

International Criminal Tribunals and the Sources of International Law

Antonio Cassese's Contribution to the Canon

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Abstract

This piece looks at the approach of Antonio (Nino) Cassese to aspects of the sources of international law. After a small set of personal reflections, it begins by discussing Cassese's general approach to international law, flagging up the co-existence of positivist and more naturalistic/humanistic approaches in his academic writings. It then moves on to how Cassese brought these approaches to his judicial work, in a manner which is termed 'presentational positivism'. The piece explains this through an analysis of his contribution to the Tadić, Erdemović, and Kupreškić et al. cases, and attempts to explain how what, at first view, might seem to be different approaches in those cases to international law in fact reflect Cassese's broader, humane view of international law. It then turns to his judicial and academic reflections on the authority of case law and how that relates to the level of reasoning they contain. This is investigated with particular reference to the difference of opinion between the ICTY and International Court of Justice (ICJ) in the Tadić and Bosnian Genocide cases, with a specific focus on how he sought to engage the ICJ in reasoned inter-judicial debate. It concludes with a comparison of Cassese with another major figure of 20th-century international law who sought to reconcile humanitarian impulses with often positivist presentations of international law, Sir Hersch Lauterpacht.

When I make my sweeping bow at heaven's gate, One thing I shall still possess, at any rate ... Unscathed, something outlasting mortal flesh ... my panache¹

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1 E. Rostand, *Cyrano de Bergerac*, trans by C. Fry (OUP, 1996), at 146.

1. Introduction

There is a great deal that ought to be said about Antonio (Nino)² Cassese. One thing is that, although he was an academic of the first order he, like Cyrano de Bergerac, had panache. To take a personal example, some years ago I asked him for a reference. I did so with some trepidation, I knew he had many, and better, claims on his time than writing references for me, but I was (then, as now) shameless, and asked anyway. His response, received as ever within a few hours,³ was telling. In a language which was at least third from his native tongue, was, verbatim: 'Of course, dear Rob, I would be honored'. The juxtaposition of the first four words shows it all: Warmth, kindness and panache. His generosity was very welcome, but not a shock; my first contact with Nino was, as a very junior scholar, receiving a package out of the blue from him, with a letter saying he was interested in my work to date, that we ought to collaborate in the future, and enclosing a selection of his recent books and articles.⁴ Young (and old) academics can have worse days.

Such personal qualities were only part of what made Nino what he was. As an international lawyer he was a groundbreaker in human rights, both as a scholar and practitioner,⁵ as well as in humanitarian law.⁶ He was also, when called upon to be, an outstanding criminal lawyer⁷ (although he was characteristically modest about this). Still, first and foremost, he was a general international lawyer.⁸ This piece is intended to show how he used the platform that was given to him in the International Criminal Tribunal for the former Yugoslavia (ICTY) (and to a lesser extent, the Special Tribunal for Lebanon (STL)) to develop general international law. He did so in spite of the fears of some that international law may be fragmenting,⁹ by refusing to accept that a proliferation of specialized tribunals inevitably leads to a fissiparous approach to the law. This vision manifested itself in his judicial pronouncements, which

2 I flatter myself to use the colloquial contraction that he (always) offered to friends.

3 Whatever time I sent Nino an e-mail, I would have a reply by return, whatever the time zone he or I were in.

4 For further personal reflections see the contributions to A. Cassese, *The Human Dimension of International Law* (OUP, 2008) section 1 and S. Zappalà, 'Personal Remarks on Antonio Cassese and His Vision of International Law and International Criminal Law along the Road He Walked', 25 *Leiden Journal of International Law* (2012) 503.

5 For the former, see A. Cassese, *Self-Determination of Peoples: A Legal Appraisal* (CUP, 1995); for the latter, not least as a member of the European Committee on Torture, see A. Cassese, *Tortured States* (Polity, 1996).

6 See e.g. Cassese, *supra* note 4, Section 2.

7 There is little that a criminal lawyer could usefully add to his Dissenting opinion in Judgment, *Erdemović* (IT-96-22-A), Appeals Chamber, 7 October 1997.

8 To take one example, see A. Cassese, *International Law in a Divided World* (OUP, 1986).

9 International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682, 2006.

have had, and are likely to continue to have, in many instances, a significant impact on international law.¹⁰

To expand upon Nino's international legal methodology and how it played out in his judicial work, this contribution will begin by looking briefly at Nino's approach to academic international law, largely, although not solely, from his own evaluations of it. It will then concentrate on two aspects of his contribution to the approach of the ICTY to sources doctrine. These are his approach to customary international law, and the authority to be granted to case law.¹¹ This piece is not intended as hagiography: Nino would not have wanted one.¹² He was inspirational, but happy to engage with critiques that were based on academic disagreement. Indeed, as we will see, he had little intellectual sympathy for those, even at the highest level, who avoided the legal questions he raised; and woe betide those who ascribed pernicious political motives to his work.¹³ I believe that any such disagreements that he and I ever had were understood as being between friends. It is in this sense I hope that any critiques made here are taken.¹⁴

2. Cassese's Approach to International Law

For a large part of his career, Nino was careful not to set out his overarching approach to international law expressly. It might have been possible to induct, from his publications, sometimes with supporting evidence from interviews,¹⁵ how he saw international law. Still, how he approached international law only

