On the Sources of International Criminal Law

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Abstract

In their efforts to establish a quite original system of procedural and material rules of international criminal law, by means of the so-called "judge-made law", the two *ad hoc* Tribunals for the Former Yugoslavia and Rwanda hold a peculiar approach to the sources of that law. The most controversial of all is their concept of "customary law". This paper is an attempt to clarify the meaning and scope of these sources mainly from some aspects of the respective rules adopted in the 1998 Rome Statute. It is also a continuance in this author's research on the sources of public international law.

I. Introduction

The International Criminal Tribunal for the former Yugoslavia (ICTY) was originally established by the UN Security Council (SC) Res 827 (1993) of 25 May 1993, with the primary aim to put an end to the crimes committed in that region, first of all in Bosnia-Herzegovina.

It is very doubtful whether the establishment and functioning of an *ad hoc* criminal tribunal can fulfil these expectations.[1] It is, however, beyond doubt that before and after all the armed conflicts in the Balkan region ended, the Office of the Prosecutor of the ICTY marked the locations of the biggest crimes and identified their victims. These tragic facts are not easy to deny, not even in a judicial procedure.

Much more complicated is the issue of prosecution and punishment of all responsible persons involved. Under normal circumstances, which, in an atmosphere of hatred against the enemy, never materialize, it should be expected that the respective States themselves, on the basis of the principle of territoriality, will identify the direct perpetrators of these horrible misdeeds and their immediate commanding officers, and prosecute them in a normal criminal procedure according to their national laws.[2] On the basis of such an investigation into the responsibilities "in

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1 Hence, a Swiss journalist, Pierre Hazan, in his remarkable book, La justice face à la guerre, de Nuremberg à La Haye, Stock, Paris (2000), 260–261, quoted Judge Antoine Garapon: "It was not the Nuremberg Tribunal that liberated the concentration camps of Auschwitz and Mauthausen, but it was done by the Red Army and the Americans." As is known, the Nuremberg Tribunal was established after the World War II in Europe had ended.

2 The fact is that before and during the process of the dissolution of the former Yugoslavia, in which five new successor States appeared, there were no breaks in legislation. During this process, all these States have had criminal laws in force in which was enshrined the substance of all four international crimes which, in 1993, became Articles 2–5 of the ICTY Statute. However, there was simply no will to put these provisions into effect.

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pyramid", it could be possible to identify higher military and political leaders who ordered, or were not willing to prevent, the crimes in question, and to sue them, too.

But with some rare and insignificant exceptions, such a normal course of events has never happened in the history of mankind.[3] Every party to a conflict is eager to punish the crimes by the enemy inflicted on its population or soldiers. But their own perpetrators of crimes and their commanders are regarded in the public opinion as national heroes, who are, as such, untouchable.

The establishment of international criminal courts and tribunals should be a remedy to these imperfections in human behavior. These tribunals should sue all suspects for all international crimes within their jurisdiction, so that none can escape his responsibility and that all, regardless of their nationality or official position, should be, if convicted, punished accordingly.

To these noble ends, two *ad hoc* tribunals have recently been created, as well as the International Criminal Court (ICC), in The Hague. Hence, we are now faced with two tracks in international criminal proceedings. On the one hand, there are the Statutes, the frequently amended Rules of Procedure and Evidence, and already a rich practice of the ICTY and of the International Criminal Tribunal for Rwanda (ICTR). On the other hand, there is a much more elaborated text of the 1998 Rome Statute, as well as the Elements of Crimes, for the ICC, and its very detailed Rules of Procedure and Evidence. There now only remains to emerge the practice of the ICC in the application and interpretation of these complex written rules.

One could join these two separate tracks into one larger road. The ICTY and the ICTR could partly adjust their practices to these newly written rules of international criminal law since 1998, and consider it as a single system of legal rules and principles.

However, some prominent international lawyers choose to contradict these two different sets of legal principles and practices. In their writings, they strongly criticize almost all the aspects in which the Rome Statute and its additional instruments substantially depart from the existing law and practice. They label the existing practice as the alleged "customary law" in this field. In addition, in all substantial innovations in the 1998 instruments, they see the victory of criminal lawyers (together with the United States at the Rome diplomatic conference) over international lawyers.

The disagreements relate to many fundamental concepts of criminal law, such as the presumption of innocence of the accused, the scope of the principle *nullum crimen sine lege*, all sources of international law laid down in Article 38(1) of the Statute of the International Court of Justice (ICJ), etc.

Hence, one of the most prominent French legal authors criticizes the exhaustive definitions of crimes in Articles 6–8 of the Rome Statute, and the subsequent elaboration and adoption of the Elements of Crimes. He asserts that this was a misapprehension by

3 These few known exceptions relate to the trials by the US courts for war crimes committed by the US armed forces in the Philippines in 1900–01, and the few instances of punishment by the Ottoman courts in 1919–20 of persons responsible for crimes against Armenians. However, the My Lai "incident", in which 347 Vietnamese civilians were massacred, and the process against Lieutenant Calley alone with the pardon granted to him by President Nixon seem rather to be a mockery of justice. There were many more cases where the commission of serious crimes was treated as an offence of a disciplinary nature.

criminal lawyers of the scope of the principle *nullum crimen sine lege*. In support, he quoted another author, who "impeccably demonstrated" that the position of the drafters of the Rome Statute is incorrect. According to the common view of these international lawyers, the customary law consolidation of the definition of the four "grand crimes" was certainly sufficient to ensure the respect of the *nullum crimen* principle. "Custom is a source of international law to the same extent as treaties and is just as apt to constitute the indispensable *lex*."[4] This appears equally from Article 11(2) of the 1948 Universal Declaration of Human Rights which confirms that "international law may be a source of legality for the purpose of applying the *nullum crimen* principle . . .".[5]

If I understand this view correctly, international judges should apply this "customary law" lock, stock and barrel part of positive international law. The matter is therefore not of a *lex ferenda* created by judges and applied retrospectively to the detriment of the accused. But that is not exactly what this author has in mind.

Pellet's additional reasoning opens many new questions of the utmost importance. By giving way to American pressure, by not trusting the judges to interpret and apply international law in its present state "and such as it is evolving", the authors of the Rome Statute have, in his view, limited the chances of making the Court an efficient instrument in the struggle against the crimes it is supposed to repress, "the most serious crimes of concern to the international community as a whole". He also argues:

> Unfortunately, men's criminal imagination appears unlimited and, by enclosing the definition of the crimes in narrow, punctilious formulations, they have forbidden the judges in advance to suppress future malevolent inventions of the human spirit; all the more so, and this is undoubtedly the most serious weakness of the Statute, because, in practice, they have excluded any realistic prospect of amendment.[6]

Happily enough, the alleged men's criminal imagination and malevolent inventions of the human spirit are not the only features of human species as such. Normal human beings are entirely devoid of that "gift", regardless of their sex, race, colour, descent, language, creed or national or ethnic origin. We can imagine that only some persons have such a vicious imagination. But because of their cowardly character, or the limits imposed on them by education or religious beliefs, they never dare to display it in their lifetime. However, probably the narrowest group of men and women reveal their criminal character in situations of armed conflicts or social turmoil. They commit and force others to commit horrible crimes allegedly in the name of their nation, or religious group, or their party in the conflict.

The foregoing remarks seem to also reflect the views of many Judges of the ICTY, at least in the first years of its functioning.[7] In prosecuting international crimes, they presumed to act, together

4 Cf. Alain Pellet, referring to Luigi Condorelli, Applicable Law, in: A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), 2 The Rome Statute of the International Criminal Court, A Commentary, Oxford (2002), 1058.

5 Ibid., 1057–1058.

6 Ibid., 1058–1059.

7 The "imagination of future torturers who wish to satisfy their bestial instincts", mentioned in the comment of common Art.3 of the 1949 Conventions, was literally quoted in para.237 of the Judgment by the Trial Chamber

with the Prosecutor of the Tribunal, in the name of the international community. However, the Security Council could not properly authorize them to implement such a far-reaching mandate because it would simply exceed its own competencies according to the UN Charter. A careful reading of the text of the Statute that it adopted in 1993 proves that it actually did not do that.

The Judges of the ICTY appropriated in their practice some other prerogatives to themselves which no judicial body is expected to exercise. Among them is the large law-making power, including the creation of new "customary law" in order to repress the unlimited man's criminal imagination.

Nevertheless, every judiciary power should be limited and controlled by other powers, by definition. In normal States, the judiciary, legislative and executive control one another. The Judges of the ICJ are restrained by the agreement of States by which they place their dispute in its jurisdiction. The same applies to inter-State arbitration. For this reason, the Court and the arbitrators are very careful in defining the applicable customary and other law in their judgments. That is because they try, strictly within the jurisdiction established by them, to convince the parties that their dispute was decided according to *positive law.* It is not different with the advisory opinions by the ICJ, which are rendered also on the basis of the will of States acting in the UN General Assembly, or the Security Council, or other competent organs which can request them.

It is precisely for the above reasons that the concepts adopted by the ICJ of *jus cogens* and of customary law differ from those declared by the Judges of the ICTY. We will discuss this issue in more detail below.

The foregoing criticism reveals the viewpoints of many Judges of the ICTY on some other issues as well. They consider that the aim of the international criminal judiciary is, above all, prosecution of international crimes. The latter is, however, the normal function of the Prosecutor in an adversarial procedure under the control of the judiciary. On the contrary, the function of every judicial body worthy of that name is to do justice according to (*positive*) law.[8] As a consequence, there is little room in the above concepts for the presumption of innocence of the accused, which is the starting point of every fair trial.

against Tihomir Blaškić of 2000, that, in spite of the fact that the Judgment itself stated several times that General Blaškić did not personally commit any crime for which he was accused. And in a large number of his written commands cited within it, there is none in which he ordered his subordinates to commit any crimes. And although Blaškić was not even accused of the crime of genocide, parts of the Nuremberg Judgment of 1946 on persecuting Jews were also quoted in the same Judgment (para.222). Nonetheless, the Appeals Chamber, in its Judgment of 2004, reduced his sentence from 45 to 9 years of imprisonment, finding that the Trial Chamber did not establish beyond reasonable doubt Blaškić's ordering any of the crimes. He was, however, sentenced for not preventing and punishing his inferior officers who inflicted inhuman and cruel treatment and hostage-taking of civilians.

8 The full title of that body, "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991", should not mislead anybody. As the Nuremberg Tribunal stated in its Judgment of 1946 concerning its discretionary power under Art.9 of its Charter to declare a group or organization as criminal: "This discretion is a judiciary one and does not permit arbitrary action, but should be exercised in accordance with well-established legal principles, one of the most important of which is that criminal guilt is personal, and the mass punishment should be avoided." Cf. AJIL (1947), 250–251. Hence, even if the UN Security Council had, in 1993, in mind the punishment of all the suspects for crimes committed in the former Yugoslavia, a judicial body cannot exercise its functions beyond the above-mentioned limits.

Taking this into account, it should finally be observed that the above legal constructions perfectly fit when the fate of others is at stake. Nevertheless, it is not hard to imagine, in abstract terms of course, that a legal author or any of the former or present Judges of the ICTY could himself come into the situation of being indicted by the Prosecutor as a suspect of horrible crimes in the capacity of a military or political superior, on the basis of the responsibility under Article 7(3) of its Statute. These accusations can, of course, be devoid at the outset of any factual or legal grounds.

But suppose that an accused in such a lamentable situation has the right to choose. Would he, from his personal perspective, like to be submitted to the procedure of the ICTY and be at the mercy of its Prosecutor and Judges, enjoying large discretionary powers (even in law-creating), or would he rather opt to be tried by the ICC according to its Statute and the Elements of Crimes? The author of this paper definitely prefers the latter procedure.

Concerning the issues discussed so far, there does not seem to be a matter of misunderstanding between the experts of public international law on the one side, and the experts of criminal law on the other. More likely, there is a misapprehension by some of the former of the sources of international criminal law—the topic of the present paper.

II. Sources of international criminal law and Article 38(1) of the ICJ Statute

The most authoritative conventional provision on the sources of international law in general is still Article 38(1) of the ICJ Statute. That is because the Statute constitutes an integral part of the UN Charter and the ICJ is the principal judicial organ of the United Nations. That provision reads as follows:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provision of Article 59,[9] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.[10]

9 Article 59 of the Statute reads: "The decision of the Court has no binding force except between the parties and in respect of that particular dispute."

10 Paragraph 2 of Art.38, which reads "This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto", does not reflect sources of international law and can be overlooked in this paper.

