Chapter 9: International Criminal Law

A. Introduction

International criminal law displays a dynamic development from unwritten law to written law. This chapter will firstly depict the early discussions of the interrelationship of sources in the context of international criminal law which preceded the establishment of the ICTY (B.). The chapter will secondly explore the jurisprudence of the ICTY and analyze the role given to customary international law, its interpretation and application and its interrelationship with treaties and general principles of law (C.). It will illustrate the use of similar techniques which could be observed in the fifth chapter in relation to the International Court of Justice. Thirdly, the chapter will turn to the Rome Statute (D.). In this context, it will focus on the Rome Statute's main features which concern the interrelationship of sources, on the debate on modes of criminal liability as an example of a potential conflict between treaty law and customary international law and on the role of customary international law on immunities.

B. The recognition of individual's responsibility for violations of international law

This section will give an overview of the recognition of individual responsibility for violations of international law and the relative significance of customary international law and treaties before the further implications on the interrelationship of sources in the context of international criminal law will be discussed (see below, C.) This section will survey the development from the interwar period to the Military Tribunals in Nuremberg and Tokyo (I.), the reception in the UNGA and in the treatymaking practice of states (II.) and the road towards an international criminal court (III.)

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I. From the interwar period to the Military Tribunals in Nuremberg and Tokyo

International criminal law is concerned with the responsibility of individuals for violations of international law, in particular international humanitarian law. The landmark decision was rendered by the International Military Tribunal in Nuremberg after the second world war:

> "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[1]

Already after the first world war, the Treaty of Versailles provided in article 227(2) that a special tribunal should be constituted to try the former German *Kaiser* who was publicly arraigned according to article 227(1) "for a supreme offence against international morality and the sanctity of treaties". By virtue of article 228(1), the "German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."[2] Article 228(2) obliged the German government to "hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities." However, the tribunal was never established, the trial against the former German *Kaiser* who had fled to the Netherlands was not conducted, the German government did not hand over the 896 persons who should have been prosecuted and the Allied decided to abstain from requesting the extradition; instead, national proceedings took place before the *Reichsgericht* in Leipzig.[3]

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1 *USA et al v Göring et al* IMT Judgment (1 October 1946) Trial of the Major War Criminals before the International Military Tribunal Vol. 1 (1947) 223.

2 Treaty of Peace with Germany (Treaty of Versailles) (signed 28 June 1919, entered into force 10 January 1920) 225 Parry 188.

3 Kai Ambos, *Treatise on International Criminal Law: Vol. I: Foundations and General Part* (Oxford University Press 2013) 3; Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (4th edn, Oxford University Press 2020) 4-5; on the Leipzig trials see Claus Kreß, 'Versailles-Nuremberg-The Hague : Germany and International Criminal Law' (2006) 40 The international lawyer 16-20; on the legacy of the Versailles treaty for international criminal law see Claus Kreß, 'The Peacemaking Process After the Great War and the Origins of International Criminal Law Stricto Sensu' (2021) 62 German Yearbook of International Law 163 ff.

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The Advisory Committee of Jurists recommended to consider the establishment of a High Court of Justice competent to try "crimes constituting a breach of international public order or against the universal law of nations."[4] The Third Committee of the Assembly, however, considered it "useless to establish side by side with the Court of International Justice another Criminal Court" and therefore suggested to set up "a criminal department in the Court".[5] Following up on the Advisory Committee's recommendation, international initiatives endorsed the establishment of such a chamber or section at the PCIJ, for instance the Inter-Parliamentary Union in 1925, the International Law Association in 1926 and the International Congress of Penal Law in the time period between 1926-1928.[6] While the draft statute of 1928 envisioned as applicable substantive law written instruments only,[7] other proposals such as the ILA Draft in its articles 21 and 23[8], and the 1943 Draft Convention for the Creation of an International Criminal Court in its article 27[9] resembled article 38 of the PCIJ Statute and included a reference to customary international law and general principles of law.

Other treaties did not explicitly address individual criminal responsibility as matter of international law. By way of treaties, states imposed obligations on each other to criminalize particular behaviour by way of domestic law. However, neither the Hague Regulations of 1907[10], the Geneva Convention of 1929[11] nor the Briand-Kellog pact[12] stipulated that individuals should be responsible for breaches of these treaties.

During the second world war, however, the UN War Crimes Commission was established in order to collect evidence of the commission of war crimes and crimes against humanity and the London Charter of 1945 led to the

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4 *Historical Survey of the Question of International Criminal Jurisdiction* Memorandum submitted by the Secretary-General (1949) UN Doc A/CN.4/7Rev.1 at 10.

5 ibid 12. The Assembly failed to adopt the recommendation.

6 For an overview see ibid 12-16.

7 ibid 82-83 (articles 35, 36 of the 1928 Statute, revised in 1946).

8 ibid 65-66.

9 ibid 103.

10 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (signed 18 October 1907, entered into force 26 January 1910) 2 AJIL Supp 90.

11 Geneva Convention relative to the protection of civilian persons in time of war (signed 27 July 1929, entered into force 19 June 1931) 118 LNTS 343.

12 Treaty between the United States and other Powers Providing for the Renunciation of War as an Instrument of National Policy (Briand-Kellogg Pact) (signed 27 October 1928, entered into force 25 July 1929) 94 LNTS 57.

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establishment of the IMT.[13] Article 6 of the Charter of the International Military Tribunal set forth the "crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility", namely crimes against peace, war crimes and crimes against humanity. According to the IMT, the Charter "is not an arbitrary exercise of power on the part of the victorious Nations [...] it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."[14] The IMT's reasoning was not confined to treaties but extended to other sources. Addressing the argument that neither the Briand Kellog pact nor the 1907 Hague Convention[15] expressly prescribed violations of their respective provisions as crimes, the IMT referred to past practices of military tribunals.[16] In particular, it held:

> "The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."[17]

This focus on the normative environment was important for the answer to the question of whether individuals could be responsible for violations of international law. In view of the IMT, the proposition "that international law is concerned with the actions of sovereign States, and provides no punishment for individuals"[18] was said to be contradicted by the list of cases

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13 Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and establishing the Charter of the International Military Tribunal (signed 8 August 1945, entered into force 8 August 1945) 82 UNTS 279; Ambos, *Treatise on International Criminal Law: Vol. I: Foundations and General Part* 4; Werle and Jeßberger, *Principles of International Criminal Law* 6-7.

14 *USA et al v Göring et al* 218.

15 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (signed 18 October 1907, entered into force 26 January 1910) 2 AJIL Supp 90.

16 *USA et al v Göring et al* IMT Judgment (1 October 1946) 220-221.

17 ibid 221. Cf. for the dynamic nature also *The United States of America vs Carl Krauch et al (IG Farben), United States Military Tribunal,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10, Vol VIII (1952), 1038: "As custom is a source of international law, customs and practices may change and find such general acceptance in the community of civilised nations as to alter the substantive content of certain of its principles."

18 *USA et al v Göring et al* IMT Judgment (1 October 1946) 222.

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> "where individual offenders were charged with offenses against the law of nations, and particularly the laws of war. Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law."[19]

The IMT stressed that the war crimes of the Charter

> "were already recognized as War Crimes under international law. They were covered by Articles 46, 50, 52 und 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929. That *violation of these provisions* constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument."[20]

The quote above could be read as an indication that already the violations of *treaty* provisions entailed the international criminal responsibility of the individual. In the specific case before the tribunal, however, the applicability of the 1907 Hague Convention was in doubt because of the "general participation clause" in Article 2 according to which the Hague Convention does only apply between contracting powers and only if all belligerents are parties to the convention. Ultimately, this clause did not prove decisive since the IMT was of the view that the Hague Convention's rules, which were said to represent "an advance over existing international law at the time of their adoption", were "recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter."[21]

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19 ibid 223.

20 ibid, 253 (italics added).

21 ibid 253-254. With respect to the Geneva Convention of 1929 cf. at 232: The IMT quoted the German Admiral Canaris who had argued that prisoners of war were protected not only under the Geneva Convention of 1929, which was not applicable in the relationship with the U.S.S.R., but also under "the principles of general international law", which the IMT characterized as the correct statement of the legal position; cf. *The German High Command Trial Case No 72, Trial of Wilhelm Leeb and Thirteen Others, United States Military Tribunal,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10, Vol XI (1950) 535: The essence of the 1907 Hague Convention and the 1929 Geneva Convention was considered to "express accepted usages and customs of war [...] Most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations and binding upon Germany and the defendants on trial before us in the conduct of the war against Russia."; cf. on the reception *Eritrea-Ethiopia Claims Commission* Eritrea's Claim 17, Partial Award: Prisoners of War (1 July 2003) XXVI RIAA 39 para 39.

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The jurisprudence of the military tribunals which operated on the basis of Allied Control Council Law No 10 emphasized that the crimes referred to in Control Law No 10 constituted preexisting law.[22]

Moreover, the Tokyo tribunal found itself in accord with the reasoning delivered by the IMT on individual responsibility[23], it considered the 1907 Hague convention "as good evidence of the customary law of nations, to be considered by the Tribunal along with all other available evidence in determining the customary law to be applied in any given situation"[24] and emphasized, with respect to the Geneva Prisoner of War Convention,

> "that under the customary rules of war, acknowledged by all civilized nations, all prisoners of war and civilian internees must be given humane treatment. [...] A

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22 *US v List et al, Hostage Case, United States Military Tribunal,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10, Vol XI (1950) 1239; *United States v Friedrich Flick and others, United States Military Tribunal,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10, Vol VI (1952) 1189; *Krupp Case (United States of America v Alfried Felix Krupp von Bohlen und Halbach et al), United States Military Tribunal,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10, Vol IX (1950) 1331; *Justice Case (United States of America v Josef Altstoetter, et al), United States Military Tribunal,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10, Vol III (1951) 966: "All of the war crimes and many, if not all, of the crimes against humanity as charged in the indictment in the case at bar were, as we shall show, violative of preexisting principles of international law. To the extent to which this true, C. C. Law 10 may be deemed to be a codification rather than original substantive legislation. Insofar as C. C. Law 10 may be thought to go beyond established principles of international law, its authority, of course, rests upon the exercise of the "sovereign legislative power" of the countries to which the German Reich unconditionally surrendered."; *Einsatzgruppen Case (United States of America v Otto Ohlendorf et al), United States Military Tribunal,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10, Vol IV (1952), 457-458; see also ibid, 459 (Art. 46 of the 1907 Hague Regulation "had become international law binding on all nations"); cf. also Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press 2011) 124: "Most of the tribunals, by contrast, claimed that they applied international law not because the London Charter had been approved by the international community, but because Law No. 10 reflected pre-existing rules of international law, both customary and conventional."

23 *Araki and others ('Tokyo Judgment')* IMTFE, Judgment (12 November 1948) in Neil Boister and Robert Cryer (eds), Documents on the Tokyo International Military Tribunal (Oxford University Press 2008) 81-81 paras 48,438-48,439.

24 ibid 102 para 48,491.

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> person guilty of such inhumanities cannot escape punishment on the plea that he or his government is not bound by any particular convention. The general principles of the law exist independently of the said conventions. The conventions merely reaffirm the pre-existing law and prescribe detailed provisions for its application."[25]

In conclusion, it is noteworthy that tribunals considered references to international law beyond the written instruments necessary in order to address retroactivity concerns and to overcome limitations of treaty law with respect to the treaty's applicability.

II. The reception in the UNGA and treatymaking practice of states

The UN General Assembly "affirm[ed] the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal".[26] It has been argued that the use of the term "affirm" instead of, as it had been proposed, "confirm" or "reaffirm", indicated "a lack of consensus among United Nations Members as to the binding character of the Nuremberg principles as rules of general international law".[27] There might not have been an agreement on all details, yet it is also noteworthy that the General Assembly established the Committee on the Progressive Development of International Law and its Codification (CPDIL) precisely to codify the Nuremberg principles, a task which then was undertaken upon recommendation of the Committee by the International Law Commission. As Ambos has pointed out, the content of the Nuremberg principles can be summarized in one sentence: "The individual criminal responsibility (Principle I) through participation (VII) with regard to international crimes (VI) is neither opposed by interstate-arranged impunity (II) nor-in principle-by acting in an official capacity (III) nor by grounds of command (IV)."[28]

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25 ibid 578 para 49,720.

26 UNGA Res 95 (I) (11 December 1946) UN Doc A/RES/95(I).

27 Bin Cheng, *Studies in International Space Law* (Oxford University Press 1997) 141; Kevin Jon Heller, 'What is an international crime? (A Revisionist History)' (2017) 58 Harvard International Law Journal 378-379; but see for the contrary view Kreß, 'Article 98' para 43.

28 Kai Ambos, *Treatise on International Criminal Law: Vol. I: Foundations and General Part* (2nd edn, Oxford University Press 2021) 12.

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The formulation of those principles by the ILC was neither adopted, affirmed, nor rejected by the General Assembly.[29]

As far as treatymaking was concerned, states did not conclude a comprehensive criminal code defining the individuals' responsibility under international law immediately after the second world war. The Genocide Convention[30], however, confirms "that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish" (article I Genocide Convention) and that "[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction" (Art. VI Genocide Convention). The Geneva Conventions of 1949[31] do not refer to the concept of crime and use the for-

29 For the discussion in the Sixth Committee where the work of the ILC received a mixed reaction, see *Report of the Sixth Committee* (8 December 1950) UN Doc A/1639, 10: "Numerous representatives also commented on the text of the seven principles formulated by the Commission. A great variety of views were expressed, and opinion was generally too divided to permit conclusions as to the sense of the Committee on the controversial issues."; cf. Baxter, 'Treaties and Customs' 92-6 (speaking of an "unsuccessful attempt to codify the Nuremberg Principles", at 92); Richard R Baxter, 'The Effects of Ill-Conceived Codification and Development of International Law' in Faculté de Droit de l'Université de Genève (ed), *En Hommage à Paul Guggenheim* (Faculté de Droit de l'Université de Genève 1968) 146-166.

30 Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948, entered into force 12 January 1951) 78 UNTS 277. On the crime of genocide see already UNGA Res 96 (I) (11 December 1946) UN Doc A/RES/96 (I): "Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds - are punishable".

31 Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention, relative to the treatment of prisoners of war (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention relative to the protection of civilian persons in time of war (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

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mulation "grave breaches" instead.[32] States are under an obligation "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention" and "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts" (Art. 49(1), (2) GC I, Art. 50(1), (2) GCII, Art. 129(1), (2) GC III, Art. 146(1), (2) GC IV). The Geneva Conventions emphasize that "the accused persons shall benefit by the safeguards of proper trial and defence" (Art. 49(4) GC I, Art. 50(4) GCII, Art. 129(4) GCIII, Art. 146(4) GC IV).[33] As these obligations are directed towards states, it is controversial whether the grave breaches regime of the Geneva Conventions entails the direct responsibility of the individual under international law.[34] It is noteworthy, however, that article

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32 During the negotiations of the Geneva Conventions, the term "grave breaches" was given preference over the term "war crime" which had been suggested by the USSR since "the word 'crimes' had a different meaning in the national laws of different countries and because an act only becomes a crime when this act is made punishable by a penal law." (ICRC, *Commentary on the First Geneva Convention (2016)* (Cambridge University Press 2017) Art. 50 para 2917, referring to *Final Record of the Diplomatic Conference of Geneva of 1949* (vol II-B, Federal Political Department) 116-7); on the relationship between the grave breaches regime and war crimes see Marko Divac Öberg, 'The absorption of grave breaches into war crimes law' (2009) 91 International Review of the Red Cross 163 ff.

33 During the negotiations of the GCs, it was not possible to agree on defences which is why it was decided that defences 'should be left to the judges who would apply the national laws.', see Fourth Report drawn up by the Special Committee of the Joint Committee of 12 July 1949, in *Final Record of the Diplomatic Conference of Geneva of 1949* 114, at 115: "The word 'crime' instead of 'breach' did not seem to be an improvement, nor could general agreement be reached at this stage regarding the notions of complicity, attempted violation, duress or legitimate defence or plea 'by orders of a superior'. These should be left to the judges who would apply the national laws."

34 Cf. Bruno Simma and Andreas L Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 AJIL 310-311 ("These provisions merely refer to the obligation of the parties either to try or to extradite alleged criminals [...] They do not qualify grave breaches as crimes of a truly international character."); cf. ICRC, *Commentary on the First Geneva Convention (2016)* Art. 49 para 2853: "The text of Article 49 establishes the individual criminal responsibility of offenders under international law, but limits it to the person committing the crime and the person who ordered the crime, without mentioning other forms of individual responsibility or available defences."

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85(5) of the First Additional Protocol to the Geneva Conventions[35] stipulated that "[w]ithout prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes".[36] The grave breaches regime applies only to international armed conflicts. In contrast, the question of individual responsibility for violations of international humanitarian law in non-international armed conflicts is addressed neither in common article 3 of the Geneva Conventions nor in the Additional Protocol II[37].

Whereas the aforementioned treaties do not address individual criminal responsibility as matter of international law explicitly, article 11(2) of the Universal Declaration of Human Rights[38], article 7(2) ECHR[39] and article 15(2) ICCPR[40] recognize that behaviour can be criminalized under international law.[41]

35 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (signed 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

36 Simma and Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' 311; Ambos, *Treatise on International Criminal Law: Vol. I: Foundations and General Part* 14; ICRC, *Commentary on the First Geneva Convention (2016)* Article 49 para 2820; Öberg, 'The absorption of grave breaches into war crimes law' 164 ff.

37 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) (signed 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

38 UNGA Res 217 A (III) (10 December 1948) UN Doc A/RES/3/217 A. Article 11(2) reads: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

39 Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221. Article 7(2) reads: "This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

40 International Covenant on Civil and Political Rights (signed 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. Article 15(2) reads: "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."

41 According to Astrid Reisinger Coracini, '"What is an International Crime?": A Response to Kevin Jon Heller' [2018] Harvard International Law Online Symposium ⟨https://harvardilj.org/wp-content/uploads/sites/15/Coracini-Response.pdf⟩

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III. The road towards an international criminal court

In the context of the progressive development and codification of international law, the ILC split up international criminal law into different codification projects and appointed Jean Spiropoulos as special rapporteur for the "Formulation of the Nuremberg Principles and Preparation of a Draft Code of Offenses against the Peace and Security of Mankind", and Ricardo Alfaro as well as Emil Sandstrum as special rapporteur for the "Draft Statute for the Establishment of an International Criminal Court" the work on which was submitted to the General Assembly in 1954.[42]

The General Assembly decided to postpone consideration of the project of an international criminal court until the finalization of the Draft Code,[43] and to postpone consideration of the Draft Code until the Special Committee on the question of defining aggression has submitted its report.[44] The General Assembly agreed on a definition of aggression in 1974[45] and the International Law Commission suggested *proprio motu* to the General Assembly that the Draft Code of Offences against the Peace and Security of Mankind "could be reviewed in the future if the General Assembly so wishes".[46] The General

accessed 1 February 2023, at 1, this provides "convincing evidence of direct criminalization" under international law; for the contrary view see Kevin Jon Heller, 'What is an International Crime? (A Revisionist History) A Reply to my Critics' [2018] Harvard International Law Journal Online Symposium ⟨https://harvardilj.org/wp-content/uploads/sites/15/Heller-Reply.pdf⟩ accessed 1 February 2023, at 3-5, arguing, *inter alia* that the reference in this articles could be directed at suppression conventions and do therefore not contradict his argument that international law does not provide for direct responsibility of individuals but for an obligation on states to domestically criminalize violations of international law.

42 See Mahmoud Cherif Bassiouni, 'The History of the Draft Code of Crimes Against the Peace and Security of Mankind' (1993) 27(1-2) Israel Law Review 248-251. According to article 2 of the Statute for the Establishment of an International Criminal Court, "the Court shall apply international law, including international criminal law, and where appropriate, national law" , Report of the 1953 Committee on International Criminal Jurisdiction (August 1953) 23.

43 UNGA Res 898 (IX) (14 December 1954) UN Doc A/RES/898(IX); UNGA Res 1187 (XII) (11 December 1957) UN Doc A/RES/1187(XII).

44 UNGA Res 897 (IX) (4 December 1954) UN Doc A/RES/897(IX); UNGA Res 1186 (XII) (11 December 1957) UN Doc A/RES/1186(XII); Bassiouni, 'The History of the Draft Code of Crimes Against the Peace and Security of Mankind' 257.

45 UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/3314 (XXIX).

46 *ILC Ybk (1977 vol 2 part 2)* 130 para 111.

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Assembly allocated the topic of the draft to the Sixth Committee[47] and requested the Secretary-General to invite states and relevant intergovernmental organizations to submit comments and observations,[48] before it ultimately invited the International Law Commission to resume its work.[49]

In 1991, the ILC adopted on first reading the Draft Code of Crimes against the Peace and Security of Mankind which found a mixed reaction due to the number of crimes which included, for instance, the crimes of aggression, intervention, colonial domination and other forms of alien domination, apartheid and terrorism.[50] The 1992 report of an ILC working group on the question of an international criminal jurisdiction made the case for separating the project of a code and the project of the statute of an international criminal court from each other, in order to make each acceptable for states who had reservation about the respective other project.[51] According to the Working Group, recourse to general international law would be no longer necessary once the crimes have been codified. Thus, the Working Group proposed to confine the jurisdiction of the envisioned court to crimes set forth in treaties.[52]

The Special Rapporteur's draft statute for an international criminal court in 1993, therefore, put a reference to general principles of law and custom in a provision on applicable law in square brackets, not without noting, however, that "no previous draft had gone so far in restricting the law that could be applied by an international criminal court."[53] According to some members, it was too restrictive, but it was also suggested "to directly define what would be regarded as international crimes for the purposes of the statute, rather than

47 Report of the 6th Committee, Draft Code of Offences Against the Peace and Security of Mankind (UN Doc A/32/470, December 1977).

48 UNGA Res 35/49 (4 December 1980) UN Doc A/RES/3549.

49 UNGA Res 36/106 (10 December 1981) UN Doc A/RES/36/106.

50 As argued by James Crawford, 'The Work of the International Law Commission' in Antonio Cassese, Paola Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court* (Oxford University Press 2002) 24, "the renewed work proved controversial and reaction to it was polarized. Much of the Code's support came from the Group of 77; much of the opposition to it came from the West. But neither group was enthusiastic at this stage about the Code's application by an international criminal court."

51 *ILC Ybk (1992 vol 2 part 2)* 67-68.

52 ibid 66, 71.

53 *Eleventh report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur* 25 March 1993 UN Doc A/CN.4/449 in *ILC Ybk (1993 vol 2 part 1)* 115.

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deal with such a matter through a provision on applicable law."[54] The working group on a draft statute proposed that the jurisdiction of the envisioned court encompassed, by default, a list of crimes defined by treaties (draft article 22) as well as, optionally, crimes under general international law and crimes under national law.[55] According to a provision on applicable law, the court should apply the draft statute, applicable treaties and the rules and principles of international law as well as, as subsidiary source, any applicable rule of national law.[56]

Yet, the proposal to generally refer to crimes under general international law received criticism in the 6th Committee.[57] The 1994 ILC draft included a provision on crimes within the jurisdiction of the proposed court, which included the crime of genocide, of aggression, of serious violations of the laws and customs applicable in armed conflicts, crimes against humanity and crimes established under or pursuant to treaty provisions listed in the annex.[58] Hence, the draft statute did not "confer jurisdiction by reference to the general category of crimes under international law".[59] According to the provision on applicable law, the envisioned court should apply the draft statute, applicable treaties and the principles and rules of general international law and, to the extent applicable, any rule of national law.[60] The expression "applicable treaties" referred to crimes established under or pursuant to the treaty provisions listed in the Annex according to article 20(e). The ILC stressed that "the expression 'principles and rules' of general international law includes general principles of law [...]"[61]. According to James Crawford, draft article 33 was modelled after article 38 ICJ Statute because "the way in which treaties and rules and principles of international law are applied [under

54 *ILC Ybk (1993 vol 2 part 2)* 17 para. 63.
55 ibid 106-109.
56 ibid 111.
57 *ILC Ybk (1994 vol 2 part 2)* 36 para 5; see also Crawford, 'The Work of the International Law Commission' 32.
58 *ILC Ybk (1994 vol 2 part 2)* 38 (draft article 20).
59 ibid 38 para. 3 (draft article 20).
60 ibid 51 (draft article 33).
61 ibid 51 para 2 (draft article 33). The quote continues: "[...] so that the court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty."

