes known as "Rape of Nanking", where approximately 20.000 persons were raped in one month, pressured to assure that some form of accountability would happen.[155] However, considering the scale and systematic nature of the crime, rape charges were very marginalized, no women was called to testify.[156] Furthermore, the charges did not include the cases of "comfort women", which referred to forced prostitution that took place in the context of the II World War.[157] According to Goldstone and Dehon:

[151] Charter of the International Military Tribunal 1945, Article 6.
[152] ibid 59-60.
[153] ibid 60–61.
[154] Boot (n 101) 460.
[155] ibid 510.
[156] Goldstone and Dehon (n 144) 123.
[157] Boot (n 101) 510.

> This is not really surprising, given that these laws were written by men drawing heavily on the male chivalric tradition and were interpreted by male military lawyers, judges and governmental experts in an age when rape was placed on the same footing as plunder, and was considered to be an inevitable consequence of war.[158]

During the Second World War, in the context of the establishment of Nuremberg and Tokyo trials, condemning rape in war needed to be an exercise of interpretation from "protection of family honours" and "religious convictions and practices" derived from the Hague Conventions of 1899 and 1917.[159] After that, the Geneva Conventions in 1949 prohibited explicitly some sexual offences internationally, but justified it again on the bases of honour: the sexual offence harms women's honour.[160] According to the Fourth Geneva Convention (Article 27): "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[161] This reasoning did not rank rape among the violent crimes.[162] Machteld Boot highlights the contrast of the protection granted by the Geneva Conventions focusing in honour and respect with a comprehension of rape as a grave violation of physical and mental integrity.[163] Hilly Moodrick-Even Khen and Alona Hagay-Frey argue that honour is better understood in its social meaning, in contrast to the idea of inherent dignity. This means that honour is connected to someone's position (a socially defined measure of human worth) within a hierarchical social order.[164] Contrarily, the idea of dignity that applies to everyone equally, it's a characteristic intrinsic of being human.[165] In this sense, crimes of sexual nature would be less grave, a harm to reputation, rather to personal integrity and dignity.[166]

[158] Goldstone and Dehon (n 144) 123.
[159] Hagay-Frey and Moodrick-Even Khen (n 139) 56.
[160] ibid.
[161] 'Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War'.
[162] Boot (n 101) 511.
[163] ibid.
[164] Rachel Bayefsky, 'Dignity, Honour, and Human Rights: Kant's Perspective' (2013) 41 SAGE Publications 809, 811.
[165] ibid 810.
[166] Hagay-Frey and Moodrick-Even Khen (n 139) 56.

Hence, once violations that affect women finally start to get some space in the discipline, they were constructed in the sense of protection of a family property, an object, as mothers/wives that need to be preserved in order to safeguard honour, families' or communities' honour. Comprehending this historical background is relevant once it establishes bases that inform the contemporary ad hoc criminal tribunals.

4.3 The ad hoc tribunals

A war happening in a European stage, where massacres against civilian population were taking place and being wide spread through media, pressured the United Nations Security Council to "do something". In this case the action taken was the establishment, under Chapter VII of United Nations Charter (which has binding force upon all member States), of an international tribunal with a wide mandate to investigate and prosecute certain crimes taking place in the territory of the former-Yugoslavia since 1991, the International Criminal Tribunal for the Former-Yugoslavia (ICTY).[167] This was the first truly international tribunal. Its broad mandate and the lack of precedents in the matter (besides some influence of post II World War trials) posed many challenges to this new enterprise. Simultaneously, it was a unique opportunity to develop International Criminal Law, seek punishment for grave crimes and address issues that were marginalized in Nuremberg and Tokyo Tribunals, including gender crimes.

Soon after the establishment of the ICTY the genocide in Rwanda also motivated the creation of another international tribunal, the International Criminal Tribunal for Rwanda (ICTR). In both conflicts, Rwanda and in the former-Yugoslavia, gender crimes, specially rape, were wide-spread and systematic used as war weapon. In Bosnia-Herzegovina more than 20.000 women were raped and in Rwanda the number reached 250.000.[168] Both ad hoc tribunals

[167] UNSC, 'S/RES/808 (1993)'.
[168] Heidi Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals' (2011) 12 109, 110.

explicit include rape under crimes against humanity in their Statutes (Article 5 of ICTY and 3 of ICTR) and they have delivered unprecedented judgements on this subject.[169] Additionally, the Statute of the ICTR also recognizes rape as a violation of Common Article 3 of the Geneva Conventions (which establishes minimum protections for civilians in internal conflicts).[170]

Furthermore, both tribunals have developed Rules of Procedure and Evidence that grants protection for witnesses and victims of sexual violence. This rules reflect a more contemporary approach on crimes of sexual nature and because they are developed by the judges of the Courts themselves, they are relevant to the present study, once they are part of the apparatus of the lawmaking process done by courts, as it has been discussed so far.