- 10 It might be objected that the cases that are evaluated in this piece were at times collegiate judgments rather than those that simply bear his name, however, all the evidence points to the relevant aspects discussed herein being his work.
- 11 He also pronounced on other issues, such as general principles of law, but for space reasons, they will not be covered here. For discussion, see J. Ellis, 'General Principles and Comparative Law', 22 *European Journal of International Law (EJIL)* (2011) 949.
- 12 As he said in relation to his tribute to Giuseppe Sperduti: "to "commemorate" Sperduti would mean to do him a disservice: he was a man with a strong critical mind, always eager to critically appraise ideas views and persons. To write about him without assessing his scientific merits but also his scholarly weaknesses would mean to betray his intellectual and moral legacy'. A. Cassese, 'Soliloquy', in Cassese *supra* note 4, lxx, lxxi.
- 13 See M. Halberstam, 'Review of Terrorism, Politics and the Law', 85 *American Journal of International Law (AJIL)* (1991) 410, and Nino's response, 86 *AJIL* (1992) 104; Halberstam replied (somewhat intemperately): 86 *AJIL* (1992) 106.
- 14 On (yet) another personal note, I once received for review an anonymized submission to the *Journal of International Criminal Justice*, of which, of course, Nino was the founding editor. I wrote back with suggestions for changes (justified or not) to the piece before it ought to be published. These were taken up and fully integrated into the piece, which was then published. It was only then that I found out that the piece was written by Nino. He had it blind reviewed and taken on board the reports before publishing it in his own journal.
- 15 H. Verrijn Stuart and M. Simons (eds), *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese: Interviews and Writings* (Amsterdam University Press, 2009) although, sadly, he probably already knew that his time with us was far from long.

took centre stage in his writing when he knew that he was likely to set out on 'that eternal voyage'¹⁶ soon.¹⁷

Nino's approach was one that sought to move the law forward and render it more humane, but broadly within a positivist framework or vocabulary. Although his position was inspired by a naturalist impulse to protect people (which, as we will see, did sometimes come to the surface) he understood the necessity of bringing states along with him by using the language and, to a fair extent, methods of positivism. He did not partake of the heady brew of pure naturalist argumentation that, for example characterizes the judicial output of Judge Antonio Cançado-Trindade in the International Court of Justice (ICJ).¹⁸ I have described approaches such as Nino's elsewhere as presentational positivism.¹⁹ Others have tried to argue in this idiom, but he was the master of it.

Furthermore he was fully conversant with interdisciplinarity, long before it became fashionable, or even acceptable (he had initially sought to work in philosophy or the humanities), and sought to reform institutions and doctrines on the basis of insights from these disciplines.²⁰ As he said, he aimed for a realizable utopia,²¹ in particular he saw the need for 'judicious reformers', who sought to 'suggest realistic and viable avenues in order to avoid, at least to some extent, those pitfalls encountered when trying to build a better path'.²²

He was also keenly aware of the paucity of mechanisms for going beyond the existing international legal *status quo*.²³ Where he found a possible way to move forward in international law, though, was through judicial opinions which, in spite of their notionally subordinate role with respect to the sources of international law, have a far greater role in developing (or, shall we say, crystallizing) international law than strict sources doctrine might imply.²⁴ In this way, he was very much in the Lauterpachtian camp, those who saw the judicial function as one which is, or ought to be, dedicated to careful

16 A. Cassese 'Introduction' in A. Cassese (ed.), *Five Masters of International Law* (Hart, 2011), x.

17 See also Zappalà, *supra* note 4, 504–505.

18 See e.g. Order on Request for Provisional Measures, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ, 28 May 2009. Dissenting Opinion of Judge Cançado-Trindade, and *ibid.*, Judgment, 20 July 2012, Separate Opinion of Judge Cançado-Trindade.

19 R. Cryer, 'The Philosophy of International Criminal Law', in A. Orakhelashvili (ed.), *Research Handbook on the History and Theory of International Criminal Law* (Edward Elgar, 2011) 232, 250. Others might describe it as 'Grotian', but that is a term that has been used to cover a large number of disparate scholars, many of whom who would bristle at such a description.

20 See Cassese, 'Soliloquy', *supra* note 12, lix–lxv.

21 A. Cassese (ed.), *Realizing Utopia* (OUP, 2012), see also Zappalà, *supra* note 4, 510.

22 A. Cassese, 'Introduction', *ibid.*, xvii, xviii.

23 *Ibid.*, xviii.

24 See e.g. R. Cryer, 'Neither Here nor There? The Status of International Criminal Jurisprudence in the International and UK Legal Orders', in M. Bohlander and K. Kaikobad (eds), *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (Brill, 2008) 183.

development of the law to promote the protection of human beings.²⁵ Given his unique position as the President of two international criminal tribunals Nino had an extraordinary opportunity to bring this about. He saw it, and seized it.

3. Exercising Judgment: Customary International Law

It is often said that the judgments of the ICTY are now more workaday, technical decisions rather than the artisanal pronouncements of the early years (i.e. the time in which Nino presided over that court).²⁶ Largely this is true, and it is in the early decisions of the ICTY (and indeed the STL) that Cassese sought to shift the balance in international law towards its humanization.²⁷ One way in which he attempted to do so was by seeking to alter the way in which the sources of international law were seen, in particular customary international law. In this respect, his contribution was to emphasize (as did the ICJ in the *Nicaragua* case)²⁸ the relevance of *opinio juris* over that of state practice. Where he was successful in doing so, it was at an extraordinary level.