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Article 38] is now fairly understood, and there was little point in seeking to elaborate them in one particular context."[62]

The ILC's procedural approach was different from the Rome Statute which both establishes a court and defines the crimes over which the ICC has jurisdiction. A similarity, however, consists in the fact that both the ILC draft and the Rome Statute confined the jurisdiction to crimes as defined by treaties, not extending to crimes under customary international law. As far as the applicable law beyond crimes is concerned, both refer to unwritten international law.[63] In comparison to article 21 Rome Statute, the ILC draft was close to article 38 ICJ Statute.

C. The interrelationship of sources and the International Criminal Tribunals, in particular the ICTY

This section will focus on the jurisprudence of the international criminal tribunals, with a particular emphasis on the jurisprudence of the ICTY. It will examine the ICTY's source preference for customary international law (I.). Subsequently, it will focus on interpretative decisions and normative considerations in the identification of customary international law and general principles of law (II.). In this context, the section will elaborate on the difficulty to appreciate and evaluate practice in armed conflicts (1.), discuss the role of general principles as a bridge between customary international law and the normative environment and considerations as expressed in treaties (2.) and highlight the significance of the legal craft, for instance in determining default positions or the scope of the rule (3.). In conclusion, this section will reflect on the stabilizing effect of normative considerations and their limits (III.).

I. The preference for customary international law

Looking back, Werle and Jeßberger note that "[o]verall, the situation until the 1990s was paradoxical. On the one hand, the legal basis of international criminal law was largely secure and the law of Nuremberg had been consolidated.

62 James Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal' (1994) 88(1) AJIL147-8.

63 See below on p. 509 on article 21 Rome Statute.

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On the other hand, the states and the community of nations lacked the will and ability to apply these principles."[64] This changed with the establishment of the international criminal tribunals for the former Yugoslavia and for Rwanda by the Security Council Resolutions 827 and 955.[65]

1. Customary international law and individual responsibility for war crimes in non-international armed conflicts

Until then, the dominant view had been that war crimes could not be committed in non-international armed conflicts.[66] This changed with the ICTY Appeals Chamber, when it decided in a landmark decision of 2 October 1995 that

> "[a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach [...] It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned [...] If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight."[67]

The Appeals Chamber emphasized that not all rules which govern international armed conflicts would also apply in a mechanical fashion in non-international armed conflicts:

64 Werle and Jeßberger, *Principles of International Criminal Law* 14. Cf. also *ILC Ybk (1994 vol 1)* at 8 (Crawford), arguing that since Nuremberg "enormous efforts had been made to delineate international crimes in treaties, whereas the customary law process had been largely bypassed. That created real difficulties of definition for the "additional" crimes under general international law."

65 UNSC Res 827/1993 (25 May 1993) UN Doc S/RES/827(1993); UNSC Res 955/1994 (8 November 1994) UN Doc S/RES/955(1994). The work of both tribunals has been continued by the International Residual Mechanism for Criminal Tribunals, see UNSC Res 1966 (22 December 2010) UN Doc S/RES/1966(2010).

66 Cf. Claus Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2001) 30 Israel Yearbook on Human Rights 104-5; Yoram Dinstein, *Non-International Armed Conflict in International Law* (Cambridge University Press 2014) 174-177; Yudan Tan, *The Rome Statute as Evidence of Customary International Law* (Brill Nijhoff 2021) 81-2, 102-4.

67 *Prosecutor v Dusko Tadić a/k/a "Dule"* ICTY AC Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) IT-94-1-AR72 para 97. On the assimilation thesis see Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' 107; Ambos, *Treatise on International Criminal Law: Vol. I: Foundations and General Part* 13.

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> "[O]nly a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts."[68]

With respect to the violation of these rules, the Appeals Chamber held that "customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife."[69]

The conclusions of the ICTY Appeals Chamber were confirmed by the ICTR which was established to prosecute persons responsible for serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states (cf. Art. 1, Art, 4 ICTR Statute).[70]

This development was also confirmed at the international conference in Rome. As Kreß pointed out, even though skeptical and dissenting voices existed, this "minority has not hindered an overwhelming majority of 120 States to accept (and another 21 States not to object to) the inclusion of a list of war crimes committed in non-international armed conflicts in Article 8(2)(c) and (e) of the ICC Statute."[71]

68 *Prosecutor v Dusko Tadić a/k/a "Dule"* IT-94-1-AR72 para 126.

69 ibid para 134.

70 See *Prosecutor v Clément Kayishema and Obed Ruzindana* ICTR TC Judgement (21 May 1999) ICTR-95-1-T para 8; *Prosecutor v Jean-Paul Akayesu* ICTR TC Judgement (2 September 1998) ICTR-96-4-T paras 608 ("It is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3"), 612-615, 617 ("The Chamber, therefore, concludes the violation of these norms entails, as a matter of customary international law, individual responsibility for the perpetrator").

71 Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' 107; see also Tan, *The Rome Statute as Evidence of Customary International Law* 104-33.

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2. Source preferences: customary international law and alternative avenues

As was demonstrated above, the ICTY based the individual responsibility for serious violations of international humanitarian law in non-international armed conflicts on customary international law which became the important source in the jurisprudence of the tribunal, as no applicable treaty explicitly set forth individual responsibility for violations of international humanitarian law. Still, the jurisprudence also demonstrates that different paths were explored and different source preferences were expressed, both in the jurisprudence of the ICTY and in scholarship.

The resolution establishing the ICTY did not set forth the applicable law, which was, however, addressed in the Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993). According to the Secretary-General, international humanitarian law

> "exists in the form of both conventional law and customary law [...] the application of the principle nullum crimen sine lege requires that the international tribunal *should apply rules of international humanitarian law which are beyond any doubt part of customary law* so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law."[72]

Against this background, it is interesting that the ICTY stated that its jurisdiction was not confined to customary international law. The Appeals Chamber

72 *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* (3 May 1993) UN Doc S/25704, paras 33-34 (italics added); cf. *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955(1994)* (13 February 1995) UN Doc S/1995/134, paras 11-12, noting the non-international character of the armed conflict and stating (in para 12) that "the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, and for the first time criminalizes common article 3 of the four Geneva Conventions." See generally on the drafting of both statutes Joseph Powderly, *Judges and the Making of International Criminal Law* (Brill Nijhoff 2020) 356.

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in *Tadić* set out the approach which was followed by Trial Chambers in subsequent proceedings:[73]

> "[T]he International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law."[74]

In certain instances, Trial Chambers based their decisions on treaties while leaving the status of customary international law open.[75] For instance, the *Galić* Trial Chamber based the crime against terrorism deliberately on a treaty provision, namely Art. 51(2) of the First Additional Protocol to the Geneva Conventions, while taking no position on the customary status of such crime.[76] The Appeals Chamber, however, whilst rejecting the defendant's submission that the tribunal's jurisdiction *ratione materiae* was limited to customary international law, argued that the Tribunal's jurisprudence demonstrated that

> "the Judges have consistently endeavoured to satisfy themselves that the crimes charged in the indictments before them were crimes under customary international law at the time of their commission and were sufficiently defined under that body of law. This is because in most cases, treaty provisions will only provide for the prohibition of a certain conduct, not for its criminalisation, or the treaty provision

73 Robert Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their Jurisdiction and on International Crimes' (2004) 75 BYIL 272; *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* ICTY TC Judgement (22 February 2001) IT-96-23-T & IT-96-23/1-T para 403; *Prosecutor v Dario Kordić, Mario Čerkez* ICTY TC Judgement (26 February 2001) IT-95-14/2-T para 167; *Prosecutor v Radoslav Brđjanin* ICTY TC Judgement (1 September 2004) IT-99-36-T para 126; *Prosecutor v Stanišić & Župljanin* ICTY TC Judgement (27 March 2013) IT-08-91-T para 35.

74 *Prosecutor v Dusko Tadić a/k/a "Dule"* IT-94-1-AR72 para 143.

75 *Prosecutor v Blaskić* ICTY TC Judgement (3 March 2000) IT-95-14-T IT-95-14-T para 172-173: "the two parties were bound by the provisions of the two Protocols, whatever their status within customary international law [...] The Defence's argument that Additional Protocol I is not part of customary international law is therefore not relevant."; for a similar position see *Prosecutor v Clément Kayishema and Obed Ruzindana* ICTR-95-1-T paras 156-7: the question of custom could be left open since Rwanda was party to the four Geneva Conventions and the Second Additional Protocol and had enacted all offences enumerated in Article 4 as crimes under Rwandan law.

76 See *Prosecutor v Stanislav Galić* ICTY TC Judgement and Opinion (5 December 2003) IT-98-29-T IT-98-29-T paras 94-138.

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itself will not sufficiently define the elements of the prohibition they criminalise and customary international law must be looked at for the definition of those elements."[77]

Since individual responsibility was associated to customary international law, tribunals regarded recourse to customary international to be necessary in order to do justice to the principles of legality and non-retroactivity.[78] Even when the Appeals Chamber in the *Čelebići* case proclaimed the principle of automatic succession to treaties of a humanitarian character, the Chamber did not rely on the humanitarian character alone but on the argument that the Geneva Conventions also reflected customary international law which was binding on a successor state.[79]

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77 *Prosecutor v Stanislav Galić* ICTY AC Judgement (30 November 2006) IT-98-29-A para 83; for the ICTR see *Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T paras 608-609 (reliance on custom); *Prosecutor v Alfred Musema* ICTR AC Judgement (27 January 2002) ICTR-96-13-A paras 236-242 and *Prosecutor v Georges Anderson Nderubumwe Rutaganda* ICTR TC Judgement (6 December 1999) ICTR-96-3-T para 90 (custom and convention).

78 *Prosecutor v Mitar Vasiljević* ICTY TC Judgement (29 October 1997) IT-98-32-T paras 193-202; *Prosecutor v Dario Kordić, Mario Čerkez* ICTY TC Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction based on the limited Jurisdictional Reach of Articles 2 and 3 (9 March 1999) IT-95-14/2 para 20; *Prosecutor v Blaskić* ICTY AC Judgement (29 July 2004) IT-95-14-A para 141; *Prosecutor v Milan Milutinović and others* ICTY TC Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration (22 March 2006) Case No. IT-05-87-PT para 15; *Prosecutor v Hadžihasanović et al* ICTY AC Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (16 July 2003) T-01-47-AR72 para 35; cf. Robert Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on Their Jurisdiction and on International Crimes (2004-2013)' (2014) 84(1) BYIL 149: "[...] the customary-law limb has been considered the primary source. Paradoxically perhaps, when judged by standards of municipal law, the unwritten customary rules were considered to be more in line with the principle *nulla poena sine lege* than the written conventional provisions."; also William Schabas, 'Customary Law or Judge-Made Law: Judicial Creativity at the UN Criminal Tribunals' in José Doria, Hans-Peter Gasser, and Mahmoud Cherif Bassiouni (eds), *The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko* (Nijhoff 2009) 94; Theodor Meron, 'The Revival of Customary Humanitarian Law' (2005) 99(4) American Journal of International Law 821; see also *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* para 34.

79 "In light of the object and purpose of the Geneva Conventions, which is to guarantee the protection of certain fundamental values common to mankind in times of armed conflict, and of the customary nature of their provisions, the Appeals Chamber is in no doubt that State succession has no impact on obligations arising out from these

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Certain commentators agreed, pointing out that, as Mettraux put it, the aforementioned *Galić* Trial Chamber, when it referred to treaties, mixed up two different aspects, namely illegality and criminality, and since the Geneva Convention were no criminal law statute, recourse to customary international law was necessary.[80] According to Robert Kolb, however, alternatives to the customary law route were available. In particular, treaties such as the Geneva Conventions and the Additional Protocols, bilateral agreements such as the Agreement of 22 May 1992 between the parties to the conflict in Bosnia and Herzegovina and domestic criminal legislation could have proven "similarly productive", and partly were used as a legal basis for crimes without violating the principle of legality.[81] He noted a tendency "that a one-sided approach (focused exclusively on customary law) increasingly gives way to a two-tier approach (navigating between customary and conventional law)",[82] even though he also concluded that customary international law

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fundamental humanitarian conventions.", *Prosecutor v Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic* ICTY AC Judgement (20 February 2001) IT-96-21-A paras 111 ff., quote at para 113.

80 Guénaël Mettraux, *International Crimes and the ad hoc Tribunals* (Oxford University Press 2005) 8-11; see also Mohamed Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection* (Oxford University Press 2012) 52, 61-63.

81 Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on Their Jurisdiction and on International Crimes (2004-2013)' (2014) 84 BYIL 149; Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their Jurisdiction and on International Crimes' (2004) 75 BYIL 272; see also Robert Kolb, 'The jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their jurisdiction and on international crimes' (2000) 71 BYIL 262-263: "The natural tendency of the Tribunals will be to postulate custom wherever possible in order to bypass the jurisdictional obstacle. The practice has already shown that these postulates of custom largely rest on undemonstrated assertions. A real analysis of the elements of custom is in effect unimaginable within the compass of the task of the Tribunals. Weak assertions made in more than one case do not add to the authority the Tribunals may enjoy. Moreover, an excessive blurring and blending of conventional and customary law tends to produce unwelcomed side-effects and to weaken the proper mechanisms of treaty law."; cf. *Prosecutor v Blaskić* IT-95-14-T paras 172-173; *Prosecutor v Stanislav Galić* IT-98-29-T paras 94-138; *Prosecutor v Clément Kayishema and Obed Ruzindana* ICTR-95-1-T paras 156-7.

82 Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their Jurisdiction and on International Crimes' 273.

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became the primary source in the jurisprudence of the ICTY.[83] In Kolb's view, it was not necessary to examine with respect to each prohibition of international humanitarian law whether there was a criminalization under customary international law. Rather, customary international law dispensed

> "with a case-by-case analysis into State practice in the context of a prosecution for a single offense. It establishes a simpler equation: as it is a general conception of law that any breach of engagement involves an obligation to make reparation, so it is a general conception of humanitarian law that any serious breach of an important rule of the laws and customs of war entails criminal responsibility."[84]

Based on this reasoning, treaties could have sufficed as a legal basis, together with the general principle that any serious breach entails criminal responsibility. One reason in favour customary international law, however, might have been the dominant criminalization approach when it comes to war crimes. The criminalization approach to war crimes provides that a war crime is a violation of international humanitarian law which is specifically criminalized under international law[85]. Hence, not every violation of international humanitarian law entails individual responsibility. This approach is not beyond criticism: it is said to be circular as "a violation of IHL is prosecutable as an international war crime only if it has previously been prosecuted as a war crime"[86], the search for a criminalization is very subjective[87] and the outcome is not predictable due to the lack of a consistent methodology and therefore

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83 Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on Their Jurisdiction and on International Crimes (2004-2013)' 149.

84 Kolb, 'The jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their jurisdiction and on international crimes' 265.

85 See for instance Georges Abi-Saab, 'The Concept of "War Crimes"' in Sienho Yee and Tieya Wang (eds), *International Law in the Post-Cold War World : Essays in Memory of Li Haopei* (Routledge 2001) 112; Michael Cottier, 'Article 8' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: a commentary* (3rd edn, Beck 2016) 304; cf. Oona A Hathaway and others, 'What is a War Crime?' (2018) 44 Yale Journal of International Law 69 ff. with further references on criminalization.

86 ibid 75.

87 Cf. Theodor Meron, 'Is International Law Moving towards Criminalization?' (1998) 9 EJIL 24: "[W]hether international law creates individual criminal responsibility depends on such considerations as whether the prohibitory norm in question, which may be conventional or customary, is directed to individuals, whether the prohibition is unequivocal in character, the gravity of the act, and the interests of the international community."

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does not satisfy the principle of legality.[88] Hathaway *et al.* have recently suggested to focus on whether the breach of international humanitarian law constitutes a serious violation.[89] An abstract definition of war crimes outside a particular treaty may, for instance, guide domestic courts in particular with respect to war crimes which were not included in article 8 Rome Statute.[90]

Whether this focus on severity or seriousness is an improvement over the criminalization approach as far as predictability is concerned, is, however, open to question. Also, the question arises whether the seriousness should be assessed from the perspective of the interpreter or whether the interpreter is required to assess the seriousness from the perspectives of the international community. If interpreters tend to the latter in order to objectivize their evaluation, the difference to the criminalization approach will become smaller. The criminalization approach has the merit that it can explain why not every violation of international humanitarian law entails the individual responsibility and that the responsibility must be rooted in customary international law or in a treaty and not in the application of a general principle by a tribunal. It has to be admitted, though, that the criminalization approach did not preclude tribunals from assuming a very important position anyway.

In any case, the concept of war crime is not necessarily tied to customary international law, it can extend to treaties as well.[91] The Rome Statute sets forth a list of crimes for which individuals can incur criminal responsibility, and, as will be addressed below in more detail[92], one interesting question then concerns the relationship between these offences and customary international law and the question of whether the Rome Statute should be read as a substantive Statute or a procedural Statute which gives jurisdiction over specific crimes that are part of customary international law. In the context of the ICTY, however, customary international law was the dominant source and its identification, interpretation and application were informed by treaties and general principles.

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88 Hathaway and others, 'What is a War Crime?' 78-81.

89 ibid 86.

90 ibid 96 ff.

91 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law: Rules* 572-573; Robert Cryer, 'Introduction: What is International Criminal Law?' in Robert Cryer, Darryl Robinson, and Sergey Vasiliev (eds), *An Introduction to International Criminal Law and Procedure* (4th edn, Cambridge University Press 2019) 9; Dapo Akande, 'Sources of International Criminal Law' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 48-49.

92 See below, p. 507.

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II. Interpretative decisions and normative considerations in the identification of customary international law and general principles of law

1. The problem of appreciating practice in armed conflicts

When it comes to the identification of customary international law, the *Tadić* Appeals Chamber described the problem clearly. It would be difficult "to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour"[93], since

> "access to the theatre of military operations [is] normally refused to independent observers [...] what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments."[94]

Therefore, "reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions."[95] Such an approach could be criticized for failing to appreciate the real practice on the ground.[96] This description of the problem, however, was not novel and already presented by Marco Sassòli in his work on codification[97] and even earlier by Richard Baxter.[98] Sassòli reasoned that the practice regarding

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93 *Prosecutor v Dusko Tadić a/k/a "Dule"* IT-94-1-AR72 para 99.

94 ibid para 99.

95 ibid para 99.

96 There was a vivid discussion on whether the ICRC Study on Customary International Law was or was not based on such practice, on the debate on custom interpretation by the ICRC see John B Bellinger and William J Haynes, 'A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law' (2007) 89(866) International Review of the Red Cross 443 ff.; Jean-Marie Henckaerts, 'The ICRC and the Clarification of Customary International Humanitarian Law' in Brian D Lepard (ed), *Reexamining customary international law* (Cambridge University Press 2017) 161 ff.

97 Sassòli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht: mit besonderer Betrachtung der Regeln zum Schutze der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten* 232 ff., in particular 233: "[D]as tatsächliche Verhalten der Kriegsführenden [ist] aus mehreren Gründen nur schwer erkennbar. Jeder wirft seinem Gegner schwerste Verletzungen vor, während er von sich absolute Rechtstreue behauptet."

98 Baxter therefore suggested to take account of statements on the law that were made outside of an armed conflict, Baxter, 'Multilateral Treaties as Evidence of Customary International Law' 282-283, in particular 300: "The firm statement by the State of

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international armed conflicts was rare, given the prohibition of the use of force, and he expressed reservations about giving particular weight to the practice of states which participate in international armed conflicts as each of such armed conflicts started with a violation of the prohibition of the use of force.[99]

Against this background, normative considerations can exert a stabilizing effect: they can help in balancing out *ad hoc* considerations, ensuring that the law is not only one-sidedly shaped by recent conflicts experiences and thereby contributing to the generality of the law. These normative considerations may be informed by rules and principles of other branches of international law.

Before exploring the ICTY's identification of customary international law further, it should not go unnoticed that the ICTY took account of the normative environment also in its interpretation of treaty law, for instance of article 4 of the Fourth Geneva Convention.[100] Article 4 of the Fourth Geneva Convention requires, for the characterization of individuals as "protected persons", that these individuals possess a nationality different from the nationality of their captors. The question arose whether Bosnian serbs would not be capable of being characterized as protected persons because Bosnia and Herzegovina had granted its nationality to them. The Chamber started with examining the limits of public international law on the conferral of nationalities and concluded that "there may be an insufficient link between the Bosnian Serbs and that State for them to be considered Bosnian nationals by this Trial Chamber in the adjudication of the present case".[101] The Chamber then argued that the Bosnian Serbs "must be considered to have been 'protected persons'"[102], since otherwise they would fall outside the protective

what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts."

99 Sassòli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht: mit besonderer Betrachtung der Regeln zum Schutze der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten* 232, see also 233-234 on whether every practice attributable to a state for the purposes of state responsibility should be regarded as state practice which contributes to customary international law.

100 Geneva Convention relative to the protection of civilian persons in time of war (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

101 *Prosecutor v Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic* ICTY TC Judgement (26 November 1998) IT-96-21-T para 259.

102 ibid para 259.

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scope of the Geneva Conventions. Additionally, the Chamber argued that this interpretation was "fully in accordance with the development of the human rights doctrine which has been increasing in force since the middle of this century"[103] and which should inform the interpretation of article 4 of the IV Geneva Convention.[104]

2. General principles as a bridge between customary international law and the normative environment

a) Recognizing the interrelationship and distinctiveness of sources: normative inspirations and functional specificities

The ICTY considered general principles extrapolated from other fields of international law in the process of identifying customary international law. The ICTY did not necessarily equate a given treaty provision with customary international law, it considered the legal evaluation and principle to which a particular rule gives expression. Legal evaluations expressed in treaties were considered, rather than being applied "lock, stock and barrel"[105], under consideration of the peculiarities of international humanitarian law and international criminal law. Judge Shahabuddeen summarized this process as follows:

> "It is good jurisprudence that particular provisions of internationally recognised human rights instruments do not apply to the Tribunal lock, stock and barrel; it is superfluous to cite authority. What applies is the substance of the standards – or goals – set by the provisions of those instruments, not the provisions themselves. The supreme goal is fairness; that is sought to be ensured, inter alia, by provisions requiring a right of appeal. However, in certain circumstances, that goal can be satisfied even in the absence of a right of appeal from a conviction or sentence by the Appeals Chamber."[106]

In evaluating the extent of convergence of customary international law in the context of international criminal law with trends expressed in treaties, the tribunal did not lose sight of the distinctiveness of sources and the functional

103 ibid para 266.

104 ibid para 259, see also paras 250, 263, 265-266.

105 Cf. *International Status of South West Africa* [1950] ICJ Rep 128 Sep Op McNair 148. See also above, p. 258.

106 *Prosecutor v Stanislav Galić* IT-98-29-A Sep Op Shahabuddeen para 19.

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characteristics which international criminal law distinguished from other fields of international law.

The example of the definition of torture illustrates this delicate exercise of acknowledging both the convergence and interplay of customary international law and treaty law and at the same time the distinctiveness of the sources and the functional differences. The *Kunarac* Trial Chamber considered the definition of torture under the Convention Against Torture (CAT). According to article 1 CAT, torture must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting *in an official capacity*".[107] The Chamber noted that in light of the "paucity of precedent in the field of international humanitarian law", the Tribunal often took

> "recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. With regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law."[108]

The Trial Chamber then stressed the "specificities"[109] of international humanitarian law and international criminal law. In contrast to human rights law, international humanitarian law and international criminal law regulated not only the conduct of states towards persons but also conduct of individuals.[110] At the same time, the Chamber noted that human rights law was not neutral towards torture inflicted in an unofficial or private capacity as human rights law imposed positive obligations on states to prevent torture in a non-official relationship. The Chamber referred to pronouncements of the European Court of Human Rights and the Human Rights Committee which suggested that article 3 of the ECHR could apply "where the danger emanates from persons [...] who are not public officials"[111] and that the state was under an obligation to protect through legislation everyone "against the acts prohibited by article 7, whether inflicted by people acting in their

107 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (italics added).

108 *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* IT-96-23-T & IT-96-23/1-T para 467.

109 ibid para 471.

110 ibid para 470.

111 *HLR v France* App no 24573/94 (ECtHR, 22 April 1997) para 40.