It is generally agreed that there is no firm hierarchy between the three main sources of law indicated in subparagraphs (a)–(c). On the other hand, it is obvious that the sources indicated in subparagraph (d) are of a subsidiary character in relation to the three main sources.[11]

The above sources normally function in the international legal order of sovereign States and other international persons. Because treaties cannot directly bind States which are not parties to them, the main source of what is understood as general international law is the general custom. General principles of law are applied in this order as an autonomous source only if they are not transformed into general customary law. That transformation most often happens through codification conventions.

Needless to say that in international criminal law, relations between Judges, the Prosecutor, the accused and his counsel, and the victims of the crime are not the same as the relations between sovereign States, which enjoy legal equality and possess the autonomy of will. This is a matter of trials of accused persons, which are not substantially different from criminal trials before national courts. But one essential difference is that the source of law in international criminal proceedings is not the national criminal law of any State, but the law emanating from the sources listed in Article 38(1).

The general principle of all criminal law—*nullum crimen nulla poena sine lege*—was already mentioned. Many call it the principle of legality (in its narrow sense).[12] The said principle is an achievement from the 1789 French Declaration of the Rights of Man and of the Citizen and is embodied in the constitutions of a great many of States as being one of the guarantees of the rights of individuals.[13] Even if, strictly speaking, it is not a peremptory norm of general international law (*jus cogens*), it is better to observe it than to undermine its importance in any criminal proceedings.[14]

Where we actually take this principle into account, and there are no convincing reasons to do the contrary, all sources of international law provided in Article 38(1) appear in a

11 This enumeration, although authoritative, is not all-exhaustive any more. In addition to general custom, the international practice knows particular customary rules which, like treaties, relate to a limited number of international persons. This paper will, however, deal with the general international customary law alone. In addition, Art.38(1) does not make any mention of unilateral acts by which a State can assume some legal obligations at its charge, or can, in some situations, acquire new rights in its profit. See details on all these sources, V.D. Degan, Sources of International Law, Martinus Nijhoff Publishers, The Hague (1997), 564 pages.

12 It seems to be more appropriate to embrace, under the principle of legality, the sum of general principles of criminal law which should be observed in any criminal proceedings.

13 Antonio Cassese, International Criminal Law, Oxford (2003), 139–158 has exposed many arguments challenging this principle as allegedly consisting in the doctrine of "strict legality", in contrast to the doctrine of "substantive justice". His arguments that this "doctrine" (including the principle of non-retroactivity of law) does not operate in international law in the same way as within States with codified law do not seem to be convincing enough.

14 In any case, the principles opposed to it—*nullum crimen sine poena* (that no crime must remain unpunished) and of "sound popular feeling", being the sources of law for Nazi criminal judges in Germany between 1933 and 1945—were strongly criticized by the Permanent Court of International Justice. See its 1935 Advisory Opinion on Danzig Legislative Decrees, PCIJ, Series A/B, No.65, 56. Those who consider the former judicial practice altogether as "customary law", should on the basis of the *stare decisis* doctrine observe this precedent.

somewhat different light from that in inter-State relations. From this principle proceed the following requirements of a fair criminal trial:

— *Nullum crimen sine lege scripta*: the basis of a criminal charge should be either in the national law of a State, or in a statute of an international criminal court or tribunal. In both instances, the matter should be subject to a rule of positive law in written form. This excludes incriminations based exclusively on (unwritten) customary law.[15]
— *Nullum crimen sine lege certa*: the elements of crimes must be precisely defined by a rule. This forbids the criminal judge to resort to analogy. To this end, the Assembly of States Parties to the Rome Statute of 1998 has adopted the Elements of Crimes, to be applied by the ICC.
— *Nullum crimen sine lege previa*: a crime must be forbidden by law at the time of its commission. Retrospective application of new criminal laws is forbidden, unless they were more favourable to the accused (*lex mitius*).
— *Nulla poena sine lege*: the penalties for specific crimes should also be provided by a legal rule in advance. It is hard to strictly respect this requirement in international criminal proceedings. The scale of prison sentences for the crimes within the competence of international criminal tribunals have so far not been provided in their Statutes.

Hence, in criminal law, either municipal or international, written sources have the preference over unwritten ones. This means that in international criminal law, customary rules cannot have the same importance as in the international legal order of sovereign States in which a near totality of rules of general international law is of customary character.

There is another substantial difference in this regard. When two or more States agree on the jurisdiction of the ICJ, or on international arbitration, they expect to obtain in these procedures the final judgment of their case. To this end, in order to avoid *non liquet*, Judges resort to all sources of law provided in Article 38(1). They must find applicable legal rules to any dispute which States can refer to them.

International criminal judges do not have such a large power. As stated, they are strictly forbidden to resort to analogy, or to apply new rules of positive criminal law retrospectively to the accused, or even to create new rules of ''customary law'' and, by that, cure the imperfections in public international law.

But this problem of *non liquet*, which was presented by some internationalists, is not of the major importance for proper functioning of international criminal tribunals.

One cause for the deficiencies of the ICTY Statute is certainly that the drafters of its Articles 2–5 did not discern the very fact that most crimes in the former Yugoslavia were committed in non-international armed conflicts. The process of disintegration of that Federation lasted some time. It took place in a series of protracted armed conflicts during

15 This prerequisite excludes even more the quasi-legislative function of criminal judges and forbids them to create new rules which, at the time of the commission of a crime, were not *lex lata*, and then to apply them on the accused retrospectively.

which new successor States acquired their independence at different dates. Only from these dates could an originally internal armed conflict transform into an international one.

Hence originates the problem of the application of the grave breaches of the 1949 Geneva Conventions, as Article 2 relates (like these Conventions themselves, except their common Article 3) only to international armed conflicts, and Article 3 sparsely defines violations of the laws and customs of war, which are applicable in all sorts of conflicts. That poses the major problem of applicable written law to war crimes in non-international armed conflicts.

On the other hand, poor definitions of the crimes against humanity in Article 5 of the ICTY Statute, which certainly encompass the practices of "ethnic cleansing" and of enforced prostitution as particular forms of already existing crimes,[16] do not impede the punishment of any responsible person. If the Tribunal finds an accused guilty of one or more crimes provided in Article 5(a)–(h) (murder, extermination, deportation, torture, persecution, etc), it can punish him properly. However, when fixing the penalty, the Judges can take into consideration "other inhumane acts" provided for in subparagraph (i) as aggravating factors. It is therefore not necessary to define in Article 5(i) new crimes against humanity and apply them to the accused retrospectively.

Certainly, definitions of all crimes against humanity as set forth in Article 7 of the Rome Statute seem to be more appropriate and more complete. But it is not a job of judges in deciding on past crimes to create perfect definitions of crimes which fall into their jurisdiction. It is better for them to stick to the *nullum crimen sine lege* principle.

All the foregoing suggests a particular order of explanation of the sources of international criminal law. We shall start with the general principles of law which any criminal judge is supposed to observe in a fair trial. Then, an explanation of treaties as a source of law for an international criminal judge will follow and, after that, the scope of custom within the international criminal law. Following these explanations, we will turn to the subsidiary sources provided in Article 38(1)(d). We shall finish our presentation with a comment on Article 21 of the Rome Statute—"Applicable law".

III. The general principles of (criminal) law

In the doctrine and practice of public international law, "the general principles of law recognized by civilized nations", as stated in Article 38(1)(c), are understood in two quite different meanings.

First, the general principles of law can be understood as the basis of any legal relationship. That is because no legal order can properly function in the absence of such principles as the rules of positive law. In their opposite sense, in absence of an applicable treaty or customary rule, i.e. in case of gaps (*lacunae*) in what is considered as positive international law, Article 38(1)(c) is usually interpreted as an option, or even an authorization, given to international judges to have resort to some legal principles common to national legal

16 See the Report of the Secretary-General pursuant to para.2 of the SC Res 808 (1993) (S/25704), para.48.

systems. These systems are still considered as more developed and more sophisticated than international law.[17]

Although analogy is forbidden to any criminal judge in respect of incrimination of human behaviour, there is still some place for general principles of law in this narrow sense as a subsidiary source of international criminal law, in particular if it is so provided in advance. That is the case with Article 21(1)(c) of the Rome Statute, to which Article 31(3) of the Statute refers concerning the grounds for excluding criminal responsibility. Nevertheless, the scope of application of these principles in this narrow sense is rather exceptional in this discipline.[18]

It is more important to envisage the general principles of law in the broad sense, as a basis of any legal order. There, they are not opposed to customary law and treaties but, in this perspective, all these three main sources form a unity.

In general international law, this is the case with its basic norm of *pacta sunt servanda.* It is worth quoting the explanation in this respect given by Sir Gerald Fitzmaurice:

> This rule does not require to be accounted for in terms of any other rule. It could neither not be, nor be other than what it is. It is not dependent on consent, for it would exist without it. There *could* not be a rule that *pacta sunt non-servanda*, or *non sunt servanda*, for then the *pacta* would no longer be *pacta.* Nor could there be a rule that *pacta sunt interdum servanda et interdum non sunt servanda.* The idea of *servanda* is inherent and necessary in the term *pacta.*[19]

The same is true with other general principles of law forming part of the law of treaties. They have been operating from the times immemorial whenever sovereign States agreed on valid treaties with the intention to respect them. Before the 1969 Vienna Convention, there were some doubts about how these general principles, mostly derived from the civil law, can apply to treaties concluded between States. Discussions were, for instance, intense on the scope of the *clausula rebus sic stantibus* in international law.

When codifying this part of the law, the International Law Commission relied on State practice as constituting rules of customary law, or at least on judicial precedents. It wanted to prove that all its propositions were rules of positive international law. However, in respect of error, fraud and corruption vitiating the consent of States, there was no such

17 It seems that only in this second narrow sense, and as distinct from treaties and customary law, are these general principles understood by Bruno Simma and Andreas Paulus: "Le rôle relatif des différentes sources du droit international pénal (dont les principes généraux de droit)", in: H. Ascensio, E. Decaux and A. Pellet (eds), Droit international pénal, Paris (2000), 55–69; see, in particular, 62–65. On the contrary, Pierre-Marie Dupuy, Normes internationales pénales et droit impératif (*jus cogens*), ibid., 71–80; see *jus cogens* in some "general principles of criminal law", ibid., 73–75. He therefore envisages these principles in the broader sense.

18 However, the genuine nature of these general principles of law is most transparent in the so-called "transnational law", which is extremely poor in substantial legal rules. When arbitrators decide disputes about contracts concluded between States and foreign corporations or private banking institutions, there are almost no other sources of applicable law except the contract itself. Then the arbitrators largely apply "general principles of law recognized by civilized nations", because the text of the contract would, in their absence, be almost meaningless. See details on that practice, V.D. Degan, Sources (1997), 113–126.

19 Cf. Sir Gerald Fitzmaurice, Some Problems regarding the Formal Sources of International Law, in: Simbolae Verzijl, The Hague (1958), 153.

practice at all. Still, the Commission proposed the inclusion of these circumstances excluding the validity of treaties as being a part of positive international law and not *lex ferenda* or precepts of natural law. On that ground, there emerged Articles 48–50 of the 1969 Vienna Convention.[20]

Today, almost all provisions of the Vienna Convention are considered as rules of customary international law. They are applicable to all existing or future treaties, even if one or all of their parties did not ratify or accede to the Convention.

This is very similar with the rationalization of general principles of law as existing rules of positive international law in codification efforts by the International Law Commission on State responsibility. If its proposed draft articles become a convention in force, then its content will also be generally recognized as reflecting customary law in this important domain.

The rules of arbitral procedure were codified by the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907. The basic principles of international judicial and arbitral procedure can be detected also in the Statute and Rules of The Hague Court, in the Rules of the Court of Justice of the European Communities, and in the statutes of all administrative tribunals of international organizations. If a judicial or arbitral body, in exercising its functions, ignores one or more of these principles, it will jeopardize the legality of its judgment and its own character as a judicial organ.[21]

Because of their continuing to be under the influence of former positivist or normativist teachings, even if unconsciously, some experts in public international law do not realize the impact of general principles of law in this broad sense in international criminal law. Hence their disagreements with experts in criminal law who have no such problems in the same discipline.

Historically, the general principles of criminal law first appeared in municipal law of some States, as guarantees against arbitrariness of judges as State organs. Since their very beginnings, they form a part of human rights. However, the development of criminal law was not quite uniform in all States.

From paragraph 39 of the *Magna Carta Libertatum*, issued by the English King John in 1215, followed the right of every free individual to be judged by his equals. From that royal guarantee, there appeared criminal trials in which the jury decides whether the accused is guilty or not, and in which the role of a professional judge is minimal. Later on, some other pledges of fair trial were extorted from the sovereign also in the form of "guarantees". The development in the United States was similar. The first 10 amendments to the Constitution of 1789 forming the "Bill of Rights" embrace some guarantees in criminal proceedings, and of liberties of citizens in general.