This first time the issue Nino had the opportunity to contribute (and, indeed, shape) the debate before the ICTY was in the seminal *Tadić* interlocutory appeal.²⁹ One issue that arose (tangentially with respect to the specifics of the appeal) was the customary law applicable to non-international armed conflicts. Much can be said about that,³⁰ but what is more important here is what that aspect of the decision showed about how he approached custom.

Speaking of the relative importance of state practice and *opinio juris* in international humanitarian law Nino asserted:

When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is 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. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally

25 See e.g. H. Lautperacht, *The Development of International Law by the International Court* (Stevens, 1958); M. Koskenniemi, *The Gentle Civilizer of Nations* (CUP, 2001) Chapter 5; the link between the two has been alluded to by others: T. Hoffmann, 'The Gentle Civilizer of Humanitarian Law—Antonio Cassese and the Creation of the Customary Law of Non-International Armed Conflicts', in C. Stahn and L. van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser Press, 2010) 58.

26 See e.g. G. Watson, 'The Changing Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', 37 *New England Law Review* (2001–2002) 871.

27 Aspects of this section trace arguments made in Cryer, *supra* note 19, 243–250.

28 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)* Merits [1986] ICJ Rep 4. See e.g. A. D'Amato, 'Trashing Customary International Law', 81 *AJIL* (1987) 101; F. Kirgis, 'Custom on a Sliding Scale', 81 *AJIL* (1987) 146.

29 Decision on the Defence Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-AR72), Appeals Chamber, 2 October 1995.

30 See Jean-Marie Henckaerts' contribution to this issue.

refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.³¹

In truth, this is probably not an epistemological issue specific to humanitarian law, however, it reflected the dual commitment of Nino's, to 'humanize' humanitarian law,³² and to foreground *opinio juris* over state practice, and, by doing so to hold states up to the standards they claimed they lived up to, rather than what their practice may imply. In some ways this showed his approach to be, as he said, to be that of a realistic utopian, which in many ways led him to an immanent critique of state behaviour: What states did ought to be critiqued on the basis of what they claim to believe.³³ When this is done states are hard-pressed to object to the (re)statement that is made, as it is a reflection of their own avowed position, making it politically difficult to then disagree. It is thus a good argument from the perspective of both law and policy. Nino deployed it in *Tadić* with an incredibly keen eye on both aspects.

Equally, it is true that in the *Tadić* opinion he also asserted a position which has more than a hint of naturalism to it:

A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. 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. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State?³⁴

As a matter of morality, there is probably little that could be said against that statement, but its naturalistic sentiment was leavened by the attempt to ground the statement in state practice, in particular the development of human rights in the post-War era.³⁵ This is entirely consistent with Nino's more general approach to international law, in which he sought to reconcile the 'old' international law, of that law which protected the prerogatives of

31 *Tadić*, *supra* note 29, § 99.

32 See Hoffmann, *supra* note 25.

33 On the virtues of immanent critique, see S. Marks, *The Riddle of All Constitutions* (OUP, 2000), 25–28.

34 *Tadić*, *supra* note 29, § 97.

35 *Ibid.*

states, and the 'new international law', which sought to advance the interests of humanity.³⁶

In this particular instance, the way in which he made the case that there was customary law applicable in non-international armed conflict that did not find its basis in existing treaty law, was brilliant. Not a year before the *Tadić* opinion serious scholars and the International Committee of the Red Cross had taken the view that there was no such law (or at least no criminal law),³⁷ and yet only three years later, come the Rome negotiations for the Statute of the International Criminal Court and the argument that '*Tadić* said' was normatively significant.³⁸ It was not the only place in which that argument had traction.³⁹ What was at best controversial prior to Cassese's opinion in *Tadić* is now accepted wisdom. This is not a coincidence.

The next time Cassese looked at custom in the ICTY, in the *Erdemović* case,⁴⁰ his approach was more restrained. As is well known, the case dealt with the question of whether or not duress could amount to a defence to a crime involving the killing of innocents. The Appeals Chamber was deeply divided, deciding by a bare majority (3-2) that it could not. The majority was made up of Judge Li, who uncritically adopted the Prosecution argument that post-World War II case law evidenced a customary rule that the defence did not apply⁴¹ and Judges McDonald and Vohrah, who, like Nino were unconvinced of the Prosecutor's position.⁴²

McDonald and Vohrah having found no customary rule on point, turned to policy considerations to determine that the duress was no defence. Nino set out a vastly different approach. He argued that if there was no specific rule excluding the defence from cases involving murder, then the default rule (that duress is a defence) ought to apply, subject to the conditions required by that defence. Indeed he excoriated the (two person) plurality as:

instead of...[reaching]...this simple conclusion, the majority of the Appeals Chamber has embarked upon a detailed investigation of 'practical policy considerations' and has

36 See e.g. Cassese, *supra* note 21, Chapter 1.

37 D. Plattner, 'The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts', 30 *International Review of the Red Cross* (1990) 409, 414. P. Rowe, 'War Crimes and the former Yugoslavia: The Legal Difficulties', 32 *Revue de droit militaire et droit de la guerre* (1993) 317, 328–333.

38 See e.g. L. Moir, *The Law of Internal Armed Conflict* (CUP, 2002) 160; E. la Haye, *War Crimes in Internal Armed Conflicts* (CUP, 2007) 136.

39 See R. Cryer, 'Of Custom, Treaties, Scholars and the Gavel: The Impact of the International Criminal Tribunals on the ICRC Customary Study', 11 *Journal of Conflict and Security Law (JSCL)* (2006) 239.