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official capacity, outside their official capacity or in a private capacity".[112] The Chamber eventually arrived at a definition of torture which consisted of only three elements, namely

> "the level of severity of the ill-treatment, the deliberate nature of the act and the specific purpose behind the act. The requirement that the state or one of its officials take part in the act is a general requirement of the Convention - not a definitional element of the act of torture - which applies to each and every prohibition contained in the Convention."[113]

In this sense, the Chamber parted with other Trial Chambers which had considered that the definition of the CAT "reflects a consensus which the Trial Chamber considers to be representative of customary international law".[114]

The Appeals Chamber presented a different reasoning on the relationship between article 1 CAT and customary international law.[115] The Appeals Chamber clarified that the conventional definition of torture "reflects customary international law as far as the obligation of States is concerned", and it added that the Trial Chamber was correct in that the definition would not "wholly" reflect customary international law "regarding the crime of torture generally".[116]

This example illustrates that a treaty provision may reflect customary international law to a certain degree, in the sense that there may be customary international law beyond the rules that are expressed in the treaty. In the just stated example, the ICTY considered the different addressees of regulation, namely states in human rights law and states and individuals in international criminal law and international humanitarian law. Against this background, the ICTY considered that the public character of torture was a requirement specific to human rights law but not a general requirement.

112 *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* Human Rights Committee E/C.12/GC/20 (10 March 1992) para 2.

113 *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* IT-96-23-T & IT-96-23/1-T para 478.

114 *Prosecutor v Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic* IT-96-21-T para 459; see also *Prosecutor v Anto Furundžija* ICTY TC Judgement (10 December 1998) IT-95-17/1-T paras 160-161; *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* IT-96-23-T & IT-96-23/1-T paras 472-473.

115 *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* ICTY AC Judgement (12 June 2002) IT-96-23 & IT-96-23/1-A paras 144-146.

116 ibid para 147.

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The example of the definition of persecution illustrates both the distinctiveness of customary international law in relation to treaty law and that functional specificities in international criminal law may constitute limits to the reception of principles from other branches of international law or at least require adaptation of those principles.

As to the distinctiveness: in the *Kupreškić* case the Trial Chamber had to examine the scope of persecution as a crime against humanity and whether the crime of persecution requires a link to another crime.[117] Such a connection is required in article 7(1)(h) Rome Statute[118]. However, the Chamber regarded this requirement of a connection as a deviation from customary international law which was held to be less restrictive.[119]

As to the specificities: The Chamber found that neither refugee law nor human rights law provided a definition of persecution, but it also noted that "exposing a person to a risk of persecution in his or her country of origin may constitute a violation of Article 3 of the European Convention on Human Rights."[120] Moreover, according to the Chamber, domestic courts in the context of refugee law "have given persecution a broad definition, and have held that it includes denial of access to employment or education".[121] When evaluating these decisions under consideration of the principle of legality, the Chamber pointed out that

> "[t]he emphasis is more on the state of mind of the person claiming to have been persecuted (or to be vulnerable to persecution) than on the actual finding of whether persecution has occurred or may occur. In addition, the intent of the persecutor is not relevant. The result is that the net of 'persecution' is cast much wider than is legally justified for the purposes of imposing individual criminal responsibility."[122]

117 *Prosecutor v Kupreškić et al* ICTY TC Judgement (14 January 2000) IT-95-16-T paras 567, 572.

118 Article 7(1)(h): "Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court."

119 ibid paras 578-580; *Prosecutor v Dario Kordić, Mario Čerkez* IT-95-14/2-T para 197; see also Kai Ambos and Steffen Wirth, 'The Current Law of Crimes Against Humanity An analysis of UNTAET Regulation 15/2000' (2002) 13 Criminal Law Forum 71 ff.

120 *Prosecutor v Kupreškić et al* para 588.

121 ibid IT-95-16-T para 588.

122 ibid para 589.

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Thus, the Chamber demonstrated that the jurisprudence in other fields of international law needed to be contextualized when determining whether this jurisprudence's principles can be meaningfully employed in international criminal law.

The *Tadić* case offers another example which illustrates that a principle's scope needs to be determined under consideration of functional specificities. The Appeals Chamber was "satisfied that the principle that a tribunal must be established by law [...] is a general principle of law", which could be found in several human rights treaties, but it argued that this principle could not be applied in the same way in which it is applied in municipal settings, as "the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting".[123] Whereas "established by law" could not mean "established by a proper legislature" in the international context, the Chamber identified two other interpretations, namely the establishment by an organ being capable of rendering binding decisions and the establishment of the court being in conformity with the rule of law. In other words, the Chamber interpreted the principle's text and the *telos* and came to the conclusion also against the background of "the necessary safeguards of a fair trial" that the Tribunal's establishment by the UN Security Council did not violate the general principle.[124]

b) The risk to disregard the functional specificities

The *Tadić* judgment also offers a good example of an arguably insufficient regard to functional differences between an attribution analysis in international humanitarian law and the attribution standard under the law of state responsibility. This led to a debate on whether the attribution of non-state actors to states can be established by an attribution standard based on overall-control, rather than effective control.

The ICTY had to determine whether a non-international armed conflict or an international armed conflict had existed. The ICTY argued that international humanitarian law might provide for "legal criteria for determining when armed forces fighting in an armed conflict which is *prima facie* internal may be regarded as acting on behalf of a foreign Power even if they do not

123 *Prosecutor v Dusko Tadić a/k/a "Dule"* IT-94-1-AR72 paras 42-43.
124 ibid paras 44-48, quote at para 47.

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formally possess the status of its organs" and that these criteria might differ from the attribution criteria of the law of state responsibility in general international law.[125] However, the Chamber eventually came to the conclusion that, whilst "the Third Geneva Convention, by providing in Article 4 the requirement of 'belonging to a Party to the conflict', implicitly refers to a test of control"[126], the degree of authority or control of a state over non-state actors needed to be specified.[127] For these purposes, the Chamber identified a "need for international humanitarian law to be supplemented by general international law"[128] and conducted an analysis of general international law. The Appeals Chamber did not find the ICJ's reasoning in *Nicaragua* "persuasive"[129] which "would not seem to be consonant with the logic of the law of State responsibility"[130] and which would be "at variance with judicial and State practice"[131]. Here, the Chamber referred to the *Loizidou* decision of the European Court of Human Rights and to the standard of "effective overall control".[132] The Chamber did not, however, sufficiently appreciate that the European Court applied its control standard in order to determine whether Turkey had exercised jurisdiction for the purposes of article 1 ECHR.[133] Also,

125 *Prosecutor v Dusko Tadić* IT-94-1-A para 90. The Prosecution had argued that "the international law of State responsibility has no bearing" (para 89). For the view that the ICTY should not have approached the general rules of state responsibility cf. ibid IT-94-1-A Sep Op Shahabuddeen paras 17, 20; Kolb, 'The jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their jurisdiction and on international crimes' 277.

126 *Prosecutor v Dusko Tadić* IT-94-1-A para 95.

127 ibid para 97.

128 See the heading to ibid para 98, see also para 105: "As stated above, international humanitarian law does not include legal criteria regarding imputability specific to this body of law. Reliance must therefore be had upon the criteria established by general rules on State responsibility."

129 ibid para 115.

130 ibid para 116, paras 117-123 for that the general principle of the law of state responsibility seem to be to prevent that states can outsource their responsibility.

131 ibid para 124.

132 ibid para 128, see also para 137 (on the content of the overall control test), para 145 (the overall control test for the case at hand).

133 *Loizidou v Turkey (Judgment) [GC]* para 56: The crucial passage reads: "It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in northern Cyprus [...] that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in

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the International Court of Justice upheld the effective control standard and confined the overall-control standard to the specific IHL question of whether an armed conflict could be classified as international or non-international.[134]

c) The role of domestic Law

Recourse to domestic law helped in concretizing and applying vague rules to a specific case.[135] Different Trial Chambers have argued that "international courts must draw upon the general concepts and legal institutions common to all the legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share."[136] At the same time, the identification of very specific general principles of law that would operate like an independent rule, such as a defence based on diminished mental responsibility[137] or a defence

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the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC' [...]. Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention (art. 1). Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus." See also above, p. 448.

134 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2007] ICJ Rep 43, 210 para 406. For the consolidation of the case-law on overall control see Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on Their Jurisdiction and on International Crimes (2004-2013)' 140-141.

135 See also Peat, *Comparative Reasoning in International Courts and Tribunals* 179.

136 *Prosecutor v Anto Furundžija* IT-95-17/1-T para 178; similar *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* IT-96-23-T & IT-96-23/1-T para 439 ("[...] to consider, from an examination of national systems generally, whether it is possible to identify certain basic principles [...]"); see also *Prosecutor v Kupreškić et al* IT-95-16-T para 677 ("[...] to fill any *lacunae* in the Statute of the International Tribunal and in customary law"). For an comprehensive overview of general principles of law emerging from domestic law in the jurisprudence of international criminal tribunals see Raimondo, *General principles of law in the decisions of international criminal courts and tribunals* 74 ff.

137 *Prosecutor v Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic* IT-96-21-A 584-590 (rejection as defence, but accepted as a consideration relating to sentencing); see also *Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur* para 36, pointing out that this defence was not recognized in the ICTY Statute.

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based on duress[138] proved to be difficult.[139] Recourse to domestic law was used in order to interpret the ICTY Statute[140] or for fundamental questions

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138 *Prosecutor v Drazen Erdemović* ICTY AC Judgement (7 October 1997) IT-96-22-A paras 17-19 and Joint Sep Op McDonald and Vohrah; see also below, p. 498; *Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur* para 38.

139 A similar observation can arguably be made with respect to the ICC: *Prosecutor v Thomas Lubanga Dyilo* ICC AC Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006 (14 December 2006) ICC-01/04-01/06-772 paras 32-35 (the power to stay proceedings for abuse of process is not general principle of law); *Situation in the Democratic Republic of Congo* ICC AC Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (13 July 2006) ICC-01/04-168 para 32 (the review of decisions of hierarchically subordinate courts disallowing or not permitting an appeal is not required by a general principle of law); *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* ICC AC Judgement (11 November 2011) ICC-02/05-03/09 OA para 33 (no general principle of law establishing a ban for former prosecutors to join the defence immediately after leaving the prosecution); *Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur* paras 67-68.

140 Cf. on the interpretation of article 10 of the ICTY Statute in light of a general principle of law *Prosecutor v Dusko Tadić* ICTY TC Decision on the Defence Motion on the Principle of non-bis-in-idem (14 November 1995) IT-94-1-T para 9, noting that "[t]he principle of *non-bis-in-idem* appears in some form as part of the internal legal code of many nations [...] This principle has gained a certain international status since it is articulated in Article 14(7) of the (ICCPR) [...] The principle is binding upon this International Tribunal to the extent that it appears in Statute, and in the form that it appears there."; see also *Prosecutor v Dusko Tadić a/k/a "Dule"* ICTY AC Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin (31 January 2000) IT-94-1-A-R77 paras 15-29 (on contempt of court): "It is otherwise of assistance to look to the general principles of law common to the major legal systems of the world, as developed and refined (where applicable) in international jurisprudence." (para 15); *Prosecutor v Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic* IT-96-21-T paras 402-407, the Chamber considered the principles of *nullum crimen sine lege* and *nulla poena sine lege* in the construction of the provisions of the Tribunal's state and Rules. According to the Chamber, these principles are "well recognized in the world's major criminal justice systems as being fundamental principles of criminality" (para 402) but "[i]t is not certain to what extent they have been admitted as part of international legal practice, separate and apart from the existence of the national legal systems. This is essentially because of the different methods of criminalisation of conduct in national and international criminal justice systems" (para 403); on this case, see in particular

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of criminal law doctrine, such as the need to conduct an analysis of both the objective and subjective elements of a crime[141], the principle of burden of proof that rests with the prosecutor[142], the change of legal qualification of facts by the prosecutor and the power of the Chamber when disagreeing with the prosecutor's legal qualification[143] or the proportionality in relation to sentencing.[144]

In addition, chambers considered domestic legal practice in the interpretation of international law more generally. For instance, when elaborating on the elements of sexual assault, one Trial Chamber started with its finding that the elements had been defined neither in a binding treaty[145] nor in customary international law.[146] The Chamber then examined domestic legal practice and found that "a number of jurisdictions place the emphasis upon absence of the victim's consent rather than highlighting the use of violence or threats by the perpetrator."[147] The Chamber interpreted international jurisprudence to the effect that "when a victim performed an act without giving genuine consent to the same, the necessary implication is that that person had been coerced to do so. Therefore, in this respect, domestic solutions are consonant with the existing international jurisprudence."[148] This example illustrates

Raimondo, *General principles of law in the decisions of international criminal courts and tribunals* 105-109; see also *Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur* para 103.

141 *Prosecutor v Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic* IT-96-21-T para 424.

142 ibid para 599-601.

143 *Prosecutor v Kupreškić et al* IT-95-16-T paras 728 ff.

144 *Prosecutor v Blaskić* IT-95-14-T para 796; but see *Prosecutor v Drazen Erdemović* ICTY TC Sentencing Judgement (22 November 1996) IT-96-22-T para 31: "[...] there is a general principle of law common to all nations whereby the severest penalties apply for crimes against humanity in national legal systems. It thus concludes that there exists in international law a standard according to which a crime against humanity is one of extreme gravity demanding the most severe penalties when no mitigating circumstances are present." The meaning of "severest penalty" is open to question, for a convincing critique see Raimondo, *General principles of law in the decisions of international criminal courts and tribunals* 97-98.

145 See *Prosecutor v Milan Milutinović et al* ICTY TC Judgement (26 February 2009) IT-05-87-T para 196 footnote 354, noting that the Rome Statute's Elements of Crime were "not binding rules, but only auxiliary means of interpretation of the substantive definitions of crimes given in the Rome Statute itself."

146 ibid para 196.

147 ibid para 198.

148 ibid para 198.

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that international law and domestic legal practice are considered in light of each other.[149]

In *Popovich*, the Trial Chamber faced the question of whether or not the conspiracy to commit genocide would be a continuous crime to which the accused could join after the conspiracy had been concluded.[150] The Trial Chamber held that the conspiracy to commit genocide was a continuous crime, holding otherwise would be "contrary to the common law position".[151] Both in the USA, in Canada and in the UK individuals would be "capable of joining a conspiracy even after the initial agreement". The Trial Chamber regarded its recourse to such "regional" general principle of law[152] justified by the fact that "the concept of criminal conspiracy incorporated into the Genocide Convention derived from the common law approach and that Article 4(3) of the Statute was adopted directly from the Genocide Convention."[153]

It may be asked whether all these references should be associated with the concept of general principles of law. The judgment of the *Tadić* Appeals Chamber is quite instructive in this regard. Based on an analysis of international and national case-law, it concluded "that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal."[154] The Chamber then explained that its "reference to national legislation and case law only served to show that the notion of common purpose upheld in international criminal law has an *underpinning* in many national systems."[155] For establishing the concept of "common pur-

149 Cf. recently Ochi Megumi, 'The New Recipe for a General Principle of Law: Premise Theory to "Fill in the Gaps"' [2022] Asian Journal of International Law 10 ff., arguing that judges consider the 'premises' of the field of international criminal law when identifying a general principle of law and that "the process of recognizing general principles of law is materially affected by the premises on which it will be applied" (at 11).

150 *Prosecutor v Vujadin Popović* ICTY TC Judgement (10 June 2010) IT-05-88-T paras 870-876.

151 ibid para 872.

152 Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on Their Jurisdiction and on International Crimes (2004-2013)' 149.

153 *Prosecutor v Vujadin Popović* IT-05-88-T para 873; cf. article III(b) of the Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 and article 4(3)(b) of the ICTY Statute.

154 *Prosecutor v Dusko Tadić* IT-94-1-A para 220.

155 ibid para 225 (italics added). See also below, p. 530.

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pose" as a general principle of law, however, "it would be necessary to show that most, if not all, countries adopt the same notion of common purpose"[156], which in the view of the Chamber was not the case, since German and Italian courts "took the same approach" but "did not rely upon the notion of common purpose or common design, preferring to refer instead to the notion of co-perpetration."[157]

The distinction drawn in this judgment between the use of general principles of law and the use of national legal systems as an additional argument and interpretative aid[158] appears to be grounded in a consensualist justification of general principles according to which it would be necessary, as the Chamber put it, that a given principle is adopted by "most, if not all" states in their domestic legal systems. It is questionable, however, whether the requirement that "most, if not all states" supported a "notion" can ever be met. The differentiation has its merits, however. It points to the varying degrees of conclusiveness which can characterize the result of a comparative law analysis, from a mere "underpinning" in domestic legal practice on the one side of the spectrum to the identification of a well-established general principle of law on the other side of the spectrum.

3. The significance of the legal craft

This section focuses on the legal craft employed by the ICTY. In particular, it highlights the role of default positions (a.) and of the determination of the scope of the rule (b).

a) Default positions

Perspectives, default positions, starting point of an examination and legal techniques are important for the identification of customary international law. It can make a difference whether one seeks to establish a positive rule or the non-existence of a negative rule. In this context, general principles of law which the interpreter might tacitly resort to can play an important

156 ibid para 225.
157 ibid para 201.
158 See also Peat, *Comparative Reasoning in International Courts and Tribunals* 207-208.

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role in defining the default position and thusly inspire the identification of customary international law.[159]

The default position itself can be subject to debate, as the example of duress as defense illustrates. In the *Erdemovic* case[160], the Appeals Chamber rejected by majority the existence of duress an excuse to the killing of innocent people, with judges Cassese and Stephen dissenting. The divergent views adopted by the judges and the prosecutor can be explained by different default positions.

According to the prosecutor, a rule of customary international law had emerged not to recognize duress as excuse in international criminal law.[161] Thus, the underlying general rule was the non-availability of duress as a defense, and those who claimed the opposite, the emergence of an exception, had to bear the burden of reasoning. According to Judges McDonald and Vohrah, neither treaty law nor customary international law determined whether duress would be an excuse.[162] A comparative analysis of municipal legal systems would not yield to a consistent rule either, and in reaching this conclusion, regard had been had "to our mandated obligation under the Statute to ensure that international humanitarian law [...] is not in any way undermined."[163] For Judge Cassese, however, there was a "general rule"[164] to recognize duress. On the basis of an analysis of domestic legal systems and of what could be termed a general conception of law, he refuted the argument of the Prosecutor that a contrary rule of customary international law had emerged.[165]

159 For the example of a general principle on responsibility for breaches of law Kolb, 'The jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their jurisdiction and on international crimes' 265. See also Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung* (Duncker & Humblot 2002) 42-43 on the role of general principles of law for the purposes of verification or falsification of an emerging norm of custom; on a combination of both see also Simma and Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' 313.

160 *Prosecutor v Drazen Erdemović* IT-96-22-A paras 17-18.

161 ibid Diss Op Cassese para 18.

162 ibid Joint Sep Op McDonald and Vohrah paras 51, 55.

163 ibid Joint Sep Op McDonald and Vohrah paras 55, 88 (quote).

164 ibid paras 11, 41. Article 31(1)(d) Rome Statute recognizes duress as a ground for excluding criminal responsibility.

165 ibid Sep and Diss Op Cassese paras 40, 44, 47: "I contend that the international legal regulation of duress in case of murder, as I have endeavoured to infer it from case-law and practice, is both realistic and flexible. It also takes account of social

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The focus on default positions, on the determination of the general rule and the exception thereto, can help to understand and to explain why interpreters come to a different assessment of customary international law and to locate the interpretative disagreement. This can improve the quality of the critical engagement with the specific identification of customary international law.

b) The determination of the scope of the rule

When evaluating international practice in order to identify customary international law, one has to consider different possibilities of how to formulate the rule which describes the practice. The debate on the *Kupreškić* case, for instance, turned on whether the identification of an absolute prohibition of civilian reprisals was justified or whether international practice would be better captured by a rule which imposes very strict conditions on the admissibility of civilian reprisals.

aa) An absolute prohibition of civilian reprisals?

The *Kupreškić* Trial Chamber argued that the protection of civilians and civilian objects against reprisals in article 51(6) and article 52 of the First Additional Protocol to the Geneva Conventions had entered the body of customary international law, even though a number of states, "which include such countries as the U.S., France, India, Indonesia, Israel, Japan, Pakistan and Turkey"[166], were no parties to the First Additional Protocol. According to the Chamber, the lack of "a body of State practice consistently supporting"[167] this rule did not prevent the ascertainment of the customary character of articles 51 and 52 of the First Additional Protocol. In view of the Chamber, the Martens clause[168] "clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the

expectations more than the rule suggested by the Prosecution and that propounded by the majority."

166 *Prosecutor v Kupreškić et al* IT-95-16-T para 527.

167 ibid para 527.

168 "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages

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demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent."[169]

The Chamber also justified its interpretation by recourse to the normative environment and argued that the reprisal killing of innocent persons "can safely be characterized as a blatant infringement of the most fundamental principles of human rights."[170] The Chamber noted that international humanitarian law underwent a "profound transformation [...] under the pervasive influence of human rights".[171] This development was said to be reflected in article 50 (d) ARSIWA which excludes from lawful countermeasures "conduct derogating from basic human rights".[172] Last but not least, with the rise of international criminal law and the prosecution and punishment of war crimes, the possibility of reprisals would no longer necessary in order to induce compliance with international humanitarian law.[173]

This interpretation of the tribunal remained controversial and some commentators argued that the tribunal overemphasized the importance of *opinio juris* and did not pay appropriate regard to international practice and the function reprisals assume in international humanitarian law as means of enforcement in an extra-judicial setting.[174] According to the UK Military Manual published in 2004, "the court's reasoning is unconvincing and the assertion that there is a prohibition in customary law flies in the face of most of the state practice that exists. The UK does not accept the position as stated in this judgment."[175] The authors of the ICRC Customary International Law Study found it difficult to conclude in light of albeit limited contrary practice that there is either a general prohibition or that there is still a right to such reprisals, and noted "a trend in favour of prohibiting such reprisals".[176]

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established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

169 *Prosecutor v Kupreškić et al* para 527.

170 ibid IT-95-16-T para 529.

171 ibid para 529.

172 ibid para 529.

173 ibid para 530.

174 Michael N Schmitt, *Essays on Law and War at the Fault Lines* (Springer 2012) 111-113.

175 Ministry of Defence, United Kingdom, *The manual of the law of armed conflict* (Oxford University Press 2004) para 16.19.2 footnote 62.

176 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law: Rules* 520-523; cf. also Sandesh Sivakumaran, *The law of non-international armed conflict* (Oxford University Press 2012) 452-453: "[S]uch a position is certainly a desirable one and foolish would be the state that undertakes belligerent reprisals against its own

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bb) The conceptual alternative to an absolute prohibition: regulation by stringent criteria

It is argued here that the Chamber cannot be faulted for having employed normative considerations. The identification of customary international law cannot solely rest on the "collection of data about factual patterns" and empirical observations, which are difficult to make in the context of an armed conflict, it must also include a normative justification.[177] The possibility of errors or questionable assessments in the appreciation of normative considerations when identifying customary international law does not of itself suggest that customary international law is too vague in order to be determined. The Chamber's decision invites one, however, to reflect on the importance of the legal craft when translating a practice into the terms of the rule.

Perhaps the Chamber's judgment would have received less criticism if the Chamber had shaped the scope of the rule of customary international law more narrowly or if it had confined itself to applying the stringent criteria which reprisals "even when considered lawful" must meet: the recourse to reprisals must remain the last resort, there must be special precautions which ensure that the decision to resort to such reprisals will be made at the highest political or military level, there must be a proportionate relationship between the reprisals and the initial violations to which the reprisals respond and recourse to reprisals may not be had any longer than necessary. Last but not least, reprisals remain restricted by elementary considerations of humanity.[178] These criteria were also applied by the *Martić* Trial Chamber which did not elaborate on an absolute prohibition and which concluded that the conditions

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population in a non-international armed conflict."; Ambos, *Treatise on International Criminal Law: Vol. I: Foundations and General Part* 390-393, according to whom it is questionable "whether the reprisal prohibition contained in AP I is indeed part of customary international law", endorsing however the number of stringent requirement of the *Kupreškic* Trial Chamber (*Prosecutor v Kupreškić et al* IT-95-16-T para 535): last resort, special precautions, proportionality in the sense of non-excessiveness, and regard to elementary considerations of humanity; Powderly, *Judges and the Making of International Criminal Law* 402 ("unabashed instance of customary international law-making").

177 Milan Kuhli and Klaus Günther, 'Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking* (Springer 2012) 382.

178 See *Prosecutor v Kupreškić et al* IT-95-16-T para 535.

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for lawful reprisals had not been met in the specific case.[179] Judges enjoy a particular authority for the application of law to facts and are to a lesser degree exposed to criticism than when they identify by way of *obiter dictum* an absolute prohibition which would have immediate repercussions beyond the case in question. In the end, the continuous application of the criteria may lead to a greater acceptance of the prohibition of civilian reprisals.