20 See details in Degan, Sources (1997), 72–89. It was there also discussed whether these "everlasting" general principles of law really affect the sovereign will of States.

21 In a case where all parties to an actual dispute provide, in their arbitral agreement, the procedural rules essentially different from those referred in the above instruments, the matter will not be of a judicial, i.e. arbitral procedure anymore, but perhaps of a different mode of pacific settlement (mediation or conciliation), or, in some instances, even of agreement by the parties on otherwise unlawful intervention by third parties into their relations.

The legal development in the continents of Europe and Latin America and in some other States took a different path. The 1789 French Declaration of the Rights of Man and of the Citizen was an attempt to codify all rights and freedoms of individuals in a single text. Its first 11 paragraphs provide the most important of what are now understood as the general principles of criminal law. They are, *inter alia*: the principle that law must be the same for all, whether it protects or punishes; the *nullum crimen sine lege* principle, including the non-retroactivity of criminal laws; and the principle that limits to human liberties can only be determined by law.

Later on, important legal rules were aggregated concerning the personal criminal responsibility of an individual, the definitions of different forms of perpetration and participation in a crime, the mental (psychological) element of a crime (*mens rea*), grounds for excluding criminal responsibility, mistakes of fact and mistakes of law.

In these countries with codified law, the sum of detailed rules of this character is provided in the "general part" of criminal codes. They bind every judge in all criminal proceedings. A judge cannot ignore them or modify them by creating new legal rules. However, the essential role in these proceedings is performed by professional judges (*juge d'instruction* and judges in the *grand jury*). Even if lay assessors form a majority in criminal chambers, they cannot independently decide on the guilt of the accused.

It is now important to outline how the procedure of international criminal tribunals developed since 1945. The London Agreement on the Nuremberg Military Tribunal adopted mainly the Anglo-Saxon procedure but without any jury of laymen. Since then, all *ad hoc* tribunals have consisted of professional judges only.

It should be noted that the Anglo–American adversarial model with a jury has the advantage of releasing the professional judges of some responsibilities and helping them to avoid the mistakes they can otherwise commit. On the contrary, the correctness of this model deprived of the jury depends almost exclusively on the professional skill, consciousness, impartiality and independence of judges. If they are incapable of handling their responsibilities, such a procedure can degenerate into its opposite—the one prevalent in the inquisitions until the end of the 18th century. Hence the contrast between the quality of the Nuremberg Judgment of 1946 and that of the Tokyo Judgment of 1948.

A jury would probably release Dražen Erdemović from his responsibility for the crimes he committed. Perhaps, it would also release General Tihomir Blaškić for most of the crimes for which the Trial Chamber of the ICTY sentenced him, in 2000, to 45 years of imprisonment. In these two cases, it probably could not have happened that juries of laymen would create a miscarriage of justice in respect of the accused.

Nevertheless, for a number of practical reasons, the jury in international criminal proceedings seems unrealistic. But the adversarial model of the procedure without a jury results in very long and expensive trials, each lasting several years and usually with little effect. For this very reason, perhaps, the European inquisitorial model, with a *juge d'instruction* and trials by chambers of professional judges on the basis of a file ("*dossier*") formed by the investigating judge, could have been speedier and more efficient. But, in such a case, and in all other cases in which international criminal tribunals consist of professional judges, the

general principles of criminal law should have been codified in advance by the statute of the tribunal, exactly as it was done in Part 3 of the Rome Statute of 1998.

The Statutes of both *ad hoc* Tribunals for the former Yugoslavia and Rwanda are poorly drafted. The subsequent practice of these Tribunals has revealed many important *lacunae* in their regulations. They both do not provide the most important general principles of criminal law. However, their common provision (Article 15 of the ICTY Statute and Article 14 of the ICTR Statute) provides the following:

> The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

The general principles of criminal law are not even mentioned. They probably fall into the category of ''other appropriate matters''. It is a usual practice in inter-State arbitrations that their parties empower the arbitrators, appointed by their agreement, to adopt the procedural rules before the proceedings. They then just adopt and transcribe the established general principles of law in that subject matter either from the 1907 Hague Convention, or from the Model Rules of Arbitral Procedure drafted by the International Law Commission in 1958. There is no disagreement on the content of these basic procedural principles at all.

On the other hand, it did not seem appropriate to confer on Judges of the *ad hoc* Criminal Tribunals, who were elected by the UN General Assembly from a list proposed by the Security Council, to adopt rules of international criminal procedures in the domains in which, prior to the 1998 Rome Statute, there were no such codified rules.

However, even in the situation that actually happened, the first concern of conscientious criminal judges should have been to provide in advance, in the Rules of Procedure and Evidence, detailed provisions of personal criminal responsibility of the accused, including those on *actus reus* and *mens rea*, different forms of perpetration and participation in a crime, grounds for excluding criminal responsibility and mistakes of fact or law.

A less favourable option seems to be to provide in these Rules a general clause according to which, for all issues not regulated by the Statute, the relevant rules of criminal law of the State in which the crime was committed will apply, provided that these rules are not inconsistent with the norms of international law. In both instances, international judges should apply the general principles of criminal law as having already been in written form.

However, the ICTY, from the very beginning, adopted another option which was reflected in the Judgment of the Trial Chamber in *Kupreškić*, of 14 January 2000 (IT-95–16-T):

> . . . any time the Statute does not regulate a specific matter, and the *Report of the Secretary-General* does not prove to be of assistance in the interpretation of the Statute, it falls to the Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or lacking such principles, (iii) general principles of criminal law common to major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice. (para.591)

Here, the matter is, therefore, not of observing the established general principles of criminal law, but mainly of their ascertainment apparently through a comparative analysis.[22] In this respect, the two *ad hoc* Tribunals sharply differ from the approach of Rome Statute, the Elements of Crimes and the Rules of Procedure and Evidence of the ICC.

Now, let us first explain how the above principles were applied in a case. Dražen Erdemović, according to his confession, took part in the summary execution of unarmed Moslem civilians after the fall of Srebrenica on 16 July 1995, where he, himself, executed about 60 persons. After his escape from Bosnia, Erdemović was first surrendered to a Serbian court and then transferred to the Tribunal, and admitted that he did kill the Moslems.

The matter seems to be of the most heinous crime of genocide. However, the Tribunal admitted that the accused acted under duress (*vis absoluta*) from his commander, Brano Gojković. Before these executions, he ventured to resist participation in the killing. Later on, he declared before the Tribunal that "if I had refused, I would have been killed together with the victims".

In that situation, which was not contested by the prosecution, a jury of laymen would most probably find Erdemović not guilty. Exactly the same would be done by the ICC in application of Article 25(3)(a) of the Rome Statute. Erdemović acted as a simple tool or instrument of his commander who was the actual, though indirect, perpetrator of the genocide. The Court would exclude Erdemović's responsibility on the basis of Article 31(1)(d) of the Statute because he acted "by duress resulting from a threat of imminent death".

In his trial before the ICTY, everything was different. The Prosecutor did not indict Erdemović for genocide, although it was exactly that crime that was committed, but "only" for crimes against humanity under Article 5 of its Statute, or, in the alternative, violations of the laws and customs of war under Article 3. The Trial Chamber, by its judgment of 29 November 1996, sentenced him to 10 years of imprisonment under Article 5 only.[23]

The Appeals Chamber, in its judgment of 7 October 1997, confirmed that duress was no defence, but vacated the Trial Chamber Judgment because Erdemović was thought not to have made an informed plea. It therefore remitted the case to a new Trial Judgment so that he could make a new plea.

The new Trial Chamber accepted his plea of guilt on violations of laws and customs of war under Article 3 and, by its judgment of 5 March 1998, sentenced him to five years of imprisonment.

However, the majority of Judges of the Appeals Chamber in 1997 confirmed the view from the first sentencing judgment of 1996 that "duress does not afford a complete

22 Besides, in its practice, the Tribunal frequently makes use of the terms "customary law" and "general principles of law" as synonyms. That is probably the reflection of its view that it can create itself new "customary law" by its decisions, like the above quoted in the *Kupreškić* Judgment. It seems, however, controversial that statements in judgments by a trial chamber which were subsequently repealed by the Appeals Chamber and all the convicted released have the force of precedents and fall, as such, within the scope of rules of "customary law". All these issues will be discussed later on.

23 For a thorough critical analysis of that judgment, see Sienho Yee, Towards an International Law of Co-progressiveness, Martinus Nijhoff (2004), 115–161.

defence to a soldier charged with a crime against humanity and/or war crime involving the killing of innocent human beings".[24]

The long individual and separate opinions by each of the five members of the Appeals Chamber in 1997 reveal how risky the establishment of simple general principles of criminal law is, if it is presumed that they constitute "customary rules" of international law and are perhaps different from the respective principles in national legislations, which can also largely disagree on details. The general principles of criminal law such as duress are not to be proved; they simply must be applied.

It is, however, most interesting to ask, what happened with Brano Gojković as an indirect perpetrator of the genocide, and with all other soldiers in the squad who, without resistance, executed civilians? We do not know the identity of others, but the name of Gojković is not on the list of accused preferred by the prosecution of the Tribunal. Perhaps he subsequently died, or there is a secret indictment against him, or the Prosecutor is simply not interested in this matter anymore. In any case, there is no doubt that this horrible crime against innocent civilians was committed and, in this light, it is difficult to grasp the purpose which the trial of Erdemović alone served.

The Tribunal starts from the postulate that the international criminal proceedings are different from procedures before national courts. It seems hard to support this position. For sure, international tribunals have within their jurisdiction the prosecution of the most serious international crimes, while municipal courts have in their competence a large spectrum of human misdeeds of very unequal social consequences. But the greater the gravity of a crime imputed to an accused, the higher the risk of miscarriage of justice. It is exactly for this reason that codified general principles of criminal law in written form have at least the same importance for international tribunals consisting of professional judges as for national judicial bodies where professional judges also dominate.

There is no room to analyse here in detail other judgments of the ICTY which involved the application of the general principles of criminal law which were not fixed in advance in the Statute. The matter is, first of all, of the presumption of innocence of the accused, but also of the principle that law must be the same for all, whether it protects or punishes, and of the principle of "equality of arms". It seems sufficient to make some indications in this respect.

According to the two Statutes, the Prosecutor is invested with very broad powers in pre-trial investigations. He/she not only has the absolute freedom to decide whether or not to initiate investigation and against whom, but carries out any judicial scrutiny. Only at the end of investigations does the reviewing judge admit or dismiss the indictment. But even in that judicial phase, the suspect and his counsel have no right to assist in the proceedings. For this reason, the confirmation of an indictment is more often than not a simple formality.[25]

24 Cf. Judgment by the Appeals Chamber of 7 October 1997, para.19, and in the disposition under (4). Judges McDonald, Vohrah and Li, in their separate opinions, made, *inter alia*, an almost complete list of provisions from national laws on duress. Judges Cassese and Stephen dissented.

25 The UN Security Council has conferred such an extensive power to the Prosecutor probably in the belief that his or her vigorous action will prevent the commission of further large-scale crimes on both territories of the former Yugoslavia and Rwanda. That, however, did not happen. In both instances, it probably also wanted to diminish its

To these powers, self-appointed missions were added by both the Prosecutor and the two Tribunals to act as organs of prosecution in the name of the international community. In performing that common mission, the Judges acquiesced in some practices for making the life of the prosecution easier. Hence, the strong insistence on the "equality of arms" between the prosecution and the accused at the stage of trial proceedings only does not seem to be a sufficient guarantee for the respect of the presumption of innocence of the latter throughout the process. We can here note some practices which, in the view of this author, are not likely to be fully in accordance with the sum of general principles of criminal law.

Although the two Statutes do not provide the competence of the Tribunals to condemn an organization as criminal, the Prosecutor is allowed to indict a group of persons for a "joint criminal enterprise". Unlike Article 25(3)(d) of the Rome Statute, the matter here is not of a form of contribution to the commission of the principal crime by furthering criminal action of actual perpetrators, but of a presumed act of co-perpetration in a crime. If the Tribunal does not strongly insist on the intent and knowledge of each member of such a supposed group, the crime can be imputed to any executioner of an order issued by his political superior who was perhaps the ultimate perpetrator. The *actus reus* and *mens rea* can then be attributed to the accused on indirect evidence, or even from factual circumstances.[26]

The Tribunal admits, in addition, the practice of confirming indictments against a person at the same time for "planning, instigation, ordering, committing, or otherwise aiding and abetting in the planning, preparation, or execution" of a crime. This is the full formula from Article 7(1) of the Statute.[27] However, in case the reviewing Judge has, from the outset, forced the Prosecutor to specify the acts he imputes to the accused, that could only enhance the prestige of both the Tribunal and its Prosecutor as being impartial. That could facilitate the co-operation with the Tribunal by governments of all the successor States of the former Yugoslavia.