40 *Erdemović*, *supra* note 7. On the decision see P. Rowe, 'Duress as a Defence to War Crimes After *Erdemović*: A Laboratory for a Permanent Court?' 1 *Yearbook of International Humanitarian Law* (1999) 210; R. Cryer, 'One Appeal, Four Opinions, Two Philosophies and a Remittal', 2 *Journal of Armed Conflict Law* (1998) 193; A. Fichtelberg, 'Liberal Values In International Criminal Law: A Critique of *Erdemović*', 6 *Journal of International Criminal Justice (JICJ)* (2008) 3.

41 *Ibid.*, Separate Opinion of Judge Li, §§ 1–12.

42 *Ibid.*, Dissenting Opinion of Judge Cassese, §§ 9–46. Separate Opinion of Judges McDonald and Vohrah, §§ 46–55.

concluded by upholding ‘policy considerations’ substantially based on English law. I submit that this examination is extraneous to the task of our Tribunal. ... Our International Tribunal is a court of law; it is bound only by international law. It should therefore refrain from engaging in meta-legal analyses. ... What is even more important, a policy-oriented approach in the area of criminal law runs contrary to the fundamental customary principle *nullum crimen sine lege*.⁴³

It is hard to square this doctrinally with his approach to international law in *Tadić*. However, there are substructural commonalities between his opinions in these cases, in particular Nino’s aim of humanizing humanitarian law. In this opinion he was clearly concerned with the predicament of victim-perpetrators such as Erdemović, and so he argued that the law had to take into account societal expectations, and ought not to require the impossible, branding people either criminals or martyrs.⁴⁴ As he continued:

Consider the following example. ... An inmate of a concentration camp, starved and beaten for months, is then told, after a savage beating, that if he does not kill another inmate, who has already been beaten with metal bars and will certainly be beaten to death before long, then his eyes will, then and there, be gouged out. He kills the other inmate as a result. Perhaps a hero could accept a swift bullet in his skull to avoid having to kill, but it would require an extraordinary — and perhaps impossible — act of courage to accept one’s eyes being plucked out. Can one truly say that the man in this example should have allowed his eyes to be gouged out and that he is a criminal for not having done so?⁴⁵

Cassese’s dissent has commended itself well to history, the Rome Statute does not contain an exclusion of duress from murder-based charges.⁴⁶

Admittedly, Nino’s judicial output has not always influenced the law in such an iconoclastic way as the cases discussed so far, as can be shown in our next example, the *Kupreškić* case.⁴⁷ In this case, when it came to the question of reprisals, Nino returned to the approach to custom he took in *Tadić*, with its focus on *opinio juris*, and interpretations thereof, this time with the addition of a very broad approach to the normative effect of the Martens clause. The clause, in its classic formulation, provides that:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience.⁴⁸

43 Cassese, *ibid.*, § 11 (emphasis in original).

44 Cassese, *ibid.*, § 47. This reflects Nino’s personal approach; he was demanding on principles, but also had a keen understanding, and empathy for, human frailties when those principles had to be applied.

45 *Ibid.* (emphasis in original).

46 Art. 31(1)(d) ICCSt. See e.g. W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2011) 490–491.

47 Judgment, *Kupreškić et al.* (IT-95-16-T), Trial Chamber, 14 January 2000.

48 1899 *Hague Convention, Preamble* 32 Stat. 1803; *Treaty Series* 403.

From this, Nino asserted that, although state practice and *opinio juris* were important, and although the principles of humanity and the dictates of public conscience were not, in and of themselves sources of international law, the 'Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates'.⁴⁹ Although some high authorities feel that the Martens clause has such a broad effect,⁵⁰ this is deeply controversial.⁵¹

In this case Nino asserted that:

This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus*, as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.⁵²

In addition to the humane moral points he made against the use of reprisals against civilians, as prohibited by Article 51(6) of Additional Protocol I to the Geneva Conventions, Nino said that — in spite of the limited practice that he identified and, controversially characterized as being in support of his position — 'Due to the pressure exerted by the requirements of humanity and the dictates of public conscience, a customary rule of international law has emerged on the matter under discussion.'⁵³

Two things ought to be said about this. The first is that invocation of the Martens clause was effectively an attempt to give a judicial imprimatur to views that Nino had previously expressed in an academic context.⁵⁴ This, as we will see, was not the only time. The second is that he had previously distinguished *opinio juris* and *opinio necessitas*, in the context of humanitarian intervention.⁵⁵ The latter being a perception that the law ought to change rather than that this was already the law, i.e. something related more to the *lex ferenda* rather than the *lex lata*. Here, however, he rather used *opinio necessitas* to refer to a perceived social need to overcome the limitations of what state views were about the former, then moved from that to seemingly substitute it, on the basis of the Martens clause, for *opinio juris*.

49 Kupreškić *et al.*, *supra* note 47, § 25.

50 Lord Wright, 'Introduction', XV LRTWC, xiii.

51 T. Meron 'The Martens Clause, Principles of Humanity and the Dictates of Public Conscience', 94 *AJIL* (2000) 78.

52 Kupreškić *et al.*, *supra* note 47, § 527.

53 *Ibid.*, § 531.

54 See A. Cassese, 'The Martens Clause: Half a Loaf, or Merely Pie in the Sky?' 11 *EJIL* (2000) 187.

55 A. Cassese, 'A Follow Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*', 10 *EJIL* (1999) 791, 797.

It might be said that this is similar to Nino's opinion in *Tadić*, but this is not quite the case. In *Tadić*, Nino framed his approach to sources doctrine very carefully. Although there were the broader naturalist assertions discussed above, these were separated from the presentation of state practice, and, on the whole, the judgment did not rely expressly on the more assertive naturalist/humanist statements that were perhaps its inspiration. In contrast in *Kupreškić*, he sought to move beyond the mainstream narrative to make the case for customary law status of controversial treaty provisions.