4.3.1 Procedural developments

The Rules of Procedure and Evidence (hereinafter Rules) of both ad hoc tribunals are very similar. The reason is that ICTR's Rules are based upon ICTY's, following a determination from Article 14 of ICTR's Statute.[171] It is possible to argue that the Tribunals have developed gender sensitive Rules, advancing many practices founded in domestic systems.[172] The most relevant rule applicable in rape cases is Rule 96 which instructs the presentation of evidence in cases of sexual assault.

The first advancement is the no obligation to found corroboration for victim's testimony. This means that a testimony of sexual assault does not require another testimony to validate it. An accused can be even condemned for gender crimes without witness testimony if there is enough evidence to prove it. In fact, the corroboration rule in the domestic settings is one of the most openly sexist rules, which shows a general distrust in women's words.[173] ICTY, in *Prosecutor*

[169] Statute of the International Criminal Tribunal for Rwanda (n 124); Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (n 124).
[170] Statute of the International Criminal Tribunal for Rwanda (n 124).
[171] ibid.
[172] Goldstone and Dehon (n 144) 132.
[173] ibid.

v. Dusko Tadic a/k/a "Dule" case has recognized how detrimental for victims the corroboration rule is, affirming: "(…) [Rule 96] accords the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something long denied to victims of sexual assault by the common law."[174]

As part of Rule 96 there is also the prohibition of use of consent of the victim as a defence for the accused. It is hard, if not impossible, to imagine a situation in a violent circumstance in which free and true consent can be given or simply inferred. In this sense, the Rule broadly describes what a coercive situation is, making it prohibited to assume consent from inaction or passivity of the victim for instance.

Finally, Rule 96 prohibits presentation of prior sexual conduct of the victim as evidence. This rule aims to exclude any possibility of considering women with previous sexual history as unreliable as well as to protect women sexually assaulted by men they knew from having pre conflict relationships being used as excuse for rape. This rule is very important because it recognizes women's sexual autonomy: women's sexual life does not concern the tribunal, but only herself. The Court's task is to judge if the accused is guilty of sexual violence which is unrelated with previous consensual sexual activities carried out or not by the victims.

The procedural developments carried out by the ad hoc criminal tribunals have an important influence in enhancing victims' dignity in the prosecution of gender crimes. They oppose objectification of women, recognize their sexual autonomy and establish a standard of equality between genders regarding acceptance of testimony. This procedural rules have also an impact on what can be understood as rape, widening the concept. This means that the Courts are moving away from the understanding of rape as a damage to honour to a comprehension of it as grave violation to one's dignity, autonomy and personal integrity. The following

[174] *Prosecutor v Dusko Tadic a/k/a 'Dule'* - *IT-94-1-T* (International Criminal Tribunal for the Former-Yugoslavia) [536].

jurisprudential developments make it more clear how the ad hoc tribunals, relying on this new understandings, use their margin of discretions to advance the field of International Criminal Law.

4.3.2 Jurisprudential developments

As a crime highly ignored and marginalized in International Criminal Law throughout the years and considering the relatively new field of International Criminal Law, ICTY and ICTR had the challenge and opportunity to create precedents that inform the discipline still today. In other words, they had a privileged opportunity/challenge to make the law on this matter (as on others as well).

In this context it is very relevant to highlight the Court's activism in the position adopted by the women judges, specially Judge Odio-Benito from ICTY and Navantham Pillay from ICTR. In the very first indictment issued by one ad hoc tribunal, in the case of *Prosecutor v. Dragan Nikolić*, there was no charge related to gender crimes.[175] However, witness testimony made it clear that many women were being subjected to sexual violence, including rape, in the camp where the accused had command.[176] In light of that, the Judge Odio-Benito publicly urged the prosecutor to include gender crimes in the indictment.[177] Pursuant that, in the review of indictment the Judges affirmed:

> From multiples testimonies and witness statements submitted by the Prosecutor to this Trial Chamber, it appears that women (and girls) were submitted to rape and other forms of sexual assaults during their detention at the Sušica camp. (…)
>
> The Trial Chamber feels that the Prosecutor may be well-advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolić with rape and other forms of sexual assault, either as crime against humanity or war crimes.