Similar to that is the practice followed by the Tribunal without rational restrictions on indictments of a person for a single act or transaction, for alternatively having been in breach of Article 3 (on violations of the laws or customs of war) and of Article 5 (crimes against humanity). This is admitted as a precaution that in case the Prosecutor does not

primary responsibility for maintenance and restoration of international peace under Art.24(1) of the UN Charter. Instead of undertaking enforcement actions against the violators of the peace by armed forces whenever it was really necessary, the Security Council settled for the activities of the Prosecutors of these two Tribunals which it, itself, had established.

26 In this respect, the still pending case of Croatian General Ivan Cermak can be of interest. After the liberation of the city of Knin, in the operation "Storm", he performed, between 5 August and 15 November 1995, the duty of military commander charged with the civilian affairs there. He had allegedly no armed forces, or even police, under his command. He was, *inter alia*, accused by the prosecution for command responsibility under Art.7(3) of the Statute, as well as for his participation in a joint criminal enterprise, for committing all crimes in that larger region. It will be intriguing to analyse the future judgment by the ICTY in case the prosecution does not prove the responsibility of General Cermak under Art.7(1).

27 These unqualified statements in indictments are abusively interpreted by some groups in Croatia which resist co-operation with the ICTY. They impute to the Tribunal and its Prosecutor their condemnation of acts of liberation of the Croatian territory between 1992 and 1995 as allegedly criminal acts. The liberation itself was a perfectly lawful action, but some crimes against unarmed civilians during it were nevertheless committed which fall within the jurisdiction of the ICTY.

prove in the proceedings the specific requirements of one crime, then the accused could be punished for another. This is nothing like the equality of arms between the two parties during the proceedings.

When the matter is of command responsibility under Article 7 of the Statute, the Trial Chamber has sometimes condemned a person cumulatively for ordering or planning a crime under paragraph (1) and, at the same time, for not preventing his subordinates to actually commit it under paragraph (3).[28]

It is true that, in most cases, the persons who bear responsibility for abhorrent crimes have been adequately punished by the ICTY. But there are still some borderline cases where the so-called "judge-made law" in the domain of general principles of criminal law could lead to unjust condemnations. In their constant wish to create new legal rules, the Judges actually blurred the threshold of personal responsibility of lower commanding officers for the deeds of their highest political or military superiors.

The next instance is of "judge-made law" in respect of mental element (*mens rea*) of the accused. According to Article 30(1) of the Rome Statute, unless otherwise provided, a person shall be criminally responsible "only if the material elements were committed with intent and knowledge". The intent and knowledge of the accused cover *dolus directus* in the first and in the second degree.[29] However, the so-called *dolus eventualis* is not provided by the Statute. Conscious negligence or recklessness is provided only in Article 28 concerning the responsibility of commanders and other superiors. But unconscious negligence, or disregard of the obligation of due diligence, is not provided in the Rome Statute expressly, even as a ground of criminal responsibility for military superiors. It is close to the notion of "strict liability" which, in criminal law of civilized nations, is excluded as a general principle.[30]

In what is labelled as "customary rules" in international criminal law, *dolus eventualis* is simply called "recklessness" (which is otherwise synonymous with negligence).[31] A new notion of "culpable negligence" is introduced which, in fact, covers the unconscious

28 It seems that the Appeals Chamber has stopped this unlawful practice. Referring to some of its former decisions, it stated in the Blaškić Judgment of 2004 the following: "Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position as an aggravating factor in sentencing" (para.91).

29 *Dolus directus* in the first degree is provided in Art.30(2): "... a person has intent where: (a) in relation to conduct it means to engage in the conduct; and (b) in relation to a consequence, it means to cause it." *Dolus directus* in the second degree is covered by Art.30(2) under (b): "... a person is aware that a consequence will occur in the ordinary course of events"; and in Art. 30(3): "... the 'knowledge' means awareness of the person that a circumstance exists or a consequence will occur in the ordinary course of events."

30 Such a form of responsibility exists in public international law only if it is agreed by a treaty in advance. Criminal laws of some States provide it for some future traffic or similar delicts of minor importance. For an analysis of all provisions concerning *mens rea*, see Albin Eser, Mental Elements: Mistake of Fact and Mistake of Law, in: A. Cassese, P. Gaeta and J.R.W.D. Jones, The Rome Statute of the International Criminal Court: A Commentary, Oxford (2002), Vol.I, 890, 902–903.

31 In American law, in case of "wanton negligence", the intent of the perpetrator is sometimes presumed, even if it is not proved.

negligence.[32] That was an attempt to extend the personal responsibility of accused beyond reasonable limits.

A paradoxical situation has appeared in the still pending process against Slobodan Milošević. This process is under careful scrutiny of the world media and critical comments. Milošević, allegedly holding *de facto* position of superior authority of Bosnian Serbs, is indicted, *inter alia*, for the crime of genocide in Bosnia-Herzegovina, pursuant to Article 7(3) of the ICTY Statute. It would not be a major problem to prove his responsibility for his recklessness or "culpable negligence" for not preventing this crime. However, the media expect from the prosecution either direct documents or at least depositions of trustworthy witnesses in support of that accusation, which it has not produced so far. Due to the considerable financial resources it spends and the very broad powers in pre-trial investigation, this is taken as a failure of the prosecution to do the job.

Hence, in a process against the person which probably bears the greatest political responsibility for the destruction of Yugoslavia and for most crimes that followed, the judge-made "customary law" simply does not function, which was otherwise easily admitted by the Tribunal against persons of much lesser importance and for lesser crimes. This means that the Tribunal did not favour the prosecution when it did not stick to the universally recognized standards of *mens rea*.

It remains to establish what that "judge-made law" *qua* customary international criminal law consists of. In case any of its authors or partisans suffered, himself, the ungrounded accusations for a presumed crime, he would intimately opt for the proceedings before the ICC according to the rules laid down in the Rome Statute.

This, however, does not mean that the Rome Statute itself is free from any criticism. The main *lacuna* in its provisions relates to the total absence of a general provision concerning "the commission by omission".[33] Again, the omission, as a criminal act, is only provided in Article 28 on the responsibility of commanders and other superiors. A commander is responsible for a crime committed by the forces under his effective command and control "*as a result of his or her failure to exercise control properly over such forces*". For the rest, there is no general provision on omission which is otherwise found in most municipal criminal laws.

It seems that this *lacuna* was deliberate, especially with respect to armed forces sent on peace-keeping missions in areas affected by conflicts. In the case of crimes of genocide, such as those committed in Rwanda in 1994 and at Srebrenica in Bosnia in 1995, only direct perpetrators and their commanders are responsible. Responsibility of representatives of Member States of the UN Security Council and of commanders of peace-keeping troops for not averting these crimes is thereby excluded. In all these situations, none of them had the special intent "to destroy, in whole or in part, a national, ethnical, racial or religious group". None of them can therefore be indicted for omission under Article 25(3)

32 Instead of a review of the practice by the ICTY, see the explanation in this respect by the first President of the ICTY, Antonio Cassese, International Criminal Law, Oxford (2003), 168–175. However, the text of the Judgment in Blaškić by the Trial Chamber of 2000 was the best example of all practical consequences of that doctrine.

33 Such a general rule is provided in Art.86(1) of the Protocol I of 1977 to four Geneva Conventions of 1949.

of the Rome Statute. But bearing in mind the huge tragic consequences of such omissions, this does not seem to be entirely justified.

All the foregoing proves that because of their axiomatic character, the general principles of criminal law cannot, in this legal branch, be confused with or assimilated into custom as a source of public international law. The careful codification of these general principles in Part 3 of the Rome Statute, as well as the submission of the powers of the Prosecutor to the judicial authority of the ICC, will probably diminish the unwelcome practice indicated above.

IV. Treaties as a source of law in international criminal proceedings

In the international legal order of sovereign States, treaties are the main source of what is called ''particular international law''. National criminal judges in their capacity of State organs are obliged to apply treaties in force for their respective country. This obligation relates especially to treaties in the domains of human rights, including the guarantees of a fair trial, immunities of some foreign persons and international judicial co-operation including extradition.[34]

Unlike national courts, international criminal tribunals are not organs of any particular State and they are not bound to apply treaties. The principle *pacta sunt servanda* is not applicable there as such, unless a tribunal itself was established by a treaty. In these cases, such as the London Agreement of 1945 or the Rome Statute of 1998, conventional instruments are constitutional acts of these bodies, much in the same manner as the UN Charter is for the United Nations Organization.

In relation to this subject matter, one should distinguish the violation of some treaties as consisting of particular crimes from the respect of treaties as one of the sources of law to be applied by international judges.

According to Article 227 of the 1919 Versailles Peace Treaty, the Allied and Associated Powers publicly accused the former German Emperor William II ''for a supreme offence against international morality and sanctity of treaties''. In Article 6 of the London Agreement, it was again provided, among the Crimes Against Peace, waging war ''in violation of international treaties, agreements and assurances''. Exactly the same crime under the same heading was set forth in Article 5 of the Charter of the International Military Tribunal for the Far East.

Because the prosecution of aggression is not in the competence of any of the current international tribunals, the violation of treaties does not figure as a specific crime in their respective statutes.

As a potential source of law for international criminal judges, treaties can be viewed from a different aspect. The question is whether an accused can be punished for the violation of

34 However, if a State has assumed the obligation by a treaty to prosecute criminal acts, such as, e.g. genocide, or the obligation concerning non-applicability of the statute of limitations to war crimes and crimes against humanity, national judges cannot give effect to these legal commitments before the adoption of the necessary national legislation.

provisions of the conventions codifying humanitarian law or for the breaches of bilateral agreements which the conflicting parties may have concluded. This problem occurred in the practice of the ICTY. It is closely related to the transformation of provisions of these conventions concerning their grave breaches in customary international law. Let us concentrate here primarily on the conventional aspect of this problem.

The Report of the UN Secretary-General (S/25704) which, according to Article 32 of the 1969 Vienna Convention on the Law of Treaties, can be considered as *travaux préparatoires* for the purpose of interpretation of the ICTY Statute, was, in this respect, quite clear:

> 34. In the view of the Secretary-General, 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.
>
> 35. The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflicts as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.

The provisions from the above conventions were the basis for drafting Articles 2–5 of the ICTY Statute. Unlike the said 1949 Geneva Conventions, to which practically all the States of the world have become parties, some important States, such as the United States, Israel, India, Pakistan and some Arab countries, have never acceded to Protocol I of 1977 to these Conventions.

It was for this reason that grave breaches of Protocol I were not provided as crimes in Article 2 of the Statute. This is quite natural because the ICTY has the jurisdiction to prosecute any person responsible for committing crimes in its jurisdiction in the territory of the former Yugoslavia since 1991. In case a US citizen is indicted by the Prosecutor for grave breaches of this Protocol alone, his counsel will be right to claim that the defendant cannot be punished for this crime. Although the former SFRY and all its successor States were parties to both Protocols of 1977, a criminal tribunal must respect what is called the "universal measures of repression". It cannot punish the accused according to their citizenship.

Nevertheless, the drafters of the ICTY Statute have probably not realized the full importance of the problem of applicable law based on the conventions in non-international armed conflicts. As already stated, Article 2 is applicable only to the crimes committed in international armed conflicts, while Article 3, applicable to all sorts of conflicts, was poorly drafted and it provides an open definition of crimes.

In its 1995 *Tadić Jurisdiction Decision*, the Appeals Chamber decided that "Article 3 of the Statute is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5".[35] Hence, it construed this poor definition as an opportunity to amend Article 3 by including other crimes it deems necessary for its proper functioning. In the view of this author, the Appeals Chamber was wrong to include, *inter alia*: "(iv) violations of agreements binding upon the parties to the conflict, considered *qua* treaty law, i.e. agreements which have not turned into customary international law."[36]

First of all, this newly added crime refutes the necessity of the "universal measures of repression" by a criminal tribunal, because the extent of the crimes to be imputed to an individual depends on the agreements that his party has accepted.

Only a few combatants or their commanders are aware of these commitments "considered *qua* treaty law". In case there is proof that the accused himself has participated in the conclusion of such an agreement, that fact could be taken as an aggravating factor in his punishment. On the contrary, when there is no direct evidence that the accused did even know of the existence of such an agreement, he cannot be guilty of its violation.[37]

For the rest, it is difficult to imagine that a person could be punished only for the violation of such an agreement without having been found guilty of more serious crimes. That proves that this amendment is almost of no practical use.