Furthermore, it is interesting to compare the *Kupreškic* judgment with the *Nuclear Weapons* advisory opinion of the ICJ. The Chamber gave the Martens clause a prominent place in legal reasoning, whereas the ICJ recognized the significance of the Martens clause[180] without attributing to it a decisive effect on the interpretation of customary international law:[181] Unlike the Chamber, which arrived at an absolute prohibition of civilian reprisals, the International Court of Justice did not affirm an absolute prohibition of the threat and use of nuclear weapons, but a general prohibition which remains subject to the exception of self-defense where the very survival of a state is at stake.

III. Preliminary evaluation: the stabilizing effect of normative considerations and their limits

The Tribunal's practice gave rise to the question of whether international criminal law has developed an understanding of sources of law which would differ from the understanding in "public international law in the classical sense".[182] William Schabas, for instance, has argued that in spite of "efforts

179 *Prosecutor v Milan Martić* ICTY TC Judgement (12 June 2007) IT-95-11-T paras 465-468; *Prosecutor v Milan Martić* ICTY AC Judgement (8 October 2008) IT-95-11-A paras 263-267.

180 *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 257 para 78, 259 para 84, 260 para 87.

181 See also Kreß, 'The International Court of Justice and the Law of Armed Conflicts' 268, 285; cf. also Antonio Cassese, 'The Martens Clause: half a loaf or simply pie in the sky?' (2000) 11(1) EJIL 214 ("Thus, arguably the Martens Clause *operates within the existing system of international sources* but, in the limited area of humanitarian law, *loosens* the requirements prescribed for *usus*, while at the same time *elevating opinio* (*iuris* or *necessitatis*) to a rank higher than that normally admitted.").

182 Schabas, 'Customary Law or Judge-Made Law: Judicial Creativity at the UN Criminal Tribunals' 100; see also Noora Arajärvi, *The changing nature of customary international law: methods of interpreting the concept of custom in international criminal tribunals* (Routledge 2014) 159 (affirming the existence of general and regime-specific secondary rules of recognition which would derive from the con-

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to anchor this normative process in earlier case law [...] overall, customary international law mainly seems to provide a convenient license of judicial law-making, a process similar in many respects to the creation of judge-made rules of the English common law."[183]

This study presents a more cautious assessment. Certainly, the jurisprudence brought to fore the interpretation of customary international law. It became clear that custom is not necessarily always just a general practice accepted as law ready to be simply applied but that it requires, just as written law, interpretation, the legal craft and the specification of general rules to the particular case. Not every specification and concretization must be fully determined by a general practice accepted as law. As the Appeals Chamber held:

> "Where a principle can be shown to have been so established (by reference to practice and opinio juris), it is not an objection to the application of the principle to a specific

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stituting treaty); see also Ratner, 'Sources of International Humanitarian Law and International Criminal Law: War/Crimes and the Limits of the Doctrine of Sources' 916 ff. (affirmative); skeptical: Jean d'Aspremont, 'Théorie des sources' in Raphael van Steenberghe (ed), *Droit international humanitaire: un régime spécial de droit international?* (Bruylant 2013) 99-101; certain scholars focus on one source, see on customary international law Schlütter, *Developments in customary international law: theory and the practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia*; Arajärvi, *The changing nature of customary international law: methods of interpreting the concept of custom in international criminal tribunals*; Micaela Frulli, 'The Contribution of International Criminal Tribunals to the Development of International Law: The Prominence of opinio juris and the Moralization of Customary Law' (2015) 14 The Law and Practice of International Courts and Tribunals 80 ff.; on general principles see Raimondo, *General principles of law in the decisions of international criminal courts and tribunals*; Jain, 'Comparative International Law at the ICTY: The General Principles Experiment' 486 ff.

183 Schabas, 'Customary Law or Judge-Made Law: Judicial Creativity at the UN Criminal Tribunals' 100; see also Arajärvi, *The changing nature of customary international law: methods of interpreting the concept of custom in international criminal tribunals* 148, proposing as new concept "declarative international law" for "norms that are announced, declared, or desired to form part of international law – but not found in widespread practice or being enforced by states"; the term "declarative international law is borrowed from Hiram E Chodosh, 'Neither Treaty nor Custom: The Emergence of Declarative International Law' (1991) 26 Texas International Law Journal 87 ff.

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situation to say that the situation is new if it reasonably falls within the application of the principle."[184]

As Nollkaemper has noted, the jurisprudential distinction between interpretation, application and development of the law can sometimes be rather thin and a difference of degree.[185] Given that the ICTY's jurisprudence constituted a landmark moment for international criminal law after dormant decades, the judicial craft and creativity were very visible in developing the modern case-law.[186] Hence, the relative age of a legal regime is one factor which scholars might want to consider when comparing the identification of customary international law in different contexts. Recourse to general principles of international law helped the Tribunal in identifying customary international law and in guiding the subjective element inherent in any interpretation, application and concretization of the law to a specific set of facts. One can, therefore, say that normative considerations had a stabilizing influence and provided a safeguard against arbitrary interpretations.[187]

The selectivity with respect to the principles and the contestability of legal interpretations are the downside to the tribunal's lengthy judgments and its transparency as to the justification of certain interpretations of customary international law by recourse to general principles. The *Furundžija* case highlights the broad interpretative range that was given to the ICTY in the absence of legally binding written definitions of the different crimes. The Trial Chamber based the definition of rape on a general principle of criminal law common to the major legal systems of the world.[188] Since it was not possible to decide on the basis of this source whether forced oral penetration is a crime as opposed to a sexual assault,[189] the Trial Chamber took recourse to

184 *Prosecutor v Milan Milutinović and others* IT-01-47-AR72 para 12.

185 André Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' in Gideon Boas and William Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff Publishers 2003) 291.

186 Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public* 228; Powderly, *Judges and the Making of International Criminal Law* 353.

187 Raimondo, *General principles of law in the decisions of international criminal courts and tribunals* 172; cf. also Kolb, 'Principles as Sources of International Law (With Special Reference to Good Faith)' 9.

188 *Prosecutor v Anto Furundžija* IT-95-17/1-T para 177, para 181; for an overview of the jurisprudence see Peat, *Comparative Reasoning in International Courts and Tribunals* 187 ff.

189 *Prosecutor v Anto Furundžija* para 182.

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the concept of human dignity which the Trial Chamber identified as "the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law" and which "has become of such paramount importance as to permeate the whole body of international law".[190] It then arrived at a definition of rape which included forced oral penetration.[191]

The lack of representativeness of the municipal legal systems from which principles would be drawn is discussed as a point of concern.[192] This concern, while being valid in principle, should not be exaggerated, however.[193] Firstly, whether a general principle of law can be applied at the international level depends on its fit to the international legal structures of the context in which it might be applied;[194] and this fit is not necessarily dependent on the principle's representativeness among municipal jurisdiction. Jaye Ellis has related the debate in international criminal law to insights from the discipline of comparative law and cast doubts on the idea that a greater representativeness in the selection of today's diverse municipal legal systems would be simply to achieve or could justify general principles of law on the basis of a voluntarist account.[195] Taking into account legal orders from several "legal families" may be intuitively appealing, yet the view that a meaningful classification according to legal families is possible is not unanimously shared within

190 ibid para 183.

191 ibid para 185; upheld by *Prosecutor v Anto Furundžija* ICTY AC Judgement (21 July 2000) IT-95-17/1-A para 215; see for a subsequent modification *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* IT-96-23-T & IT-96-23/1-T paras 439-453, arguing that domestic law "may disclose 'general concepts and legal institutions' which, if common to a broad spectrum of national legal systems, disclose an international approach to a legal question which may be considered as an appropriate indicator of the international law on the subject" (para 439). The chamber identified as legally protected value not the absence of violence but "sexual autonomy" (para 457).

192 Raimondo, *General principles of law in the decisions of international criminal courts and tribunals* 179-183.

193 Cf. also *Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur* para 28, advocating a "pragmatic approach", covering a "wide and representative comparative analyses, covering different legal families and regions of the world" without requiring that a principle must be present in every legal order.

194 Cf. also Megumi, 'The New Recipe for a General Principle of Law: Premise Theory to "Fill in the Gaps"' 10 ff.; see above, Fn. 149.

195 Jaye Ellis, 'General Principles and Comparative Law' (2011) 22(4) EJIL 953 ff., 970-971.

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comparative law theory,[196] and the possibility to borrow legal principles intrinsically connected to a particular legal culture and to transplant them into another system of law is contested as well.[197] According to Ellis, a more thoroughly applied comparative legal research could have supported some of the tribunal's conclusions in the just mentioned *Furundžija* case.[198] Given the difficulties to ever identify a general principle universally recognized in domestic legal orders, Ellis has suggested to consider the idea that "the validity of a general principle would have to be grounded in the soundness and persuasiveness of legal argumentation rather than in claims about the objective nature of law or implicit state consent".[199]

The contestability of the identification and application of customary international law or general principles of law does not necessarily have to go at the detriment of a judgment's persuasiveness or even legitimacy. If one wanted to reduce the room for judicial creativity, one must resort to treatymaking and negotiate a convention. In fact, this was precisely one objective when drafting the Rome Statute and in particular when drafting an exhaustive list of crimes and the corresponding elements of crimes. The next section will explore the interrelationship of sources in the context of the Rome Statute. As will be demonstrated however, a treaty can reduce, but not necessarily eliminate the need for doctrinal considerations and recourse to customary international law and general principles of law.

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196 Jain, 'Comparative International Law at the ICTY: The General Principles Experiment' 491; Neha Jain, 'Judicial Lawmaking and General Principles of Law in International Criminal Law' (2016) 57(1) Harvard International Law Journal 133-137; Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45 American Journal of Comparative Law 19 ff., advocating a classification according to the relationship between law, politics and tradition.

197 In favour Alan Watson, 'Legal Change: Sources of Law and Legal Culture' (1983) 131 University of Pennsylvania Law Review 1121 ff.; contra Pierre LeGrand, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht Journal of European and Comparative Law 111 ff.; according to Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61(1) The Modern Law Review 11 ff., the transplant would cause "irritations" in the legal system into which it was transplanted.

198 Ellis, 'General Principles and Comparative Law' 968, noting a development in municipal legal orders to define this crime from the perspective of the victim.

199 ibid 971 ("An advantage of this approach is its honesty. Rather than asserting the commonality of a general principle without providing evidence in support of this assertion, judges could present the actual line of reasoning that led them to identify a particular principle as useful or relevant.").

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D. The Interrelationship of Sources and the Rome Statute

This section will examine the interrelationship of sources and its development in the context of the Rome Statute. This section will first give an overview of those articles of the legal regime which are considered to be of relevance for an examination of the interrelationship of sources (I.). This section will then address the relationship between the general rules of interpretation and the Rome Statute (II.) and discuss the question of a potential conflict between customary international law and the Rome Statute with respect to the modes of liability (III.) The section will then examine how the ICC approached immunities under customary international law (IV.).

I. The legal regime

The Rome Statute was adopted in 1998 and entered into force in 2002.[200] It not only establishes the International Criminal Court but also defines the crimes over which the ICC has jurisdiction. The ICC's jurisdiction extends to crimes committed on the territory of a state party (article 12(2)(a) Rome Statute), even when committed by citizens of non-State parties, crimes which nationals of a state parties were accused of (article 12(2)(b) Rome Statute), crimes on the territory of a non-State party if the non-State party accepted the exercise of the ICC's jurisdiction (article 12(3) Rome Statute) and situations referred by the UN Security Council (article 13(b) Rome Statute).

According to article 5 Rome Statute, the ICC has jurisdiction with respect to the crime of genocide (article 6 Rome Statute), crimes against humanity (article 7 Rome Statute), war crimes (article 8 Rome Statute) and, based on an amendment, the crime of aggression (article 8*bis* Rome Statute). Those articles do not include an opening clause which would give the ICC jurisdiction over further crimes under general international law. The list of crimes can only be, and successfully has been, expanded through amendments.[201]

200 Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

201 *Assembly of States Parties to the Rome Statute, Amendments to article 8 of the Rome Statute, 6 October 2010* RC/Res.5 (Article 8(2)(e)(xiii), (xiv)); *Assembly of States Parties to the Rome Statute, Amendments to article 8 of the Rome Statute, 14 December 2017* ICC-ASP/16/Res.4 (articles 8(2)(b)(xxvii), (xxviii), (xxix), (e)(xvi), (xvii), (xviii)); *Assembly of States Parties to the Rome Statute, Amendments to article 8 of the Rome Statute, 6 December 2019* ICC-ASP/18/Res.5 (article 8(2)(e)(xix)).

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Such amendments will be subject to article 121(5) Rome Statute according to which the Court shall not exercise its jurisdiction regarding a crime covered by an amendment when committed on the territory or by nationals of a State party which did not accept the amendment in question.[202] In relation to the crime of aggression, the exercise of jurisdiction is subject to a special regime laid down in articles 15*bis* and 15*ter*.[203]

The Rome Statute leaves room for the further development of customary international law. Article 10 of the Rome Statute stipulates that "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." This provision's inclusion responded to concerns that the treatification of international criminal law would lower the level of protection under customary international law and preempt the further development of custom.[204] Simi-

202 Article 121(5) derogates to this extent from article 12(2)(a), Andreas Zimmermann and Meltem Şener, 'Chemical Weapons and the International Criminal Court' (2014) 108 American Journal of International Law 444; Andreas Zimmermann, 'Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties' (2012) 10 JICJ 217-219; for a different view see Astrid Reisinger Coracini, ''Amended Most Serious Crimes': A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court?' (2008) 21 Leiden Journal of International Law 718; cf. Claus Kreß and Leonie von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 JICJ 1197-1198, 1214-1215. The Assembly of State Parties, when introducing the amendments to article 8, "*confirm[ed]* its understanding that in respect to this amendment the same principle that applies in respect of a State Party which has not accepted the amendment applies also in respect of States that are not parties to the Statute", see *Assembly of States Parties to the Rome Statute, Amendments to article 8 of the Rome Statute, 6 October 2010*; *Assembly of States Parties to the Rome Statute, Amendments to article 8 of the Rome Statute, 14 December 2017*; *Assembly of States Parties to the Rome Statute, Amendments to article 8 of the Rome Statute, 6 December 2019*.

203 Cf. in particular article 15*bis*(2), (4). Cf. Marko Milanovic, 'Aggression and Legality: custom in Kampala' (2012) 10 JICJ 177 ff., see also 183-186 on the question of whether the definition in article 8*bis* reflects custom.

204 Alain Pellet, 'Applicable Law' in Antonio Cassese, Paola Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) vol 2 1083 (on normative regressions); Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 EJIL 157, according to whom "the Statute itself seems to postulate the future existence of two possible regimes or *corpora* of international criminal law, one established by the Statue and the other laid down in general international criminal law; cf. Leila Nadya Sadat, 'Custom, Codification and some thoughts about

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larly, article 22(3) Rome Statute provides that article 22 on *nullum crimen sine lege* "shall not affect the characterization of any conduct as criminal under international law independently of this Statute." Article 10 and article 22(3) indicate that rules of international criminal law may exist outside the Statute and that the Statute, therefore, allows for the possibility that it might not be wholly reflective of customary international law or freeze the latter's further development. Furthermore, according to article 31 Nr. 3 of the Statute, the ICC may consider a ground for excluding criminal responsibility other than those referred to in the Statute where such a ground is derived from applicable law as set forth in article 21.[205] The Statute thus envisions the possibility to include defenses that have been developed in international law.

Article 21 sets forth the applicable law. It stipulates:

> "1. The Court shall apply:
> a. In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
> b. In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
> c. Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."

Even though article 21 does not include the term customary international law, its reference to principles and rules of international law has been read

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the relationship between the two: Article 10 of the ICC Statute' (2000) 49(4) DePaul Law Review 912 (critical of "[h]aving law inside and outside the Statute that differ from each other"); see also Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press 2014) 269, pointing out, as one effect of article 10, that article 10 "ensures that States can continue to take positions on the (non-)customary status of certain norms by distinguishing between the Rome regime and general international law".

205 Akande, 'Sources of International Criminal Law' 45, 50.

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as a reference to customary international law.[206] Commentators explain the lack of an explicit reference with the concern that customary international law may seem to lack sufficient precision in the context of international criminal law[207], which is interesting against the background of the history of international criminal law and the role customary international law has played in the jurisprudence of the tribunals.

It is debated whether general principles of law to which article 38(1)(c) ICJ Statute refers are covered by article 21(1)(b) or (c) of the Rome Statute.[208] The drafting process took place against the background of the ILC draft which provided that the court shall apply the draft statute, applicable treaties and the rules and principles of international law as well as applicable rules of national law.[209] The 1994 ILC commentary clarified that "the expression 'principles and rules' of general international law includes general principles of law [...]"[210] During the negotiation of the Rome Statute, delegates held different views on whether the new court shall be empowered to directly apply national law.[211] Article 21 represents a compromise in that the ICC may derive general principles from national laws of legal systems of the world, including the laws of the state that would normally exercise jurisdiction over

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206 Margaret M deGuzman, 'Article 21 Applicable Law' in Kai Ambos (ed), *Rome Statute of the International Criminal Court* (4th edn, CH Beck 2022) 1138-40; William A Schabas, *The International Criminal Court* (2nd edn, Oxford University Press 2016) 522; for a critique of the lack of a specific reference, which was also missing in the ILC drafts, see Pellet, 'Applicable Law' 1067 ff.; Johan Verhoeven, 'Article 21 of the Rome Statute and the ambiguities of applicable law' (2002) 22 Netherlands Yearbook of International Law 12.

207 deGuzman, 'Article 21 Applicable Law' 1138; see also *United Nations Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, Proceedings of the Preparatory Committee during March-April and August 1996* (13 September 1996) UN Doc A/51/22 para 190 ("[D]oubts were expressed by some delegations as to whether customary international law covered the issue of punishment in relation to individuals held responsible for their acts or omissions.").

208 See deGuzman, 'Article 21 Applicable Law' 1131, 1138-44; Schabas, *The International Criminal Court* 514-5, 519 ff.

209 *ILC Ybk (1993 vol 2 part 2)* 111; *ILC Ybk (1994 vol 2 part 2)* 51; see above, p. 473.

210 ibid 51 para 2.

211 *United Nations Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, Proceedings of the Preparatory Committee during March-April and August 1996* paras 187-8.

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the crime in question.[212] Interpreting article 21 Rome Statute in light of the ILC draft, William Schabas has argued that article 21(1)(b) comprises the general principles of law in the sense of article 38(1)(c) ICJ Statute, whereas article 21(1)(c) Rome Statute is concerned with general principles of national criminal law.[213] According to Margaret deGuzman, article 21(1)(b) Rome Statute encompasses not only custom and general principles of law, but also principles "even when they are neither derived from national laws nor part of customary international law", such as principles intrinsic to the idea of law, principles valid through all kinds of societies, and principles of justice.[214] According to a third interpretation, the classification in article 21(1)(a)-(c) Rome Statute corresponds to the classification in article 38(1)(a)-(c) ICJ Statute, in the sense that article 21(1)(b) refers exclusively to customary international law and article 21(1)(c) refers to general principles of law.[215] The ICC has, in an earlier decision, discussed the existence of a general principle of law with reference to article 21(1)(c) Rome Statute, following, however, the categorization of the prosecutor.[216] The *Bemba* Trial Chamber held that the principles and rules of international law in the sense of article

212 Per Saland, 'International Criminal Law Principles' in Roy S Lee (ed), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results* (Kluwer 1999) 214-5.

213 Schabas, *The International Criminal Court* 514-5, 519 ff.; see also Ambos, *Treatise on International Criminal Law: Vol. I: Foundations and General Part* 126-30 (article 21(1)(c) would refer to principles in the comparative law sense); cf. also Vladimir-Djuro Degan, 'On the Sources of International Criminal Law' (2008) 4(1) Chinese Journal of International Law 52-3.

214 deGuzman, 'Article 21 Applicable Law' 1139; deGuzman borrows those categories of principles from Schachter, *International law in theory and practice: general course in public international law* 75.

215 Alain Pellet, 'Revisiting the Sources of Applicable Law before the ICC' in Margaret M deGuzman and Diane Marie Amann (eds), *Arcs of Global Justice: Essays in Honour of William A. Schabas* (Oxford University Press 2018) 239-41; Werle and Jeßberger, *Principles of International Criminal Law* 88; Verhoeven, 'Article 21 of the Rome Statute and the ambiguities of applicable law' 8-9 (discussing and rejecting the interpretation that article 21(1)(b) refers not only to customary international law but to general principles of international law that are different from customary international law); Akande, 'Sources of International Criminal Law' 51-2; Raimondo, *General principles of law in the decisions of international criminal courts and tribunals* 150.

216 *Situation in the Democratic Republic of Congo* para 32; Schabas, *The International Criminal Court* 520 f.; deGuzman, 'Article 21 Applicable Law' 1140.

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21(1)(b) "are generally accepted to refer to customary international law", without specifically discussing general principles of law.[217]

In theory, the classification may matter in that article 21(1)(c) authorizes the ICC to take recourse to general principles of law in situations in which the sources referred to in article 21(1)(a) and (b) Rome Statute do not provide for an answer, provided that the general principle in question is not inconsistent with the Statute and international law. In other words, recourse to article 21(1)(c) depends on different conditions than article 21(1)(b). In practice, however, the difference does not seem to matter too much. The ICC seems to stress more the commonality of article 21(1)(b) and (c) when it refers to both provisions as "subsidiary sources" in relation to the Statute.[218] In its earlier case-law, the ICC rejected the Prosecutor's submission that there was a general principle of law or a rule of international law which would have permitted the practice of witness proofing and preparation to the prosecution. The TC noted that the Prosecution did not refer to examples from the Roman-Germanic legal system and pointed to the differences between the procedural framework of the *ad hoc* tribunals and the ICC system.[219]

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217 *Prosecutor v Jean-Pierre Bemba Gombo* ICC TC III Judgment pursuant to Article 74 of the Statute (21 March 2016) ICC-01/05-01/08-3343 para 71.

218 See for instance *Situation in the State of Palestine* ICC PTC I Decision on the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine (5 February 2021) ICC-01/18-143 para 88 (the ICC PTC held that it was "not necessary to have recourse to subsidiary sources of law under article 21(1)(b) and (c) of the Statute"); on the terminology of "subsidiary sources" see also *Prosecutor v Germain Katanga* ICC TC II Judgment pursuant to Article 74 of the Statute (7 March 2014) ICC-01/04-01/07-3436-tENG paras 39-40; *Prosecutor v Jean-Pierre Bemba Gombo et al* ICC AC Judgment (8 March 2018) ICC-01/05-01/13-2275-Red para 76; see also *Prosecutor v William Samoei Ruto et al* ICC PTC II Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012) ICC-01/09-01/11-373 para 289 ("[T]he chamber should not resort to applying article 21(1)(b), unless it has found no answer in paragraph (a)").

219 *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06-772 paras 29, 35 (the Prosecution's argument that witness proofing was a widely accepted practice in international criminal law is considered under article 21(1)(b), whereas the argument that witness proofing is a general principle of law is considered under article 21(1)(c) Rome Statute); *Prosecutor v Thomas Lubanga Dyilo* ICC TC I Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (30 November 2007) ICC-01/04-01/06-1049 para 41 (witness proofing no general principle of law pursuant to Article 21(1)(c) of the Statute), para 44 (considering *ad hoc* tribunals and noting that the procedural issue of witness proofing "would

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Article 21(3) reminds the interpreter that an interpretation must be consistent with internationally recognized human rights.[220] It thus not only points to the applicable law but also guides the interpreter in interpreting and applying the law. So far, article 21(3) has been used by the Court to bring in human rights law in the interpretation of the Statute.[221] Another provision relevant to the Statute's interpretation is article 22(2) which stipulates that the definition of a crime shall be strictly construed and shall not be extended by analogy and, in case of doubt, be interpreted in favour of the person being investigated, prosecuted or convicted.[222]

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not, *ipso facto*,prevent all procedural issues from scrutiny under Article 21(1)(b), the Chamber does not consider the procedural rules and jurisprudence of the *ad hoc* Tribunals to be automatically applicable to the ICC without detailed analysis"); cf. *Prosecutor v Milutinović et al* ICTY TC Decision on Ojdanic motion to prohibit witness proofing (12 December 2006) IT-05-87-T paras 11-7 (explaining why the chamber of the ICTY views the practice of witness proofing differently than the chamber of the ICC; for an overview see Megumi, 'The New Recipe for a General Principle of Law: Premise Theory to "Fill in the Gaps"' 15-6.