His position did not, however, achieve the level of state acceptance that his opinion in *Tadić* did. For example, the United Kingdom military manual, in probably the most notable example of its (rare) divergences from the conclusions of the ICTY, expressly disavowed its findings on point in *Kupreškić*.⁵⁶ As, admittedly implicitly and not entirely unambiguously, did the ICTY Appeals Chamber when, in *Martić*, it probably accepted the lawfulness, subject to strict conditions, of such reprisals.⁵⁷ Admittedly it is true that owing to the fact that it found the conditions for reprisals were not fulfilled in that case, the *Martić* Appeals Chamber decided it need not deal with the question any further, it could be argued that Chamber had avoided the question. However, the question of whether or not a defence to a crime exists is separate, and logically precedes that of whether or not its conditions are fulfilled (a point well made by Nino in his dissent in *Erdemović*).⁵⁸ In *Martić*, the Appeals Chamber expressly upheld the Trial Chamber's decision that in that case the criteria for reprisals had not been fulfilled. This would not be necessary if the defence did not exist at all.⁵⁹

The final occasion on which Nino sought to make a major contribution to the law of custom formation was in his judicial role as President of the STL. Although the Tribunal's substantive criminal jurisdiction was over Lebanese criminal law, a preliminary decision on the applicable substantive law dedicated a considerable portion of its reasoning to discussion of customary law.⁶⁰ The discussion centred, particularly, on the vexed question of whether or not customary international law recognizes a general definition of the crime

56 Ministry of Defence, *Manual of the Law of Armed Conflict* (OUP, 2004) 421. For academic critique see C.J. Greenwood, 'Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', in H. Fischer, C. Kreß and S. Rolf Lüder (eds), *International and National Prosecution of Crimes Under International Law: Current Developments* (Springer, 2001) 539. See also F. Kalshoven, 'Reprisals and the Protection of Civilians: Two Recent Decisions of the Yugoslavia Tribunal', in Vohrah et al. (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer, 2003) 481, in which Kalshoven chose Nino's *festschrift* as the venue for a strongly worded critique of the judgment.

57 Judgment, *Martić* (IT-95-11-A), Appeals Chamber, 8 October 2008, §§ 263–267.

58 *Supra* note 7, §§ 44–46.

59 It is also true that the Appeals Chamber in *Martić* stated that the prohibition on attacking civilians was 'absolute', *ibid.*, § 268, however this was in response to the separate argument that civilians could be targeted in self-defence, as the Appeals Chamber itself stated (*ibid.*) and its reference to the relevant previous ICTY jurisprudence shows.

60 Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-11-01-17bis), Appeals Chamber, 16 February 2011.

of terrorism. Nino had previously, in an academic context, argued, against the mainstream view, that it did.⁶¹ This, not surprisingly, proved controversial.⁶² This, however, is not as important for our purposes as the more general comments he made about customary law.

In this case Nino returned to the argument that *opinio necessitas* and *opinio juris* were closely intertwined, and asserted that:

Relying on the notion of international custom as set out by the International Court of Justice in the *Continental Shelf* case, it can be said that there is a settled practice concerning the punishment of acts of terrorism, as commonly defined, at least when committed in time of peace; in addition, this practice is evidence of a belief of States that the punishment of terrorism responds to a social necessity (*opinio necessitatis*) and is hence rendered obligatory by the existence of a rule requiring it (*opinio juris*).⁶³

The echoes of *Kupreškić* are unmistakable. The same difficulty attends them however, the use of social necessity as a substitute for *opinio juris*, in the cause of pushing the law forward remains contentious. That said, once again Nino was solicitous of the necessity of adducing more traditional arguments to make a case that would be conducive to positivists. So he cited a number of pieces of what he considered to be proof of the customary crime of terrorism and its definition.⁶⁴ In addition to domestic legislation, sectoral treaties and Security Council resolutions, he included a number of domestic cases which did not specifically refer to customary international law, but domestic offences of terrorism, or definitions in domestic law for the purposes of e.g. immigration law. As such, many would think that they were not really relevant to the customary definition of a crime of terrorism.⁶⁵ Nino had already anticipated that criticism, and argued in response that:

Even if the view were taken that those national judgments do not advert, not even implicitly, to a customary international rule nor explicitly note that they reflect an international obligation of the State nor express a feeling of international legal obligation, nevertheless our conclusion stands. It is supported by the legal criteria suggested on the basis of careful scrutiny of international case law by a distinguished international lawyer, Max Sørensen. According to him one should assume as a starting point the *presumption* of the existence of *opinio juris* whenever a finding is made of a consistent practice; it would follow that if one sought to deny in such instances the existence of a customary rule, one must point to

61 A. Cassese 'Terrorism as an international crime', in A. Bianchi (ed.), *Enforcing International Law Norms against Terrorism* (Hart, 2004) 213; A. Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law', 4 *JICJ* (2006) 1. For the (mainstream) view that it did not, see B. Saul, *Defining Terrorism in International Law* (OUP, 2006).

62 M.J. Ventura, 'Terrorism According to the STL's Interlocutory Decision on the Applicable Law: A Defining Moment or a Moment of Defining?' 9 *JICJ* (2011) 1021 (in support of the decision); M. Gillett and M. Schuster, 'Fast Track Justice: The Special Tribunal for Lebanon Defines Terrorism', 9 *JICJ* (2011) 989; B. Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism', 24 *Leiden Journal of International Law* (2011) 677 (against).