[175] *Prosecutor v Dragan Nikolić - IT-94-2* (International Criminal Tribunal for the Former-Yugoslavia).
[176] Goldstone and Dehon (n 144) 123.
[177] ibid 124.

> (…) the Chamber considers that rape and other forms of sexual assault inflicted on women in circumstances such as those described by the witnesses, may fall within the definition of torture submitted by the Prosecutor.[178]

This statement is remarkable not only because it shows the explicit activist position taken by the Court, but also because it demonstrates how open the judges are to use their margin of discretion to affirm rape as a crime beyond crimes against humanity. Considering it as a war crime and equating it to torture are two new steps towards law development clearly suggested in the previous quote.

Other judge activism seen was during one of the first challenges faced by these tribunals: the lack of a definition of rape in International Law. The ICTR, in the case against Jean-Paul Akayesu, delivered the first judgement with a conviction for rape as crime against humanity.[179]

Initially the indictment against Akayesu also did not have charges for rape. During the trial procedures, however, witnesses again reported widespread rapes taking place with support of the accused. The only women judge sitting in this case, Navantham Pillay, elicited evidence of gross sexual violence. With the support of amicus curiae briefs urging the amendment of the indictment the prosecution brought new charges including sexual violence.[180] Thus, in the absence of a definition of rape ICTR looked to national jurisdictions, sought other international instruments, and customary law, such as Martens Clause and the Geneva Conventions.[181] Through its analyse of the concept of rape the Court decided to stress the objectives of it: "(…) rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person."[182] Additionally, and very importantly, the Court equates rape with torture, saying both crimes are violations upon dignity. This is very

[178] *Prosecutor v Dragan Nikolić - Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence - IT-94-2* (International Criminal Tribunal for the Former-Yugoslavia) [33].
[179] *The Prosecutor versus Jean-Paul Akayesu* (ICTR).
[180] Goldstone and Dehon (n 144) 124.
[181] ibid, para 596.
[182] ibid, para 597.

relevant once in International Law, torture is considered a very serious crime, achieving the status of *jus cogens* and having obligations *erga omnes.* Furthermore, the Court deviates from the main understanding of rape as a damage to honour (as represented in the Geneva Conventions) to finally perceive it as a violation of personal dignity. According to the progressive definition adopted by the Trial Chamber:

> (…) rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. (…)
>
> The Chamber defines **rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.** Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed:
>
> (a) as part of a wide spread or systematic attack;
>
> (b) on a civilian population;
>
> (c) on certained catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.[183]

Highlighting the concept of rape delineated by the Court is pertinent once it centralizes the victim's suffering and the injury on dignity. Avoiding a description connected to body parts and objects and its use, permits flexibility to see rape or other sexual offences in broader circumstances that are harmful. This meant, for the case, that thrusting pieces of wood into sexual organs of victims could fall upon the notion of rape, in the same manner that forced act of undressing a student and making her do gymnastics naked in public was considered sexual violence.[184]

In the context of the ICTY, the Chamber judging the case of *Prosecutor v. Anto Furundžija* also sought to define rape.[185] It relied on the reasoning done by the ICTR in the Akayesu case, but it decided to depart from it in some aspects. Besides, as did the ICTR, the Court highlights

[183] ibid 597–598, emphasis added.
[184] ibid, para 686 and 688.
[185] *Prosecutor v Anto Furundžija* (ICTY).

evidence that women were perceived as objects once more: to woman were reserved by the accused "other methods", meaning sexual violation.[186]

In its effort to re-think the concept of rape the ICTY strongly connected sexual violations to harms to human dignity. Choosing not to follow completely the definition drew in the Akayesu case, it asserted that the principle of specificity demands a more precise definition.[187] By setting rape among the most serious violations the Court affirmed:

> 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.[188]

The Chamber was facing specifically the challenge to reason if forced oral sex felt under the definition of rape.[189] By analysing the concept under various national legislations and taking a progressive view it concluded that forced physical penetration (including of the mouth) is the main characteristic of rape.[190] Therefore:

> (…) 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.[191]

Both cases, Akayesu and Furundžija, the ad hoc tribunals use their margin of discretion to legally reason an adequate definition of rape. It is paramount to notice a clear shift towards a new understanding of rape as a grave violation of one's dignity. More than that, both Courts,

