

# Judicial Lawmaking at the *ad hoc* Tribunals: The Creative Use of the Sources of International Law and “Adventurous Interpretation”

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I.	Introduction	460
II.	Sources of International Criminal Law	462
	1. Article 38	462
	2. Custom	463
	3. General Principles	468
	4. Judicial Decisions	471
III.	Lawmaking at the ICTR: The Prominence of <i>Akayesu</i>	475
IV.	Interpretation as Lawmaking	478
V.	Conclusion	484

## Abstract

The UN Security Council’s instruction that the ICTY should apply its Statute without legislating new international law was not realistic because it failed to take into account the underdeveloped nature of international criminal law. This article considers the *ad hoc* International Criminal Tribunals’ use of the sources of international law in making new law, drawing on Article 38 of the ICJ Statute. The article will focus on the use of customary international law, general principles and judicial decisions. In cases of gaps in the existing law, the Tribunals have made law by resorting to the purposive method of interpretation. The ICTY has justified controversial decisions by referring to the purpose of extending the protection of humanitarian law to areas that have previously been unaffected by humanitarian law. The article will consider instances of such lawmaking in the case law of the Tribunals and ask whether the interpretative methodology used by the judges was justifiable.

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## I. Introduction

The *ad hoc* International Criminal Tribunals have been widely praised for playing a pioneering role in the formation and implementation of international criminal law. Because of the underdeveloped and rudimentary nature of international criminal law at the time of the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), it can be argued that the *ad hoc* Tribunals simply could not carry out their primary mandate – to prosecute those responsible for serious violations of international humanitarian law – if they did not also engage in adventurous lawmaking. The lawmaking activities of Tribunal judges can be described as one of the most important legacies of the *ad hoc* Tribunals.

Lawmaking is inherently controversial. Judicial lawmaking in the field of international criminal law raises the same philosophical concerns that judicial lawmaking raises in other fields. Philosophers such as *Blackstone* and *Montesquieu* believed that judges should interpret the law but never make the law.<sup>1</sup> This view is embodied in the principle *iudicis est ius dicere sed non dare*. If one shares this view, then many of the decisions of the *ad hoc* Tribunals would be regarded as unsatisfactory, even unacceptable. If one, however, takes the view that the role of judges is essentially interpretative and involves the exercise of discretion, one would be less critical of Tribunal judges.

The lawmaking activities of the judges should be understood against the background of the dramatic changes in the international community that occurred during the last decade of the previous century. *Richard Falk* observed that these changes – the fundamental shift from respecting and deferring to state sovereignty to interventionism and the active enforcement of humanitarian law – led to the creation of new international law.<sup>2</sup> The post-Cold War international political and moral climate allowed the Security Council to create the ICTY and the International Criminal Tribunal for Rwanda (ICTR)<sup>3</sup> and, it is argued, led to an atmosphere of tolerance and acceptance of a certain measure of judicial lawmaking in the spirit that the end (enforcing and expanding humanitarian law) justifies the sometimes novel and unauthorized means.

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<sup>1</sup> See *W. Blackstone*, *The Commentaries on the Laws of England*, Vol. 1, 1876, 47. See *C. Montesquieu*, *The Spirit of the Law*, Vol. 1, 1949, 152, quoted by *M. Shahabuddeen*, *Precedent in the World Court*, 2001, 234.

<sup>2</sup> *R. Falk*, *Reparations, International Law and Global Justice: A New Frontier*, in: *P. de Greiff* (ed.), *The Handbook of Reparations*, 2006, 480.

<sup>3</sup> *Falk* (note 2), 478.

According to the Report of the Secretary-General on the establishment of the ICTY,<sup>4</sup> the judges of the Tribunal could only apply those laws that were beyond doubt part of customary international law. The Secretary-General's Report was formulated in this way in an attempt to avoid law-making. The Report further states that "in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Secretary-General would [thus] not be creating or purporting to 'legislate' that law. The Tribunals would rather have the task of applying existing international humanitarian law."<sup>5</sup> In practice, however, the judges relied upon all the sources of international law, and took a particularly flexible approach to custom.<sup>6</sup> The ICTR, on the other hand, is not bound by the same restriction to only use law that is "beyond any doubt" customary international law. The Security Council took a more expansive view of the subject matter jurisdiction of the Rwanda Tribunal and included not only customary international law but international instruments regardless of whether they were part of customary international law.<sup>7</sup> The ICTR is therefore empowered to use both customary international law and treaty law as far as it was binding on Rwanda at the time of the crimes committed.<sup>8</sup>

It can be argued that the special constraint placed upon the ICTY perhaps contributed to more lawmaking by the ICTY judges than their ICTR counterparts. This article considers the Tribunals' use of the sources of international law, drawing on the framework of Art. 38 of the ICJ Statute,<sup>9</sup> although given that the existence of a relevant treaty will usually obviate the need for lawmaking, the focus will be primarily on customary international law, general principles and judicial decisions. In cases of ambiguity or gaps in the existing law, the Tribunals have made law by resorting to the pur-

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<sup>4</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), presented 3.5.1993, (S/25704) para. 34.

<sup>5</sup> Report of the Secretary General (note 4).

<sup>6</sup> G. Mettraux, *International Crimes and the Ad Hoc Tribunals*, 2005.

<sup>7</sup> Comprehensive Report of the Secretary-General on Practical Arrangements for the Effective Functioning of the International Criminal Tribunal for Rwanda, Recommending Arusha as the Seat of the Tribunal, UN Doc. S/1995/134 (13.2.1995), para. 12.

<sup>8</sup> This was acknowledged in *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment paras. 604-607, 2.9.1998; *Prosecutor v. Musema*, ICTR-96-13-T, Trial Judgment, 27.1.2000, para. 242. The ICTR itself has however indicated that it will be unnecessary and unfair to hold an accused person guilty in relation to conduct that was not clearly defined under international criminal law. See *Prosecutor v. Bagilishema*, ICTR-95-1A-a, Appeal Judgment, 3.7.2002, para. 34.

<sup>9</sup> Statute of the International Court of Justice, annexure to the Charter of the United Nations, 1945.

positive method of interpretation. This article will look at instances of such lawmaking in the case law of the Tribunals and ask whether the interpretative methodology used by the judges was justifiable.

## II. Sources of International Criminal Law

### 1. Article 38

A distinction should be drawn between law and the sources of law. The term “law” has often been defined as a system of rules,<sup>10</sup> while *Brownlie* defines a source of law as “those legal procedures and methods for the creation of rules of general application which are legally binding on the addressees”.<sup>11</sup> The scope of this chapter does not allow for a complete exposition of the traditional sources of international law. Since the ICTY and ICTR Statutes, unlike the ICC Statute, do not contain a special list of sources, the focus will be on the lawmaking capacity inherent in the sources listed in Art. 38 of the ICJ Statute. It will be argued that these sources can assist in lawmaking and have the potential to develop the law when used creatively.

Art. 38 refers to the two most important sources of international law, that of treaties and custom. Reference is also made to general principles of law recognized by civilized nations and, as subsidiary sources, judicial decisions and the writings of publicists. In *Bassiouni's* view, the writings of publicists cannot be deemed a source of international criminal law since it could violate the principle of legality.<sup>12</sup> Treaties as a source of international law will receive less attention here than custom, general principles or judicial decisions. Since treaties tend to regulate only specific matters of concern to relevant contracting states they do not possess the flexibility required to be used as lawmaking tools. It is precisely because of the gaps in Statutes (the fact that Statutes fail to provide for all eventualities) that the need for lawmaking arises. For purposes of facilitating lawmaking at the Tribunals, custom and general principles have been resorted to most frequently.

*Cassese* writes that the sources in Art. 38 should be approached as if in a hierarchy.<sup>13</sup> One should first look for a treaty and, failing there being an

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<sup>10</sup> See *W. J. Hosten, A. B. Edwards* (eds.), *Introduction to South African Law and Legal Theory*, 1983, 220.

<sup>11</sup> *I. Brownlie*, *Principles of Public International Law*, 1998, 1. See the discussion in *R. Kolb*, *Principles as Sources of International Law*, NILR 53 (2006), 1 et seq. (2 et seq.).

<sup>12</sup> *M. C. Bassiouni* (ed.), *International Criminal Law*, Vol. 1, 1999, 4.

<sup>13</sup> *A. Cassese*, *International Criminal Law*, 2003, 26.

applicable treaty, one should then look for a customary rule or a general principle of international law. Only if no relevant rule can be found in this way can one apply general principles of law recognized by the domestic legal orders of states. It can be argued that in the case of the ICTY this sequence is not appropriate. Because of the Secretary-General's direction that the ICTY may only apply law that is "beyond any doubt part of customary international law", customary international law assumes primary importance alongside the Statute.