220 Pellet termed this the imposition of human rights as "super-legality", Pellet, 'Applicable Law' 1067 ff.; Verhoeven, 'Article 21 of the Rome Statute and the ambiguities of applicable law' 12; on the debate on whether the reference to "internationally recognized human rights" includes regional human rights, see Stephen Bailey, 'Article 21(3) of the Rome Statute: a Plea for Clarity' (2014) 14(3) International Criminal Law Review 513 ff., advocating a non-regional approach; Daniel Sheppard, 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21 (3) of the Rome Statute' (2010) 10(1) International Criminal Law Review 43 ff., advocating a territorial approach by which human rights treaties regionally applicable to the dispute should inform the interpretation of article 21(3); see also James Crawford, 'The Drafting of the Rome Statute' in Philippe Sands (ed), *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge University Press 2003) 129-133 (on human rights of the accused); on the ICC practice see Emma Irving, 'The other side of the Article 21(3) coin: Human rights in the Rome Statute and the limits of Article 21(3)' (2019) 32 Leiden Journal of International Law 837 ff.

221 Cf. for an overview deGuzman, 'Article 21 Applicable Law' 1146 ff.; see *Prosecutor v Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* ICC AC Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence' (1 November 2021) ICC-02/05-01/20-503 paras 83, 86-7 on the interpretation of the *nullum crimen* principle enshrined in article 22(1) of the Statute in light of article 21(3).

222 On the character as interpretative principle in the context of the Rome Statute see recently Jean d'Aspremont, 'The Two Cultures of International Criminal Law' in

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In a formalistic way, article 21 provides for a formal hierarchy of sources and even a legal basis for the court to rely on its previous decisions.[223] This regime is intended to restrict judicial creativity[224], but since these rules are in the hands of the ICC, which can refer to other sources under the general rules of treaty interpretation, the ICC still enjoys ample latitude.[225] It, therefore,

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Kevin Jon Heller and others (eds), *Oxford Handbook of International Criminal Law* (Oxford University Press 2020) 419-420.

223 For the view that article 33 of the ILC draft was considered as too vague see *United Nations Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, Proceedings of the Preparatory Committee during March-April and August 1996* para 188. First reactions to article 21 of the Rome Statute were critical, see in particular Pellet, 'Applicable Law' 1057, speaking of a "veritable brainwashing operation led by criminal lawyers", resulting into the idea that general international law would be too vague to satisfy the nullum crimen principle; Pellet, 'Revisiting the Sources of Applicable Law before the ICC' 231; for the position that codification was required see Mahmoud Cherif Bassiouni and Christopher L Blaskesley, 'The Need for an International Criminal Court in the New International World Order' (1992) 25(2) Vanderbilt Journal of Transnational Law 175-176; for critiques of article 21 see also Robert Cryer, 'Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources' (2009) 12(3) New Criminal Law Review: An International and Interdisciplinary Journal 393 ff. (arguing that article 21 would establish hierarchies which would not "comport with general international law" and that the "interrelationship of sources is more complex than article 21's apparently rigid hierarchy implies", 393); Verhoeven, 'Article 21 of the Rome Statute and the ambiguities of applicable law' 11 (stressing that general international law should inform the interpretation of the treaty, even if it was "not strictly applicable"); see also Bruno Simma and Andreas L Paulus, 'Le rôle relatif des différentes sources du droit international pénal: dont les principes généraux de droit' in Hervé Ascensio, Emmanuel Decaux, and Alain Pellet (eds), *Droit international pénal* (Pedone 2000) 55 ff.; see also Schabas, *The International Criminal Court* 526 ("The reference to the Court's case law hardly seems necessary.").

224 See for instance Leena Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21(3) EJIL 571; Powderly, *Judges and the Making of International Criminal Law* 464; on the drafting of article 21 see deGuzman, 'Article 21 Applicable Law' 1131 f.

225 According to Gilbert Bitti, 'Article 21 and the Hierarchy of Sources of Law before the ICC' in Carsten Stahn (ed), *The law and practice of the International Criminal Court* (Oxford University Press 2015) 443 ff., the ICC was more faithful to the textualism indicated by article 21 of the Rome Statute in 2008 than in 2014. According to Joseph Powderly, 'The Rome Statute and the Attempted Corseting of the Interpretive Judicial Function: Reflections on Sources of Law and Interprative Technique' in Carsten Stahn (ed), *The law and practice of the International Criminal Court* (Oxford

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remains important to observe how the court uses this latitude and to what extent its reasoning will be confined to the Rome Statute or will include references to general international law.

II. The interrelationship between the general rules of interpretation and the Rome Statute

1. Article 21 Rome Statute and the general rules of interpretation

The interpretation of the Rome Statute and the just stated provisions is governed by the general rules of treaty interpretation as set forth in articles 31-33 VCLT.[226] The abstract relationship between the general rules of interpretation and the applicable law as set forth in article 21 Rome Statute has been addressed by the *Katanga* Trial Chamber and the *Bemba* Trial Chamber.

The *Katanga* Trial Chamber emphasized that "article 21 of the Statute establishes a hierarchy of the sources of applicable law" and that the Chamber "shall therefore apply the subsidiary sources of law under article 21(1)(b) and 21(1)(c) of the Statute only where it identifies a lacuna in the provisions of the Statute".[227] Turning to the general rules of interpretation, the Chamber rightly noted that article 31 VCLT "sets forth *one* general rule of interpre-

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University Press 2015) 497 ff., "the Rome Statute's attempted corseting of the creative interpretative freedom of the bench through the inclusion of a set of specific 'disciplining' rules [...] proved to be a failure"; see already Pellet, 'Applicable Law' 1053; see also d'Aspremont, 'The Two Cultures of International Criminal Law' 414 ff.; deGuzman, 'Article 21 Applicable Law' 1133; Cryer, 'Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources' 393.

226 Cf. *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08-3343 paras 75-7 ("the interpretation of the Statute is governed, first and foremost, by the VCLT, specifically Articles 31 and 32"); *Situation in the Democratic Republic of Congo* ICC-01/04-168 para 33; *Prosecutor v Germain Katanga* ICC AC, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages" (27 May 2008) ICC-01/04-01/07-522 para 38; *Prosecutor v Germain Katanga* ICC-01/04-01/07-3436-tENG paras 43-5; *Prosecutor v Thomas Lubanga Dyilo* ICC TC I Judgment pursuant to Article 74 of the Statute (14 March 2012) ICC-01/04-01/06-2842 para 601; cf. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* [2016] ICJ Rep 3, 19 para 35 ("Article 31 to 33 of the Convention reflect rules of customary international law", with further references); Schabas, *The International Criminal Court* 517.

227 *Prosecutor v Germain Katanga* ICC-01/04-01/07-3436-tENG para 39.

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tation"[228], but it then held that "various ingredients - the ordinary meaning, the context, and the object and purpose-" of only article 31(1) shall "be considered together in good faith" without any hierarchical or chronological order between those ingredients.[229] The means of interpretation set forth in article 31(3)(c) VCLT, however, should be referred to in what seems to be a subsidiary fashion, namely "[w]here the founding texts do not specifically resolve a particular issue",[230] including, for instance, when "the text of the Statute itself refers at times to external sources."[231] For this purpose, the Chamber noted that it might be necessary "to refer to the jurisprudence of the ad hoc tribunals and other courts on the matter."[232] With respect to article 7 on crimes against humanity, the Trial Chamber held that "interpretation of the terms of article 7 of the Statute and, where necessary, the Elements of Crimes, requires that reference be had to the jurisprudence of the ad hoc tribunals insofar as that jurisprudence identifies a pertinent rule of custom, in accordance with article 31(3)(c) of the Vienna Convention. Of note in this connection is that the negotiation of the definition of a crime against humanity was premised on the need to codify existing customary law."[233]

The *Bemba* Trial Chamber explained one year after the *Katanga* Trial Chamber that the jurisprudence of the *ad hoc* tribunals may be relevant not only in the interpretation of the Statute according to customary international law as set forth in article 31(3)(c) VCLT, but also in the context of article 21(1)(b). The Chamber acknowledged that "the boundaries between the two approaches may be fluid" and emphasized "that it must not use the concept of treaty interpretation to replace the applicable law".[234] The Chamber summa-

228 *Prosecutor v Germain Katanga* para 44.

229 ibid para 45.

230 ibid para 47. Cf. already Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' 574-575 on *Prosecutor v Omar Hassan Ahmad Al Bashir* ICC PTC I Decision on the Prosecution's Application for a Warrant of Arrest (4 March 2009) ICC-02/05-01/09-3 para 126.

231 *Prosecutor v Germain Katanga* ICC-01/04-01/07-3436-tENG para 48.

232 ibid paras 47 (quote), 1100.

233 ibid para 1100.

234 *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08-3343 para 79. Cf. for a similar formula *Oil Platforms* [2003] ICJ Rep 161 Sep Op Higgins 225 para 49: "[The ICJ] has rather invoked the concept of treaty interpretation to displace the applicable law."; Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' 574.

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rized that it "applies Article 21 of the Statute, in combination with Articles 31 and 32 of the VCLT [...] in full respect of the limitations provided for in Articles 21(3) and 22(2)."[235]

Both Trial Chambers associated customary international law as means of interpretation or as applicable law with the international criminal tribunals and their potential significance for the interpretation of the Rome Statute. The *Bemba* Trial Chamber is correct in that the rules of interpretation and the applicable law are distinct concepts, which, it is here submitted, are also interrelated ones: article 21(1)(a) determines that the ICC shall apply "[i]n the first place this Statute, Elements of Crimes and its Rules of Procedure and Evidence", and the Statute is to be interpreted according to the general rules of interpretation.[236] However, article 31(3)(c) VCLT and customary international law shall be employed always in the interpretation of a treaty and not only when, to borrow a formula from the *Katanga* Trial Chamber, the "texts do not specifically resolve a particular issue", as the question of whether the text does or does not resolve a particular issue is itself subject to interpretation. Of course, the specific relevance of this means of interpretation may differ from case to case.[237]

2. The crimes of the Rome Statute and customary international law

Whereas the foregoing remarks concerned the abstract relationships between the applicable law, the rules of interpretation and the Rome Statute, the relationship in specific cases will depend on whether the provision in question of the Rome Statute was intended to align with or depart from customary international law.

With respect to crimes, the question has arisen whether the Rome Statute should be read as a procedural Statute which refers to crimes as they exist in customary international law or whether it should be understood as a

235 *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08-3343 para 86.

236 For an in-depth study see Grover, ‘A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court’ in particular 573-577 (on a presumption of interpretation consistent with custom); Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court*; see also Darryl Robinson, ‘The Identity Crisis of International Criminal Law’ (2008) 21 Leiden Journal of International Law 935.

237 On the single-combined operation see above, p. 406.

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substantive statute which defines for the purposes of the Statute the crimes.[238] The drafters intended to codify war crimes which were considered to be part of customary international law.[239] Commentators, however, hold different views on the extent to which the Rome Statute in fact reflects customary international law.[240]

238 Marko Milanović, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' (2011) 9 JICJ 27 ff.

239 Darryl Robinson and Herman von Hebel, 'War crimes in internal conflicts: Article 8 of the ICC Statute' (1999) 2 Yearbook of International Humanitarian Law 194 ("Delegations agreed that the definitions of these crimes must be articulated in the Statute and that those definitions must reflect existing customary law", with further references); Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' 109 ("States have, in their overwhelming and steadily growing majority solemnly expressed the view that the war crimes list in Article 8(2) (c) and e is based on customary law"). According to Milanović, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' 32 footnote 25, states held different views on whether the crimes had to be part of customary international law, with reference to *United Nations Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, Proceedings of the Preparatory Committee during March-April and August 1996* 16: "several delegations" argued that the crimes "should be defined by enumeration of the specific offences rather than by reference to the relevant legal instruments, to provide greater clarity and transparency, to underscore the customary law status of the definitions, *to avoid a lengthy debate on the customary law status* of various instruments, to avoid possible challenges by States that were not parties to the relevant agreements, to avoid the difficulties that might arise if the agreements were subsequently amended and to provide a uniform approach to the definitions of the crimes irrespective of whether they were the subject of a convention [...] *Several delegations held the view that the Statute should codify customary international law and not extend to the progressive development of international law.*" (italics added). See also ibid para 59 (on the customary status of the crime of genocide).

240 Several commentators note, in particular with respect to crimes in NIACs, that the Statute remains below CIL, see for instance, Werle and Jeßberger, *Principles of International Criminal Law* 508 para 1342 (the delayed repatriation of prisoners of war which is a grave breach under Article 85(4)(b) Add. Prot. I is not regulated by the Statute), 540 para 1432 (no equivalent to Article 8(2)(b)(ii) for NIACs), 564 para 1504 (the Statute's provisions on forbidden methods and means of warfare in NIACs lag behind CIL), 577 para 1545 (use of weapons are criminalized under CIL to a greater extent than under the Rome Statute); O'Keefe, 'An "International Crime Exception" to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, not Likely' 121 (Article 8 does not represent the customary position); cf. also Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' 150-152; Robert Cryer, 'Of Custom, Treaties, Scholars and the Gavel:

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As far as only parties to the Rome Statute are concerned, the debate on whether the Rome Statute is fully reflective of customary international law might appear to be theoretical, as it could be said that the ICC can just interpret and apply the Statute. In this sense, the *Ntaganda* Trial Chamber explicitly argued that article 8 Rome Statute can be applied regardless of its relationship to customary international law.[241] However, such a treaty-based approach has its limits, in particular when non-State parties are involved and the Court's jurisdiction will be based on the *ad hoc* declaration of a non-party State under Article 12(3) or a referral of a situation by the UNSC according to article 13(b) Rome Statute. The view that in such situations the *nullum crimen* principle will require the ICC to apply article 8 only to the extent

The Influence of International Criminal Tribunals on the ICRC Customary Law Study' (2006) 11 Journal of Conflict and Security Law 251 ("the Rome Statute is not to be taken as anything more than a base-level of what customary law is"); Beth van Schaack, 'Mapping War Crimes in Syria' (2016) 92 International Law Studies 295-298; cf. Schabas, *The International Criminal Court* 221 (arguing that Article 8 also recognized new crimes, such as the recruitment of child soldiers and attacks on peacekeepers); for a different view as to the customary prohibition of child recruitment see *Prosecutor v Sam Hinga Norman* SCSL AC Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (31 May 2004) SCSL-2004-14-AR72(E) para 53; cf. also *Decision on the Prosecution Request for a Ruling on Jurisdiction under Article 19(3) of the Statute* PTC I (6 September 2018) ICC-RoC46(3)-01/18-37 para 45 (substantial parts of Articles 7 and 8 constituted "pure codification" elements, whereas "other provisions represent a 'progressive evolution' of custom."). See also Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 302: "On balance [...] [there is support for] the idea that the crimes in the Rome Statute are generally or largely reflective of custom. Departures may be discerned that are progressive and retrogressive relative to custom, and the Statute may not reflect all crimes that exist under customary international law." Cf. Michael Cottier and Matthias Lippold, 'Article 8' in Kai Ambos (ed), *Rome Statute of the International Criminal Court: a commentary* (4th edn, Beck 2021) para 48.

241 *Prosecutor v Bosco Ntaganda, ICC TC VI Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9 (4 January 2017)* ICC-01/04-02/06-1707 para 35: "The Chamber observes that the Statute is first and foremost a multilateral treaty which acts as an international criminal code for the parties to it. The crimes included in Articles 6 to 8 of the Statute are an expression of the State Parties' desire to criminalise the behaviour concerned. As such, the conduct criminalised as a war crime generally will, but need not necessarily, have been subject to prior criminalisation pursuant to a treaty or customary rule of international law."

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that it corresponds with customary international law[242] can find support in a recent decision of the Appeals Chamber in the *Abd-Al-Rahman* case. In that case, the ICC's jurisdiction was based on a UNSC referral (article 13(b) Rome Statute) and the accused was a national of Sudan which was not a party to the Statute at the time when the crimes allegedly took place. The PTC argued that there was no violation of the *nullum crimen* principle as enshrined in article 22(1) Rome Statute since the case was based on the Statute's "provisions detailing the prohibited conduct, which existed and were in force at the time of all of the events underlying the charges."[243] The defence's argument that in such situations the principles of legality and non-retroactivity required the prior criminalization of the conduct in question by customary international law or by the relevant states "would result in restricting its scope to such an extent as to call into question the very raison d'être of that particular triggering mechanism".[244] In contrast, the Appeals Chamber held that article 22(1) of the statute needed to be interpreted and applied in light of internationally recognized human rights according to article 21(3) Rome Statute.[245] Relying on the concepts of foreseeability and accessibility from the jurisprudence of the ECtHR, the AC argued that the criminalization of conduct by the Statute would not suffice in a situation

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242 Milanović, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' 51; Talita de Souza Dias, 'The Nature of the Rome Statute and the Place of International Law before the International Criminal Court' (2019) 17 JICJ 529-532; Talita de Souza Dias, 'The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations: An Appraisal of the Existing Solutions to an Under-discussed Problem' (2018) 16 JICJ 87 ff.; Rogier Bartels, 'Legitimacy and ICC Jurisdiction Following Security Council Referrals: Conduct on the Territory of Non-Party States and the Legality Principle' in Nobuo Hayashi and Cecilia M Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press 2017) 166; Bruce Broomhall, 'Article 22' in Kai Ambos (ed), *The Rome Statute of the International Criminal Court* (4th edn, Beck 2021) paras 20-1, 34; cf. Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court* (Brill Nijhoff 2019) 151; but see William A Schabas, *An Introduction to the International Criminal Court* (6th edn, Cambridge University Press 2020) 62 (arguing that, with the adoption of the Rome Statute, the Statute's application to nationals of non-party States was no longer unforeseeable).

243 *Prosecutor v Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* ICC PTC II Decision on the Defence 'Exception d'incompétence' (ICC-02/05/01/20-302) (17 May 2021) ICC-02/05-01/20-391 para 40 (quote) and paras 36-42.

244 ibid para 41.

245 *Prosecutor v Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* ICC-02/05-01/20-503 para 83.

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where the crime was committed on the territory of a non-party State. Rather, "a chamber must look beyond the Statute to the criminal laws applicable to the suspect or accused at the time the conduct took place and satisfy itself that a reasonable person could have expected, at that moment in time, to find him or herself faced with the crimes charged."[246] Turning to the specific case, the AC concluded that the accused "was reasonably capable of taking steps to comprehend and comply with his obligations under international law".[247] Here, the Statute became important as evidence of those obligations. The AC noted that the statutory crimes resulted from a concerted codification effort and "were intended to be generally representative of the state of customary international law", which "weighs heavily in favour of the foreseeability of facing prosecutions for crimes within the jurisdiction of this Court, eve in relation to conduct occurring in a State not party to the Statute".[248]

Another example of the limits of a purely treaty-based approach concerns arrest warrants against persons who enjoy, in principle, immunity. This situation is addressed by article 27 Rome Statute which applies, however, only *inter partes*. For non-State parties, customary international law matters. In this context, it has been argued that the introduction of the concept of an international crime to the international legal order led to a modification of immunities[249] to the extent that those immunities may not be compatible with the concept of crime and the idea that the international community exercises a *jus puniendi*.[250] Based on this reading, the customary character of the crimes in question matters because only crimes that are part of customary international law could have led to a modification of immunities under customary international law.[251]

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246 ibid para 86.

247 ibid para 88.

248 ibid para 89; cf. paras 93-5 for a summary of the view of judge Ibáñez who argued that the Statute "has been public since its adoption" and that Sudan signed the Statute, which is why it would be "unnecessary to engage in a discussion as to whether the crimes within the jurisdiction of the Court existed also as customary international law" (all quotes in para 95).

249 Kreß, 'Article 98' paras 32, 37, 40, 43, 53, 130; Cf. Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 EJIL 840 (on the concept of crime in conjunction with the principle of extraterritorial jurisdiction).

250 Kreß, 'Article 98' paras 127-130; on the *ius puniendi* see also Ambos, *Treatise on International Criminal Law: Vol. I: Foundations and General Part* 57-60.

251 Kreß, 'Article 98' para 130. See also below p. 546 ff.

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3. Further development of treaty-based approaches or alignment with customary international law?

A different question is whether these crimes, regardless of whether they were originally intended to reflect customary international law, will be interpreted and applied in light of customary international law or whether the ICC will strike a different path. While it is true that articles 6, 7, 8 and 8*bis* provide definitions of the crimes "[f]or the purpose of this Statute", in general, several reasons speak in favour of interpreting the Rome Statute, and in particular the crimes, in accordance with customary international law. First, the drafters did not intend to engage in a legislative exercise. Only crimes recognized under customary international law should be included in the Statute.[252] Second, even though article 10 stipulates that the Statute's second part does not prejudice the development of customary international law, the general rule of treaty interpretation as set forth in article 31 VCLT speaks in favour of interpreting the crimes in the Rome Statute in accordance with customary international law.[253] As has been demonstrated throughout this study, functionally equivalent rules of customary international law and treaty law tend to converge rather than to develop differently (which, of course, remains possible though). Third, if the ICC understands itself not just as a

252 Cottier, 'Article 8' paras 17-26; Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' 109; see also Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 270, 301-2 (concluding that "the jurisdiction of the Court, the Rome Statute's articulation of the legality principle and applicable law, the Statute's relationship to existing and developing law, the definitions of crimes including their mental elements and the Elements of Crimes lend support to the idea that the crimes in the Rome Statute are generally or largely reflective of custom. Departures may be discerned that are progressive and retrogressive relative to custom, and the Statute may not reflect all crimes that exist under customary international law"); Tan, *The Rome Statute as Evidence of Customary International Law* 187-8 (on the codification of the crimes against humanity and the alignment of the removal of the nexus requirement with an armed conflict and the recognition of the element of policy); see now also *Prosecutor v Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* ICC-02/05-01/20-391 para 89.

253 Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' 572, 575; cf. on Part 3 of the Statute, the so-called general principles of criminal law and the "paucity of customary international law" Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' 142-3.

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treaty body but as an organ exercising the *jus puniendi* of the international community, a reasoning based only on the Statute without regard to customary international law will have its limits, in particular when non-State parties are concerned.

Moreover, recourse to customary international law will be necessary when interpreting and applying the crimes with respect to, for instance, the definition, temporal and geographical scope of armed conflicts or "the established framework of international law" (article 8(2)(b), (e)).[254] At the same time, one must remain aware of functional specificities, which may, even if rarely, exist between international humanitarian law and international criminal law. For instance, a concept such as direct participation in hostilities may assume a different meaning in IHL than the concept of using children to actively participate in hostilities (article 8(2)(b)(xxvi), (e)(vii)). In the context of IHL, the direct participation in hostilities can lead to the loss of protection of civilians by international humanitarian law, which is why this concept should be interpreted narrowly. In contrast, the crime of using children to actively participate in hostilities primarily concerns the perpetrator who uses children in situations which may render children subject to attacks. The interpretation of this crime should not lead to the result that children are considered no longer protected by international humanitarian law.[255]

Nevertheless, it is possible for the ICC to strike a different path; in fact, certain decisions indicate a preference for a *lex specialis* approach that focuses

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254 Cf. on the practice of the ICC Rogier Bartels, 'The Classification of Armed Conflicts by International Criminal Courts and Tribunals' (2020) 20 International Criminal Law Review 595 ff. *Prosecutor v Bosco Ntaganda* ICC AC Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9" (15 June 2017) ICC-01/04-02/06-1962 para 53: "Thus, the specific reference to the "established framework of international law" within article 8 (2) (b) and (e) of the Statute permits recourse to customary and conventional international law regardless of whether any lacuna exists, to ensure an interpretation of article 8 of the Statute that is fully consistent with, in particular, international humanitarian law."; *Prosecutor v Thomas Lubanga Dyilo* ICC AC Judgment (1 December 2014) ICC-01/04-01/06-3121-Red para 322.

255 See also Andreas Zimmermann and Robin Geiß, 'Article 8(2)(e)(vii)' in Kai Ambos (ed), *The Rome Statute of the International Criminal Court* (4th edn, Beck 2021) para 963; Tilman Rodenhäuser, 'Squaring the Circle? Prosecuting Sexual Violence against Child Soldiers by their 'Own Forces'' (2016) 14 JICJ 179-180; on the *Ntaganda* case and other recent examples of expansive interpretations see also Andreas Zimmermann, 'Internationaler Strafgerichtshof am Scheideweg' [2022] JuristenZeitung 264-5.