63 Applicable Law Decision, *supra* note 60, § 102.

64 For firm criticism see Saul, *supra* note 62.

65 See e.g. Saul, *ibid.*, 686–693.

the reasons of expediency or those based on comity or political convenience that support the denial of the customary rule.⁶⁶

There are a number of issues that arise here. The first is factual, some questions have to be asked if state practice is, in fact consistent on this. The positions of states in relation to the negotiation of a comprehensive treaty is evidence of deep divides on point, and the vast majority of states in those negotiations put forward their positions not on the basis that they are seeking to codify customary international law. Although some of these views may be politically motivated, and thus the legal views of states, through their legislation and case law, could be differentiated, the issue is really one of salience rather than *opinio juris*. The domestic practice is simply not seen by states as relevant to the international law on point.

The second issue is more conceptual. Sørensen's view is not the view of the vast majority of international lawyers, who remain of the view that *opinio juris* is an element of custom that requires specific proof.⁶⁷ The citation to Sørensen that the decision provided was to his (admittedly well-regarded) Hague Academy General course of 1976, but as Article 38(1) of the ICJ Statute makes clear, scholars are only a subsidiary means of determining what international law is. It is true that Sørensen had, prior to the Course, propounded such views in a judicial capacity, in the *North Sea Continental Shelf* cases.⁶⁸ However, judicial decisions are also only a subsidiary means of determining international law. It might be countered that in practice judicial decisions (especially of the ICJ) have a far higher standing than that, and certainly more than the writings of academics.⁶⁹ This is true, but it is telling that in those cases, Sørensen was dissenting, which rather attenuates the value of his opinion.

As mentioned above, the *Applicable Law* decision has generated considerable controversy, and it might be questioned whether the decision of an international/hybrid tribunal could be enough to persuade states that, in spite of the deep divisions that remain over the definition of terrorism, custom has developed to the point where there is such a definition. Then again, it is all too easy to forget how controversial *Tadić* was in 1995,⁷⁰ and the decision has

66 *Applicable Law* Decision, *supra* note 60, § 101.

67 E.g. M. Akehurst, 'Custom as a Source of International Law', 47 *British Yearbook of International Law* (BYIL) (1974–1975) 1; O. Elias, 'The Nature of the Subjective Element in Customary International Law', 44 *International and Comparative Law Quarterly* (1995) 501; R. Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates', 21 *EJIL* (2010) 173.

68 *Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*, Judgment [1969] ICJ Rep 4.

69 M. Shahabuddeen, *Precedent in the World Court* (CUP, 1995); R.Y. Jennings, 'The Judiciary, National and International, and the Development of International Law', 45 *International and Comparative Law Quarterly* (ICLQ) (1996) 1; G. Schwarzenberger, *International Law as Applied By International Courts and Tribunals: Vol. 1* (3rd edn., Stevens, 1957).

70 For contemporary critiques see C. Warbrick and P. Rowe, 'The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the *Tadić* Case', 45 *ICLQ* (1996) 691; G.R. Watson, 'The Humanitarian Law of the

already been cited in the United Kingdom Court of Appeal for the proposition that there is a defined customary international crime of terrorism.⁷¹

In all, what can be said about Cassese's approach to custom was that, for the most part, it was broad and very 'modern'⁷² in the sense that he tended to emphasize *opinio juris* (and later *opino necessitas*), and use those concepts to render the law more responsive to humanitarian concerns. Where that approach did not serve humanitarian ends though, as in *Erdemović*, he was happy to jettison such an approach and adopt a stricter one to sources than to human beings. This, as we will see, is a characteristic of some of the greatest judges in international law.

4. Jurisprudence on Jurisprudence

Nino also engaged in a significant discussion about the normative status of case law in international law. The ICTY has made, and continues to make, frequent references to case law, both their own, which was subject to a system of precedent set up in the *Aleksovski* case,⁷³ and of other Tribunals, in particular, although not exclusively, those from the post-War era. Therefore the issue of how such cases ought to impact on the general international law of war crimes arises in a manner that cannot appropriately be avoided.

Largely, at least in the abstract, Nino adopted a traditional approach, building upon Article 38(1)(d) of the ICJ Statute to argue that in the absence of a hierarchy of courts in international society, there is an absence of a strict doctrine of precedent between courts, and that the status of judicial decisions were simply as a subsidiary means of determining the law.⁷⁴ He engaged in a sensible exegesis of the law, stating that the Tribunal was not to rely on one case, or a series of them in and of themselves for propositions of law. They were, instead to use them as evidence of practice, *opinio juris*, or the emergence of a general principle of law.⁷⁵

In addition Nino argued that cases may also be persuasive in that they could agree that an earlier decision was the correct interpretation of a relevant rule. This was not, though, to be confused with precedential value per se, but that their reasoning was persuasive: 'prior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight.'⁷⁶ All of this is correct in

Yugoslavia War Crimes Tribunal: Jurisdiction in *Prosecutor v Tadić*, 36 *Virginia Journal of International Law* (1996) 687, 709–728.

71 *R v Gul* [2012] EWCA 280, § 33, notably referring specifically to 'the late Judge Cassese, an international judge of eminence'.

72 A.E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *AJIL* (2001) 757.

73 Judgment, *Aleksovski* (IT-95-14/1-A), Appeals Chamber, 24 March 2000, § 113.

74 *Kupreškić et al.*, *supra* note 47, § 540.