## 2. Custom

Art. 38(1)(b) lists "international custom, as evidence of a general practice accepted as law" as a source of international law. According to *Cassese* the main feature of custom is that it is not a deliberate lawmaking process,<sup>14</sup> and *Kelsen* went so far as to describe the creation of customary law as "unconscious and unintentional lawmaking".<sup>15</sup> When states participate in creating norms of custom they do not act for the primary purpose of laying down international rules. Their primary concern is to safeguard some economic, social or political interest.<sup>16</sup> The birth of a new international rule is often merely the side effect of a state's conduct in international relations.<sup>17</sup>

The ICTY Appeals Chamber repeatedly emphasized that the Tribunal needed to base its subject matter jurisdiction "on firm foundations of customary law".<sup>18</sup> In *Ojdanić* it was stated that the ICTY's power to convict an accused of any crime listed in the Statute "depends on its existence *qua* custom at the time this crime was allegedly committed".<sup>19</sup> This statement is important because it recognizes the principle that the ICTY only has subject matter jurisdiction over crimes recognized by customary international law, as well as being in accordance with the principle of legality.

<sup>14</sup> A. Cassese, *International Law*, 2001, 119.

<sup>15</sup> H. Kelsen, *Principles of International Law*, 1952, 307 et seq.

<sup>16</sup> Cassese (note 14), 119.

<sup>17</sup> Cassese (note 14), 119.

<sup>18</sup> See *Prosecutor v. Hadzihadžanović*, Command Responsibility Appeal Decision, IT-01-47, 16.7.2003, Chamber, para. 55; *Prosecutor v. Blaskić*, Appeals Judgment, para. 113.

<sup>19</sup> *Prosecutor v. Milutinović, Šainović & Ojdanić*, II-99-37-AR72, Appeals Chamber, Decision on *Dragoljub Ojdanić's* Motion Challenging Jurisdiction (2003), para. 9.

It is well-established law that the two main requirements for the existence of a rule of customary law are state practice (*usus*) and *opinio juris*.<sup>20</sup> Since proof of *opinio juris* is often difficult to obtain, it will often be presumed to be present when sufficient evidence of state practice can be found.<sup>21</sup> It seems as if custom in international criminal law and specifically at the Tribunals is determined in a different way from the way custom is traditionally determined in international law. *Mettraux* remarks that *opinio juris* has played a dominant (perhaps disproportionate) role in the determination of custom by the Tribunals.<sup>22</sup> He explains that state practice often only assists in explaining or justifying the finding by the Tribunals that a norm is a customary norm. The practice however rarely *constitutes* the rule.<sup>23</sup> As a result customary rules in international criminal law have emerged even where state practice was rare and far from consistent.<sup>24</sup> *Nollkaemper* comments on the fact that, in determining custom, the Tribunals have often been satisfied with “extremely limited case law” and therefore with limited state practice.<sup>25</sup> Although the accepted rule is that the existence of a customary norm is established “by induction based on an analysis of a sufficiently extensive and convincing state practice, and not by deduction based on preconceived ideas” as to what the law should be, the Tribunals have frequently “turned the customary process on its head”,<sup>26</sup> stating the rule first and then explaining subsequent state practice in light of the rule.

*Mettraux* observes,

“The statement that a norm is customary is therefore only ever as good as the explanation referred to by the court in support of its finding to that effect. Regrettably, many a Chamber of the *ad hoc* Tribunals has been too ready to brand

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<sup>20</sup> *Dugard* defines *opinio juris* as a sense of obligation, a feeling on the part of states that they are bound by a certain rule. *J. Dugard*, *International Law: A South African Perspective*, 2005, 33.

<sup>21</sup> *Dugard* (note 20), 34. *Dugard* however points out that certain ICJ judgments such as the *Nicaragua Case* (ICJ Reports 1986, 14 at 108 et seq.) and the *North Sea Continental Shelf Cases* (ICJ Reports 1969, 176) do not support this presumption.

<sup>22</sup> *Mettraux* (note 6), 13.

<sup>23</sup> *Mettraux* (note 6), 13.

<sup>24</sup> Examples include the *Tadić Appeals Judgment* regarding the scope of the “protected person” status under the grave breaches regime. See *Prosecutor v. Tadić*, IT-94-1-A, 15.7.1999 (*Tadić Appeals Judgment*), paras. 163 et seq. Another example is the *Furundžija Trial Chamber Judgment* regarding the extension of the definition of torture under customary international law. See *Prosecutor v. Furundžija*, IT-95-17/1, 10.12.1998, paras. 162, 253.

<sup>25</sup> *A. Nollkaemper*, *The Legitimacy of International Law In the Case Law of the International Criminal Tribunal for the former Yugoslavia*, in: T. A. J. A. Vandamme/J.-H. Reestman (eds.), *Ambiguity In the Rule of Law, The Interface between National and International Legal Systems*, 2001, 17.

<sup>26</sup> *Mettraux* (note 6), 13.

norms as customary, without giving any reason or citing any authority for that conclusion.”<sup>27</sup>

The *Martens Clause* has had an important influence on the unconventional determination of custom at the Tribunals. *Cassese* claims that because of the influence of the *Martens Clause*,<sup>28</sup> *usus* and *opinio juris*, as elements of customary law, play a different role in humanitarian law than in international law generally.<sup>29</sup> The clause, which has been taken up in the 1949 Geneva Conventions and the First Additional Protocol, puts the “laws of humanity” and the “dictates of the public conscience” on the same footing as the “usages of States” (i.e. state practice) as historical sources of international law.<sup>30</sup> *Cassese* states that as a consequence, it is logically admissible to infer that the requirement of state practice may not be strictly required for the formation of a principle or rule based on the laws of humanity. The *Martens Clause*, in his view, loosens the requirement of *usus* while at the same time elevating *opinio juris* to a rank higher than normally acknowledged. In the *Kupreškić* case the Trial Chamber conceded that state practice did not support the proposition that custom had evolved on the subject of the legality of reprisals but nevertheless found that in this area it was possible to deduce *opinio necessitatis* from the imperatives of humanity or public conscience which was sufficient to establish customary law.<sup>31</sup>

Judges at the *ad hoc* tribunals have looked to customary law to determine the elements of the offences contained in the Statutes. After identifying these elements the judges have incorporated them in their judgments, a necessary process for deciding cases. *Mundis* writes that the judges are exercising a quasi-legislative function in so far as substantive crimes are defined or cre-

<sup>27</sup> *Mettraux* (note 6), 15. In *Mettraux's* view this has also been the case in the *Congo v. Belgium* case. *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium)*, 14.2.2002, ICJ Reports 2002, 3 et seq.

<sup>28</sup> The *Martens Clause* which was adopted at the Hague Peace Conference reads as follows: “Until a more complete code of the laws of war has been issued, the High Contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerent remain under the protection and the rule (*sous la sauvegarde et sous l'empire*) of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.” The *Martens Clause* was first inserted in the preamble of the 1899 Hague Convention II. The English translation of the Clause was reported in *J. B. Scott* (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 1915, 101 et seq.

<sup>29</sup> *Cassese* (note 14), 126.

<sup>30</sup> *Cassese* (note 14), 122.

<sup>31</sup> *Prosecutor v. Kupreškić*, IT-95-16-T, 14.1.2000, para. 527.

ated in much the same way as legislatures do in a domestic context.<sup>32</sup> According to *Mundis*, this means that judges go beyond simply interpreting the statute. Judges fill *lacunae* with respect to not only substantive crimes, but also with regard to evidentiary rules, as shown by making the Rules of Procedure and Evidence of the Tribunals by the judges.<sup>33</sup>

The Tribunals often conclude that a rule of customary law exists or has come into existence after examining various national cases.<sup>34</sup> Decisions of municipal courts within any particular state, when sufficiently uniform and authoritative, may be regarded as expressing the *opinio juris* or state practice within that state. When a point of international law is covered by a series of authoritative decisions of municipal courts of various states such decisions can be regarded as evidence of international custom.<sup>35</sup> The Permanent Court of International Justice (PCIJ) considered national judicial acts as “facts that express the will and constitute the activities of States.”<sup>36</sup> *Nollkaemper* writes that large parts of customary law have been developed on the basis of the practice of national courts.<sup>37</sup> The Appeals Chamber in *Erdemović* discussed extensively the extent to which national case-law provided support for a rule of customary law regarding the availability or non-availability of duress as a defense to a charge of murder, concluding that there was insufficient evidence to support the existence of such a rule.<sup>38</sup>

Although the Tribunals have relied heavily on representative municipal case-law in determining custom, they have not regarded the lack of such case-law as an insurmountable obstacle in determining custom. In *Tadić* the

<sup>32</sup> *D. Mundis*, The Legal Character and Status of the Rules of Procedure and Evidence of the *ad hoc* International Criminal Tribunals, *International Criminal Law Review* 1 (2001), 191 et seq.