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on the particularities of the Rome Statute. In February 2021, a Pre-Trial Chamber decided in favour of jurisdiction in relation to a situation referred to the ICC by Palestine. The PTC did refer to customary international law when it interpreted the territoriality principle set forth in article 12(2)(a) Rome Statute, concluding that territorial jurisdiction can encompass acts which partly take place outside a state's territory.[256] The majority then saw no need, however, to examine whether Palestine would be a state under general international law; it sufficed that Palestine was a state party to the Rome Statute. According to the majority of the Chamber, there was no need to resort to general international law, article 31(3)(c) VCLT or article 21(1)(b) Rome Statute.[257]

The *Ntaganda* case is another interesting example. The Trial Chamber argued that "the Statute is first and foremost a multilateral treaty which acts as an international criminal code for the parties to it. [...] [T]he conduct criminalised as a war crime generally will, but need not necessarily, have been subject to prior criminalisation pursuant to a treaty or customary rule of international law."[258] The Appeals Chamber did not explicitly endorse this *dictum*. However, noting that article 8(2) does not refer for all war crimes to the "persons and property protected under the provisions of the relevant Geneva Convention"[259], the Appeals Chamber held that there is neither under

256 *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* ICC PTC III (14 November 2019) ICC-01/19-27 paras 55-62.

257 *Situation in the State of Palestine* ICC-01/18-143 para 88, where the Chamber argued that it could rely on article 21(1) and that "it is not necessary to have recourse to subsidiary sources of law under article 21(1)(b) and (c) of the Statute. Furthermore, the Chamber considers that recourse to article 31(3)(c) of the Vienna Convention on the Law of Treaties (the 'Vienna Convention'), being a rule of interpretation, cannot in any way set aside the hierarchy of sources of law as established by article 21 of the Statute, which is binding on the Chamber." Critical of this approach *Situation in the State of Palestine* ICC PTC I Decision on the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, Judge Péter Kovács, Partly Dissenting Opinion (5 February 2021) ICC-01/18-143-Anx1 paras 63, 73-74.

258 *Prosecutor v Bosco Ntaganda, ICC TC VI Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9 (4 January 2017)* ICC-01/04-02/06-1707 para 35.

259 Compare on the one hand Article 8(2)(a) and (c) and on the other hand Article 8(2)(b) and (e) the latter of which do not refer to the concept of protected persons but to the "established framework of international law".

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Article 8 nor under the established framework of international law for each crime, or for the crimes of rape and sexual slavery specifically, a general status requirement according to which only persons with the status of a protected person under the Geneva Conventions could be victims of such war crimes.[260] The Appeals Chamber decided that sexual abuse and rape of child soldiers under fifteen years by other members of the same party to the conflict constituted war crimes and that it was the nexus requirement, rather than a status requirement, on the basis of which ordinary crimes were to be distinguished from war crimes.[261] While the Appeals Chamber did not explicitly endorse the Trial Chamber's formulation of the crimes' treaty nature, the Appeals Chamber's reasoning arguably does not differ substantially from the Trial Chamber's reasoning in this regard. It interpreted and applied first and foremost article 8 Rome Statute before examining in a second step whether international humanitarian law would provide for a status requirement limiting the interpretation and application of article 8 Rome Statute. It could not identify a general status requirement, given that certain rules of international law protect, for instance, a party's own forces.[262] While this reasoning led to the result that child soldiers could be victims of a crime under article 8(2)(e)(vi) Rome Statute, this reasoning's unfortunate side effect is that it

260 *Prosecutor v Bosco Ntaganda* ICC-01/04-02/06-1962 paras 46-67; see already *Prosecutor v Bosco Ntaganda, ICC TC VI Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9 (4 January 2017)* ICC-01/04-02/06-1707 paras 37-44.

261 *Prosecutor v Bosco Ntaganda* ICC-01/04-02/06-1962 para 68; the decisions have received a mixed reaction: Marco Longobardo, 'The Criminalisation of Intra-party Offences in Light of Some Recent ICC Decisions on Children in Armed Conflict' (2019) 19 International Criminal Law Review 630-2 (positive); for the view that the decision should be interpreted restrictively, confined to the special situation of child soldiers see Luca Poltronieri Rosetti, 'Intra-party sexual crimes against child soldiers as war crimes in Ntaganda. 'Tadic moment' or unwarranted exercise of judicial activism?' [2019] Questions of International Law 65; a different way to arrive at the result of the *Ntaganda* AC on the basis of the common article 3 of the Geneva Conventions would have been to argue that according to a *bona fide* interpretation child soldiers who were recruited in violation of international law remain civilians "*vis-à-vis* those who are responsible for their unlawful recruitment", or, alternatively, that they are to be regarded as hors de combat during the time of the crime and that they are therefore protected by common article 3, see Rodenhäuser, 'Squaring the Circle? Prosecuting Sexual Violence against Child Soldiers by their 'Own Forces'' 186 and 191–2.

262 *Prosecutor v Bosco Ntaganda* ICC-01/04-02/06-1962 para 59, referring, *inter alia* to article 12 of the first two Geneva Conventions of 1949.

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does not answer the question of whether these child soldiers were in fact protected by common article 3 of the four Geneva Conventions. This side effect could be evaluated more positively if one argued that this reasoning relieved the prosecution from examining whether each possible victim of a crime was in fact protected by common article 3 or whether the victim's specific participation in the hostilities led to a loss of protection. If this had been a concern, this concern could have been dealt with, as convincingly suggested by Rodenhäuser, by a *bona fide* interpretation according to which child soldiers who were recruited in violation of international law remain civilians "*vis-à-vis* those who are responsible for their unlawful recruitment"[263], or, alternatively, that they are to be regarded as *hors de combat* during the time of the crime and that they are therefore protected by common article 3.[264]

The question of whether the ICC favours treaty-based approaches over alignment with customary international law will be explored in more detail in the next section on modes of criminal liability and the relationship between the Rome Statute and customary international law in the context of immunities of head of states.

III. A conflict of sources? Between JCE, control theory and indirect perpetratorship

If one focuses on the interrelationship of sources in the judicial practice, one fascinating example concerns the modes of liability. Whereas the ICTY developed on the basis of an analysis of customary international law the concept of joint criminal enterprise (JCE), the ICC developed its interpretation of article 25 Rome Statute on the basis of the doctrines of indirect perpetratorship and of control theory. The example of modes of criminal liability illustrates that international practice can appear to look like a *Rorschach* blot in the sense that the reading and interpretation of international practice depends on the respective viewer's personal and doctrinal background and training.[265]

263 Rodenhäuser, 'Squaring the Circle? Prosecuting Sexual Violence against Child Soldiers by their 'Own Forces'' 186.

264 See ibid 191–2.

265 On this metaphor see Leila Nadya Sadat and Jarrod M Jolly, 'Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot' (2014) 27 Leiden Journal of International Law 755-756; for a detailed account that zeros in on the criminal law specificities all of which cannot be addressed here, see Lachezar Yanev, 'Joint Criminal Enterprise' in Jérôme de Hemptinne, Robert Roth,

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Early criminal decisions tended to follow the unitarian perpetrator model (*Einheitstätermodell*) according to which no meaningful distinction was made between principals and accessories.[266] This approach took account of the fact that war crimes were mass crimes[267] and that individual criminal responsibility should be extended beyond the soldier on the ground, the direct

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and Elies van Sliedregt (eds), *Modes of Liability in International Criminal Law* (Cambridge University Press 2019) 120 ff.; Elies van Sliedregt and Lachezar Yanev, 'Co-Perpetration Based on Joint Control over the Crime' in Jérôme de Hemptinne, Roberts Roth, and Elies van Sliedregt (eds), *Modes of Liability in International Criminal Law* (Cambridge University Press 2019) 85 ff.

266 Elies van Sliedregt, 'Perpetration and Participation in Article 25(3)' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 502-503; Ambos, *Treatise on International Criminal Law: Vol. I: Foundations and General Part* 105-108; Werle and Jeßberger, *Principles of International Criminal Law* 235; *Trial of Franz Holstein and Twenty-Three Others* UNWCC Law Reports Vol. VII, 26 32 ("a universally recognised principle of modern penal law that accomplices during or after the fact are responsible in the same manner as actual perpetrators or as instigators"); *Justice Case (United States of America v Josef Altstoetter, et al), United States Military Tribunal,* 1063 ("the person who persuades another to commit murder, the person who furnishes the lethal weapon for the purposes of the commission, and the person who pulls the trigger are all principals or accessories to the crime."); for an overview unitary and differentiated models see Elies van Sliedregt, *Individual criminal responsibility in international law* (Oxford University Press 2012) 65-67.

267 Cf. on the mass crime character *Attorney General v Adolf Eichmann* District Court of Israel, Criminal Case No. 40/61 36 ILR 236-237: "[...] these crimes were mass crimes, not only having regard to the numbers of victims but also in regard to the numbers of those who participated [...] and the extent to which any one of the many criminals were close to or remote from the person who actually killed the victims says nothing as to the measure of his responsibility. On the contrary, the degree of responsibility generally increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher levels of command, the 'counsellors', in the language of our law."

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perpetrator.[268] The ICTY developed as mode of liability the so-called Joint Criminal Enterprise (JCE).[269]

This section will first give an overview of the construction of JCE and its three distinct categories (1.). Subsequently, it will address the question of whether and to what extent the Rome Statute embraced a different paradigm and a different understanding of the modes of liability (2.). Finally, this section will offer concluding observations and express scepticism as to the idea of a conflict between sources in this context (3.).

1. The construction of JCE and its three distinct categories

Starting from principle of personal culpability as "the foundation of criminal responsibility"[270], the ICTY distilled on the basis of an analysis of customary international law as evidenced by "many post World War II cases"[271], the interpretation of its statute and of the criminal law of several national legal systems[272] "the principle that when two or more persons act together to further a *common criminal purpose*, offences perpetrated by any of them may

268 In favour of a unitarian model James G Stewart, 'The End of Modes of Liability for International Crimes' (2012) 25(1) Leiden Journal of International Law 55-73; but see Gerhard Werle and Boris Burghardt, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute' in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press 2014) 302-319, defending a differentiation model with reference to article 25 Rome Statute, the case-law of the *ad hoc* tribunals and normative arguments , see also 318: "The question of whether a person holds individual criminal responsibility cannot be answered adequately with a simple 'Yes' or 'No'. The task of criminal law is not limited to defining the scope of criminal responsibility; it includes developing normative criteria for gradation of responsibility."

269 See generally Ambos, *Treatise on International Criminal Law: Vol. I: Foundations and General Part* 108-112. Early solutions to the question of how to hold leaders responsible for crimes perpetrated by others were the so-called command responsibility of superiors for crimes of subordinate soldiers and the concept of a membership in a criminal organization which may be characterized as a crime rather than a mode of participation, see Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* 262 ff., 290 ff.; Yanev, 'Joint Criminal Enterprise' 129; Sliedregt, *Individual criminal responsibility in international law* 27 ff., 183 ff.; Yoram Dinstein, 'Command Responsibility' [2013] Max Planck EPIL.

270 *Prosecutor v Dusko Tadić* para 186.

271 ibid para 195.

272 ibid para 193.

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entail the criminal liability of all the members of the group."[273] Furthermore, "the notion of *common purpose* encompasses three distinct categories of collective criminality."[274]

The first category, JCE I, addresses a situation where "all co-defendants, acting pursuant to a common design, possess the same criminal intention"[275], which can also be described as co-perpetratorship. The second category, JCE II, is "a variant of the first category"[276] and is based on the so-called "concentration camp cases"[277], where "the accused held some position of authority within the hierarchy of the concentration camps [...] they had acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes."[278] JCE III "concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose."[279]

273 ibid para 195, para 220 (italics added).
274 ibid para 195 (italics added).
275 ibid paras 195, 196.
276 ibid para 203.
277 ibid para 202.
278 ibid para 202.
279 ibid para 204. For a critique in particular of JCE III see Ambos, *Treatise on International Criminal Law: Vol. I: Foundations and General Part* 141; Kai Ambos, 'Amicus Curiae Brief in the Matter of the Co-Prosecutors' Appeal on the Closing Order Against Kaing Guek Eav "Dutch" Dated 8 August 2008' (2009) 20 Criminal Law Forum 353; Mohamed Elewa Badar, ''Just Convict Everyone!'-Joint Perpetration: From Tadić to Stakić and Back Again' (2006) 6 International Criminal Law Review 293; *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* STL AC (11 February 2011) STL-11-01/I/AC/R176bis paras 248-249 (arguing that convictions under JCE III for special intent crimes like terrorism should not be made); *Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE)* ECCC (20 May 2010) D97/15/9 para 83 (finding that the materials relied upon by the ICTY did not "constitute a sufficiently firm basis to conclude that JCE III formed part of customary international law"); but see *Prosecutor v Stanišić & Župljanin* ICTY AC Judgeement (30 June 2016) IT-08-91-A para 599 (in favour of JCE III under customary international law); see on this jurisprudence Noora Arajärvi, 'Misinterpreting Customary International Law Corrupt Pedigree or Self-Fulfilling Prophecy?' in Panos Merkouris, Jörg Kammerhofer, and Noora Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge University Press 2022) 50-1.

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The ICTY's analysis of concepts in domestic criminal law is characterized by a certain ambiguity. On the one hand, the ICTY did not stop at terminological differences and instead adopted a functional perspective, examining the principle which underlined the municipal concepts. In this sense, the ICTY noted that post-World War II trials in Italy and Germany "took the same approach to instances of crimes in which two or more persons participated with a different degree of involvement. However, they did not rely upon the notion of common purpose or common design, preferring to refer instead to the notion of co-perpetration."[280] On the other hand, this difference led the ICTY to stress that references to municipal law "only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems" and not to establish a general principle of law for which "it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion."[281]

It is open to question whether an analysis characterized by a higher degree of abstraction could have furnished a general principle which, of course, would have to be further developed and concretized. After all, the ICTY itself recognized before that the German and Italian cases, while having adopted a "different notion", "took the same approach". However, once established, this distinction between the concept of common purpose and the concept of indirect perpetratorship played a significant role in the further development of modes of liability. It began to stand for a debate between common law approaches and continental European approaches.[282] One important question in the context of this competition of schools of thought was whether the accused high-ranking official had to be a member of the very same JCE which the physical perpetrator on the ground was part of, or whether he could used the latter as an instrument for committing crimes.

280 *Prosecutor v Dusko Tadić* IT-94-1-A para 201.

281 ibid para 225.

282 For an overview see Marjolein Cupido, 'Pluralism in Theories of Liability: Joint Criminal Enterprise versus Joint Perpetration' in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press 2014) 129 ("There is a division between scholars who affirm and welcome the ICC's approach and those who critically question the Court's distinctive course"); Sliedregt, *Individual criminal responsibility in international law* 101: "The ICC and the international criminal tribunals rely on concepts of co-perpetration that differ on conspicuous points but also overlap. Generally, there is an unwillingness on either side to uncover similarities and overlap between co-perpetration and JCE, let alone apply each other's case law with regard to these concepts."

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a) Indirect perpetratorship as conceptual alternative

The *Stakic* Trial Chamber argued that JCE was

> "only one of several possible interpretations of the term 'commission' under Article 7(1) of the Statute and that other definitions of co-perpetration must equally be taken into account. Furthermore, a more direct reference to 'commission' in its traditional sense should be given priority before considering responsibility under the judicial term 'joint criminal enterprise'."[283]

The Chamber then "prefers to define 'committing' as meaning that the accused participated, *physically or otherwise directly or indirectly*, in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others."[284] With reference to the work of the German criminal law scholar Claus Roxin, the Chamber argued that co-perpetratorship should be defined by the joint control over the act.[285] The Chamber concluded that

> "the end result of its definition of co-perpetration approaches that of the aforementioned joint criminal enterprise and even overlaps in part. However, the Trial Chamber opines that this definition is closer to what most legal systems understand as 'committing' and avoids the misleading impression that a new crime not foreseen in the Statute of this Tribunal has been introduced through the backdoor."[286]

The Trial Chamber's interpretation of Article 7(1) of the ICTY Statute was not well received by the Appeals Chamber and criticized for departing from a concept which the Appeals Chamber considered to be rooted in customary international law. The Trial Chamber's interpretation was not appealed by any of the parties, but the Appeals Chamber considered this issue to be one of "general importance warranting the scrutiny of the Appeals Chamber *proprio motu*", as the "introduction of new modes of liability into the jurisprudence of the Tribunal may generate uncertainty, if not confusion".[287] The Appeals Chamber concluded that the Trial Chamber

> "erred in conducting its analysis of the responsibility of the Appellant within the framework of 'co-perpetratorship'. This mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law and in the

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283 *Prosecutor v Milomir Stakić* ICTY TC Judgement (31 July 2003) IT-97-24-T para 438.

284 ibid para 439 (italics added).

285 ibid para 440.

286 ibid para 441.

287 *Prosecutor v Milomir Stakić* ICTY AC Judgement (22 March 2006) IT-97-24-A para 59.

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> settled jurisprudence of this Tribunal [...] By way of contrast, joint criminal enterprise is a mode of liability which is ’firmly established in customary international law’ and is routinely applied in the Tribunal’s jurisprudence."[288]

Also, the *Milutinovic* Trial Chamber acknowledged "the possibility that some species of co-perpetration and indirect perpetration can be found in various legal systems throughout the world", yet "the task before the Trial Chamber is not to determine whether co-perpetration or indirect perpetration are general principles of law. [...] Neither *Stakic* nor the Prosecution has cited any authority that convincingly establishes state practice or *opinio juris* for the *Stakic* definition."[289]

b) Attempts of reconciliation

Judge Iain Bonomy sought to reconcile the different doctrinal approaches. With respect to the questions of whether leaders at the top have to form a joint criminal enterprise with the soldiers on the ground or whether the former can use the latter as an instrument, Bonomy found the jurisprudence of the tribunal inconclusive.[290] He suggested to distinguish between small-scale criminal enterprises, where a JCE between the accused and the principal perpetrator must exist,[291] and large-scale criminal enterprises, where no JCE between the accused and the soldier on the ground as principal perpetrator must exist.[292] Based on the observation that in municipal criminal law systems

288 *Prosecutor v Milomir Stakić* para 62.

289 *Prosecutor v Milan Milutinović and others* IT-01-47-AR72 para 39.

290 ibid IT-01-47-AR72 Sep Op Bonomy paras 8, 13.

291 *Prosecutor v Radoslav Brđjanin* IT-99-36-T para 344: "in order to hold the Accused criminally responsible for the crimes charged in the Indictment pursuant to the first category of JCE, the Prosecution must, *inter alia*, establish that between the person physically committing a crime and the Accused, there was an understanding or an agreement to commit that particular crime." See also paras 345-353, concluding that there was no evidence to establish the existence of such JCE.

292 In a case concerning a large scale enterprise, the Trial Chamber had held the accused general Krstic responsible for the conduct of footsoldiers without requiring the existence of a JCE or an agreement between them, *Prosecutor v Radislav Krstić* ICTY TC Judgement (2 August 2001) IT-98-33-T paras 607 ff., in part. paras 617-618, para 621, para 636 and para 644, where the Chamber held that while Krstic had not personally perpetrated the crimes, he had "fulfilled a key coordinating role in the implementation of the killing campaign". The Appeals Chamber did not "disturb" (*Prosecutor v Radoslav Brđjanin* ICTY AC Judgement (3 April 2007) IT-99-36-A

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an accused can be liable for a crime even when he had not committed the *actus reus* by himself as long as he had caused an element in the *actus reus*, Bonomy argued that the further "interpretation and delineation of the contours of JCE" should be informed by this general principle of criminal law.[293]

The *Brdanin* Appeals Chamber found in post WW II precedents confirmation for the view that an accused could be responsible for crimes which had been physically committed by another person, even when the latter had not belonged to the JCE of the accused.[294] In an attempt to consolidate the case-law and to bring indirect perpetratorship under the label of JCE,[295] the Chamber concluded, contrary to the Trial Chamber, that the physical perpetrator of a crime would not have to be a member of the JCE. Instead, members of a JCE can "use" other persons to further the common criminal purpose.[296]

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para 408.) the Trial Chamber's reasoning, see *Prosecutor v Radislav Krstić* ICTY AC Judgement (19 April 2004) IT-98-33-A paras 134-144.

293 *Prosecutor v Milan Milutinović and others* IT-01-47-AR72 Sep Op Bonomy paras 20-26, 30. He also referred to the ICTR for the observation that many traditional cases could not be categorized clearly within the later-made up schema of JCE. His analysis might also demonstrate that practice accepted as law alone without dogmatic considerations cannot support either JCE or indirect perpetratorship alone.

294 *Prosecutor v Radoslav Brđjanin* IT-99-36-A paras 394, 404 410. See also Giulia Bigi, 'Joint Criminal Enterprise in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the Prosecution of Senior Political and Military Leaders: The Krajišnik Case' (2010) 14 Max Planck Yearbook of United Nations Law 74 ff.

295 Sliedregt, *Individual criminal responsibility in international law* 162-163: "While the *Stakić* Appeals Chamber had ended the life of indirect co-perpetration, the *Brđnin* Appeals Chamber seemed to have somewhat revived it, albeit under the JCE label."

296 *Prosecutor v Radoslav Brđjanin* IT-99-36-A paras 410 ff., in part. para 413: "[...] to hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis." See also paras 420 ff., holding that the JCE-doctrine concerns also large-scale cases and that JCE was not about guilt by association, ibid paras 426, 428.

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2. Rome and the move towards a new paradigm

Article 25(3) of the Rome Statute distinguishes between different forms of perpetration (article 25(3)(a) Rome Statute) and different forms of participation (article 25(3)(b)-(d) Rome Statute) which include ordering, soliciting or inducing the commission of a crime (b), facilitating, aiding or abetting or otherwise assisting the commission of a crime (c), or otherwise contributing to the commission of the crime (d).

With respect to perpetration, article 25(3)(a) provides that a crime can be committed "as an individual, jointly with another or through another person, regardless whether that other person is criminally responsible." A significant change took place in the course of the drafting: after an earlier draft had limited the indirect perpetration ("through another person") to an innocent agent, meaning a perpetrator who is not criminally responsible, such limitation was ultimately deleted.[297] This change was significant as it allowed the ICC to develop indirect perpetration by means of an organization even when the direct perpetrator was not an innocent agent.

The 2007 *Lubanga* Pre-Trial Chamber decided to distinguish between principals and accessories according to the criterion of control over the crime which the PTC considered to be applied in "numerous" legal systems and searches for the criminal mastermind.[298] The Chamber ruled out alternative approaches. Given that article 25(3)(a) envisioned indirect perpetration ("through another person"), it was no apposite test to look at who objectively committed the *actus reus*.[299] Furthermore, the Chamber argued that the Statute embodied a subjective approach close to the common purpose doctrine of the ICTY in article 25(3)(d) as "residual form of accessory liabil-

297 Thomas Weigend, 'Indirect Perpetration' in Carsten Stahn (ed), *The law and practice of the International Criminal Court* (Oxford University Press 2015) 542-543. Cf. Sadat and Jolly, 'Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot' 774, arguing that the traveaux would not support a strict principal/accessory distinction; critical as to a hierarchy of blameworthiness *Prosecutor v Thomas Lubanga Dyilo* ICC TC II Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert (20 December 2012) ICC-01/04-02/12-4 para 22; *Prosecutor v Thomas Lubanga Dyilo* ICC TC I Judgment pursuant to Article 74 of the Statute, Separate Opinion of Judge Adrian Fulford (14 March 2012) ICC-01/04-01/06-2842 paras 8-9; in this sense also *Prosecutor v Germain Katanga* ICC-01/04-01/07-3436-tENG para 1386.

298 *Prosecutor v Thomas Lubanga Dyilo* ICC PTC I Decision on the confirmation of charges (7 February 2007) ICC-01/04-01/06-803-tEN paras 328-332.

299 ibid para 333.

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ity" for contributions which fell short of constituting "ordering, soliciting, inducing, aiding, abetting or assisting within the meaning of article 25(3)(b) or article 25(3)(c)".[300] For the Chamber, this demonstrated that the drafters could have adopted, but in fact did not adopt, a subjective common purpose approach in article 25(3)(a) of the Statute.[301] The Chamber emphasized that the letter of article 25(3)(a) of the Rome Statute supports the control over the crime approach for the purposes of this distinction.[302] Thus, the Chamber was primarily concerned with treaty interpretation and did not address customary international law.[303] The Appeals Chamber supported the application of the control over the crime theory as "convincing and adequate" for the interpretation of article 25.[304]

Building on the Chamber's reasoning, the PTC in *Katanga & Chui* argued that indirect perpetration was "recognized by the major legal systems"[305] and by doctrine. The chamber referred in particular to Claus Roxin and his

300 ibid para 337.