75 *Ibid.*

76 *Ibid.*

relation to the 'black letter' international law on point, but it must be said that it does not reflect the practice of the ad hoc Tribunals, which has been to frequently rely on series of cases, or at times even one case alone,⁷⁷ to establish legal propositions (although, of course, Nino cannot be blamed for cases he did not decide).

Interestingly, and almost certainly correctly, Cassese distinguished between decisions of international tribunals and domestic courts.⁷⁸ This was on the basis that international tribunals would, of necessity, be applying (other than in very specific circumstances, such as determining nationality)⁷⁹ international law. The same cannot necessarily be said in relation to domestic courts, which may operate on the basis of domestic law, or under its influence. That said, where national courts were basing themselves directly on international law, they could be influential in determining the international law on point:

In many instances no less value may be given to decisions on international crimes delivered by national courts operating pursuant to ...international treaties. In these instances the international framework on the basis of which the national court operates and the fact that in essence the court applies international substantive law, may lend great weight to rulings of such courts. Conversely, depending upon the circumstances of each case, generally speaking decisions of national courts on war crimes or crimes against humanity delivered on the basis of national legislation would carry relatively less weight ...⁸⁰

As a result, Nino advocated caution and was in favour of looking carefully at national pronouncements to determine whether they were really applying international law in its pure state.⁸¹ It is, in truth, difficult to reconcile this with his later approach to domestic jurisprudence taken in the *Applicable Law* decision of the STL discussed above, where the various different purposes for which domestic courts had looked into terrorism were passed over in favour of an assumed *opinio juris* that they were asserted to reflect. Perhaps his views on this changed in the intervening decade or so between the two cases.

Although Nino gave greater weight to the output of international judicial organs than that of domestic courts, he remained convinced of 'the Justinian maxim whereby courts must adjudicate on the strength of the law, not of cases... also applies to the Tribunal as to other international criminal courts'.⁸² And he had little time for cases, even from the ICJ, that he did not consider to be up to intellectual scratch. The clearest example of this came in the *Tadić* 1999 Appeal.⁸³ In that case, the question of whether or not the conflict between the Bosnian Muslims and the Bosnian Serbs had been internationalized

77 Judgment, *Bagilishema* (ICTR-95-1A-A), Appeals Chamber, 3 July 2002, § 35.

78 *Kupreškić et al.*, *supra* note 47, § 538.

79 Although this is not quite as simple as might be thought, see Judgment, *Delalić, Mucić, Delić and Landžo* (IT-96-21-T), Trial Chamber, 16 November 1998, §§ 245–275.

80 *Kupreškić et al.*, *supra* note 47, § 541.

81 *Ibid.*, § 542.

82 *Ibid.*, § 540.

83 Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999.

by virtue of the level of assistance given by Serbia to the Bosnian Serb forces was germane. The ICJ had pronounced directly on point in the *Nicaragua* case, and had set a high threshold, of 'effective control'.⁸⁴ This threshold, in spite of the very heavy dependency the *Contras* had on US support, was not considered, by a majority of the Court, to have been fulfilled. Had it been, it would have rendered the actions of *Contras* those of the United States from the point of view of state responsibility and internationalized the conflict.

Owing to the fact that *Tadić* had been charged with grave breaches of the Geneva Conventions, which, the ICTY had (accurately) determined only apply to international armed conflicts,⁸⁵ it became necessary to determine whether or not the relevant conflict had been internationalized. The Trial Chamber adopted the *Nicaragua* standard, and on that basis of that standard, the majority at least implicitly determined that the conflict had not been internationalized.⁸⁶ The Prosecution appealed, and rather than take the *via media* that was offered by (ex-ICJ) Judge Shahabuddeen on point, which would have avoided the necessity of facing down the *Nicaragua* decision,⁸⁷ Nino chose to take the line of most resistance — disagree with the ICJ and, in contrast to the frequent practice of that Court, set out his reasoning in detail.⁸⁸

So, the Appeals Chamber in *Tadić* argued that, as a matter of general international law (that of state responsibility) the ICJ had, simply, got it wrong. In doing so, the Chamber refused to adopt the position of the Prosecution, later implied by the ICJ, that international criminal law might have a different test.⁸⁹ Instead the Chamber, in a section that had Nino's judicial fingerprints all over it, took the ICJ to task for being vague, and not working properly in line with customary law.⁹⁰ This was not all though, in addition, Nino charged

84 *Nicaragua*, *supra* note 28, §§ 109, 115.

85 *Tadić*, *supra* note 29, §§ 71–84. Although Judge Abi-Saab dissented on point: Separate Opinion of Judge Abi-Saab on the Defence Interlocutory Appeal on Jurisdiction. For a convincing demonstration that the majority was correct, see S. Boelaert-Suominen, 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflicts: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for all Armed Conflicts?' 5 *JCSL* (2000) 63.

86 Judgment, *Tadić* (IT-94-1-T), Trial Chamber, 7 May 1997, §§ 607–608, albeit only by a majority, see Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute.

87 *Tadić* Appeal, *supra* note 83, Separate Opinion of Judge Shahabuddeen, §§ 4–32. His approach was, in essence, to determine whether or not Serbia was using force against Bosnia through the Bosnian Serb forces, an approach that would not have necessitated a full-frontal attack on *Nicaragua*.