<sup>33</sup> *Mundis* (note 32).

<sup>34</sup> In the *Tadić* Appeals Chamber decision the Appeals Chamber, after considering various national cases, decided the joint criminal enterprise doctrine included liability for offences committed by one of the perpetrators, which while outside the common design, was nevertheless a foreseeable consequence of pursuing that common design. The court stated: “The consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down in the [ICTY] Statute and general international criminal law and in national legislation, warrant the conclusion that the case law reflects customary rules of international criminal law.” See *Tadić Appeals Judgment* (note 24), para. 226.

<sup>35</sup> *H. Lauterpacht*, The Development of International Law by the International Court, 1958, 20 et seq.

<sup>36</sup> *German Interests in Polish Upper Silesia*, PCIJ Rep., Series A, No. 7 (1926), 19.

<sup>37</sup> *Nollkaemper* mentions in particular the fields of jurisdiction and immunities. *A. Nollkaemper*, Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY; *G. Boas/W. Schabas* (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, 2003, 282.

<sup>38</sup> *Prosecutor v. Erdemović*, IT-96-22-A, 7.10.1997, para. 55.



Appeals Chamber showed its resourcefulness in determining custom by making reference to Nigerian prosecutions and also referred to “many elements of international practice [which] show that States intend to criminalise serious breaches of customary rules and principles in internal conflicts”, including national military manuals and national legislation.<sup>39</sup>

In *Galić* the ICTY did not pretend to anchor its lawmaking in customary international law and relied directly on treaty law. Art. 51(2) of Additional Protocol I contains a prohibition of acts or threats of violence “the primary purpose of which is to spread terror among the civilian population”.<sup>40</sup> The ICTY Trial Chamber held that *Stanislav Galić*, a Serbian Commander of the Sarajevo Romanija Corps could be held responsible for the crime of “terror” as a violation of the laws or customs of war as a result of his involvement in the shelling of civilian areas of Sarajevo during the Bosnian conflict.<sup>41</sup> To establish the appropriate form of *mens rea* for the crime, the Trial Chamber decided that the crime of terror requires a specific intent and that *dolus eventualis* or recklessness would not suffice.<sup>42</sup> *Mettraux* criticizes the Chamber for relying on a treaty (in the absence of any state practice or *opinio juris*) in reaching this outcome.<sup>43</sup> It is doubtful whether the ICTY was empowered to decide that the violation of a treaty amounted to a *crime*. It is clear that the ICTY Trial Chamber in *Galić* acted *ultra vires*. The Appeals Chamber in *Galić* however recognized the importance of considering whether the crime of terror is recognized in customary international law. The Appeals Chamber found evidence that the prohibition of terror among the civilian population formed part of customary international law from the inclusion of the rule in Art. 51 of Additional Protocol I and Art. 13 (2) of Additional Protocol II.<sup>44</sup>

It can be asked whether it was not equally illegitimate for the Tribunal to neglect state practice as a requirement for custom as it did in *Furundžija*.<sup>45</sup> The Trial Chamber in *Furundžija* did not find evidence of state practice when it decided to categorize forced oral penetration as rape rather than as sexual assault.<sup>46</sup> The Trial Chamber admitted that not all national jurisdic-

<sup>39</sup> *Tadić Appeals Judgment* (note 24), paras. 131 et seq.

<sup>40</sup> *Prosecutor v. Galić*, Trial Judgment, IT-98-29-T, 5.12.2003, para. 132.

<sup>41</sup> *Prosecutor v. Galić* (note 40), paras. 132 et seq.

<sup>42</sup> *Prosecutor v. Galić* (note 40), para. 136.

<sup>43</sup> See *Mettraux* (note 6), 7 et seq.; 127 et seq.

<sup>44</sup> *Prosecutor v. Galić*, Appeals Judgment IT-98-29-A, para. 88. The Appeals Chamber further mentions the 1923 Hague Rule on Warfare and Art. 33 of the Fourth Geneva Convention prohibiting “measures of intimidation and terrorism”.

<sup>45</sup> *Prosecutor v. Furundžija* (note 24).

<sup>46</sup> *Prosecutor v. Furundžija* (note 24), para. 178.

tions criminalize forcible oral penetration and that the law of Yugoslavia did not categorize forcible oral penetration as rape.<sup>47</sup> The Trial Chamber argued that this was not contrary to the principle of legality since the context of war transforms conduct which might have amounted to sexual assault into aggravated sexual assault.<sup>48</sup> The Trial Chamber proceeds to justify its decision by referring to the importance of protecting human dignity. It may nevertheless be asked whether the Trial Chamber should not have been more sensitive to the principle of legality when it decided to broaden the definition of rape in this way. *Fabian Raimondo* agrees that the Trial Chamber's decision in *Furundžija* amounted to lawmaking because it "led to the formulation of a precise and detailed definition of the objective and subjective elements of the crime of rape, rather than the identification of existing law".<sup>49</sup>

### 3. General Principles

The *ad hoc* Tribunals have frequently resorted to general principles of law as a lawmaking tool. *Cassese* describes general principles as "sweeping and loose standards of conduct that can be deduced from treaty and customary rules by extracting and generalizing some of their most significant common points".<sup>50</sup> He has also described them as "the potent cement that binds together the various and often disparate cogs and wheels of the normative framework of the [international] community".<sup>51</sup> *Cassese* includes the following as general principles of international criminal law: the principle of individual criminal responsibility,<sup>52</sup> the principle of legality of crimes<sup>53</sup> and the principle of legality of penalties.<sup>54</sup> According to *Kolb* each one of the general principles is in itself a source of law. He calls them "norm sources" which are not concerned with the fixed meaning of rules to be applied but with the adaptation of the rules to certain constitutional necessities and to new developments and needs.<sup>55</sup>

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<sup>47</sup> *Prosecutor v. Furundžija* (note 24), para. 184.

<sup>48</sup> *Prosecutor v. Furundžija* (note 24).

<sup>49</sup> See his chapter in this collection, p. 463.

<sup>50</sup> *Cassese* (note 14), 151.

<sup>51</sup> *Cassese* (note 14).

<sup>52</sup> *Cassese* (note 13), 136.

<sup>53</sup> *Cassese* (note 13), 145.

<sup>54</sup> *Cassese* (note 13), 157.

<sup>55</sup> *Kolb* (note 11), 9.

The role of general principles is to provide guidelines for the proper interpretation of the law when specific rules prove insufficient. According to *Starke*, general principles were inserted into the ICJ Statute in order to provide an additional basis for a decision if there were no other materials to rely on.<sup>56</sup> *Lauterpacht* notes that Art. 38(1) includes the general principles of law recognized by civilized nations as a source in order to prevent the possibility of a *non liquet*.<sup>57</sup> The term *non liquet* means “it is not clear” and a judge would pronounce a *non liquet* when he believes that the law provides no answer to a legal question. Since the very purpose of general principles could be said to facilitate lawmaking, general principles lend themselves to lawmaking *par excellence*. General principles enable courts to fill the gaps of written or unwritten norms.<sup>58</sup> It is precisely the “looseness” of these principles which makes them good lawmaking tools. International courts and tribunals play an increasingly important role in formulating general principles: they identify and set out principles hidden in the interstices of the normative network.<sup>59</sup> *Cassese* writes that it cannot be denied that courts which act in this manner are fulfilling a function very close to the creation of law.<sup>60</sup>

The following examples illustrate the use of general principles. The ICTY has referred to “general principles of law” in order to establish jurisdiction and confer individual criminal responsibility. In *Prosecutor v. Delalić*, the Appeals Chamber enunciated that “it is universally acknowledged that the acts enumerated in common Art. 3 [of the Geneva Conventions] are wrongful and shock the conscience of civilised people”, and thus are, in the language of Art. 15(2) of the International Covenant on Civil and Political Rights “criminal according to the general principles of law recognized by the community of nations”.<sup>61</sup> In *Furundžija* the ICTY Trial Chamber held that the definition of rape as a crime against humanity resulted from the convergence of the principles of the major legal systems of the world.<sup>62</sup> The Trial Chamber stated that these principles may be derived “with all due caution” from national law.<sup>63</sup> The idea that concepts from national law will only be applied with due caution in the international legal order was also

<sup>56</sup> J. G. *Starke*, Introduction to International Law, 1989, 32.