301 ibid para 335.

302 ibid paras 338, 339; see also *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC PTC I Decision on the confirmation of charges (13 October 2008) ICC-01/04-01/07-717 paras 484, 485, declaring the control over crime approach as "leading principle for distinguishing between principals and accessories to a crime", being supported by also a "number of legal systems" and by doctrine.

303 Note that the prosecution submitted "that it is important to take into consideration the fundamental differences between the ad hoc tribunals and the Court, because the latter operates under a Statute which not only sets out modes of criminal liability in great detail, but also deliberately avoids the broader definitions found in, for example, article 7(1) of the ICTY Statute", *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06-803-tEN para 323.

304 *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06-3121-Red paras 469-473 (quote in para 469), referring also to *Prosecutor v Germain Katanga* ICC-01/04-01/07-3436-tENG paras 1394-5: "The Chamber is therefore of the view that the 'control over the crime' criterion appears the most consonant with article 25 of the Statute, taken as a whole, and best takes its surrounding context into account, in due consideration of the terms of article 30. To the Chamber, the decisive argument is not recognition of the 'control over the crime' theory in domestic legal systems. [...] Here, the prime consideration of the Chamber is to satisfy itself that the guiding principle allowing effect to be given to the distinction between the perpetrators of and accessories to a crime which, as aforementioned, inheres in article 25(3) of the Statute, enables the body of relevant provisions of this article concerning individual criminal responsibility to take full effect."

305 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07-717 para 495.

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theory according to which an indirect perpetrator can act through a direct perpetrator if the direct perpetrator is embedded into a hierarchical structure and the indirect perpetrator assumes control over the organization.[306] The PTC presented three arguments in favour of perpetration through control over the organization. It had been incorporated into the statute, because "by specifically regulating the commission of a crime through another responsible person, the Statute targets the category of cases which involves a perpetrator's control over the organization"[307]; it was "increasingly used" in national jurisdictions[308] and was addressed in jurisprudence of "international tribunals".[309] A contrary decision such as the Argentinian Supreme Court's rejection of the control over the organization approach was rejected as not relevant within the framework of the Rome Statute which would expressively provide for indirect perpetratorship.[310] Moreover, contrary judgments of the ICTY were characterized as not apposite as they were said to be concerned with customary international law:

> "However, under article 21(1)(a) of the Statute, the first source of applicable law is the Statute. Principles and rules of international law constitute a secondary source applicable only when the statutory material fails to prescribe a legal solution. Therefore, and since the Rome Statute expressly provides for this specific mode of liability, the question as to whether customary law admits or discards the 'joint commission through another person' is not relevant for this Court. This is a good example of the

306 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* paras 496-499 ff.; see also *Prosecutor v Germain Katanga* ICC-01/04-01/07-3436-tENG para 1404; cf. Claus Roxin, 'Straftaten im Rahmen organisatorischer Machtapparate' [1963] (7) Goltdammer's Archiv für Strafrecht 201 ff.; Claus Roxin, *Strafrecht Allgemeiner Teil Band II Besondere Erscheinungsformen der Straftat* (vol 2, Beck 2003) 46-58; on Roxin see also Sliedregt, *Individual criminal responsibility in international law* 81-83; for a critique of the reliance on sources see Chantal Meloni, 'Fragmentation of the Notion of Co-perpetration in International Criminal Law?' in Larissa J van den Herik and Carsten Stahn (eds), *The diversification and fragmentation of international criminal law* (M Nijhoff Publishers 2012) 499.

307 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07-717 para 501.

308 ibid ICC-01/04-01/07-717 para 502 footnote 666, referring to judgments delivered by the German Supreme Court, the Federal Appeals Chamber of Argentina (which was later overturned by the Supreme Court), the Supreme Court of Justice of Peru, the Supreme Court of Chile, the Supreme Tribunal of Spain as well as the National Court of Spain.

309 ibid para 500.

310 ibid para 505.

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> need not to transfer the *ad hoc* tribunals' case law mechanically to the system of the Court."[311]

The PTC defined the hierarchical structure[312] and the fact that the execution of crimes would be "secured by almost automatic compliance with orders"[313], which is why "the actual executor of the order is merely fungible individual"[314], as important aspects of such organisational apparatus. According to the Chamber, "[a]n alternative means by which a leader secures automatic compliance via his control of the apparatus may be through intensive, strict, and violent training regimens."[315] In addition, the PTC recognized that co-perpetration can be based on joint control over the crime, meaning two or more persons act in a concerted manner for the purpose of committing a crime through another person.[316]

311 ibid para 508. See also Sliedregt and Yanev, 'Co-Perpetration Based on Joint Control over the Crime' 94 (on the focus on the ICC Statute and on the importance of customary international law for the legality principle), 110.

312 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07-717 para 512.

313 ibid para 515. See also *Prosecutor v Germain Katanga* ICC-01/04-01/07-3436-tENG para 1408.

314 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07-717 para 516, with references to German commentaries on the German criminal code.

315 ibid para 518. See Kai Ambos, 'Article 25' in Kai Ambos (ed), *Rome Statute of the International Criminal Court: a commentary* (4th edn, Beck 2021) para 14 (arguing that these factors "arguably capture better [than the fungibility criterion] the typical lack of institutional autonomy of a direct perpertrator acting in a macro-criminal context given the institutionalist pressure exercised by the criminal system or organization upon him", while acknowledging also "specific *evidentiary challenges* to prove the organizational control".

316 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07-717 paras 521-522, para 492; see also Ambos, 'Article 25' para 17 ("indirect co-perpetration ('*mittelbare Mittäterschaft*') which however does not constitute a new (fourth) mode of attribution"). Sliedregt and Yanev, 'Co-Perpetration Based on Joint Control over the Crime' 110-114 (pointing out that the Appeals Chamber "did not have the opportunity to rule on the status of indirect co-perpetration, as Katanga decided not to appeal his conviction."), and 116 ("indirect co-perpetration with control through an OSP cannot be regarded as having the status of customary international law [...] It is a theory that is premised on German law and criminal law theory (Roxin)."); for a critique see *Prosecutor v Thomas Lubanga Dyilo* Concurring Opinion of Judge Christine Van den Wyngaert ICC-01/04-02/12-4 paras 58-64 (new mode of liability); cf. Jens David Ohlin, Elies van Sliedregt, and Thomas Weigend, 'Assessing the Control-Theory' (2013) 26 Leiden Journal of International Law 734-738 ("Van den Wyngaert was right to express caution about this mode of liability

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In contrast to this situation, where each of the two defendants had control over a separate organization and was held responsible for crimes committed by the members of the other defendant's organization, the *Blé Goudé* PTC also recognized "a form of joint indirect perpetratorship ('*Mittäterschaft in mittelbarer Täterschaft*') [...] [where] leaders exercise joint control over one hierarchical organization."[317]

Recently, the Appeals Chamber by majority upheld the Trial Chamber's conviction of Bosco Ntaganda based on indirect co-perpetratorship and thus endorsed this doctrine.[318]

3. Evaluation: institutional and conceptual competition instead of conflict of sources

At first sight, the existence of two standards, JCE on the one hand and control theory or indirect perpetratorship on the other hand, can in the context of this study raise associations to the delimitation of the continental shelf with

[...] None of this suggests that an adequate theory of indirect co-perpetration cannot be constructed. However, it cannot be merely assumed, and that theory is certainly not a straightforward application of the bare text of the Statute.").

317 Ambos, 'Article 25' para 17; *Prosecutor v Blé Goudé* ICC PTC Decision on the Confirmation of Charges (11 December 2014) ICC-02/11-02/11-186 paras 136-137, 149.

318 See *Prosecutor v Bosco Ntaganda, ICC TC VI Judgment (8 July 2019)* ICC-01/04-02/06-2359 paras 771-857 and pp. 535-8; *Prosecutor v Bosco Ntaganda, ICC AC Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment' (30 March 2021)* ICC-01/04-02/06-2666-Red paras 879-80, 1170; cf. *Prosecutor v Bosco Ntaganda* ICC AC Judgment on the appeals, Partly Concurring Opinion of Judge Eboe-Osujit (30 March 2021) ICC-01/04-02/06-2666-Anx5 paras 13-102 (arguing against indirect co-perpetratorship and control theory and the need for a distinction between perpetrators and accessories); cf. *Prosecutor v Bosco Ntaganda* ICC AC Judgment on the appeals, Separate Opinion of Judge Howard Morrison (30 March 2021) ICC-01/04-02/06-2666-Anx2 paras 1-42 (expressing concerns regarding the theory of indirect co-perpetration, while subscribing to the conviction based on it); cf. *Prosecutor v Bosco Ntaganda* ICC AC Judgment on the appeals, Separate opinion of Judge Luz Del Carmen Ibáñez Carranza (30 March 2021) ICC-01/04-02/06-2666-Anx3 para 214 (defending the interpretation that article 25(3)(a) of the Statute as encompasses indirect co-perpetration); for an analysis see Marjolein Cupido, 'The Control Theory as Multidimensional Concept. Reflections on the Ntaganda Appeal Judgment' (2022) 20 JICJ 637 ff.

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respect to which either the equidistance-special circumstances rule or the equitable principles were applied. Unlike in the maritime field, however, where the development of both concepts was, by and large, in the hand of the same court, namely the ICJ, the two concepts of criminal responsibility are associated with different courts and tribunals. This and the competing schools of thought, which respectively promote one of the two concepts, may explain the perception that both concepts are rivals based on different rationales.[319] Yet, it has been pointed out that both concepts pursue similar objectives and share similar features, for instance in their focus on the systemic character of the criminal enterprise.[320]

The differences between both concepts can be explained by different conceptual approaches, doctrinal preconceptions and different visions of how

319 Cf. the overview by Cupido, 'Pluralism in Theories of Liability: Joint Criminal Enterprise versus Joint Perpetration', 128-9 (the doctrine of indirect perpetration is rather objective in that it focuses on the *actus reus*, whereas the doctrine of JCE is rather subjective in that it focuses on the common purpose).

320 Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility' (2007) 5(1) JICJ 183; Kai Ambos, 'Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the Most Responsible' in Harmen van der Wilt and André Nollkaemper (eds), *System criminality in international law* (Cambridge University Press 2009) 157 ("[...] ultimately, the doctrine of *Organisationsherrschaft* confirms what has been identified as the underlying rationales of JCE and also command responsibility"); Florian Jeßberger and Julia Geneuss, 'On the Application of a Theory of Indirect Perpetration in Al Bashir' (2008) 6 JICJ 868 ("applying the admittedly novel concept of indirect perpetration, it may be argued, as a mere 'functional equivalent' to other, firmly acknowledged modes of liability would not necessarily render the decision incorrect with a view to meeting customary law standard."); see also Cupido, 'Pluralism in Theories of Liability: Joint Criminal Enterprise versus Joint Perpetration' 150-158 ("The alleged objective–subjective dichotomy between these theories of liability is nominal rather than actual and should therefore be banned from the debate on theories of liability" (158); Sliedregt, 'Perpetration and Participation in Article 25(3)' 515-516; Ambos, 'Article 25' para 13 (on traces of the doctrine of control over an organization in post WW II case-law); on this aspect see also Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* 271-2; Robert Charles Clarke, 'Together Again? Customary Law and Control over the Crime' (2015) 26 Criminal Law Forum 458; on the differences see Sliedregt and Yanev, 'Co-Perpetration Based on Joint Control over the Crime' 113 ("JCE requires proof of a *significant* instead of an *essential* contribution [...] JCE liability allows for *dolus eventualis* whereas liability under Article 25(3) of the ICC Statute requires *dolus directus* [...]"); Yanev, 'Joint Criminal Enterprise' 131-2; Lachezar D Yanev, *Theories of Co-Perpetration in International Criminal Law* (Brill Nijhoff 2018) 546.

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international criminal law should develop.[321] For instance, if one rejects a substantial distinction between perpetrators and accomplices in the field of international criminal law for sentencing purposes, one can be critical of control theory as means for distinguishing forms of participation.[322] If one reads article 25(3) of the ICC Statute as rejection of the *Einheitstätermodell*[323], and if one is of the view that different labels are appropriate for the purposes of labelling justice, with a view to considering the different forms of participation in sentencing,[324] one may look more favourably at the ICC jurisprudence.

The examples of JCE and indirect perpetratorship illustrate the importance of *Dogmatik*[325], of doctrinal considerations, for both concepts[326] when

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321 Cf. Jens David Ohlin, 'Co-Perpetration: German Dogmatik or German Invasion?' in Carsten Stahn (ed), *The law and practice of the International Criminal Court* (Oxford University Press 2015) 517, speaking of a "the clash of legal traditions embodied by competing doctrinal paradigms"; see also Mikkel Jarle Christensen and Nabil M Orina, 'The International Criminal Court as a Law Laboratory. Professional Battles of Control and the 'Control of the Crime' Theory' (2022) 20 JICJ 699 ff.

322 Judges Fulford and Van den Wyngaert who in two individual opinions voiced criticism against control theory and indirect perpetratorship both rejected any distinction between perpetrators and accomplices, *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06-2842 Sep Op Fulford para 11; *Prosecutor v Mathieu Ngudjolo Chui* ICC TC II Judgment pursuant to Article 74 of the Statute (18 December 2012) ICC-01/04-02/12-3-tENG Conc Op Judge Van den Wyngaert paras 24-26; cf. Ohlin, Sliedregt, and Weigend, 'Assessing the Control-Theory' 740 ff.; see recently *Prosecutor v Bosco Ntaganda* paras 29-76; *Prosecutor v Bosco Ntaganda* Sep Op Morrison ICC-01/04-02/06-2666-Anx2 paras 7 ff.

323 Ambos, 'Article 25' para 2: "This approach confirms the general tendency in comparative criminal law to reject a pure unitarian concept of perpetration (*Einheitstätermodell*) and to distinguish, at least on the sentencing level, between different forms of participation."; Yanev, *Theories of Co-Perpetration in International Criminal Law* 539; for a different view see Sadat and Jolly, 'Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot' 774-775.

324 Cf. *Sylvestre Gacumbitsi v The Prosecutor: ICTR* ICTR AC Judgement (7 July 2006) ICTR-2001-64-A Sep Op Schomburg paras 6 ff.; cf. for the possible effects on sentencing Ohlin, Sliedregt, and Weigend, 'Assessing the Control-Theory' 745 footnote 91; Ohlin, 'Co-Perpetration: German Dogmatik or German Invasion?' 530-531.

325 Cf. generally George P Fletcher, 'New Court, Old Dogmatik' (2011) 9 JICJ 179, in particular at 184 on the ICC; Ohlin, 'Co-Perpetration: German Dogmatik or German Invasion?' 517 ff.; Sliedregt, 'Perpetration and Participation in Article 25(3)' 515.

326 As Ohlin, Sliedregt, and Weigend, 'Assessing the Control-Theory' 525, 527 correctly observe, whereas the PTC may have developed "an ICC-specific *Dogmatik*", "any

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identifying customary international law or interpreting a treaty provision. If the debate focuses only on the question of whether indirect perpetratorship is "customary international law" or a "general principle of law"[327], the debate may not sufficiently take account of the difference between the norm and the legal conceptualization that occurs in the interpretation and application of the norm. In this sense, the *Lubanga* Appeal Chamber rightfully remarked

> "that it is not proposing to apply a particular legal doctrine or theory as a source of law. Rather, it is interpreting and applying article 25(3)(a) of the Statute. In doing so, the Appeals Chamber considers it appropriate to seek guidance from approaches developed in other jurisdictions in order to reach a coherent and persuasive interpretation of the Court's legal text."[328]

It is submitted that similar considerations apply to JCE in that doctrinal perspectives and legal technique were involved in constructing three categories

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approach will inevitably prejudice either a civil-law or common-law approach to perpetration. If a court adopts JCE, it looks suspiciously like conspiracy or other common law modes of liability. If a court adopts co-perpetration based on the control theory, it looks suspiciously like a civil-law approach to co-perpetration."

327 Cf. Sadat and Jolly, 'Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot' 757, 784; see also Powderly, *Judges and the Making of International Criminal Law* 477 (arguing that "a persuasive argument could perhaps be made that co-perpetration ought to be considered a general principle of law in accordance with Article 21(1)(c). However, the Chamber makes no effort to provide such an insight."), see also 484, arguing that a purely textual understanding of article 25(3)(a) is unpersuasive.

328 *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06-3121-Red para 470; see also *Prosecutor v Germain Katanga* ICC-01/04-01/07-3436-tENG para 1406: "For the Chamber, this does not mean that the theory of control over the organisation is the one and only legal solution that allows the provisions of article 25(3)(a) concerning commission by an intermediary to be construed. As such, the theory need not be held up as an essential constituent element of commission by an intermediary. As mentioned above, the sole indispensable criterion, in its view, is the indirect perpetrator's exertion, in or other some fashion, including from within an organisation, of control over the crime committed through another person." Critical Yanev, *Theories of Co-Perpetration in International Criminal Law* 553-555 (arguing at 553: "The approach that the ICC Chambers have taken on this matter so far shows a regrettable tendency to purposely seek departure from, rather than cohesion with, the settled international case law"; "[...] it is evident that the ICC's adoption of the joint control approach to co-perpetration liability was a matter of choice and not a decision that is strictly required by the text of Article 25(3)", at 555); see also Tan, *The Rome Statute as Evidence of Customary International Law* 284, 311.

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based on an analysis of international and national jurisprudence.[329] Of course, the *Stakić* Appeals Chamber rejected the Trial Chamber's "framework of 'co-perpetratorship'" because joint criminal enterprise "is a mode of liability which is 'firmly established in customary international law'"[330]. However, also the ICTY's conceptualization of the international and domestic practice into three specific categories of JCE was arguably not completely dictated by customary international law and can be seen as a conceptualization which can and must be subject to debate. Apparently, it was possible, as demonstrated by Iain Bonomy or the *Brdanin* Appeals Chamber, to search for ways to reconcile the different concepts. If one acknowledges the degree of doctrinal conceptualization involved in formulating a legal rule on the basis of one's evaluation of a general practice accepted as law, it may be possible to identify common ground and to discuss the substantive merits of each concept from the perspective of international criminal law, rather than from the perspective of a sources discussion.[331] It is, therefore, suggested that the dissent that leads

329 Cf. for different perspectives *Prosecutor v Blagoje Simić, ICTY TC Judgement* (17 October 2003) IT-95-9-T Sep and Partly Diss Op Lindholm 314 para 2: "The so-called basic form of joint criminal enterprise does not, in my opinion, have any substance of its own. It is nothing more than a new label affixed to a since long well-known concept or doctrine in most jurisdictions as well as in international criminal law, namely co-perpetration."; *Prosecutor v Blagoje Simić, ICTY AC Judgement* (28 November 2006) IT-95-9-A Diss Op Shahabuddeen 124 para 32 (co-perpetratorship and JCE are different); Diss Op Schomburg 130 para 14: "Since Nuremberg and Tokyo, both national and international criminal law have come to accept, in particular, co-perpetratorship as a form of committing" and 130 para 18: "In my opinion, this approach towards interpreting committing is clearly reconcilable with the Tadić Appeal Judgement, which introduced joint criminal enterprise into ICTY jurisprudence. However, the Tadić Appeal Judgement does not only refer to 'common (criminal) design', but also speaks expressly of 'co-perpetrators'."

330 *Prosecutor v Milomir Stakić* IT-97-24-A para 62, referring to *Prosecutor v Dusko Tadić* IT-94-1-A para 220.

331 See for instance Stefano Manacorda and Chantal Meloni, 'Indirect Perpetration versus Joint Criminal Enterprise. Concurring Approaches in the Practice of International Criminal Law?' (2011) 9 Journal of International Criminal Justice 165-167, arguing that JCE is a label encompassing "a variety of criteria" (165), the doctrine led to "divergent results" (166) and is problematic from the perspective of the principle of culpability (166-167); Ohlin, Sliedregt, and Weigend, 'Assessing the Control-Theory' 735-736 f., expressing reservations about the combination of modes of liability and arguing that an adequate theory of indirect co-perpetration "is certainly not a straightforward application of the bare text of the Statute" and needs to be constructed, also arguing (745) that "control theory does not provide the limitation

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to the competing concepts lies at the level of doctrinal conceptualisation rather than in an irresolvable conflict between customary international law and the Rome Statute.

Nevertheless, as the ICTY referred to customary international law and the ICC primarily[332] relied on an interpretation of treaty law, the impression has emerged that one now is left with two different standards associated with customary international and the Rome Statute, if one is not of the view that the interpretation of article 25 Rome Statute had an effect on customary international law.[333] According to Yanev's evaluation, this jurisprudence of the ICC is but another example of a "regrettable tendency to purposely seek departure from, rather than cohesion with, the settled international case law, from Nuremberg to The Hague".[334] However, as stated above, it is doubtful whether all conceptual details of JCE can be equated with customary international law; arguably, customary international law is less precise in relation to modes of liability than it is in relation to crimes.[335] Ultimately,

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of liability that some expected it to bring." For a focus on the way in which the notion of "control" is applied in case-law, see recently Cupido, 'The Control Theory as Multidimensional Concept. Reflections on the Ntaganda Appeal Judgment' 639 ff.; for ordering liability under article 25(3)(b) Rome Statute as conceptual alternative see Johannes Block, 'Ordering as an Alternative to Indirect Co-Perpetration. Observations on the Ntaganda Case' (2022) 20 JICJ 717 ff.

332 See above, p. 536; but cf. also Clarke, 'Together Again? Customary Law and Control over the Crime' 465: "[...] the Appeals Chamber did hint at a broader international legal pedigree for the principle, linking its preference for control over the crime as a 'normative [criterion] to distinguish co-perpetrators' to JCE doctrine"; cf. *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06-3121-Red paras 445, 471: "Notably, the notion of joint criminal enterprise developed by the ad hoc tribunals also uses normative criteria to distinguish co-perpetrators from accessories, although it puts the emphasis on a subjective criterion and not on an objective one."

333 Cf. Thomas Weigend, 'Perpetration through an Organization: The Unexpected Career of a German Legal Concept' (2011) 9(1) JICJ 106 ("[...] I would regard the issue as still open. There is certainly nothing to even remotely suggest that the concept of 'perpetration through an organization' is a form of criminal liability recognized as customary international law").

334 See Yanev, *Theories of Co-Perpetration in International Criminal Law* 553-5, quote at 553, see also 564, concluding that "the 'basic' (and by extension the 'systemic') form of jce is rightly regarded by the modern international tribunals as a customary form of co-perpetration responsibility." See also 564-567, concluding that JCE is not part of customary international law.

335 Cf. Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' 143, arguing that "[d]ue to the

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different criminal law preferences, which had articulated themselves already in the jurisprudence of the ICTY, asserted themselves in the context of the ICC, and control theory was regarded by the majority in the chambers to be a good fit for article 25 Rome Statute.[336]

Whether these "two streams"[337] need to be bridged by a new unified theory which is not attached to one particular legal or Western tradition[338] or whether one will see that only one concept will eventually assert itself in international practice, only time will tell. As far as the emancipation from "domestic" doctrines is concerned, it is likely that the doctrine of control theory will be adapted to the present specificities of international criminal law. This applies arguably also to the doctrinal construct of the perpetrator behind the perpetrator, even though this doctrine is, at least in the German legal system, not a tool for everyday criminality but specifically designed to address situations which international criminal law is concerned with. Having in mind the *Eichmann*[339] process, Claus Roxin developed this doctrinal construct as exception to the innocent agent rule, according to which a perpetrator can

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paucity of customary international law ICTY and ICTR had to undertake a good deal of comparative legal research with a view to identify and applicable principle of law." He also noted that the drafters of the Rome Statute "did not consider their exercise of drafting general principles of criminal law to be a matter of codifying existing customary law as the did with respect to the definitions of crimes. Rather, they consciously acted as international legislators."

336 For the view that the identification of a principle if informed by the setting in which the principle will be applied see above, Fn. 194.

337 Yanev, *Theories of Co-Perpetration in International Criminal Law* 547.

338 Cf. in this regard James G Stewart, 'Ten Reasons for Adopting a Universal Concept of Participation in Atrocity' in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press 2014) 334-335; cf. Ohlin, 'Co-Perpetration: German Dogmatik or German Invasion?' 537. Further comparative research may identify functionally equivalent theories in other legal orders, see for the view that the Japanese legal order knows of attribution mechanisms that are similar to indirect co-perpetrationship Philipp Osten, 'Indirect Co-Perpetration and the Control Theory. A Japanese Perspective' (2022) 20 JICJ 689 and 696 ("even though the original doctrine was (and is) not in its entirety the prevailing theory in Japanese case law and scholarship, the control theory as adopted by the ICC jurisprudence and the concepts of perpetration based on this theory [...] were for the most part evaluated by Japanese commentators as adequate theoretical concepts, by and large compatible with the statutory frame- work provided by Article 25(3)").