In this light, it seems highly desirable that the statutes of criminal tribunals provide, in advance, all the crimes within their jurisdiction, exactly as was done in the Rome Statute. Amendments like that are not in accordance with the principle *nullum crimen sine lege.*

V. Place of custom in international criminal law

There are legal terms in general use on whose exact meaning there is no general agreement. Some authors usually resort to some of these terms in order to assert some facts or legal rules which they are otherwise unable to support by stronger legal arguments. For such purposes, they sometimes use the terms of equity, natural law, even sources of international law in general and, as shown above, the general principles of law.[38]

In the practice of *ad hoc* tribunals and in the writings of some publicists on international criminal law, the same frequently occurs with the term "customary law". Their notion of this term has substantially different features from those that appeared in the long practice of the two Hague Courts since 1922. We feel it our duty to introduce some necessary clarifications

35 Cf. Tadić Jurisdiction Decision of 1995, para.89.

36 Ibid., para.143.

37 For this reason, the violation of *ad hoc* agreements of this kind falls into the domain of responsibility of States or recognized insurgents, for which the ICTY is not competent. This means that the criminal responsibility of individuals cannot entirely replace the State responsibility here.

38 The author of this paper confronted these misunderstandings by trying to reveal the exact meaning and content of some of these notions, including, when necessary, their historic developments. See V.D. Degan, L'équité et le droit international, La Haye (1970), 264 pages; and with respect to other above terms, including that of natural law, Sources of International Law, The Hague (1997), 564 pages.

here. We shall first briefly explain the meaning of custom in public international law, including its two essential elements, and then its place in national and international criminal law. We shall, of course, not overlook the misunderstandings of customary law created by the ICTY and its Judges, which have already been partly revealed.

Article 38(1)(b) of the ICJ Statute correctly indicates the two elements of custom.[39] A customary rule consists of a material element: practice, which can be general or common to two or more international persons in their mutual relations only; and a psychological element: *opinio juris sive necessitatis*, i.e. the fact that a uniform, consistent and durable practice (or "usage") has been "accepted as law" by its participants.

There is not enough space to explain here all the characteristics of these two elements, such as the authors of the practice, its density, uniformity and frequency, duration and quality, as well as the *opinio juris.*[40]

The inter-relation between these two elements in the process of creating a new customary legal rule was best explained in the 1969 Judgment by the ICJ in *North Sea Continental Shelf*:

> . . . for in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.* The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[41]

It should be added that the States concerned also begin to believe that there is a reciprocal duty for all other States to conform to the same legal obligation from the customary rule it claims to exist. Hence, a claim of existence of the *opinio juris* is not necessarily equivalent to a unilateral commitment to or abnegation of rights by such a State.

In the 1986 Judgment in *Nicaragua*, the Court stressed in addition that: "The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice."[42] As a consequence, somebody's belief in the existence of a customary rule does not suffice if there is no confirmation of the *opinio juris* in the actual practice of States.

It is of particular importance to make a precise note of State practice and the *opinio juris* in the domains of international humanitarian law and of law of armed conflicts in general. The matter is here certainly not of the "practice" in everyday application of respective legal rules,

39 The wording "international custom, as evidence of a general practice accepted as law" was rightly criticized in the doctrine. Besides its bypassing customary rules of particular international law, it was contended that this wording put the cart before the horse. It should be understood that the practice as being accepted as law is the evidence of customary rules, and not *vice versa.*

40 See an explanation taking into account the case law by the ICJ up to its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons of 1996, in: V.D. Degan, Sources of International Law, The Hague (1997), 147–174. On the basis of the explained materials, the reader can, of course, come to his own conclusions on various factors in the customary process.

41 ICJ Reports (1969), 44, para.77.

42 ICJ Reports (1986), 98, para.184. See ibid., 99–100, para.188, etc.

such as those concerning diplomatic and consular relations, the law of treaties or the law of the sea. A "general practice" does not require a worldwide armed conflict in which all States should apply these rules in their mutual relations. Sufficient proof of the "practice" and of the *opinio juris* is general participation by States as parties to the Geneva and other Conventions on humanitarian law.

However, especially in the domains of humanitarian law and international criminal law, customary legal rules appear mainly in the practice of sovereign States, coupled with the *opinio juris* of their main decision makers. The practice of political organs of international organizations, such as the UN General Assembly or the Security Council, is easy to assimilate in the practice of States which take part in their deliberations. But, in any case, the matter cannot be of the *opinio juris* of judges or of professors of international law.[43] There are a number of cogent reasons for that.

Only sovereign States keep their regular armed forces under control, which are able to commit crimes in international armed conflicts in violation of their legal commitments. In case of internal insurgencies, it is of the utmost importance that the State conducts the operations against a rebel movement (which usually invokes its right to self-determination), in accordance with the legal obligations it has assumed for that kind of conflict. In case, in order to preserve its national and territorial integrity, the State treats rebels with cruelty, the conflict quickly degenerates into numerous crimes on both sides. Then, retrospective application to their perpetrators of new "customary rules", which were invented by judges, will certainly not dissuade other States and rebels in other regions from repeating the practice of the most cruel misdeeds.

Hence, because international judges (or professors) have no armed forces under their command, their own *opinio juris* as to the existence of some customary rules is not the *opinio juris* of any States. And because every legal rule on warfare consists of a compromise based on "the desire to diminish the evils of war, as far as military requirements permit",[44] the "customary rules" in this domain cannot be deduced by judges from "elementary considerations of humanity" as they conceive them. They will better fulfil their mission by insisting on the respect of customary rules which form positive international law.

Now we come to the role of international custom as a source of national and international criminal law. A national criminal judge must observe in his practice peremptory norms of general international law (*jus cogens*) which are all of customary character. These norms relate mainly to immunities from prosecution of some foreign persons, such as active Heads of State, other high-ranking State officials and diplomatic agents. He must also respect the inviolability of some objects, such as foreign diplomatic premises or warships, etc.

43 As stated in the above 1969 Judgment by the ICJ, the *opinio juris* means a belief (i.e. a conviction) that a practice is rendered obligatory by the existence of a rule of law requiring it. The *opinio juris* can, therefore, never be understood as a simple "legal opinion" by a judge or a legal author.

44 That was provided in the preamble to the Fourth Hague Convention Respecting the Laws and Customs of War on Land of 1907. The said compromise is in the core of all the rules on armed conflicts that States are willing to accept and observe in their actual practice at a given time. Nevertheless, the history of warfare since 1907 proved many examples where even this minimum of legal commitments was disavowed.

More important is the question of whether a national judge can directly resort to rules of customary international law and punish a person for his or her violations on this ground alone.

It was already stated that the general principle of law *nullum crimen sine lege* impedes judges in continental systems of codified law to resort to analogy, or to base the incrimination of some acts exclusively on customary law. In the best tradition of the dualistic doctrine of relationship between municipal and international law, even the rules of *jus cogens* in this domain must first be transformed into municipal laws in order to be applied by a national criminal judge.

In the Anglo–American law, the situation seems different at the first glance. This problem will be explained in our next section. It is sufficient to say here that new offences can sometimes be created by judicial precedents on the basis of the *stare decisis* doctrine. However, such a "judge-made law" has nothing in common with customary rules of whatever origin—domestic or international. As a consequence, the Anglo–American judges do not directly apply in criminal proceedings the existing rules of customary international law; nor can they create them by their own decisions.

The principle of *nullum crimen sine lege* is equally valid in international criminal law. As stated above, international criminal tribunals should apply first of all written legal rules embracing the definitions of crimes, as provided in their statutes. Resorting to analogy, or retrospective application of new legal rules to the accused, results in violations of the principle *nullum crimen sine lege* in the same way that an unlawful practice by national courts does.

Customary rules cannot, as a matter of principle, be a direct basis of incrimination by an international criminal judge. However, as shown in the above-quoted paragraphs 34 and 35 of the 1993 Report of the UN Secretary-General, codified customary rules of general international law can nevertheless be a model or test when drafting future statutes of international criminal tribunals. Several requirements, however, must be fulfilled to this end.

(i) As shown above, it must be a matter of general customary norms which, being rules of positive international law, relate to all States and other international persons in the world. If an important convention which codified humanitarian law was not adhered to by an important group of States, in particular by one or several permanent members of the UN Security Council, the "grave breaches" defined in it are not parts of general international law.

(ii) Such a rule must, at the same time, consist of a peremptory norm of general international law (*jus cogens*), as defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties.[45] There should not be general customary norms belonging to the *jus dispositivum*.[46]

45 It is provided there that such a norm "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

46 Some norms of this kind can be found in the 1961 and 1963 Vienna conventions on diplomatic and consular relations, or in the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, etc.

(iii) However, although all international crimes belong to *jus cogens*, all peremptory norms of this character do not solely consist of international crimes. According to the former draft Article 19(2) on the Responsibility of States by the International Law Commission:

An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

The above criterion has two aspects: "one is the requirement that the obligation breached shall, by virtue of its content, be essential for the protection of fundamental interests of the international community; the other, which completes the first and provides a guarantee that is essential in such a delicate matter, makes the international community as a whole responsible for judging whether the obligation is essential and, accordingly, whether its breach is of a 'criminal' nature."[47] Hence, international crimes cannot be established as such by the *opinio juris* of one or a few States.

(iv) A further requirement is that such an international crime with all the above attributes was included in the competence of a particular criminal tribunal by its statute. Hence, although aggression is generally recognized as an international crime both involving personal responsibility of its perpetrators and the responsibility of the respective State, important States have prevented its inclusion in the statutes of the current *ad hoc* Tribunals. These Tribunals, as well as the ICC, have not within their jurisdiction the power to prosecute international crimes of piracy on the high seas, slavery and slave trade, international terrorism, drug-trafficking as a trans-national crime, etc., although most of them meet all the requirements for international crimes.

Nevertheless, in case of the institution of any new international criminal court or tribunal, the principle of non-retroactivity will not be disobeyed if the prosecution of past international crimes that have already been recognized as a part of positive international law is within their competence. Under such circumstances in respect of these crimes, the principle *nullum crimen sine lege* will not be affected.[48]

As already said, the problem with the law applicable by the ICTY appeared with the fact that Article 3 of its Statute, which relates to internal and international armed conflicts, was drafted in sparse terms.[49] This insufficient provision on the violations of laws or customs of

47 Cf. ILCYB (1976), Volume II, Part Two, 119, para.61.

48 On this ground, the ICTY is competent to punish the crimes committed in the territory of the former Yugoslavia since 1991, although it was, itself, established by UN SC Res 827 of 25 May 1993. Nevertheless, Arts 11 and 24 of the Rome Statute exclude the jurisdiction of the ICC in respect of the crimes committed before its entry into force. See also ICCPR, Art.15(2).

49 The entire text of Art.3 reads as follows: "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:—(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to

war repeated some prohibited acts, but not all of them, listed in the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on the Land. The Report of the Secretary-General stresses that these provisions were, by 1939, recognized by all civilized nations and were regarded as being declaratory of the laws or customs of war.[50]

Article 3 thus provides an open and unfinished definition of crimes. That could be interpreted as an invitation for the Tribunal itself to supplement it in one of its Judgments by enlarging its content to include all other war crimes that may happen, especially in non-international armed conflicts.

In order to remain within the limits of universally adopted general customary international law, the Tribunal could amend the text of Article 3 by adding to it some other crimes as already prescribed in Article 23 of the Hague Regulations, taking into account the development in the methods and means of warfare and harmful effects of new arms.[51] Such violations also include taking hostages, using enemy prisoners of war or civilians as a shield against attacks, and torture. All these crimes equally affect the civilian population and combatants and there is no doubt that all of them were customary rules of general international law in 1993, when the ICTY Statute was adopted.

However, the Tribunal wanted to legislate. In the *Tadić Jurisdiction Decision* from 1995, the Appeals Chamber did not enumerate specific crimes that could be committed in non-international armed conflicts. But, in disrespect of the principle *nullum crimen sine lege*, it enclosed under Article 3 the entire body of international instruments with all their provisions.

Hence, under the Violations of Laws or Customs of War heading, the Appeals Chamber included: (i) violations of the Hague law on international conflicts (exactly as suggested above); (ii) infringements of the provisions of the Geneva Conventions other than those classified as "grave breaches" in the Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; and (iv) violations of agreements binding upon the parties to the conflict, considered *qua* treaty law (discussed in the previous paragraph).[52]

The ICTY found the justification for exceeding its proper judicial function in the *travaux préparatoires* concerning the adoption of the SC Res 827 establishing the ICTY. The delegates of the United States, the United Kingdom and France shared the view that Article 3 of the Statute included all obligations that flow from the humanitarian law agreements

institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property."