<sup>57</sup> H. *Lauterpacht*, The Functions of Law in the International Community, 1933, 205 et seq. See also the Dissenting Opinion of Judge *Schwebel* in: Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8.7.1996, ICJ Reports 1996, 216 et seq. (311 et seq.).

<sup>58</sup> *Cassese* (note 13), 135.

<sup>59</sup> *Cassese* (note 14), 152.

<sup>60</sup> *Cassese* (note 14).

<sup>61</sup> *Prosecutor v. Delalić*, IT-96-21-A, 20.2.2001, para. 173.

<sup>62</sup> *Prosecutor v. Furundžija* (note 24), paras. 174 et seq.

<sup>63</sup> *Prosecutor v. Furundžija* (note 24), paras. 174 et seq.

recognized by the ICJ in the International Status of South West Africa advisory opinion.<sup>64</sup>

A good instance of a case in which the Tribunal decided not to rely on national concepts is *Kupreškić*.<sup>65</sup> In *Kupreškić* the Appeals Chamber relied on general principles to determine the standard of review of the factual findings of the Trial Chamber. The Appeals Chamber however decided against relying on national concepts in determining under which test additional evidence reveals an error of fact of such magnitude as to occasion a miscarriage of justice.<sup>66</sup> The Appeals Chamber in *Kupreškić* extensively discussed national case law as evidence of general principles. After declaring the standard it applied with respect to the reconsideration of factual findings by the Trial Chamber, the Appeals Chamber examined the degree of caution required to be observed by a court before convicting an accused person based upon eyewitness identification made under difficult circumstances.<sup>67</sup> The Appeals Chamber analyzed domestic criminal systems under the heading “General Principles” and cited cases from common law countries (the United Kingdom, Canada, Australia, Malaysia and the United States). Citing cases from Germany, Austria and Sweden, the Appeals Chamber concluded that most Romano-Germanic jurisdictions allow judges a considerable scope in assessing the evidence before them, but that in a number of cases courts have emphasized that trial judges must exercise great caution in evaluating eyewitness identification, particularly when the identification of the accused rests on the credibility of a single witness.<sup>68</sup>

It is important that the ICTY has stated that the threshold for identification of general principles is high. It must be shown that the principle is part of most, if not all, national legal systems. The Appeals Chamber in *Tadić* noted:

“[i]n the area [of common purpose] national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world; for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose.”<sup>69</sup>

<sup>64</sup> See the Separate Opinion of Judge *McNair* in: International Status of South West Africa Case, Advisory Opinion of 11.7.1950, ICJ Reports 1950, 128 et seq. (146 et seq.).

<sup>65</sup> *Prosecutor v. Kupreškić*, IT-95-16-A, 23.10.2001.

<sup>66</sup> *Prosecutor v. Kupreškić* (note 65), para. 75.

<sup>67</sup> *Prosecutor v. Kupreškić* (note 65), para. 34.

<sup>68</sup> *Prosecutor v. Kupreškić* (note 65), para. 38.

<sup>69</sup> *Prosecutor v. Tadić*, IT-94-1-A, 15.7.1999, para. 225.

The ICTY has made ample use of general principles in developing international criminal law. The Tribunal has reached for general principles in many different circumstances. In cases such as *Furundžija* the ICTY referred to general principles to indicate a measure of consensus between the major legal systems of the world. By choosing this methodology the Tribunal showed that it is an *international* Tribunal and that it is concerned that the law of the Tribunal should reflect the law of the major legal systems of the world. In cases such as *Kupreškić* the ICTY also used national case law as providing authority for its decisions. By making reference to national case law and “the major legal systems of the world” the Tribunal adds legitimacy to its work.

#### 4. Judicial Decisions

According to Art. 38(1)(d) of the ICJ Statute, the court shall apply “judicial decisions ... as subsidiary means for the determination of the rules of law”. The status of judicial decisions in the hierarchy of sources has been hotly debated. But according to *Oppenheim* judicial decisions have become “a most important factor” in the development of international law.<sup>70</sup> Because of the rudimentary nature of international criminal law many decisions of the most authoritative courts (such as the ICJ) will have an important influence in establishing the existence of customary rules.<sup>71</sup>

It is clear that judicial decisions are only a secondary and indirect source of international law. *Oppenheim* writes, “Since judges do not in principle make law but apply existing law, their role is inevitably secondary since the law they propound has some antecedent source.”<sup>72</sup> Another important reason why judicial decisions only have a secondary role is because of the absence of the common law doctrine of *stare decisis* in international adjudication.<sup>73</sup> The ICJ, a court that, like the *ad hoc* Tribunals, is not bound by precedent, has in the interest of consistency increasingly referred to its own previous decisions. As time went by and the Yugoslav Tribunal’s jurisprudence developed, it relied more and more on its own previous decisions.

The ICTY has resorted to judicial decisions as a source of law on many occasions. An important example is the *Tadić* Trial Chamber’s reliance on

<sup>70</sup> R. Jennings/A. Watts (eds.), *Oppenheim’s International Law*, 9<sup>th</sup> ed. 1992, Vol. I, 41, para. 13.

<sup>71</sup> Cassese (note 14), 159.

<sup>72</sup> Cassese (note 14).

<sup>73</sup> See *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, 24.3.2000.

the *Nicaragua* case in deciding on the criminality of violations of international laws of war in the context of internal armed conflict.<sup>74</sup> Although the *Tadić* Appeals Chamber subsequently rejected the *Nicaragua* test,<sup>75</sup> the Trial Chamber's reliance on *Nicaragua* indicated not only the ICTY's willingness to engage with judicial decisions but also showed its respect for the judgments of the ICJ. The Trial Chamber in *Kvočka*,<sup>76</sup> in deciding how to distinguish co-perpetrators from aiders and abettors in the case of the participation of a number of persons in a joint criminal enterprise, relied exclusively on case-law. The court looked at various decisions of the British<sup>77</sup> and United States Military Courts,<sup>78</sup> including the *Dachau*<sup>79</sup> and *Belsen*<sup>80</sup> concentration camp cases. The importance of decisions of national courts was

<sup>74</sup> *Prosecutor v. Tadić*, IT-94-1-T, Opinion and Judgment, 7.5.1997, para. 585 citing *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, Merits (note 21), 14.

<sup>75</sup> *Prosecutor v. Tadić* (note 74) citing *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (note 21).

<sup>76</sup> *Prosecutor v. Kvočka et al.*, IT-98-30/1, 19.12.2003.

<sup>77</sup> *Trial of Bruno Tesch and Two Others*, British Military Court, Hamburg, Germany, 1.-8.3.1946, UNWCC (United Nations War Crimes Commission), Vol. I, 93 et seq. (*Zyklon B*). *Trial of Max Wielen and 17 others*, British Military Court, Hamburg, Germany, 1.7.-3.9.1947, UNWCC, Vol. XI, 31 et seq., (*Stalag Luft III*). *Trial of Otto Sandrock and Three Others*, British Military Court for the Trial of War Criminals, Almelo, Holland, 24.-26.11.1945, UNWCC, Vol. I, 35, 43 (*Almelo*). *Trial of Rear-Admiral Nisuke Masuda and Four Others of the Imperial Japanese Navy*, US Military Commission, United States Naval Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, 7.-13.12.1945, UNWCC, Vol. I, 71 et seq. (*Jaluit Atoll* case). *Trial of Heinrich Gerike and Seven Others*, British Military Court, Brunswick, 20.3.-3.4.1946, UNWCC, Vol. VII, 76 et seq. (*Velpke Children's Home*). *Trial of Josef Altstoetter et al.*, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 17.2.-4.12.1947, UNWCC, Vol. III, 1 et seq.

<sup>78</sup> *Trial of Alfons Klein and Six Others*, US Military Commission Appointed by the Commanding General Western Military District, Wiesbaden, Germany, 8.-15.10.1945, UNWCC, Vol. I, 46 et seq. (*Hadamer Trial*). The *Kvočka* court also considered the South African case of *S v. Safatsa and Others*, 1988 (1) SA 868 (A), 901 and the US case of *US v. Long*, 190 F.3d 471, 475 (6<sup>th</sup> Cir. 1999).

<sup>79</sup> *Trial of Martin Gottfried Weiss and thirty-nine others*, General Military Government Court of the United States Zone, Dachau, Germany, 15.11.-13.12.1945, Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Published for the United Nations War Crimes Commission by his Majesty's Stationary Office, London, 1947, UNWCC, Vol. XI, 5, (*Dachau Concentration Camp*).