339 *Attorney General v Adolf Eichmann* District Court of Israel; cf. Kai Ambos, 'Adolf Eichmann' in *The Cambridge Companion to International Criminal Law* (Cambridge University Press 2016) 275 ff.

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commit a crime through another person only in cases of innocent agents as opposed to fully responsible perpetrators.[340] In this sense, the power by bureaucracy (*Organisationsherrschaft*) was not intended to be a theoretical concept for German municipal criminal law[341], it was crafted to specifically address situations that fall within the scope of international criminal law.[342]

Being a child of its time and drawing "its lifeblood from the intuitive persuasiveness of holding the leaders of National-Socialist organizations such as the SS responsible as perpetrators of the mass atrocities committed by the members of these organizations"[343], the concept of indirect perpetratorship will need to be adapted to the new challenges, for instance holding key figures

340 Roxin, 'Straftaten im Rahmen organisatorischer Machtapparate' 201 ff.; Roxin, *Strafrecht Allgemeiner Teil Band II Besondere Erscheinungsformen der Straftat* 46-58. For an overview see Jeßberger and Geneuss, 'On the Application of a Theory of Indirect Perpetration in Al Bashir' 859-862. The question of how a state leader can be responsible for conduct perpetrated by fully responsible individuals has been approached by Murmann. Murmann proposes to imagine two chains or relations of responsibility. The responsibility of the direct perpetrator would result from the violation in the relation *vis-à-vis* the other individual; the relationship of state leaders would be based on a violation of a state's duty to protect through the use of the state's unique *Verletzungsmacht*; see Uwe Murmann, 'Tatherrschaft durch Weisungsmacht' (1996) 143(1) Goltdammer's Archiv für Strafrecht 276-278; Ambos, 'Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the Most Responsible' 149.

341 For this reason, it is misleading to argue that the concept would not fit outside the German law context in international criminal law, cf. *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06-2842 Sep Op Fulford paras 7 ff; *Prosecutor v Mathieu Ngudjolo Chui* Judgment pursuant to Article 74 of the Statute Concurring Opinion of Judge Christine Van den Wyngaert (18 December 2012) ICC-01/04-02/12-4 para 27 ff.

342 Ambos, 'Joint Criminal Enterprise and Command Responsibility' 182.

343 Weigend, 'Perpetration through an Organization: The Unexpected Career of a German Legal Concept' 104; see also Meloni, 'Fragmentation of the Notion of Co-perpetration in International Criminal Law?' 502 (concept perhaps too hierarchical); Manacorda and Meloni, 'Indirect Perpetration versus Joint Criminal Enterprise. Concurring Approaches in the Practice of International Criminal Law?' 171. But see *Prosecutor v Germain Katanga* ICC-01/04-01/07-3436-tENG para 1410: "To the Chamber, this type of structure, proof of whose existence in both a factual and legal sense presents a particular challenge, is not, however, inconsistent with the very varied manifestations of modern-day group criminality wherever it arises. It cannot be reduced solely to bureaucracies akin to those of Third Reich Germany and which lie at the root of the theory."

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of a non-state apparatus, as opposed to a state apparatus, accountable.[344] Whilst this doctrine might not lose its German origin, it will have to adapt to the international context and then becomes more and more an international doctrine, just like general principles of law recognized *in foro domestico* will take a shape that aligns with the international legal order and may look different from the shape in domestic settings.[345]

IV. (No) Immunities under customary international law

The question of the relationship between immunities under customary international law and the Rome Statute arose recently in the context of the *Al-Bashir* case[346], which concerned immunity *ratione personae* of a then sitting head of state. If one accepts the *Milošević* indictment[347] and the *Taylor* indictment[348] as precedents for or confirmation of the proposition that im-

344 One proposal has already been made by the ICC: the PTC defined the hierarchical structure by the fact that the execution of crimes would be "secured by almost automatic compliance with orders", for instance because of the replaceability of individual soldiers or through "intensive, strict, and violent training regimens", *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07-717 paras 515, 518.

345 Cf. recently Hernán Darío Orozco López and Natalia Silva Santaularia, 'Reflections on Indirect (Co-)Perpetration through an Organization' (2022) 20 JICJ 666-7.

346 See above, p. 330 for the immunity discussion in the ILC.

347 *Prosecutor v Slobodan Milošević* Decision on Review of Indictment and Application for Consequential Orders, Judge David Hunt (24 May 1999) IT-02-54 para 38; Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 AJIL 417 footnote 70, arguing that at the time of the indictment, "there was some doubt as to whether the FRY was a member of the United Nations" but "by the time Milošević was handed over to the ICTY in June 2001, the FRY had been admitted to the United Nations (in 2000). In any event, surrender by the FRY would have constituted a waiver of any available immunities." Cf. Kreß, 'Article 98' para 119 ("first judicial precedent for the exercise of jurisdiction by an international criminal tribunal over an incumbent Head of State.").

348 *Prosecutor v Charles Ghankay Taylor* Special Court of Sierra Leone, AC Decision on Immunity from Jurisdiction (31 May 2004) SCSL-2003-01-I paras 51-2: "[T]he principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community [...] the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court." Crit.

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munity *ratione personae* does not apply before international tribunals where those have jurisdiction,[349] the question may arise whether this proposition holds true also in the horizontal relationship between states when one state is requested by the ICC to arrest a sitting head of state.[350]

This section will first give an overview of the Rome Statute's legal regime concerning immunities (1.). It will then illustrate the different positions on immunities under customary international law by different chambers (2.) and the Appeals Chamber (3.).

1. The legal regime

The ICC's jurisdiction extends to crimes committed on the territory of a state party (article 12(2)(a) Rome Statute), even if committed by citizens of non-State parties, crimes which nationals of a state parties were accused of (article 12(2)(b) Rome Statute), crimes on the territory of a non-State party if the non-State party accepted the exercise of the ICC's jurisdiction (article 12(3) Rome Statute) and situations referred by the UN Security Council (article 13(b) Rome Statute).

Article 27(2) of the Rome Statute stipulates in its second paragraph that a person's immunity under national or international law "shall not bar the Court from exercising its jurisdiction over such a person."

Article 98 of the Statute then stipulates that the ICC may not "proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect

Micaela Frulli, 'The Question of Charles Taylor's Immunity' (2004) 2 JICJ 1122-4 (arguing that the judges did not pay sufficient regard to the "treaty nature of the SCSL [...] avoid[ing] explicitly addressing *the question of whether a treaty-based court may remove immunities accruing to incumbent high-ranking third states' officials*."); Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press 2008) 290.

349 Cf. *Arrest Warrant of 11 April 2000* [2002] ICJ Rep 3, 25 para 61: "[...] an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VI1 of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention."

350 See also Kreß, 'Article 98' para 97.

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to the State or diplomatic immunity" (article 98(1)) or with its obligations under "international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court" (article 98(2)).[351]

2. The *Al-Bashir* case

In 2005, the Security Council referred the situation in Darfur to the ICC and decided "that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor".[352] It emerges from the resolution's text that Sudan was put into a position analogous to a State party *vis-à-vis* the ICC and that, therefore, head of state immunity did not constitute a bar for the International Criminal Court. Yet, the resolution does not explicitly address the relationship between Sudan and the member states of the Rome regime, which raises the question of whether head of state immunity may apply as a matter of customary international law in the relationship between Sudan and state parties to the Rome Statute.[353]

According to one view, article 27 Rome Statute reflected customary international law, which is why head of states were not entitled to immunity from the jurisdiction of an international criminal court such as the ICC. This view was held by the Pre-Trial Chambers in *Malawi* and in *Chad*.[354] Since

351 According to Dapo Akande, whilst article 27 governs the relationship between states parties to the effect immunities under international law constitute a bar neither in the relation to the court, nor in relation to other States parties, article 98(1) concerns the relationship between State parties and non-State parties only, Akande, 'International Law Immunities and the International Criminal Court' 419 ff.; on a recent scholarly treatment of potential treaty conflicts between agreements in the sense of article 98(2) Rome Statute and obligations under the Rome Statute see Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (Cambridge University Press 2014) 212-281.

352 UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593(2005) para 2.

353 For this view see Dire Tladi, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir Under South African and International Law: a Perspective from International Law' (2015) 13(5) JICJ 1035, 1037, 1040; cf. also Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 JICJ 324, 332.

354 *Prosecutor v Omar Hassan Ahmad Al Bashir* ICC PTC I Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the

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"customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes", there was "no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply."[355]

In response to the criticism of this approach,[356] the PTC II chose a different reasoning to arrive at the same result of the non-availability of immunity in the specific case: whilst article 27 of the Rome Statute applied only *inter partes*, UNSCR 1593 (2005) "was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities [...] Consequently, there also exists no impediment at the horizontal level between the DRC and Sudan [...]."[357] The PTC II considered itself "unable to identify

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Arrest and Surrender of Omar Hassan Ahmad Al Bashir (13 December 2011) ICC-02/05-01/09-139-Corr paras 36, 43: *Prosecutor v Omar Hassan Ahmad Al Bashir* ICC PTC I Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir (13 December 2011) ICC-02/05-01/09-140-tENG paras 13-14.

355 *Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-139-Corr para 43.

356 Cf. for an overview Nerina Boschiero, 'The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593' (2015) 13 JICJ 636-639.

357 *Prosecutor v Omar Hassan Ahmad Al Bashir* ICC PTC II Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court (9 April 2014) ICC-02/05-01/09-195 paras 25-29. Cf. for a similar reasoning based on the UNSC resolution Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 JICJ 342; Erika de Wet, 'Referrals to the International Criminal Court under Chapter VII of the United Nations Charter and the Immunity of Foreign State Officials' (2018) 112 AJIL Unbound 35-37. See also for the argument that the UNSCR imposes the obligation to waive, rather than waives, the immunity of Al-Bashir (Michiel Blommestijn and Cedric Ryngaert, 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity' (2010) 6 Zeitschrift für Internationale Strafrechtsdogmatik 441), and that by virtue of this obligation South Sudan would be precluded from invoking the international responsibility of a State the authorities of which would arrest and transfer Al-Bashir, see (critically) Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' 331, who refers to Conforti's proposal to understand non-binding UNSCR-recommendations as justification for what would otherwise be a breach of international law, Benedetto Conforti, 'Le rôle de l'accord dans le système des Nations Unies' (1974) 142(2) RdC 262-265; Carsten Stahn, *A Critical Introduction*

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a rule in customary international law that would exclude immunity for Heads of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court, including, specifically, this Court."[358]

Domestic courts in South Africa were also divided. The African High Court held that the South African government was obliged under the Rome Statute and the Implementation Act to arrest Bashir; with respect to the question of immunity, it referred to the PTC I decision and to article 27.[359] The judgment of the Supreme Court of Appeal of South Africa rejected an exception to head of state immunity and decided to resolve the tension between South Africa's obligation to cooperate under the Rome statute and immunities under customary international law at the level of domestic law rather than international law: The domestic implementation of international obligations put more emphasis on the obligations under the Rome Statute.[360]

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to International Criminal Law (Cambridge University Press 2019) 257 (finding the chamber's argument problematic, arguing, *inter alia* that a waiver needs to be declared explicitly); on the question of explicitness, see also Manuel J Ventura, 'Escape from Johannesburg?: Sudanese President Al-Bashir Visits South Africa, and the Implicit Removal of Head of State Immunity by the UN Security Council in light of Al-Jedda' (2015) 13(5) JICJ 995 ff.

358 *Prosecutor v Omar Hassan Ahmad Al-Bashir* ICC PTC II Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir (6 July 2017) ICC-02/05-01/09-302 para 68, relying on the Arrest Warrant case.

359 *Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others* High Court of South Africa (Gauteng Division, Pretoria) (26 June 2015) (27740/2015) [2015] ZAGPPHC 402 paras 31-32.

360 *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* Supreme Court of Appeal of South Africa (15 March 2016) (867/15) [2016] ZASCA 17 para 103. As a consequence, South Africa declared to leave the ICC because a membership would compel South Africa to violate customary international law. Yet, the High Court of South Africa decided that both the government's notice of withdrawal from the Rome Statute without prior parliamentary approval was unconstitutional and invalid, *In the matter between Democratic Alliance and Minister of International Relations and Cooperation et al* High Court of South Africa (Gauteng Division, Pretoria) (22 February 2017) Case No 83145/2016 paras 47, 51.

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3. The decision of the ICC Appeals Chamber

The ICC Appeals Chamber sided in its recent judgment with the approach adopted by the Pre-Trial Chambers in *Malawi* and in *Chad* and decided that article 27(2) of the Rome Statute "reflects the status of customary international law"[361] in that Mr Al-Bashir was not entitled under customary international law to immunity from arrest and surrender by Jordan at the request of the ICC.[362] This reasoning extended also to "the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State".[363] Consequently, "a State Party cannot refuse to arrest and surrender the Head of State of another State Party on the ground of Head of State immunity."[364]

The judgment of the Appeals Chamber employed some of the techniques that have been illustrated in this book in other contexts: for instance, it examined the *telos* of the immunity rule. The object and purpose of this rule, to give expression to the sovereign equality of states and the principle of *par in parem non habet imperium*, was said to be not applicable before international courts: domestic courts "are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States", whereas "international courts act on behalf of the international community as a whole."[365] The Appeals Chamber used this difference also to define the default position and to argue that "the *onus* is on those who claim that there is such immunity in relation to international courts to establish sufficient State practice and opinio juris."[366]

The decision addressed not only customary international law but also the UN Security Council resolution 1593, and while it did not follow the analysis of customary international law by PTC I, it emphasized that the Pre-Trial Chamber "reached the same conclusion [...] based on its interpretation of the

361 *Prosecutor v Omar Hassan Ahmad Al-Bashir* ICC AC Judgment (6 May 2019) ICC-02/05-01/09 OA2 paras 103-113 (quote at para 103).

362 ibid para 117.

363 ibid para 114; see also ibid paras 125-127.

364 ibid para 132.

365 ibid para 115.

366 ibid para 116. For a similar argument see Donald Riznik, *Die Immunität ratione personae des Souveräns* (PL Academic Research 2016) 250.

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Statute and bearing in mind Sudan's position under Resolution 1593", which the Appeals Chamber endorsed.[367]

By exploring and pursuing both the "customary law avenue" and the "Security Council avenue"[368], the judgment displays a certain degree of ambiguity. In particular, the relationship between both avenues is unclear. The Chamber held, for instance, that "by ratifying or acceding to the Statute, States Parties have *consented* to the inapplicability of Head of State immunity for the purposes of proceedings before the Court"[369], before it then addressed the effect of Resolution 1593 on Sudan which is no State Party. In this context, it argued that "the legal obligation under Resolution 1593, which imposed upon Sudan the same obligation of cooperation that the Rome Statute imposes upon States Parties, *including with regard to the applicability of article 27(2) of the Statute*, prevailed as *lex specialis* over any immunity that would otherwise exist between Sudan and Jordan."[370]

Against this background and taking into account that the joint concurring opinion characterized its reasoning on the UNSC resolution as "dispositive considerations" on which the decision's "primary focus" was, it has been argued that the Security Council route proved to be decisive as far as the relationship between a State party and a non-State party is concerned.[371] Such a reading finds support in the fact the Joint Concurring Opinion addressed three scenarios in which the difficulty of immunity at the horizontal plane between states could present itself[372]: the first scenario concerned the relationship between States Parties to the Rome Statute. The second scenario focused on the relationship between two UN member states one of which would not be party to the Rome Statute and described a situation "where the Security Council specifically requires the third State to cooperate fully with

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367 *Prosecutor v Omar Hassan Ahmad Al-Bashir* ICC-02/05-01/09 OA2 para 119 ("this interpretation of the Statute was, as such, correct").

368 On this terminology see *Written observations of Professor Claus Kreß as amicus curiae with the assistance of Ms Erin Pobjie* 2018 June 2018 ICC-02/05-01/09-359 3.

369 *Prosecutor v Omar Hassan Ahmad Al-Bashir* ICC-02/05-01/09 OA2 para 132 (italics added).

370 ibid para 144 (first italics added).

371 See Sarah MH Nouwen, 'Return to Sender: Let the International Court of Justice Justify or Qualify International-Criminal-Court-Exceptionalism Regarding Personal Immunities' (2019) 78(3) Cambridge Law Journal 605-607.

372 *Prosecutor v Omar Hassan Ahmad Al-Bashir* ICC AC Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa (6 May 2019) ICC-02/05-01/09-397-Anx1-Corr ICC-02/05-01/09-397-Anx1-Corr para 451.

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the ICC, pursuant to a Resolution taken under Chapter VII of the UN Charter for purposes of conferring jurisdiction upon the Court through an Article 13(b) referral".[373] The third scenario was a variation of the second scenario in the sense that it concerned two UN member states which did not ratify the Rome Statute but which were addressed by a Security Council resolution. According to the Joint Concurring Opinion, immunity would not constitute a bar in the aforementioned scenarios. However, this list of scenarios did not include the scenario in which jurisdiction is based on the territoriality principle set forth in article 12(2)(a) Rome Statute rather than on a UNSC resolution.[374] It is precisely this scenario where the question of the existence of immunities under customary international law is particularly important.

Then again, however, the Appeals Chamber emphasized the customary law avenue by explicitly stating that "[t]he absence of a rule of customary international law recognising Head of State immunity *vis-à-vis* international courts is relevant [...] also for the horizontal relationship between States [...] no immunities under customary international law operate in such a situation to bar an international court in its exercise of its own jurisdiction."[375]

Whereas the Chamber argued only briefly that "international courts act on behalf of the international community as a whole"[376], the concurring opinion is more elaborative.[377] It held that international courts "exercise jurisdiction on behalf of the *international community*, such as is represented by the aggregation of States who have authorised those international judges"[378] and that the court exercises jurisdiction "on behalf of the international community represented in the membership of the Rome Statute"[379], and that an international tribunal "exercises the jurisdiction of all the concerned sovereigns *inter se*, for their overall benefit."[380]

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373 ibid para 451.

374 See Kreß, 'Article 98' para 112. Cf. also ICC, 'Q&A Regarding Appeals Chamber's 6 May 2019 Judgment in the Jordan Referral Re Al-Bashir Appeal, ICC-PIOS-Q&A-SUD-02-01/19_Eng' ⟨https://www.icc-cpi.int/itemsDocuments/190515-al-bashir-qa-eng.pdf⟩ accessed 1 February 2023.

375 *Prosecutor v Omar Hassan Ahmad Al-Bashir* ICC-02/05-01/09 OA2 para 114.

376 ibid para 115.

377 *Prosecutor v Omar Hassan Ahmad Al-Bashir* ICC-02/05-01/09-397-Anx1-Corr paras 56-60.

378 ibid para 53.

379 ibid para 53.

380 ibid para 59. Cf. *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174, 185: "[...] fifty States, representing the vast majority of the members of the international community, had the power, in conformity with

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The answer to the question of whether the idea is accepted that the ICC acts not only on behalf of the parties but on the behalf of the international community of the whole will be important for rebutting the counter-argument to the position of the Appeals Chamber: that immunities under customary international law continue to exist in the relationship with non-state parties since states can derogate from customary international law only *inter se* by treaty and cannot accord the ICC powers which each of the states does not possess. It remains to be seen whether a wide interpretation of this judgment according to which no immunities under customary international law exist when it comes to ICC proceedings, including the enforcement of arrest warrants, or a restrictive interpretation according to which the principles of the judgment find application only in the situation of a UNSC referral will assert itself.[381] A reasoning based on the *jus puniendi* of the international community can also have implications for the applicable law: the crimes which are to be prosecuted would have to be crimes under customary international law, as crimes that exist only under a treaty could not have led to a modification of immunities under customary international law.[382]

E. Concluding Observations

This chapter explored the interrelationship of sources in international criminal law. It began by tracing the interrelationship of sources as a *motif* in stages of the historical development of international criminal law.[383] Subsequently, it zeroed in on the jurisprudence of the international criminal tribunals, particularly the ICTY, and examined the preference for customary international

international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone [...]" This *dictum*, however, concerned the question of whether an international organization can have the capacity to bring a claim against a non-State party of that organization.

381 The answer to this question is relevant for the ICC arrest warrant of 17 March 2023 against the Russian President or the establishment of a tribunal to prosecute the crime of aggression against Ukraine, see the collection on Just Security, Just Security, 'U.N. General Assembly and International Criminal Tribunal for the Crime of Aggression Against Ukraine' ⟨https://www.justsecurity.org/tag/u-n-general-assembly-and-international-criminal-tribunal-for-aggression-against-ukraine/⟩ accessed 1 February 2023.

382 For this argument see Kreß, 'Article 98' paras 51-52, paras 126-129. See above, p. 521.

383 See above, p. 464.

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law, interpretative decisions, normative considerations and the importance of the legal craft in the identification of customary international law.[384] The chapter then examined shifts in the interrelationship of sources in the context of the Rome Statute, with a focus on the applicable law and its interpretation, the modes of liability and immunity under customary international law.[385]

In contrast to the European Court which, because of the written character of the ECHR, could interpret the ECHR without the need to ascertain it first[386], the ICTY had to do both and its decisions were therefore more likely to face a higher level of criticism. As far as the technique, legal craft and consideration of principles are concerned, the way in which the ICTY identified customary international law is arguably similar to approaches that could be observed in the ICJ jurisprudence.[387] It is submitted that a focus on the techniques can explain the disagreement which may exist with respect to certain interpretations and judgments. As disagreement on the law can be explained, disagreement as such does not have to call into question the credibility and legitimacy of customary international law and general principles of law as sources of international law. The jurisprudence of the ICTY made also a valuable contribution to the doctrine of general principles, as it highlighted the importance to take account of the functional specificities of the respective regime in which a principle from a different branch is to be applied.[388] Paying regard to this normative assessment can complement scholarship which discusses primarily the representativeness (or lack thereof) of the materials relied on when identifying a principle.

The Rome Statute raises the question of the extent to which it shifts the relative significance of the sources over time or leads to a "decline" of one source.[389] The ICC jurisprudence includes examples in which chambers focused more on the particularities of the Rome Statute. The shift in the interrelationship can also reflect a shift in preferred doctrinal concepts or criminal

384 See above, p. 476.
385 See above, p. 507.
386 The European Court may need to address the question of whether a reservation is valid, cf. *Belilos v Switzerland [Plenum]* App no 10328/83 (ECtHR, 29 April 1988) paras 89-103.
387 See above, p. 499.
388 See above, p. 487.
389 See above, p. 517; cf. Larissa Jasmijn van den Herik, 'The Decline of Customary International Law as a Source of International Criminal Law' in Curtis A Bradley (ed), *Custom's future: international law in a changing world* (Cambridge University Press 2016) 230ff.

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law theory. In this sense, JCE on the one hand and indirect perpetratorship and control theory on the other hand primarily represent different, competing conceptualizations. International practice can look like a *Rorschach* blot in which different viewers see different aspects depending on the respective viewer's personal, or in the context of law, doctrinal background and training.[390] It may be worthwhile for future research on customary international law to distinguish also in other contexts between the practice that was interpreted for a specific rule and the doctrinal conceptualization expressed in the formulation of a rule of customary international law.

At the same time, it was demonstrated that a purely treaty-based reasoning has its limitations as long as not all states are parties to the Rome Statute. It will be important to observe whether the ICC will focus on the treaty and its particularities without engaging with customary international law or whether it will emphasize the interrelationship and regard itself not just as a court based on a treaty but as a court in the service of the international community and engage with customary international law in good faith. It is noteworthy that the ICC in the *Al-Bashir* case was conscious of the implications which a judgment resting exclusively on the interpretation of a Security Council resolution and the Rome Statute can have for the future development of customary international law on immunities.[391] Such a judgment could have been read as an implicit confirmation of the view that a UNSC resolution was necessary as immunity applied in the horizontal relationship between a state party to the Rome Statute and a non-state party. Other courts and tribunals might take from this example to be mindful of the implications a reasoning which is or is not based on custom can have for the future development of customary international law.

390 On this metaphor see Sadat and Jolly, 'Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot' 755-756.

391 See above, p. 546. See also *Written observations of Professor Claus Kreß as amicus curiae with the assistance of Ms Erin Pobjie* para 6: "The choice between the two legal avenues before [the Appeals Chamber] has implications that transcend the case in question."

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