50 See para.41 of that Report.

51 The crimes from Art.23 are mainly the following: "(b) killing or wounding treacherously individuals belonging to the hostile nation or army; (c) killing or wounding an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion; (d) declaring that no quarter will be given; (e) employment of arms, projectiles, or material calculated to cause unnecessary suffering; (f) making improper use of a flag of truce, of the national flag, or of military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention." Article 23 further provides that: "A belligerent is likewise forbidden to compel the nationals of a hostile party to take part in operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war."

52 Cf. Tadić Jurisdiction Decision of 1995, 51, para.89.

in force on the territory of the former Yugoslavia. The American delegate expressly included in that law the common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocols to these Conventions.

"Since no delegate contested these declarations, they can be regarded as providing an authoritative interpretation of Article 3 (of the Statute) to the effect that its scope is much broader than the enumerated violations of Hague law" was the conclusion of the Appeals Chamber.[53] The same practice was followed in subsequent cases.

The above enrichment of the content of Article 3 by the Appeals Chamber gives rise to many interesting questions. It reveals once again the necessity of a general definition of international crimes as originally proposed in draft Article 19 on State responsibility which the International Law Commission, in its new draft articles of 26 July 2001, simply avoided.[54] Besides that, newly added crimes refute the already discussed necessity of the "universal measures of repression" by any criminal tribunal. Let us, however, briefly comment on some of the above points.

As to point (ii), it should be noted that whoever has read large texts of the 1949 Geneva Conventions, especially those of the Third and Forth Convention, he cannot but agree with Jean Pictet that "violations of certain of the detailed provisions of the Geneva Conventions might quite obviously be no more than offences of a minor or purely disciplinary nature".[55] If not the ambassadors of the permanent Member States in the Security Council, at least the Judges of the ICTY should be aware of this fact. It is therefore difficult to find international crimes outside the "grave breaches" that were specified in these Conventions as such.

In respect of point (iii), a similar crime—"violations of Article 3 common to the Geneva Conventions and of Additional Protocol II"—was provided for the first time in Article 4 of the ICTR Statute. Both the common Article 3 and the Protocol II do not define their grave breaches; neither were they provided in the ICTY Statute. The UN Security Council adopted the ICTR Statute by its Res 955 on 8 November 1994. However, the ICTY is not allowed to apply this crime by analogy (which is forbidden in criminal law), and especially not against the accused within its jurisdiction for their acts committed before 8 November 1994.

Finally, in respect of point (iv), it should be added that a general principle of law was already detected in Roman law, which reads: *nemo plus juris in allium transferre potest*

53 Cf. Tadić Jurisdiction Decision of 1995, para.88. The authoritative interpretation is only offered in the Report of the Secretary-General pursuant to para.2 of SC Res 808 (1993), (S/25704) of 27 May 1993, to which the ICTY Statute was enclosed. Together with the Statute, it was adopted by the Security Council under Chapter VII of the UN Charter. Statements by representative of Member States in the debate, even if not opposed by others, can hardly be considered as the *travaux préparatoires* of the Statute for the purpose of its interpretation. That is because these representatives cannot by their statements legally bind their country, e.g. in respect of the 1977 Protocol I. On abstract and verbal statements by State representatives as a proof of State practice in customary process, see Degan, Sources (1997), 160–161.

54 Instead of the old draft Art.19, the Commission proposed in its new draft Art.26 "serious breaches of peremptory norms of general international law". Hence, just before the events of 11 October of the same year, in its text on "Responsibility of States for Internationally Wrongful Acts", the Commission unwisely suppressed any mention of international crimes. In spite of that, we believe that the content of the suppressed article constitutes the law in force.

55 Cf. Jean S. Pictet, The Geneva Conventions of 12 August 1949, Commentary, I, 370, Geneva (1952).

quam ipse habet. Its equivalent in relations among sovereign States is that no State can impose legal obligations on another State that it, itself, has dismissed in respect to itself. That relates to the above-mentioned statement by the delegate of the United States in the Security Council that the 1977 Additional Protocols should be included in Article 3.

Hence, the Judges of the Appeals Chamber were not successful in their effort to complement Article 3 of the Statute. Their statements did not satisfy the above-mentioned criteria for the very existence of international crimes. In respect of the equally open definition of crimes against humanity in Article 5, it was already stressed that "other inhumane acts" from its paragraph (i) do not need formulation of new crimes and their retrospective application to the defendant. Such acts, if they are established by the Tribunal, can be taken as an aggravating factor in punishing their perpetrator.

Unlike the ICTY Statute, Articles 6, 7 and 8 of the Rome Statute were drafted with much more care. The intention of its drafters, and of all States Parties to the Statute as well, was to provide very broad and comprehensive definitions of all crimes within the jurisdiction of the ICC, coupled with the Elements of Crimes. That will exclude in advance the necessity for the legislative function of its Judges. In criminal matters, legislative and judicial power mutually exclude one another.

Genocide, in the short text of Article 6, is defined exactly according to Article II of the 1948 Convention, which was reaffirmed in Article 4 of the ICTY Statute and Article 2 of the ICTR Statute.[56] Hence, this definition is deeply rooted in the general customary international law without any need for subsequent improvements.

Crimes against humanity are more comprehensively enumerated in Article 7(1) of the Statute than in any previous instrument. Compared with Article 5 of the ICTY Statute (and Article 3 of the ICTR Statute), this Article comprehends in addition, in its subparagraph (i), "enforced disappearance of persons" and, in subparagraph (j), the crime of apartheid, although the Convention on Apartheid of 1973 has never been adhered to by the States of the former Western block. It is, however, important that in paragraph (2) of Article 7, the meanings of most of the crimes listed in its paragraph (1) were included.

Article 8, on war crimes, is the largest and the most complex in the entire text of the Rome Statute. It was a clear intention of its parties to confirm the distinction of war crimes that can be committed in international armed conflicts from the crimes committed in "armed conflicts not of an international character".[57] The former are set forth in its paragraphs 2(a) and 2(b), and the latter in paragraphs 2(c) and 2(e). However, in paragraphs 2(d) and 2(f), it repeated that paragraphs 2(c) and 2(e) do not apply "to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature".

56 However, the text of Art.III of the Genocide Convention was not reproduced in Art.6. Acts of perpetration of or participation in all the crimes within the jurisdiction of the ICC are regulated by Art.25(3) of the Rome Statute. Nevertheless, direct and public incitement of others to commit genocide constitutes, in its subpara.(e), a separate crime.

57 Hence, this division has been a part of positive international law at least since the adoption of the 1949 Geneva Conventions. The views *de lege ferenda* by some Judges of the ICTY and some other authors on its unfitness from the aspect of "elementary considerations of humanity" should not influence any judicial decision.

By this, Article 8 confirms all sorts of situations from the aspect of applicability of humanitarian law, as previously provided in common Articles 2 and 3 of the 1949 Geneva Conventions and in Article 1 of the 1977 Protocol II.

Unlike the statutes of *ad hoc* Criminal Tribunals, the Rome Statute is a conventional instrument. It depends on the sovereign will of any State whether it will become a party to it. From this aspect, there was a large margin of discretion for its drafters to provide "law-generating rules" of general international law, i.e. new rules intended to legislate, and to "improve" the law of armed conflicts and international criminal law. The drafters of the ICTY and ICTR Statutes did not enjoy the same freedom, and still less the Judges in application of their provisions.

It is, however, to the credit of the drafters of the Rome Statute that in spite of that freedom to legislate, Article 8 of the Rome Statute sticks to the division between the "law declaratory rules" of general customary law in this domain and the "law crystallizing rules" in cases where codification conventions have not yet attained the universal approval.[58]

Among the rules declaratory of the customary law on international crimes are those concerning war crimes in Article 8(2)(a) and (c). Paragraph 2(a) relates to the well known grave breaches of the 1949 Geneva Conventions, which are couched in the exactly same terms as in Article 2 of the ICTY Statute.[59]

In Article 8(2)(c) of the Rome Statute, serious violations of Article 3 common to the 1949 Geneva Conventions in case of non-international armed conflicts are enumerated. Their enumeration was obviously inspired by Article 4 of the ICTR Statute. However, it leaves out acts of terrorism, while pillaging is provided in Article 8(2)(e) of the Rome Statute. This means that since the entry into force of the Rome Statute, all States Parties consider these crimes as declaratory of general international law.

On the other hand, Article 8(2)(b) of the Rome Statute contains a list of 26 offences as constituting "[o]ther serious violations of the laws and customs applicable in international armed conflicts, within the established framework of international law".

The same reservation appears in Article 8(2)(e) concerning "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law", which includes no less that 12 sub-paragraphs.

In the view of this author, the above reservation should be understood in the context of the law of treaties. If a suspect is accused of a crime originally provided in a convention of which his national State is not a party, he could plead the fact that such a crime cannot be imputed to him "within the established framework of international law".[60]

58 The three modalities of customary law resulting from general codification conventions—(a) declaring effect, (b) crystallizing effect, and (c) constitutive or generating effect—were originally introduced by Eduardo Jiménez de Arechaga, the former President of the International Court of Justice. See his general course at the Hague Academy of International Law, International Law in the Past Third of a Century, 159 RCADI (1978), 14–22. See also, V.D. Degan, Sources (1997), 201–215.

59 This means that item (ii) in para.89 of the Tadić Jurisdiction Decision of 1995 on "infringements of the provisions of the Geneva Conventions other than those classified as 'grave breaches' in the Conventions" is meaningless. There are no other genuine international crimes that can be found in these four Conventions.

60 It is nevertheless at the discretion of the Court to attach to this wording any meaning it finds appropriate.

We hope that this reservation is of temporary importance. Once a great majority of States, including all the permanent members of the UN Security Council, become parties to the Rome Statute, its Articles 7 and 8 will be considered as a complete codification of customary law on international crimes, humanitarian law and the law of armed conflicts, all of which form, in fact, a unity.

However, until this requirement is fully satisfied, some newly added crimes in Articles 7 and 8 will consist of legal rules obligatory for the ICC only. But they are, on the conventional basis, already obligatory for all the States Parties to the Rome Statute and their citizens, in particular if they take part in the enforcement and peace-keeping missions abroad. These States must, from now on, fully conform the operations of their armed forces with these provisions. Otherwise, their nationals could fall under the jurisdiction of the ICC for committing the crimes provided in its Statute.

VI. Judicial practice and doctrine

As stated above, among the sources of international law under Article 38(1) of the ICJ Statute figure (subject to the provision of its Article 59) ''judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law''.

Because Judges of the ICTY and ICTR frequently refer to former judicial decisions on the punishment of war crimes as ''customary law'', for the sake of clarity, it seems important to offer some explanation in this respect. Otherwise, both notions remain completely obscured. Judicial practice is the focus of our interest here, while the doctrine will be mentioned only randomly. Nobody has so far confused customary law with the teachings of the most highly qualified publicists.

The law of England, the United States and other countries which follow that tradition is developed in the practice of their highest judicial organs. In these States, the doctrine *stare decisis et non quieta movere* is valid. Judges are obliged to abide by former judicial precedents when the same points arise in later litigation. However, this doctrine presupposes a hierarchy of judicial organs and of their respective decisions. Only final decisions of the highest judicial court have the power of precedents. We found the best explanation in respect of the legal scope of precedent in English law:

> A judgment or decision of a court, normally recorded in a law report, used as an authority for reaching the same decision in subsequent cases. In English law, decisions of the House of Lords are binding upon the Court of Appeals and all lower courts and are normally followed by the House of Lords itself. Decisions of the Court of Appeals are binding on all lower courts and, subject to some exceptions, on the Court of Appeals itself. Decisions of the High Court are binding on inferior courts, but decisions of inferior courts do not create any binding precedent. A lower court is not bound by all aspects of a previous decision but only by those parts of the judgment that constitute the principles of the decision (*ratio decidendi*) and are not merely passing comments (*obiter dicta*) of the judge.[61]

61 Cf. Elizabeth A. Martin (ed.), A Dictionary of Law, Fourth Edition, Oxford University Press (1997), 348.

It is similar with the federal law of the United States and the laws of any of its 50 states. It is important to stress that in this ''judge-made law'', there is nothing similar to the creation of new rules of customary international law, or to the application of the existing ones. Taking all the circumstances of a case into account, judges form precedents, wishing them to be applicable to most of the subsequent similar cases. By that, they try to adopt the most reasonable decisions.

On the contrary, in the codified legal systems of Europe, Latin America, China and other States, judges, in principle, do not create new legal norms, but apply laws passed by the legislature. In practice, the situation is more complex. However, the transposition of the *stare decisis* doctrine is not recognized in these systems as such. The precedents of the highest courts have a high authority of standards (or examples), which is not good to neglect. It is normal that a lower court should abide by the decisions of the court of appeals or of the court of cassation which will finally decide on the appeal of the applicant.a

In the law applied by the ICJ, the *stare decisis* doctrine is also not formally recognized. Article 59 of its Statute prevents the doctrine from being applied and confirms the principle *sententia jus facit inter partes.* Besides, the will of international judges is not the same as the wills of sovereign States which are relevant in customary law-creating process. In addition, according to general international law, the competence of any international court or tribunal is not compulsory. These bodies can settle international disputes by binding decisions only if all their parties have agreed on their jurisdiction.