<sup>80</sup> *Trial of Josef Kramer and 44 others*, British Military Court, Luneberg, 17.9.-17.11.1945, Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Published for the United Nations War Crimes Commission by his Majesty's Stationary Office, London, 1947, UNWCC, Vol. II, 1, (*Belsen*).

also emphasized in *Kupreškić*. In this case the judges virtually equated national judgments to judgments of international courts and tribunals.<sup>81</sup>

*Shahabuddeen* claims that in the context of the ICJ, judicial decisions can generate new law but that they can do so only through the process through which international customary law is developed.<sup>82</sup> In his view a decision may recognize the existence of a new customary law and may in that limited sense be regarded as the final stage of development of the new law, but the decision in itself does not create the law.<sup>83</sup> He argues that unless and until a new rule becomes a part of customary international law, it is not law.<sup>84</sup> This view seems to be consistent with the Secretary-General's statement in his Report that the Yugoslav Tribunal should apply rules of the international humanitarian law which are beyond any doubt part of customary law.<sup>85</sup> The ICTY has held that in order to avoid violating the principle of *nullum crimen sine lege*, it should either apply rules of customary law or rules from treaties binding on the parties.<sup>86</sup> In addition to determining the existence of custom, the Tribunal may also consider national case law when engaging in treaty interpretation.

In the *Jelisić* case, in which the ICTY interpreted the Genocide Convention, the Tribunal stated that the Convention's terms should be interpreted according to Arts. 31 and 32 of the Vienna Convention on the Law of Treaties.<sup>87</sup> The Tribunal also stated that when interpreting treaties it could take account of subsequent practice grounded upon the Convention. The Tribunal mentioned the *Akayesu* and *Kayishema* judgments as "the only international case law on the issue".<sup>88</sup> The Tribunal then stated that the practice of states "notably through their national courts" have also been taken into account.<sup>89</sup> In *Krstić* the ICTY similarly interpreted the Genocide Convention pursuant to Arts. 31 and 32 of the Vienna Convention. But the Trial Cham-

<sup>81</sup> The court stated: "In many instances no less value [than decisions of international courts] may be given to decisions on international crimes delivered by national courts operating pursuant to the 1948 Genocide Convention, or the 1949 Geneva Convention or the 1977 Additional Protocols or similar international treaties." *Prosecutor v. Kupreškić* (note 31), para. 541.

<sup>82</sup> *Shahabuddeen* (note 1), 69.

<sup>83</sup> *Shahabuddeen* (note 1), 72.

<sup>84</sup> *Shahabuddeen* (note 1), 73.

<sup>85</sup> Report of the Secretary General (note 4).

<sup>86</sup> *Prosecutor v. Tadić*, IT-94-1-AR72A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2.10.1995 (*Tadić Jurisdictional Decision*), para. 143.

<sup>87</sup> *Prosecutor v. Jelisić*, IT-95-10-T, 14.12.1999, para. 61.

<sup>88</sup> *Prosecutor v. Jelisić* (note 87).

<sup>89</sup> *Prosecutor v. Jelisić* (note 87).

ber in *Krstić* “also looked for national guidance in the legislation and practice of states, especially their judicial interpretations and decisions”.<sup>90</sup>

In *Krstić* the judges came to the conclusion that widespread national judicial practice on the application of the Genocide Convention could not be found. They cited six national cases: three decisions of a German court, two of the Polish Supreme Court and one of the United States Military Tribunal at Nuremberg.<sup>91</sup> Six cases did not constitute enough practice to determine how a treaty was to be interpreted. *Nollkaemper* concludes that the Tribunal in *Krstić* recognized that judicial decisions should be used to supplement other sources or tools of interpretation such as the ordinary meaning of the terms, the object and purpose of the Convention, the preparatory work, and reports of the International Law Commission, General Assembly resolutions and international legal practice.<sup>92</sup>

What should an international tribunal do in light of *a lacuna* in the law? It could seek to determine the matter by resort to policy, as did the majority in their pursuit of the goal of preventing the undermining of international humanitarian law. Alternatively, a tribunal could apply the national law most applicable to the accused. *Cassese* took this position. He argued that where the majority found a gap in the law, or where the law was genuinely ambiguous, they should have drawn upon the law applicable in the former Yugoslavia.<sup>93</sup>

The *Erdemović* case not only highlights the problems surrounding national case law but is also an example of the undisciplined use of national case-law. In this case *Cassese* extensively discusses national case law.<sup>94</sup> *Cassese*'s discussion of the use and relevance of national case-law was necessary since this has not been clarified in the case-law before. His *obiter*

<sup>90</sup> *Prosecutor v. Krstić*, IT-98-33-T, 2.8.2001, para. 541. *Nollkaemper* describes the analysis of the ICTY in both *Jelisić* and *Krstić* as “awkward” because in both cases the Tribunal indicated that it used the Genocide Convention as customary law rather than as treaty law. It was therefore not clear why it had to resort to Arts. 31 and 32 of the Vienna Convention. In his view however the cases remain relevant since given the fact that the Trial Chamber assumed it had to apply the Vienna Convention, it considered national case law to be relevant in the interpretation of treaties. See *Nollkaemper* (note 37), 280.

<sup>91</sup> *Prosecutor v. Krstić* (note 90), para. 541.

<sup>92</sup> *Nollkaemper* (note 37), 282.

<sup>93</sup> P. Rowe, *Duress as Defence to War Crimes After Erdemović: A Laboratory for a Permanent Court?*, *Yearbook of International Humanitarian Law* 1 (1999), 210 et seq. (213). *Separate and Dissenting Opinion of Judge Cassese*, para. 49. For a discussion of *Cassese*'s rejection of the policy-oriented approach see also M. *Shahabuddeen*, *Policy Oriented Law in the International Criminal Tribunal for the Former Yugoslavia*, in: L. C. Vohrah/F. Pocar/Y. Featherstone/O. Fourmy (eds.), *Man's Inhumanity to Man*, 2003, 889.

<sup>94</sup> *Prosecutor v. Erdemović* (note 38), *Separate and Dissenting Opinion of Judge Cassese*, para. 49.



comments can be seen as an example of legitimate (indirect) lawmaking. After expressing reservations about the relevance of national case-law however, *Cassese* proceeds to discuss instances of national case-law (a small collection of little-known Italian and better-known German cases).<sup>95</sup> *Cassese* justifies his survey of “copious case-law”<sup>96</sup> by stating that the manifest inconsistency of state practice warrants the conclusion that duress can be admitted as a defense. Disappointingly, he does not explain the basis on which the cases were selected which makes the selection appear to have been arbitrarily made. *Cassese* stated in his Opinion that a policy-oriented approach in the area of criminal law would run counter to the fundamental customary principle *nullum crimen sine lege*.<sup>97</sup> But undisciplined reference to case-law could similarly run counter to *nullum crimen*.

### III. Lawmaking at the ICTR: The Prominence of *Akayesu*

In *Akayesu* the judges of the ICTR developed international criminal law both in relation to the crime of rape and the crime of genocide. Until the judgment in *Akayesu*, rape and other forms of sexual violence had never been defined under international law. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. The Trial Chamber in *Akayesu* formulated a broad and sensible definition of rape and sexual violence:

“The Chamber defines rape as a physical insertion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence [,] which includes rape is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.”<sup>98</sup>

<sup>95</sup> *Prosecutor v. Erdemović* (note 38), paras. 35 et seq. The Italian cases include *Bernardi and Randazzo*, Court of Assize of Vercelli, brought before Court of Cassation on 18.12.1946 and *Sra et al.*, 6.11.1947 in *Giurisprudenza completa della Corte Suprema di Cassazione*, sez pen, 1947, No. 2557, 414. These decisions are not readily available. *Cassese* advises that only the headnote of these two cases has been published. He used the original hand-written text of the two cases provided by the Rome Central Public Record Office.

<sup>96</sup> *Prosecutor v. Erdemović* (note 38), para. 40.

<sup>97</sup> *Prosecutor v. Erdemović* (note 38), para. 11.

<sup>98</sup> *Prosecutor v. Erdemović* (note 38), paras. 597, 599. See para. 690 stating that: “[s]exual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.” The court cites as an example the forcing of a woman (Chantal) to perform gymnastics naked in front of a crowd.