[186] ibid, para 87.
[187] *Prosecutor v. Anto Furundžija* (n 185) [177].
[188] ibid, para 183-184.
[189] ibid 183.
[190] ibid 179.
[191] ibid 185.

in different degrees, feel ready to broad the meaning of rape in International Law, adopting definitions that go beyond many national jurisdictions. By comparing both of them, however, I believe that it is plausible to argue that the definition adopted by the ICTY, because of its focus on mechanical descriptions and body parts, is a step backwards in relation to the ICTR one, especially considering the focus on penetration, which is a very male perception of what means to be sexually violated.[192] In fact, many have criticized the definition delineated in Akayesu for its excessive broadness, which would confuse the practical difference between rape and other sexual violations.[193] Nevertheless, other concepts in International Law also are defined in a broad manner. The definition of torture is a good example. In the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the term torture means:

> (…) any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is 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.[194]

In other words, torture is any act that is purposely inflicted on someone and causes suffering, with any form of acquiescence of the State. Suffering is a subjective concept and will have different degrees depending on the context in which is inflicted, and other characteristics of the victim, such as age, health, gender, among others. This does not prevent the proper use of the concept, but it gives Courts the need to analyse it case by case. The European Court of Human

[192] Goldstone and Dehon (n 144) 128.
[193] Ajevski (n 22) 107; Goldstone and Dehon (n 144) 129.
[194] United Nations, 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' <http://www.refworld.org/docid/3ae6b3a94.html> accessed 2 May 2016, Article 1.

Rights does exactly that, evaluating subjective levels of humiliation and having a blurred line to separate the concepts of torture from other inhumane treatment/punishment.[195]

In this manner, a "physical invasion of sexual nature under circumstances that are coercive", as the ICTR defines rape, seems to be enough description to also allow case by case analyses. It would have already encompassed forced oral sex as rape. Richard Goldstone and Dehon also affirm how regrettable is the fixation on penetration used in the ICTY definition, in contrast with "invasion of sexual nature".[196] In fact, the ICTR did not favour the revised definition in Furundžija. Following the approach started in Akayesu, in *Prosecutor v. Alfred Musema* case the Court affirms rape once more as: "(…) an aggression that is expressed in a sexual manner under conditions of coercion."[197]

Besides the definitions of rape, which are a strong example of lawmaking capabilities and possibilities of international courts, the ad hoc tribunals also played important role in perceiving rape as the *actus reus* of other crimes, such as genocide, or even other forms of crimes against humanity, such as torture.[198]

Considering rape as a means to commit genocide, the ICTR noticed in the Akayesu case that:

> **With regard (…) [to] rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such**. (…) In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public (…). These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi

[195] See more: *MC v Bulgaria App No 39272/98* (European Court of Human Rights); *Ireland v UK App no 5310/71* (European Court of Human Rights); *Tyrer v UK App no 5856/72* (European Court of Human Rights).
[196] Goldstone and Dehon (n 144) 129.
[197] *Prosecutor v Alfred Musema - ICTR-96-13* (International Criminal Tribunal for Rwanda) [226].
[198] Goldstone and Dehon (n 144) 125.

> women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.[199]

This reasoning represents a perception of rape as indeed a grave crime and with particular aims in the context of armed conflicts, contrasting with periods in which rape was seen as an inevitable spoil of war.

In the situation of rape being used as torture, the ICTY has recognized that, if the elements of torture are met (purposely causing suffering with the acquiescence of the State), rape stand as a form of torture, as shown in the *Mucić et al.* case.[200] This case was also the first international one to assert rape as a form of discrimination, once it constitutes a form of violence directed against women because she is a woman.[201] In this manner, considering that rape as crime against humanity carries its own elements of crime (widespread and systematically being inflicted on civilian population) noting and taking action to punish it under other circumstances is imperative to justice.

By analysing this small sample of jurisprudence of the ad hoc tribunals one can conclude that there was a clear advancement made by the Courts themselves, regarding gender crimes, in relation to the tribunals of the post Second World War. Actually, the ICTY has indeed issued the first international case focused exclusively in gender crimes: *Prosecutor v. Kunarac, Kovač and Vukivić.*[202] In these judgements human dignity starts playing a major role in defining the crime, rape is perceived as means to commit other crimes and is ranked as grave as torture, which keeps it from being seen as a minor crime, marginalized.