The ICJ and international arbitrators are, in their practice, careful not to exceed their competence and the subject matter of the dispute as agreed by the parties. Particularly the ICJ spends about three-quarters of its time considering the questions of jurisdiction and of the admissibility of applications.

In addition, the Court is careful to avoid making comments on all questions not falling within its jurisdiction or the subject matter of the dispute. It sometimes formulates legal norms of general character referring to its former decisions, but only within this narrow framework. It almost never qualifies such a norm as part of *jus cogens*, although that can be deduced from its judgment.

In its judgments and advisory opinions, the ICJ normally refers to its former practice and the practice of its predecessor, the Permanent Court of International Justice (PCIJ). It refers, however, very infrequently to previous arbitral decisions, which does not seem entirely justified. In order to corroborate its decisions, it almost never quotes doctrines. It is nevertheless evident from large texts of individual and dissenting opinions of its judges, which extensively refer to doctrinal views, that they are not unknown to the Court during its deliberations.

Unlike that, arbitral awards in inter-State disputes extensively refer to the precedents of the PCIJ and the ICJ, to former arbitral practice, as well as to the viewpoints of the most highly qualified publicists.

Because The Hague Court and international arbitrators adhere to the above restrictions, their decisions are carefully reviewed by the doctrine. Some of them are praised and some criticized.

In respect of the customary process, judicial decisions are often declaratory of already existing rules of international law. In order to confirm their findings, judges usually show proof of former State practice and the *opinio juris.*[62]

However, in some cases, judicial decisions have a crystallizing effect. They confirm as customary rules some existing practices of States which have not yet achieved a degree of uniformity, and the norms in question have not yet been "accepted as law" (*opinio juris*) by the necessary majority of States.[63]

It is exceptional that the ICJ tried to legislate by asserting the existence of new "customary rules" without proof of any former State practice and *opinio juris.*[64]

Some judgments and advisory opinions by the Hague Court, especially if they were supported by convincing legal reasons, enjoy high authority as evidence of existence or non-existence of some customary rules. Upon their rendering, all States which find that these statements corroborate their claims in respect to other States refer to them as imposing rules *erga omnes.* On other States, with different interests, then falls the heavy burden to prove the contrary.

The ICTY and ICTR have excelled in their practice of all that is disallowed by the above restrictions. They do not refer in their decisions to former State practice and the *opinio juris* as the only, or even as the main, evidence of customary law. They rather rely on the practice of former *ad hoc* military tribunals established by Allied Powers after World War II in occupied Germany and in the Far East, as well as to their own practice.[65] They thus call that former judicial practice, as a whole, "customary law".

However, considering themselves as organs of the international community, these *ad hoc* Tribunals do not hesitate to create new "customary rules" deducing them directly from "elementary considerations of humanity", which are presumably their own *opinio juris sive necessitatis.* The borderline between *lex lata* and *lex ferenda* is almost completely

62 There is still a paradox in that. With the increasing importance of general customary legal rules for the maintenance of the world political order, the Hague Court's duty to prove State practice and *communis opinio juris* is diminishing.

63 Hence, the ICJ had already stated in its Judgment of 24 February 1982 on the Continental Shelf case (Tunisia/Libya) that the exclusive economic zone "may be regarded as part of modern international law" (ICJ Reports (1982), 74, para.100). At that time, it was not yet certain that the pending Third UN Law of the Sea Conference would succeed. The Convention, with its Part V on that zone, was adopted at the Conference on 30 April, and it was formally signed on 10 December 1982. It entered into force no earlier than 16 November 1994.

64 To our knowledge, it happened with a number of "equitable principles" on maritime delimitations defined in the 1969 judgment in North Sea Continental Shelf. This attempt was abortive. In the cases on maritime delimitations that followed, it became evident that because of their abstract content, these "equitable principles" did not lead to predictable results. Hence, judicial and arbitral practice returned in later cases to the basic principle of equidistance and special circumstances, as applicable in delimitations of all maritime areas. For more details, see V.D. Degan, Equitable Principles in Maritime Delimitations, Le droit international à l'heure de sa codification, Etudes en l'honneur de Roberto Ago, Milano, Giuffrè (1987), vol.II, 107–137; Sources of International Law, The Hague (1997), 95–99. It is somewhat paradoxical that the same 1969 Judgment by the ICJ formulated side by side the most precious rules concerning customary process.

65 Even if these military tribunals, which acted in the post-war period, were organs of respective States, there is no proof that they were willing to prosecute, on the basis of the same principles, the same misdeeds by members of their own armed forces.

blurred. Still, they expect that States themselves will conform their practices in warfare to that judge-made "customary law" in future international and non-international armed conflicts.

They could perhaps even achieve some desirable results in these efforts of humanizing war, had not they taken on almost unlimited freedom in this act of law-creating. By that, they have betrayed their judicial function, without protecting the victims of future armed conflicts at the same time.

These Tribunals have an ambivalent approach to the relationship between case law and the customary process. It seems possible to discern two aspects of this problem: the application of existing case law *qua* customary rules, and the creation of new legal rules of this kind.

In respect of the first aspect, there is not enough evidence that the ICTY and ICTR recognize in former judicial practice the confirmation of previous State practice and of the *communis opinio juris*, and that they apply such "customary law" as rules of positive international law. Consequently, unlike the Anglo–American law, the *stare decisis* doctrine does not seem to be recognized by these judicial bodies in all its essential aspects.

Large texts of both the judgments by Trial Chambers and the Appeals Chamber look like doctoral theses where a mass of documentary material is carefully analysed, such as former case law, respective conventional instruments, State legislation and doctrinal views. Nevertheless, in this intellectual venture, there is room to pick and choose. The research is not limited to the final decisions of the Appeals Chamber. All arguments in favour of established conclusions are welcome, even if they are found in the judgments of Trial Chambers later on reversed by the Appeals Chamber and the convicts released.

For instance, the famous *Yamashita* case should not be taken as a precedent by any present criminal court. The execution of that unfortunate Japanese general was most likely a crime in itself. That case of miscarriage of justice should be governed by the principle *ex injuria jus non oritur*.[66] On the other hand, the Trial Chamber in the *Kupreškić* case of 14 January 2000 rejected the *tu quoque* argument as allegedly being "universally rejected", although, as a specific defence to punishment, it was recognized by the Nuremberg Judgment of 1946 in respect of two German Admirals, Dönitz and Raeder.[67]

In this light, labelling the former judicial practice altogether as "customary law" seems to be a distortion of the meaning of this source of public international law.

66 The decision by the US Military Commission on Yamashita was quoted in the Judgment by the Trial Chamber on Furundžija of 10 December 1998 (para.168). The Judgment on the same case by the US Supreme Court was cited in the Judgment by the Trial Chamber on Delalić of 16 November 1998 (para.338), etc. In that Judgment, the majority in the Supreme Court refused the *habeas corpus* in respect to his imprisonment and the death sentence rendered by the Military Commission. However, Justices Murphy and Rutledge (327 US 1 (1946), 26–81) noted in their dissenting opinions that the majority had not shown that Yamashita had "knowledge" of gross breaches perpetrated by his troops, that he had no "direct connection with the atrocities", nor could be found guilty of a "negligent failure to discover" the atrocities, nor did he, in other words, have "personal culpability". He spent less than a month in the position of the last supreme commander of Japanese forces in the Philippines. It was therefore better to forget that example of gross judicial miscarriage, although the text of Art.7(3) of the ICTY Statute was probably inspired by that case.

67 See Kupreškić, paras 515–516. Instead of an extensive presentation of this issue here, see an excellent and extensive review of this problem published in this very Journal by Sienho Yee, The *tu quoque* argument as a defence to international crimes, prosecution or punishment, 3 Chinese JIL (2004), 87–133.

The efforts to create new "customary rules" of international criminal law do not fare better. One of the founding fathers and the first President of the ICTY, Professor Antonio Cassese, is one of the champions of this "judge-made law". He has exposed in a recent article copious case law concerning "elements of both the Statute provisions and general international law on the definitions of crimes".[68] Let us cite him with all his references:

> Thus, for instance, ICTY case law has defined, from the viewpoint of international humanitarian law, the features of armed conflict,[69] as well as the conditions on which one may hold that an international armed conflict has broken out.[70] Furthermore, it has clarified the notion of war crimes, in particular by stating for the first time that such crimes may also occur in internal armed conflicts,[71] the notion of grave breaches[72] and the objective and subjective elements of crimes against humanity.[73] Furthermore, it has spelled out the notion of such crimes as torture,[74] rape,[75] deportation,[76] enslavement,[77] extermination[78] and persecution,[79] besides delineating some important aspects of genocide.[80]

68 Cf. Antonio Cassese, The ICTY: A Living and Vital Reality, 2 JICJ (2004) 585–597, 592.

69 See Jurisdiction Appeals Decision, Tadić (IT-94-I/AR72), Appeals Chamber, 2 October 1995, para.70.

70 See Judgment, Tadić (IT-94-A), Appeals Chamber, 15 July 1999, paras 88–145; Aleksovski (IT-95–14/I-A), Appeals Chamber, 24 March 2000, paras 120–146.

71 See Jurisdiction Appeals Decision, Tadić, 2 October 1995, cit. paras 94–137.

72 See Jurisdiction Appeals Decision, Tadić, 2 October 1995, cit. para.70; Appeals Judgment, Tadić (IT-94-A), 15 July 1999, paras 80–87; Kordić and Cerkez, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdiction Reach of Articles 2 and 3 (IT-95–14/2-T), Trial Chamber, 2 March 1999, paras 12–34; Trial Judgment, Kordić and Cerkez (IT-95–142-T), 26 February 2001, paras 65–160.

73 See Jurisdiction Appeals Decision, Tadić (IT-94-I/AR72), 10 August 1995, paras 141–142; Tadić (IT-94–1-I), Trial Chamber, 7 May 1997, para.656; Appeals Judgment, Tadić (IT-94–1-A), 15 July 1999, paras 271–272; Zoran Kupreškić and others (IT-95–16-T), Trial Chamber, 14 January 2000, paras 547–549 and 556; Kunarac and others (IT-96–23-T), Trial Chamber, 22 February 2001, paras 413–420 and 433; Blaškić (IT-95–14-T), Trial Chamber, 3 March 2000, paras 208–213.

74 See, e.g. Furundžija (IT-95–17/1-T), Trial Chamber, 10 December 1998, para.185; Kunarac and others (IT-96–23-T), Trial Chamber, 22 February 2001, paras 465–497.

75 See, e.g. Furundžija (IT-95–17/1-T), Trial Chamber, 10 December 1998, paras 174–189; Kunarac and others (IT-96–23-T), Trial Chamber, 22 February 2001, paras 436–464.

76 See, e.g. Krstić (IT-98–33-T), Trial Chamber, 2 August 2001, para.529; Krnojelac (IT-97–25-T), Trial Chamber, 15 March 2002, paras 472–485; Stakić (IT-97–24-T), Trial Chamber, 31 July 2003, paras 671–687.

77 See, e.g. Kunarac and others (IT-96–23-T), Trial Chamber, 22 February 2001, paras 515–541.

78 See Krstić (IT-98–33-T), Trial Chamber, 2 August 2001, paras 496–501; Vasiljević (IT-98–32-T), Trial Chamber, 29 November 2002, paras 216–229; Stakić (IT-97–24-T), Trial Chamber, 31 July 2003, paras 638–642.

79 See, e.g. Zoran Kupreškić and others (IT-96–23-T), Trial Chamber, 14 January 2000, paras 616–636; Trial Judgment, Kordić and Cerkez (IT-95–14/2), 26 February 2001, paras 188–220.

80 See, e.g. Goran Jelisić (IT-95–10-I), Trial Chamber, 14 December 1999, paras 59–108; Krstić (IT-98–33), Trial Chamber, 2 August 2001, paras 539–599; Stakić (IT-97–24-T), Trial Chamber, 31 July 2003, paras 499–561.

Let us only take one of these examples. In its judgment in *Furundžija* of 10 December 1998, the Trial Chamber made a thorough analysis of torture and rape as international crimes in all relevant conventional texts, decisions by international tribunals, comparative research of domestic law, etc. On this basis, it established its own objective elements of these crimes, as well as the *actus reus* and *mens rea* of aiders and abettors.[81]

Instead of applying the existing law to the accused and determining his sentence on this basis, the order was, here, as usual, reversed: the Chamber first established that new "customary law" *in extenso*, and then it applied it to the accused.[82]

It must be finally stressed that normative statements in judicial decisions should be considered only as *emerging customary law* and not as positive legal rules. They can transform into genuine customary law subsequently, if a majority of States confirm them in practice coupled with the *communis opinio juris.* However, this legislative process is generally inappropriate for criminal courts, because of a constant risk of punishing the indicted for some acts which were not criminal at the time of their commission.