The Trial Chamber considered rape to be primarily a form of aggression and that the central element of rape “cannot be captured in a mechanical description of objects and body parts”.<sup>99</sup> Instead, the Chamber decided to take a “conceptual approach”. In taking this approach the Trial Chamber examined the object in carrying out the rape – whether this object is intimidation, degradation, humiliation, control or discrimination. The Chamber stated that because rape is a crime against personal dignity, it can be considered as torture under certain circumstances.<sup>100</sup> In following a conceptual approach, the Chamber decided that “force” does not have to be described as physical behavior *per se*, but can also be assumed to be inherent in the circumstances.<sup>101</sup> Psychological force will therefore also be understood as force. Evidence of physical force is not required to prove rape and the victim is spared the ordeal of having to describe the alleged rape in detail. This was one of the considerations that led the Trial Chamber to define rape in this way. The Chamber mentioned the “painful reluctance and inability of witnesses to disclose graphic anatomical details” of sexual violence.<sup>102</sup> Significantly, the *Akayesu* Trial Chamber also stated that rape can constitute a separate crime of torture when inflicted by or at the instigation of a public official.<sup>103</sup>

The *Akayesu* case was considered groundbreaking because it was the first time in history a defendant was tried and convicted by an international tribunal for genocide.<sup>104</sup> The decision has also been described as historic because it affirmed the “intricate linkage” between sexual violence and genocide in Rwanda.<sup>105</sup> *Akayesu* developed the law relating to gender-based crimes in at least three respects: (1) the Trial Chamber recognized sexual violence as an integral part of the genocide in Rwanda, and found the accused guilty of genocide for crimes that included sexual violence. *Akayesu* was also significant because it was not only the first genocide conviction by an international criminal tribunal but the *Akayesu* decision also constituted the

<sup>99</sup> *Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, 2.9.1998, para. 597.

<sup>100</sup> *Prosecutor v. Jean Paul Akayesu* (note 99).

<sup>101</sup> *Prosecutor v. Jean Paul Akayesu* (note 99), para. 688.

<sup>102</sup> *Prosecutor v. Jean Paul Akayesu* (note 99), para. 687.

<sup>103</sup> *Prosecutor v. Jean Paul Akayesu* (note 99), para. 597.

<sup>104</sup> During the *Akayesu* Trial, evidence of rape was heard during courtroom testimony. Consequently, the trial was adjourned and the Office of the Prosecutor (OTP) investigated the question of whether *Akayesu* was guilty of crimes of sexual violence. There was pressure by women’s groups on the OTP to amend the indictment. Chief Prosecutor *Louise Arbour* amended the indictment in June 1997 to add charges of sexual violence. For a summary of the case see. *K. D. Askin*, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals*, AJIL 93 (1999), 97 et seq. (105, 106).

<sup>105</sup> *Askin* (note 104).

first acknowledgement that rape can be an act of genocide and the first occasion when an accused was convicted on the ground of rape as an act of genocide; (2) the Chamber recognized rape and other forms of sexual violence as independent crimes constituting crimes against humanity; and (3) the Chamber enunciated a broad, progressive international definition of both rape and sexual violence.<sup>106</sup>

The Tribunal stated that when the “intent to destroy a group” is present, rape and sexual violence can be considered genocide. It concluded that in this specific case sexual violence did constitute a step in the process of the destruction of the Tutsi group – this destruction encompassing “destruction of the spirit, of the will to live, and of life itself”.<sup>107</sup> The ICTR in *Musema*<sup>108</sup> and *Nyitegeka*<sup>109</sup> and the ICTY in *Čelibici*<sup>110</sup> adopted the *Akayesu*-style definition. The conceptual approach taken in *Akayesu* approximates the purposive interpretation often applied by ICTY judges.

The decision in *Akayesu* was however not universally praised. The *Akayesu* definition of rape was controversial and debated extensively in academic circles. It is significant that the *Akayesu* decision was not followed in subsequent ICTY cases. The Trial Chamber in *Furundžija* rejected the broad *Akayesu* definition.<sup>111</sup> The *Furundžija* case was followed by the *Kunarac* case which adopted a very similar definition to *Furundžija* and therefore also rejected the definition in *Akayesu*. The *Kunarac* Trial Chamber found however that *Furundžija* was too restrictive in only emphasizing the element of force. The *Kunarac* Trial Chamber emphasized that the true common denominator between different definitions of rape is “the violations of sexual autonomy”.<sup>112</sup>

<sup>106</sup> *Askin* (note 104).

<sup>107</sup> *Prosecutor v. Jean Paul Akayesu* (note 99), para. 732.

<sup>108</sup> *Prosecutor v. Musema* (note 8), paras. 228 et seq.

<sup>109</sup> *Prosecutor v. Eliezer Niyetegeka*, ICTR-96-14-T, 16.5.2003.

<sup>110</sup> *Prosecutor v. Delalić (Čelibici case)* IT-96-21, 16.11.1998.

<sup>111</sup> The definition of rape in *Furundžija*, IT-96-21 reads as follows: “The sexual penetration however slight, either of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator, where such penetration is effected by coercion or force or threat of force against the victim or a third person.”

<sup>112</sup> *Prosecutor v. Kunarac, Kovać and Vuković*, IT-96-23-T, 22.2.2001, para. 438. The *Kunarac* definition reads “The sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim. Consent for the purpose must be given voluntarily, as a result of the victim’s free will, assessed in the context of surrounding circumstances. The *mens rea* is the intention to effect the sexual penetration, and the knowledge that it occurs without the consent of the victim.”, para. 460.

As noted by *McKinnon*, the *Akayesu* definition was also vulnerable to the criticism that a broad definition of rape violates the principle of legality and therefore the rights of the accused.<sup>113</sup> Whereas the broad approach to definition and the emphasis on personal dignity taken in *Akayesu* is commendable it can be asked whether the various decisions of rape in the jurisprudence of the Tribunals contributed to the consistency and legality of Tribunal law. The definitions in *Furundžija* and *Kunarac* are more clear and specific and have replaced the *Akayesu* definition. The *Akayesu* definition is now only rarely referred to.

#### IV. Interpretation as Lawmaking

It is widely acknowledged that judges make law through interpretation.<sup>114</sup> In a common law system when judges reformulate rules in the process of applying them to particular cases, the reformulations become part of the body of sources of law in later cases.<sup>115</sup> One can of course understand the term interpretation in a broad or narrow sense.<sup>116</sup> An expansive understanding of interpretation would hold that all texts require interpretation (even a text whose meaning is undisputed). A constrictive definition allows for interpretation only where the text is unclear or ambiguous.<sup>117</sup> The concern here is for that kind of interpretation which aims at recognizing and correcting the textual circumstances which call for narrow interpretation, a kind of interpretation that can be termed adventurous interpretation. The *ad hoc* Tribunals have often resorted to such interpretation.

Adventurous interpretation occurs when judges fill gaps in the law by using a specific method of interpretation and is often attacked as constituting lawmaking.<sup>118</sup> The use of purposive interpretation can be described as adventurous lawmaking. In his separate opinion in *Tadić* Judge *Li* described the majority decision as “an unwarranted assumption of legislative po-

<sup>113</sup> See *C. McKinnon*, *Defining Rape Internationally: A Comment on Akayesu*, *Colum. J. Transnat'l L.*, 44 (2006), 941 et seq. (945 et seq.).

<sup>114</sup> See for example *D. Kennedy*, *A Critique of Adjudication*, 2001, 81.

<sup>115</sup> *Kennedy* (note 114), 32. According to *Kennedy* this means that law can be made even in the most routine application of rule to facts. *Kennedy* (note 114), 26.

<sup>116</sup> *A. Barak*, *Purposive Interpretation*, 2005, 5.

<sup>117</sup> *Barak* (note 116).

<sup>118</sup> *W. Schabas*, *Interpreting the Statutes of the Ad Hoc Tribunals*, in: *Vohrah/Pocar/Featherstone/Fourmy* (note 93), 848.

wer”.<sup>119</sup> But it is clear that purposive interpretation has helped judges to fill gaps in the Statutes and the law.

Since the *ad hoc* Tribunals were established by the Security Council and are therefore derived from the UN Charter,<sup>120</sup> the provisions of the Vienna Convention on the Law of Treaties on interpretation apply. In the *Tadić* decision it was decided that even though the Statute is not a treaty, the rules of treaty interpretation contained in the Vienna Convention were relevant.<sup>121</sup> Even though Tribunal judges have not always explicitly mentioned the Vienna Convention they have used the interpretative scheme of the Convention,<sup>122</sup> including the support it provides for a purposive or contextual approach.<sup>123</sup> For instance, in order to give effect to the purpose of the ICTY Statute, to prosecute persons for serious violations of international humanitarian law, the *Tadić* Appeals Chamber decided to classify the conflict in question as one which was international in nature.<sup>124</sup>

The Tribunals have also relied on the literal approach or the ordinary meaning of words<sup>125</sup> but have not made law in this way. The purposive approach is of course the approach more suitable to making law. *Nollkaemper* describes the ICTY’s approach to the identification of law as “quintessentially teleological”.<sup>126</sup> In the spirit of the purposive approach, the Tribunals have, for example, referred to their purpose in protecting “human dignity”. In *Furundžija* the Trial Chamber redefined rape and stated that the broader definition helped to promote the “fundamental principle of protecting human dignity.”<sup>127</sup> It can be argued that the Tribunals have at times been more concerned with what is *desirable* than with what is required by positive law.