88 On the ICJ's reluctance to show its 'working out' on controversial issues, see I. Scobbie, 'Smoke, Mirrors and Killer Whales: The International Court's Opinion on the Israeli Barrier Wall', 5 *German Law Journal* (2004) 1107. See more generally, C. Byron, 'Armed Conflicts: International or Non-International?' 6 *JCSL* (2001) 63; T. Meron, 'Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua's* Fallout', 92 *AJIL* (1988) 236.

89 *Tadić* Appeal, *supra* note 83, §§ 89–98, 103–108. *Case Concerning the Application of the Convention Concerning the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2006, ICJ General List 91, § 403.

90 As was identified with Judge Ago's dissent in *Nicaragua*, *Tadić* Appeal, *ibid.*, § 108.

the ICJ with propounding an approach that was inconsistent with both the logic of state responsibility and other judicial and state practice on attribution. Therefore he expressed a different standard, of 'overall control' which he set out as reflecting the customary standard.⁹¹

When the matter returned to the ICJ in the *Genocide* case, that Court, in spite of its considerable reliance on ICTY jurisprudence on matters of international criminal law, reaffirmed the *Nicaragua* standard,⁹² and in a comment that was not redolent of humility, asserted that

the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.⁹³

Understandably, Nino did not take this lying down. Admitting that it was possible that on the substantive issue he may not be correct, he nonetheless castigated the ICJ for failing to treat the argumentation in *Tadić* as a matter of general international law, and not actually engaging the reasoning in the former case, dismissing it rather than proving that it was incorrect.⁹⁴ Nino insisted on full, reasoned argument on both sides, which the ICJ did not provide. He was unimpressed with *ex cathedra* statements such as that the ICJ made in the *Genocide* case. He genuinely wanted to see whether or not he was right or wrong, and disappointed that the ICJ did not engage in a dialogue on point.

Although the current tide may be against the *Tadić* approach as it stands,⁹⁵ two counterpoints can be made. Firstly, there is an increasing dissatisfaction with the stringency of the traditional law of State responsibility, particularly, although not only, in relation to terrorism.⁹⁶ Secondly, it is notable that the ICC has accepted the applicability of the *Tadić* test of attribution for the purposes of internationalization, so it retains contemporary relevance.⁹⁷ Perhaps here we see an example of what Wilfred Jenks argued (in relation to Sir Hersch Lauterpacht) of the Scholar (and Judge) as Prophet.⁹⁸

91 *Ibid.*, §§ 116–162.

92 See generally, Cryer, 'Neither', *supra* note 24.

93 *Genocide*, *supra* note 89, § 403.

94 A. Cassese, 'The Nicaragua and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *EJIL* (2007) 649. Judge al-Khawneeh had admittedly seen this, and criticized the majority for its evasion of the point, Dissenting opinion of Judge al-Khawneeh, § 34.

95 J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002), 111–112.

96 See e.g. T. Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart, 2006).

97 Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber, 14 March 2012, § 541.

98 C.W. Jenks, 'Hersch Lauterpacht: The Scholar as Prophet', 36 *BYIL* (1960) 1.

5. Conclusion

The links between Cassese and Lauterpacht are close. Both were scholars who were willing to go beyond positivism, and advance the law in their scholarly writings, albeit carefully, and with a keen eye for how to make a progressive argument in a largely positivist frame in a judicial setting.⁹⁹ When writing of Lauterpacht, Sir Gerald Fitzmaurice said:

In his judicial work ... [he] ... exhibited the same broad sense of humanity as had characterized all of his previous work and outlook. ... [N]o judge lacking in humanity can be great as a judge, no matter what the merits of his findings. Other qualities of the great judge, pre-eminently possessed by ... [him] ... were courage (he frequently took a very unpopular line); insight; breadth of outlook; learning; grasp of principle and the capacity to apply it to the facts of the case at hand; the ability to temper law with justice, and yet at the same time do justice within the discipline and confines of the law.¹⁰⁰

He could easily have been speaking of Nino. It may be a standard trope of critical legal scholarship that international law is made up of (and by) persons with projects,¹⁰¹ but that does not render it any less true. In his roles within the international tribunals Nino saw his chance to develop the law, particularly through the application of customary international law, in ways that were less than fully formalistic, owing to his understanding of the limits of that approach.¹⁰²

That said, his judicial practice was characterized, with some exceptions, by attention to presenting arguments in a manner consistent with an approach to international law that was 'mainstream'.¹⁰³ This, along with his extra-curial avowal of progressive interpretation rather than 'black-letter' lawyering,¹⁰⁴ rendered his approach complex and not easily reduced to generalizations. If one can be made though, it is that he brought a rare quality to debates about the sources of international law: panache.

99 G. Fitzmaurice, 'Hersch Lauterpacht: The Scholar as Judge Parts I-III', 37 *BYIL* (1961); 38 *BYIL* (1962) 1; and 39 *BYIL* (1963) 1.

100 *Ibid.*, 'Part 1', at 7.

101 D. Kennedy, 'Tom Franck and the Manhattan School', 35 *New York University Journal of International Law and Politics* (2003) 397, 398–399.

102 On custom and formalism, and the extent to which the latter can really explain the former, see J. d'Asprement, *Formalism and the Sources of International Law: A Theory of the Ascertainment of International Rules* (OUP, 2011).

103 On which see M. Koskenniemi, 'The Pull of the Mainstream', 88 *Michigan Law Review* (1990) 1946.

104 A. Cassese, 'Black-Letter Lawyering v. Constructive Interpretation: the *Vasiljević* Case', 2 *JICJ* (2004) 265.