In respect of the new "customary rules" established especially in the *Furundžija* judgment, the developments seem to go in the opposite direction. The judicial findings by the ICTY did not compel parties to the actual conflicts in Chechenya and Afghanistan, or the culprits at the Guantánamo base and recently in the Abu Ghraib prison in Baghdad, to abide by them. It seems, therefore, more productive in criminal proceedings to insist on the rigorous respect for the minimum legal obligations of all the parties in international and internal armed conflicts than to create new "customary rules".[83]

However, these embellishments in material law have no harmful effect if the responsibility of the presumed perpetrator was established concerning the commission of the original crime which is in the competence of the Tribunal according to its Statute. Much more delicate is the question of interpretation of command responsibility under Article 7(3) of the ICTY Statute.[84] However, the judgment of the Appeals Chamber in the *Blaškić* case of 29 July 2004 is, in this respect, encouraging.

81 See paras 134–256, especially paras 162 and 185 of that Judgment.

82 Hence, in respect of torture, the "customary law" established in that Judgment consisted of its being also inflicted by omission, which Art.7 of the Rome Statute does not recognize. And although the convict did not himself commit rape or other sexual assault against the victim, but his culpability was established as his aiding and abetting the actual perpetrator, the "customary law" in that Judgment was nevertheless enriched by defining a sexual penetration in physical terms. Such a definition, though justified, could fit in a judgment against an actual rapist. In the light of widespread and numerous acts of rape committed as a part of criminal policy by one party in the conflicts in the former Yugoslavia, the judges were not patient enough to wait for a genuine crime of this kind.

83 This is, however, not to say that even widespread practices of torture, rape or organized prostitution can lead to appearance of opposite customary rules by which all this mischief could become lawful. Such a development is opposed even by rare condemnations by national tribunals of individual perpetrators of these crimes, although only with symbolic penalties so far. However, in a situation in which States either fail to exercise effective control over their troops, or they themselves organize concentration camps for suspects who are deprived of judicial guarantees, it seems to be vain to create in judicial practice rules stricter than those proceeding from treaties.

84 For a thorough analysis of all aspects of this problem, see Bing Bing Jia, The Doctrine of Command Responsibility Revisited, 3 Chinese Journal of International Law (2004), 1–42.

It must be finally stated that the *opinio juris* is definitely not equivalent to simple "legal opinions" either by judges or by legal experts in their collective works. In both cases, these "opinions" do not amount to international custom in the meaning of Article 38(1)(b) of the ICJ Statute. Being "judicial decisions and the teachings of the most highly qualified publicists of the civilized nations", these opinions are but "subsidiary means for the determination of the rules of law" under subparagraph (d) of that same Article.

VII. A brief comment on Article 21 of the Rome Statute

Instead of an abstract assessment of which system is better than the other, i.e. whether the "customary law" encompassed by the former judicial practice is better than the law set forth in the Rome Statute, it seems more productive to comment here on the applicable law as provided in Article 21 of the said Statute.

Unlike Article 38(1) of the ICJ Statute, Article 21 establishes a hierarchy of sources of law that should be applied by the ICC.[85] However, Article 21 does not only provide sources of the material law on international crimes within the jurisdictions of the ICC, but also relates to all law that can be applied by it.

In paragraph (1a) of that provision, it is stated that the Court shall apply "In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; . . .".

The Rome Statute is the constitutive instrument of the ICC in the same way as the Charter is for the United Nations Organization. It provides, *inter alia*, rules on the "Establishment of the Court" (Part 1); on International co-operation and assistance and on Enforcement (Parts 9 and 10); on the Assembly of States Parties (Part 11); on its Financing (Part 12); etc. The Court functions as a separate international organization and, like specialized agencies, it is in relationship with the United Nations. Unlike the ICJ, it is not the organ of the United Nations. Many additional agreements will be concluded in the implementation of the Rome Statute.

More important is the fact that for the first time in the history of international criminal tribunals, the Rome Statute provides, in its Part 3, the General Principles of Criminal Law in written form and in advance. Among these principles are those on individual criminal responsibility and on various forms of perpetration of and participation in a crime (Article 25), on the *mens rea* (Article 30), on grounds for excluding criminal responsibility (Article 31), on mistakes of fact or law (Article 32), etc. This is, in fact, what constitutes the substantial provisions in the "general part" of criminal laws of many States, which judges must not disregard or interpret at will.

85 The hierarchy was obviously inspired by Art.7 of the Twelfth Hague Convention of 1907 of the International Court of Prize, which has never entered into force. That former provisions read as follows: "If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions in the said treaty. In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity."

The Statute contains an extensive enumeration of definitions of all the crimes within the jurisdiction of the Court. As already stated, they are: Genocide (Article 6), Crimes against Humanity (Article 7) and War Crimes (Article 8). All these written definitions are sufficient to ensure that the problem of *non liquet* will not arise in practice. However, because these definitions were adopted from codification conventions of humanitarian law, they sometimes miss the description of *actus reus* and *mens rea* of perpetrators or participants in a crime. For that purpose, the Elements of Crimes are appended to the Statute which, according to Article 9, "shall assist the Court in the interpretation and application of Articles 6, 7 and 8". They must be consistent with the Statute but can be amended in a simpler procedure that the Statute itself.

The Statute itself provides detailed procedural provisions. It is also supplemented by the even more detailed Rules of Procedure and Evidence, which are also adopted as an instrument in the application of the Statute. These Rules and all their subsequent amendments must be consistent with the Statute. In the event of conflict, the Statute will always prevail (Article 51).

It seems important to stress that both the Elements of Crimes and the Rules of Procedure and Evidence were not adopted by Judges, but by a two-thirds majority of members of the Assembly of States Parties. However, the Prosecutor and Judges, acting by an absolute majority, may propose amendments to them. Judges adopt, by an absolute majority, only the Regulations of the Court for its routine functioning, which can be commented on by States parties. All this has finally brought the legislative function of Judges to an end.

In Article 21(1)(b) of the Statute, it is provided that the Court shall apply, furthermore, "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; . . .".

Several supplementary sources of international law are in this hierarchical order provided here. The applicable treaties (other than the Rome Statute itself) may, for instance, include the 1966 International Covenant on Civil and Political Rights, or regional conventions such as the 1950 European Convention on the Human Rights and Fundamental Freedoms with protocols attached to it. The provisions of these applicable treaties concerning fair trial and similar problems that are perhaps not entirely regulated by the Statute and the Rules of Procedure and Evidence of the ICC can be of special importance.

Under "principles and rules of international law", it should be understood to include customary rules of general international law. Probably because of the frequent misuse of these terms in the past, they were not referred to as such. But this less precise wording has the advantage that the Court will not need to prove the customary character of "principles and rules" it wishes to apply, especially not the *communis opinio juris.*

Established principles of the international law of armed conflicts consist most often of customary rules confirmed in codification conventions. Hence, they include numerous provisions from the four 1949 Geneva Conventions and the two 1977 Protocols, but not the definitions of their "grave breaches".

These "established principles" may include, *inter alia*, rules concerning proper qualification of armed conflicts; specific prohibitions of reprisals against protected persons, buildings or equipment; localities and zones under special protection and on demilitarized zones; conditions to be fulfilled for belligerent occupation; neutrality in a conflict; or rules of the warfare at sea, when there is room for their application. These rules are most often conventional, but can also be found in the practice of warfare.

All the above sources under paragraph (1)(b) cannot replace, amend or extend either the general principles of criminal law set forth in the Statute or definitions of crimes within the jurisdiction of the Court. They are of lower legal force than even the Elements of Crimes and the Rules on Procedure and Evidence.

Paragraph (1)(c) provides that the Court shall apply furthermore:

> Failing that, general principles of law derived by the Court from national laws and 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.

Hence, in the absence of any applicable law under paragraph (1)(a) and (b), the Court can resort to the general principles of law in their narrow sense, as explained above. National laws and legal systems of the world (continental, Anglo-Saxon and possibly Islamic) do not require an analysis of laws of a great many States. It is sufficient to consider a few representative samples. When appropriate, the Court will take into account the national laws of States "that would normally exercise jurisdiction over the crime", either by the application of the principle of territoriality, or of active personality, or perhaps according to the law of the State which arrested the suspect and surrendered him to the Court.

Paragraph (1)(c) stresses that all these derived general principles of law must be consistent with the Statute and with international law and "internationally recognized norms and standards" (having probably in mind human rights and fundamental freedoms). The emphasis is, here, once again, on the rules of positive international law and not of *lex ferenda* by judges.

In this context, we want to add an explanation on the two kinds of general principles of law. An obvious example of these principles in their broad sense is Article 31 of the Rome Statute, which codifies four grounds for excluding criminal responsibility: mental disease or defect, intoxication, self-defence and duress/necessity. These grounds were, in Article 32, supplemented by mistakes of fact or law. A great many States have in their national legislation the same or similar rules.[86]

86 But this is not all. The 1969 Vienna Convention on the Law of Treaties also codifies in its Arts 48–52 similar general principles of law vitiating the consent of the parties that can result in invalidity of a treaty. They are: error, fraud, corruption and coercion of a representative of a State, and the coercion of a State by the threat or use of force. The Draft articles on State responsibility provide in all their versions the following circumstances precluding wrongfulness of an act: consent, self-defence, countermeasures (lawful reprisals), *force majeure*, distress and necessity. Hence, all these general principles of law have, in various contexts, the same basis.

However, the drafters of the Rome Statute were conscious that by Articles 32 and 33 did not codify all the possible general principles of law in this respect. For that reason, it is provided in Article 31(3):

> At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21 ....

Here, we come to the domain of the general principles of law in their narrow sense, exactly as provided in Article 21(2)(c). A comparative analysis of national laws and legal systems throughout the world indicates the following possible grounds for excluding somebody's criminal responsibility: (i) consent by the victim; (ii) the immunity of an active diplomat; (iii) military necessity; (iv) lawful reprisals; and (v) *tu quoque* argument. However, grounds under (i), (iii) and (iv) do not seem to be consistent with the present peremptory norms of international humanitarian law. The one under (ii) will depend on further clarifications in case law, while the *tu quoque* argument as a defence to punishment under (v) in this precise sense seems only to be justified (hence, not as a defence to crimes, or to prosecution).[87]

The short text of Article 21(2) provides that "The Court may apply principles and rules of law as interpreted in its previous decisions."

This means that the ICC is not bound to follow even its own precedents. The *stare decisis* doctrine is therefore not obligatory for it. The previous practice of State military tribunals and of *ad hoc* international tribunals is not mentioned in this provision at all. It is, therefore, obvious that it does not constitute "customary law".

However, on that ground the Court "may apply" its own previous practice, it is most likely that it will follow the practice of the ICJ in this respect. In order to support its new decisions, it will not hesitate to refer to its previous judgments, first of all those by its Appeals Chamber. Nevertheless, when, subject to the circumstances of a new case, it decides otherwise, it will expose legal arguments for having declined from its former practice.

Finally, Article 21(3) states the following:

> 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.

The matter is here not of "super-legality".[88] The matter is only of confirmation of peremptory norms of general international law in that domain, including the principle of

87 See Sienho Yee, above n.67.

88 This paragraph was thus interpreted and, at the same time, criticized by Alain Pellet, Applicable Law, above n.4, 1079–1082.

non-discrimination. These norms are obligatory for judges in any national or international criminal proceedings, even if they were not expressly provided.

In the light of all specific sources of public international law set forth in Article 38(1) of the ICJ Statute, as applied in its normal practice and in the practice of inter-State arbitrators, there cannot be raised any serious objections to the text of Article 21 of the Rome Statute. When sources of international criminal law, as being applied by criminal courts and tribunals, are at stake, hierarchical order in their application seems to be perfectly appropriate.

The rules of the Rome Statute, taken as a whole, will not allow Judges of the ICC to improvise with the general principles of criminal law, or to manoeuvre with applicable law on international crimes within its jurisdiction. These, as well as many other guarantees of legality in the procedure, should encourage the States, which are suspicious with regard to the previous practice of *ad hoc* tribunals, to adhere to the Rome Statute.

It seems, in addition, highly desirable to include in the Statute, at the next Review Conference, the definition of the crime of aggression, as well as that of the crime of international terrorism. There are no more suitable impartial fora than the ICC for combating this scourge of the international community.