ICTY and ICTR judges have also justified progressive decisions and the extension of the applicability of humanitarian law to new areas by resorting to purposive or teleological interpretation. The Trial Chamber in *Čelebici* extensively discussed principles of interpretation. It was stated by the Trial

<sup>119</sup> *Tadić Jurisdictional Decision* (note 86), Separate Opinion of Judge *Li*, para. 13.

<sup>120</sup> *Schabas* (note 118), 847.

<sup>121</sup> *Tadić Jurisdictional Decision* (note 86), para. 18.

<sup>122</sup> *Tadić Jurisdictional Decision* (note 86), paras. 71 et seq.

<sup>123</sup> *Tadić Jurisdictional Decision* (note 86).

<sup>124</sup> *Prosecutor v. Tadić* (note 24), para. 162.

<sup>125</sup> The Tribunals applied the “ordinary meaning” in, *inter alia*, *Prosecutor v. Bagasora et al.*, ICTR-98-37-A, 8.6.1998, paras. 28 et seq. and *Prosecutor v. Aleksovski*, IT-95-14/1, 25.6.1999, para. 35.

<sup>126</sup> *Nollkaemper* (note 25), 18.

<sup>127</sup> *Prosecutor v. Furundžija* (note 24), para. 184. See also the ICTY’s reliance on the “elementary considerations of humanity and common sense” in *Tadić* on the question of whether restrictions on certain categories of weapons apply in internal armed conflict. *Prosecutor v. Tadić*, IT-94-1, 2.10.1995, para. 119.

Chamber that “[t]he international community can only come to grips with the hydra-headed elusiveness of human conduct through a reasonable as well as a purposive interpretation of existing provisions of international customary law”.<sup>128</sup> *Schabas* argues that in criminal cases the rule of strict construction can be a more appropriate method of interpretation than purposive interpretation.<sup>129</sup> Strict construction requires one to interpret a law against the state and in favor of an accused, in cases of ambiguity.<sup>130</sup> The Tribunals have, however, made use of strict construction only to a very limited extent. In *Tadić* the Appeals Chamber held that “in applying these criteria, any doubt should be resolved in favor of the defence, in accordance with the principle *in dubio pro reo*”.<sup>131</sup>

*Aharon Barak* has described the essence of purpose as follows, “The purpose of a text is a normative concept. It is a legal construction that helps the interpreter understand a legal text.”<sup>132</sup> In determining purpose, judges should look to the relevant context of the text, which is defined as “the data that provides information about the text’s purpose”.<sup>133</sup> The Trial Chamber in *Čelebici* stated that, “The idea of the [purposive] approach is to adapt the law to changed conditions, be they special, economic or technological, and attribute such change to the intention of the legislation.” One of the best examples of Tribunal lawmaking by resorting to purposive interpretation is the *Tadić* Appeals Chamber decision on the definition of “protected persons”.

The question as to whether the conflict in Bosnia-Herzegovina was of an internal or international nature was discussed extensively in the *Tadić* Trial and Appeals Chamber judgments.<sup>134</sup> In order to consider the criminal responsibility of *Tadić* for grave breaches, it was crucial for both the Trial and Appeals Chambers to classify the conflict in which *Tadić* committed those crimes as international.<sup>135</sup>

<sup>128</sup> *Čelibici Trial Judgment* (note 110), para. 170.

<sup>129</sup> *Schabas* (note 118), 847.

<sup>130</sup> *J. C. Jeffries*, Legality, Vagueness and the Construction of Penal Statutes, *Va. L. Rev.* 71 (1985), 189 et seq. (198). The principle of strict construction was discussed in the *Čelibici* case. *Prosecutor v. Delalić et al.* (note 110), paras. 408 et seq.

<sup>131</sup> *Prosecutor v. Tadić*, IT-94-1-A, Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15.10.1998, para. 73. Strict construction was also employed in *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1, 21.5.1999, para. 3 and *Prosecutor v. Akayesu* (note 99), para. 319.

<sup>132</sup> *Barak* (note 116), 110.

<sup>133</sup> *Barak* (note 116), 111.

<sup>134</sup> *Prosecutor v. Tadić*, IT-94-1-T, 7.5.1997.

<sup>135</sup> *Prosecutor v. Tadić* (note 134). See the factual findings in paras. 194 et seq. Many of the counts in the indictment concerned events said to have taken place at a camp at Omarska,

The grave breaches contained in the Geneva Conventions and Additional Protocol I can be committed only in international armed conflicts.<sup>136</sup> And in order for the grave breaches regime to apply a conflict must not only be international, but the Geneva Conventions require that the victims of the conflict must be “protected persons”. To establish state responsibility, it was necessary to establish that the Federal Republic of Yugoslavia (FRY) exercised effective control over the Bosnian Serb army or the Republika Srpska (following the test established by the ICJ in the *Nicaragua* case).<sup>137</sup> To establish effective control the Prosecution had to establish that the FRY controlled the Bosnian Serb army by the giving of orders and by directing its operations. The majority of the *Tadić* Appeals Chamber found that the effective control test was not satisfied.<sup>138</sup> The majority found that the Republika Srpska and the Bosnian Serb army could not be regarded as *de facto* organs of state or agents of the FRY. As a result, the civilian victims in the *Tadić* case could not be regarded as protected persons because they were not in the hands of a party of which they were not nationals. The grave breaches provisions were therefore held not to apply.

In a cross-appeal the Appeals Chamber abandoned the literal interpretation of the definition of protected persons followed by the Trial Chamber. Instead, the Appeals Chamber replaced the requirement of nationality with the factors of allegiance and effective protection.<sup>139</sup> The Appeals Chamber justifies this step by citing examples of specific provisions of the Geneva Conventions, where nationality is not decisive, namely for refugees and neutral nationals.<sup>140</sup> Although the victims in *Tadić* were not refugees or neutral nationals, the Appeals Chamber used these examples to illustrate the point that, in these cases the lack of allegiance to a state and diplomatic protection by this state were considered as more important than the formal link of nationality.<sup>141</sup> The Appeals Chamber also referred to the inadequacy of

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where large numbers of Bosnian Muslims and Croats were detained by Serb forces. The charges dealt with accusations of rape, unlawful killing, torture and cruel treatment. In respect of each of the alleged incidents the indictment charged the defendant under Arts. 2, 3 and 5 of the Statute of the Tribunal.

<sup>136</sup> The Appeals Chamber held that the concept of grave breaches under the Geneva Conventions was inseparable from the concept of protected persons and that neither concept featured in common Art. 3 (the only article in the Conventions applicable to internal armed conflicts) *Tadić Appeals Judgment* (note 24), paras. 79 et seq.

<sup>137</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27.6.1986, Merits (note 21), 14.

<sup>138</sup> *Tadić* (note 74), paras. 602, 605.

<sup>139</sup> *Tadić* (note 74), paras. 163 et seq.

<sup>140</sup> See Fourth Geneva Convention, Arts. 4 (2), 44 and 70 (2).

<sup>141</sup> *Tadić Appeals Judgment* (note 24), para. 165.

applying the nationality criterion to contemporary conflicts and stated that international humanitarian law must apply according to substantial relations rather than formal bonds,

“This legal approach, hinging on substantial relations rather than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that of the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance.”<sup>142</sup>

The Appeals Chamber found that since it had been shown that the Bosnian Serb forces acted as *de facto* organs of another state, the FRY, the requirements of Art. 4 had been met, that is to say, the victims were protected persons as they found themselves in the hands of armed forces of a state of which they were not nationals.<sup>143</sup> The Appeals Chamber took a purposive approach and looked at the purpose of Art. 4 which, according to the Appeals Chamber, is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy diplomatic protection, “and correlatively are not subject to the allegiance and control of the State in whose hands they may find themselves”.<sup>144</sup> It held that it would frustrate the object and purpose of the Geneva Convention if nationality was kept as the only criterion in such conflicts.<sup>145</sup> This seems to be a good example of the Appeals Chamber using the “maximum protection” justification to extend the protection of the Geneva Conventions to those not previously protected.

The dramatic result of the redefinition of protected persons by the Appeals Chamber is that, in the future, all victims of international armed conflict, if it can be proven that they pass the new test formulated by the Appeals Chamber, can benefit from the protection provided by the protected person status under the Geneva Conventions.