[199] *The Prosecutor versus Jean-Paul Akayesu* (n 154) [131], emphasis added.
[200] *Prosecutor v Zenil Delalic; Zdravko Mucic; Hazim Delic; Esad Landzo - IT-96-21* (International Criminal Tribunal for the Former-Yugoslavia) [495–496].
[201] ibid 493.
[202] *Kunarac et al (IT-96-23 & 23/1)* (International Criminal Tribunal for the Former-Yugoslavia).

Finally, the Court's on motion to perceive rape as method to carry out genocide and as torture are prove of the comprehension that Courts have the duty to use their margin of discretion to indeed advance law in favour of justice, guaranteeing the Rule of Law.

4.4 The ICC

The International Criminal Court was founded by the Rome Statute which entered in force in 2002. In fact, the drafting process of the Rome Statute was concomitant to many of the developments done by the ad hoc tribunals, which informed the discussions in the drafting committees.[203] Generally, the achievements of ICTY and ICTR are reflected in the Elements of Crimes, which aid the judges to interpret and apply the Rome Statute.[204]

The ICC is a relatively new court having very few cases finalized, which gives a narrow space for considerations on its lawmaking activities and broader contributions to International Criminal Law. However, remarks can be done through analyses of some of its documents and one specific case, *The Prosecutor v. Jean-Pierre Bemba Gombo.*[205]

The Rome Statute, under the rubric of crimes against humanity, goes beyond rape, other inhumane acts or outrages on personal dignity and explicitly prohibits: sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.[206] This represents a victory from feminist groups actively working with the ad hoc tribunals and the preparation committees for the ICC.[207] Furthermore, the prohibition of persecutions recognizes the category of gender.[208] However, the definition of gender as elaborated in the Statute is quite controversial, which restricts itself to "two sexes, male and

[203] Janet Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' (2009) 30 11.
[204] Boot (n 101) 510; 'ICC - Elements of Crimes'.
[205] *The Prosecutor v Jean-Pierre Bemba Gombo - ICC-01/05-01/08* (International Criminal Court).
[206] 'Rome Statute of the International Criminal Court (Last Amended 2010)' (n 79), Article 7.
[207] Goldstone and Dehon (n 144) 135.
[208] 'Rome Statute of the International Criminal Court (Last Amended 2010)' (n 79), Article 7.

female, within the context of society".[209] Many have argued that this definition is impractical, and will complicate the works of the Court.[210]

Regarding ICC's Rules of Procedure and Evidence, they have been elaborated encompassing the rules already developed for the ad hoc tribunals and seem to give a step further. Rule 16.1(d) enumerates as a responsibility of the registrar: "Taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings."[211] Other rules, such as the prohibition on the requirement of corroboration for crimes of sexual nature (Rule 63.4); prohibition of evidence of prior or subsequent sexual conduct (Rule 71); as well as other protective measures envisaged to protect victims and witnesses of sexual violence are present.

A broader advancement in relation to the ad hoc tribunals Rules of Procedure and Evidence are the rules on consent (Rule 70), which prohibits the inference of consent in many circumstances (e.g. lack of action or silence of the victim; incapability of giving genuine consent; by prior or subsequent sexual conduct) and enhances the understanding of coercion and coercive environment.[212]

The understanding of the ICC of gender crimes, specifically rape, can also be informed by the Elements of Crimes. Accordingly, it must be part of a widespread or systematic attack directed against a civilian population which the perpetrator was aware of. For the ICC, the concept of rape would be an invasion of a persons' body, under circumstances that are coercive, resulting in penetration "however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body."[213] The Court is ready to interpret "invasion" broadly to be gender neutral.[214] In

[209] ibid.
[210] Goldstone and Dehon (n 144) 135–136.
[211] International Criminal Court, 'Rules of Procedure and Evidence - ICC'.
[212] Goldstone and Dehon (n 144) 136–137.
[213] 'ICC - Elements of Crimes' (n 204) 8.
[214] ibid.

this concept the ICC repeats the focus on penetration, as did the ICTY. Finally, it is relevant to notice that the Elements of Crime also included description of rape as a war crime and as means to commit genocide.[215]

The above Elements of Crimes informed the Court in its only case which found the defendant guilty, in June 2016, for rape as crime against humanity, *The Prosecutor v. Jean-Pierre Bemba Gombo* (known as the Bemba case), as cited before. This case will probably follow to the Appeals Chamber.[216]

In the Bemba case the Court recalled the Elements of Crimes for the crime of rape and included the jurisprudence of the ICTY, in which forced oral sex is understood as rape.[217] While analysing coercion, the judgement is guided by the decision of ICTR in the Akayesu case, admitting some circumstances as inherently coercive, such as armed conflicts.[218] However, from this point the ICC goes further, recognizing more situations which can be deemed coercive:

> Further, the Chamber considers that several factors may contribute to create a coercive environment. It may include, for instance, the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation, or is committed together with other crimes. In addition, the Chamber emphasises that, in relation to the requirement of the existence of a "coercive environment", it must be proven that the perpetrator's conduct involved "taking advantage" of such a coercive environment.[219]

In this manner it is possible to affirm that the ICC is seeking to construct a jurisprudence, and more broadly, International Criminal Law, in which consent cannot be used as a defence,

[215] ibid 2;28;36.
[216] ICC- Defence for Mr. Jean-Pierre Bemba Gombo, 'Defence Notice of Appeal against Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399' <https://www.icc-cpi.int/CourtRecords/CR2016_05360.PDF> accessed 27 July 2016.
[217] *The Prosecutor v. Jean-Pierre Bemba Gombo - ICC-01/05-01/08* (n 205) [101].
[218] ibid 104.
[219] ibid.

widening its perception of coercive environments and situations in which people may become vulnerable to this crime.

Additionally, it is clear that the permanent court is strongly benefitting from the lawmaking done by the ad hoc tribunals once its discussion on rape departs from the foundations built by them. This approach contrasts with both first rape as crime against humanity cases of ICTR and ICTY, in which they debate the lack of definition for the crime in International Law and sought national laws to aid in their understandings.

For the future development of the ICC one hopes that the Court will enhance its perception of gender inequality permeating armed conflict situations and will favour women's voices denouncing violence and discrimination. Besides, it would be positive if the Court focused on the detrimental aspects of rape as a grave violation of sexual nature of one's personal integrity, autonomy and dignity, leaving the attachment on penetration aside, which again is a very male perception of what means sexual violation.[220]

4.5 Conclusion

The case of the development of the crime of rape as crime against humanity can illustrate properly how international courts may use their margin of discretion to effectively give meaning to rights, protections and prohibitions, such as the right to personal integrity, the acknowledgement of peoples' inherent dignity, the prohibition of torture, among others.

The ad hoc tribunals, facing the lack of definition of rape in International Criminal Law, could have made the unfortunate decision of a narrower approach. Or they could have restrained themselves to the exactly wording of the Statutes and not taking the active position of perceiving rape as means to genocide, as a form of torture and a discriminatory persecution.

[220] Goldstone and Dehon (n 144) 128.

These positions may even had found supporters among who still voices a more positivist approach, but would certainly have jeopardized justice and harmed the principles of Rule of Law, which demands that rights have a meaningful existence, and that grave crimes do not go unpunished. In this manner, the case has shown how essential was the use of court's margin of discretion.

5.0 General Conclusion

The lawmaking process in the international system is indeed diffuse and counts with a wide range of actors. International courts rank among the most relevant of them. Admitting this is extremely relevant because enhances our perceptions of the legitimacy of court's judgements and re-directs courts goals towards delivering justice, not as simply "pronouncers" of written law.

What authorizes courts to make law is the legitimacy of their margin of discretion which is envisaged within International Law: through the Vienna Convention on Law of the Treaties, general principles of law and the universal juridical conscience. By comprehending the sources of the margin of discretion one is also able to perceive that it has its limits, ensuing from the manner in which international courts and International Law are organized: existence of formal sources, duty to issue reasoned juridical decisions, judges deciding in group and seeking consensus, States possibilities to create and amend treaties, individual's possibility to appeal and so on. Once more, margin of discretion is not a blanket permission to judge in a vacuum.

As the case study has demonstrated courts are able to use their margin properly, guaranteeing effectiveness of treaties, of the law and seeking to deliver justice. J. Alter also concurs to this conclusion: "(…) rape as a war crime case studies led to the creation of obligations and rights that extend into the future."[221]

Furthermore, the study has also demonstrated that courts are capable to use their discretion without harming the principle of *nullum crimen sine lege* or becoming arbitrary. On the contrary. Aware of their duties, theses Courts have detailed their reasoned decisions, basing them in the law and dictates of the universal juridical conscience, as the "object and purpose" of the founding treaties of these Courts require. Finally, the case study has assisted in the

[221] J. Alter (n 42) 27.

answering of the main research question of this thesis, concerning the implications of the margin of discretion to International Law: it works guaranteeing the courts a space of maneuver to make law meaningful and effective, enhancing Rule of Law in the international relations, and improving their capabilities to deliver justice.

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