In *Tadić* the ICTY Appeals Chamber went beyond the interpretation of existing law to create new law.<sup>146</sup> The Appeals Chamber’s blurring of the distinction between international and internal armed conflicts called for a redefinition of protected persons. The traditional definition of protected persons was incompatible with the Appeals Chamber’s decision on the classification of the conflict. This would be an example of commendable lawmaking or development of the law, lawmaking by which the Tribunals ex-

<sup>142</sup> *Tadić Appeals Judgment* (note 24), para. 168.

<sup>143</sup> *Tadić Appeals Judgment* (note 24).

<sup>144</sup> *Tadić Appeals Judgment* (note 24).

<sup>145</sup> *Tadić Appeals Judgment* (note 24), paras. 163 et seq.

<sup>146</sup> *Tadić Appeals Judgment* (note 24), paras. 163 et seq.



tended the protection of humanitarian law and an example of what *Meron* would call the humanization of humanitarian law. The Trial Chamber in *Blaskić* followed this approach, holding that “[i]n a nation that had crumbled, ethnicity became more important than nationality in determining loyalties”.<sup>147</sup> The intricacy of the situation in the former Yugoslavia (of a state dissolving into many states) called for a new approach to the test of nationality and the usefulness of such a notion in contemporary conflicts. With regard to the question of conflict classification and confronted with the choice between a literal or purposive interpretation of the Statute, the Appeals Chamber chose the latter over the former.

Had the ICTY not qualified the conflict in which *Tadić* committed those crimes as international, then the charge of grave breaches could not have been made. When taking a purposive approach the ICTY and ICTR must take the objects and purpose of the Statutes into consideration as well as the social and political considerations which gave rise to their creation.<sup>148</sup> In order to give effect to the purpose of the ICTY Statute, that is, to prosecute persons for serious violations of international humanitarian law, it was therefore crucial for both the Trial and Appeals Chamber to classify the conflict as international.

Although the Appeals Chamber’s adoption of the overall control standard can legitimately be criticized it can be argued that the decision led to a correct outcome. In order for Art. 2 of the ICTY Statute to fulfill its purpose the Tribunal had to find a way of classifying the conflict as an international conflict. The judges needed to make law in order to make Art. 2 of the Statute functional.

The protection of humanitarian law has been extended through the use of purposive interpretation. This mode of interpretation advances the purpose of the ICTY Statute, which is to provide a criminal forum for the punishment of those who have perpetrated especially serious violations of international humanitarian law.<sup>149</sup> In the *Tadić* case the Appeals Chamber decided to abandon the literal definition of protected persons and, in the spirit of purposive interpretation, focused more on the factor of allegiance than formal nationality in determining the protective regime.<sup>150</sup> By finding that the

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<sup>147</sup> *Prosecutor v. Blaskić*, IT-95-14, 3.3.2000, paras. 125 et seq.

<sup>148</sup> *Prosecutor v. Delalić* (note 110), (*Čelibici* Trial Judgment), para. 170. See also *T. Meron*, Cassese’s *Tadić* and the Law of Non-International Armed Conflicts, in: *Vohrah/Pocar/Featherstone/Fourmy* (note 93), 535 et seq.

<sup>149</sup> *A. M. Danner/J. S. Martinez*, *Guilty Associations: Joint Criminal Enterprise Command Responsibility and the Development of International Criminal Law*, *Calif. L. Rev.* 93 (2005), 132.

<sup>150</sup> *Prosecutor v. Tadić* (note 24), paras. 163 et seq.

Bosnian Serbs acted as *de facto* agents of another state (the FRY), the Appeals Chamber also expanded the scope of protection of humanitarian law.<sup>151</sup>

## V. Conclusion

The Security Council's instruction that the ICTY should apply its Statute without legislating new international law was not realistic because it failed to take into account the underdeveloped nature of international criminal law and the "laconic" Statutes of the ICTY and of the ICTR.<sup>152</sup> It can be argued that the Yugoslavia Tribunal would simply not have been able to function (or could only have functioned in a very limited way) if it faithfully carried out the instruction of the Secretary-General to only apply rules of law which were "beyond any doubt part of customary international law". Moreover, the crime an accused had been charged with had to be a crime under customary international law "at the time when they were committed".<sup>153</sup> Many of the rules formulated by the ICTY over the last fourteen years simply did not meet this high threshold.

Of course too great a shift away from custom that is anchored in the practice of states to a more specifically humanitarian interpretation of the customary process carries with it the risk "of undermining the certainty and clarity which sources of international law have to provide".<sup>154</sup> Such lack of certainty in the context of criminal law might jeopardize the rights of the accused and violate the principle of legality.

Lawmaking under the guise of purposive interpretation has been a common feature of the ICTY's reasoning. The ICTY has justified controversial decisions by referring to the purpose of extending the applicability of humanitarian law. The humanization of humanitarian law is an argument in favor of extending the protection of humanitarian law to areas that have previously been unaffected by humanitarian law. In the spirit of the *Martens Clause* one can argue that international humanitarian law should be interpreted consistently with the principles of humanity which includes principles which give the law of war a more humane face such as protecting not only non-combatants but also combatants and ideas such as the dictates of

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<sup>151</sup> *Prosecutor v. Tadić* (note 150), para. 168.

<sup>152</sup> *Schabas* (note 118), 848.

<sup>153</sup> *Prosecutor v. Ojdanić*, Joint Criminal Enterprise Decision, para. 9.

<sup>154</sup> Cited by *Mettraux* (note 6), 18.

“public conscience”.<sup>155</sup> It was appropriate for the Tribunals to use purposive interpretation to allow for the extended applicability of humanitarian law. The approach of the *Tadić* Appeals Chamber in giving effect to substance rather than form in defining protected persons can not be faulted. This reasoning is in line with the purpose of extending the protection of humanitarian law to the maximum extent. But purposive interpretation can not be an excuse for unfettered judicial discretion.

A method of interpretation which is commendable in the context of human rights law cannot be employed in a criminal setting if this violates the principle of legality and fair trial standards.<sup>156</sup> The jurisprudence of the ICTY provides examples of circumstances in which the purposive approach violated the principle of legality as well as circumstances in which using the purposive approach developed the law without violating *nullum crimen sine lege*. The decision in *Furundžija* that oral penetration constitutes rape in international law in spite of the fact that it is categorized as sexual assault in many jurisdictions is an example of a decision that violates the principle of legality. And the decision of the *Tadić* court that a person might be convicted of the war crime of “cruel treatment” also possibly violates the principle of legality. The *Tadić* Trial Chamber admitted that “no international instrument defines cruel treatment” and that “no narrow or special meaning should be given to this expression”.<sup>157</sup> But in cases such as *Ojdanić* the ICTY stated that respecting *nullum crimen sine lege* does not preclude progressive development of the law.<sup>158</sup>

The Tribunals developed international criminal law in many responsible and creative ways. The redefinition of protected persons and the resulting extension of the protection of humanitarian law in *Tadić* is an example of responsible lawmaking. In *Aleksovski* the ICTY stated that the non-retroactivity of criminal rules does not bar courts from refining and elaborating upon existing rules through a process of interpretation and clarification as to the elements of a particular crime.<sup>159</sup>

<sup>155</sup> It has been noted that the principles of humanity include principles that “elementary considerations of humanity” encompass three customary principles incorporated in the *Martens Clause*, namely: (i) the right of parties to choose the methods and means of warfare; (ii) that a distinction should be made between persons participating in military operations and civilians and (iii) that it is prohibited to launch an attack against the civilian population as such. See *T. Meron*, *The Martens Clause, Principles of Humanity and the Dictates of the Public Conscience*, *AJIL* 94 (2000), 78 (83).

<sup>156</sup> For the fundamental differences between human rights law and criminal law see *Danner/Martinez* (note 149), 88.

<sup>157</sup> *Prosecutor v. Tadić* (note 134), paras. 724 et seq.

<sup>158</sup> *Prosecutor v. Ojdanić*, IT-99-37, 21.5.2003, paras. 37 et seq.

<sup>159</sup> *Prosecutor v. Aleksovski*, IT-95-14, 30.5.2001, para. 127.

It cannot be overemphasized that the humanitarian purposes advanced by international criminal law must be balanced with the principle of legality and respect for the rights of the accused. Since the ICTY and ICTR are criminal Tribunals great emphasis should be placed on the rights of the accused and fairness of procedure. Whereas lawmaking may be an appealing intellectual and academic exercise for the judges, lawmaking may not be equally appealing to the accused. It is predicted that some instances of lawmaking by the Tribunals will form an important part of their legacy. Instances of lawmaking such as the criminalization of sexual offences and the extension of the protection of humanitarian law can be seen as important moral and legal achievements. But since not all Tribunal lawmaking can be described as desirable and legitimate (primarily because of infringements on the principle of legality) the legacy of the Tribunals may be described as ambiguous.