

Constitutionalisation at its best or at its worst? Lessons from the development of customary international criminal law

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Introduction

In international criminal law, just as in general international law, custom is one of the most disputed sources of law. Yet, especially in the field of international criminal law, controversies around the formation of customary international law seem to be rooted in the fact that the classical, two-fold concept of custom formation of Art. 38 (1) (b) of the ICJ Statute does not fit the norms in this field. International criminal law is still a relatively new area of international law and most of its rules are of a prohibitive character. In many areas the existence of certain rules has been discussed for the first time before the international criminal tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR).² Therefore, hard evidence of state practice and *opinio juris*, which according to Art. 38 of the ICJ Statute make up a customary rule, is not easy to find.³

To embrace the particularities which custom faces in international human rights and humanitarian law, different methodological concepts have been suggested. Most of the time, these new approaches deviate significantly from the traditional two-fold concept of Art. 38. Even though a wide range of views has been suggested, approaches to customary international humanitarian law or international human rights law are prone to rely upon conceptions of international law, which are best described as ‘constitutionalist’. They build upon the ‘universality’ of international human rights law or the ‘fundamental humanitarian values’ enshrined in the Martens clause. Thus, at least to some extent, they also tend to support ‘constitutionalist’ tendencies of general international law.

Until today, the ICTY and the ICTR respectively, have delivered large bodies of jurisprudence, which to a great extent, relies upon the source of customary international law. Since international criminal law is comprised of norms of both international humanitarian law and international human rights law, an examination of the ICTY and the ICTR’s case-law on customary international law seems to offer a welcome opportunity to assess whether constitutionalist tendencies have found a footing in international criminal law and perhaps even in general international law. On the other hand, it may also reveal some of the downsides of a constitutionalist approach, or even disprove its existence altogether.

A plethora of theories

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² Cf. the application of common Art. 3 to international as well as internal armed conflicts in the Tadic Interlocutory Appeal (Tadić, Decision on Defence Motion for Interlocutory Appeal, 02.10.1995) and the application of the principle of command responsibility to internal armed conflicts in the Hadzihasanovic decision (Hadzihasanovic, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16.07.2003).

³ Cf. The quantitative assessment carried out by L. Gradoni, ‘Nullum crimen sine consuetudine: A Few Observations on How the International Criminal Tribunal for the Former Yugoslavia Has Been Identifying Custom’, paper presented at the Inaugural Conference of the ESIL, Florence, 13. – 15 May 2004; at: www.esil-sedi.org/english/pdf/Gradoni.PDF.

However, before delving right into the jurisprudence of the two ad hoc tribunals, let us first examine the different strands of scholarly opinion, which have been advanced for the creation of customary international human rights and humanitarian law.

First and foremost, it has to be taken into account that the greatest part of the plethora of theories, which have been advanced on the formation of customary international humanitarian and human rights law have developed on the basis of Art. 38 (1) (b) ICJ Statute. Hence they agree upon a two-fold concept of general customary international law, which takes into account the elements of *opinio juris* and state practice. However, by modifying this general approach in the areas of international humanitarian and human rights law, they try to compensate for insufficiencies which arise in the course of application of a two-element approach to customary international law to these areas of international law.

A variety of authors discuss these issues under the broader subheading of inconsistent practice.⁴ They observe that human rights norms and other prohibitions of state conduct are often comprised of prohibitions of state conduct. The said prohibitions however, such as the prohibition of torture, are frequently violated without the resulting consequence that the corresponding prohibition ceases to be part of customary international law.⁵ On the other hand, authors have addressed the formation of norms of international human rights and humanitarian law under the heading 'different sorts or forms of customary international law'.⁶ Modifications of the traditional two-element approach to custom have also been supported by the contention that customary international human rights and humanitarian norms are "strongly supported and important to international order and human values."⁷

Scholars who identify international human rights and humanitarian law as an area which is comprised of a different sort of customary international law admit quite frequently that due to their value-loaded character, norms of customary international human rights and humanitarian law could develop out of *opinio juris* alone,⁸ or even be conceived as belonging to some 'higher law' which contains some 'higher normativity' in the sense of an inherent claim to compliance.⁹

⁴ R. Higgins, *Problems and Process, International law and How We Use It* (Cambridge, Clarendon Press, 1994) 22; M. Akehurst, 'Custom as a Source of International Law', (1974-5) BYBIL Vol. XLVII, 20.

⁵ Cf the illustration of the issue by R. Higgins, (note 4), 22.

⁶ Cf. R-J. Dupuy, *Coutume sage et coutume sauvage*, in: *La communauté internationale*, Melanges à Charles Rousseau, Paris, (1973), 84 ; S. Sur, *La coutume internationale* (1990) 2^{ème} cahier, 2; L. Henkin, *International Law: Politics and Values*, The Hague, 1992, at 39 ; O. Schachter, 'New Custom, Power, Opinio Juris and Contrary Practice', in: J. Makarczyk, *Theory of International Law at the Threshold of the 21st Century; essays in honour of K. Skubiszewski*, 539; V. U. Degan, 'Some objective features in positive international law', *ibid.*, 134.; R. Kolb, 'Selected Problems in the Theory of Customary International Law', (2003) NILR, 119ff; cf C. Tomuschat, 'Obligations Arising for States Without or Against Their Will, (1993) RdC, Vol. 241, 291; *id.* 'General Course on Public International Law', (1999) RdC, vol. 281, 332.

⁷ O. Schachter, (note 6) 538; cf T. Meron, 'Geneva Conventions as Customary Law' in: *id.*, *War Crimes Law comes of Age* (Oxford, Clarendon 1998) 170, 171.

⁸ Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, 1989, 94; *id.* 'General Course on Public International Law', (2003) 301 RdC, 22.

⁹ O. Schachter, (note 6), 539; cf. *id.*, 'Entangled Treaty and Custom' in: Y. Dinstein (ed.), *International Law at a Time of its Perplexity, Essays in Honour of S. Rosenne*, London, 1988, 718; V. U. Degan, (note 6), 144.

Other approaches advocate that customary international criminal norms might be deduced from general principles of international law.¹⁰ According to this view, common values of mankind, for example, dominate customary rules in the field of international humanitarian law.¹¹ Hence, also the Martens clause and its implications play a decisive role in the development of new customary international humanitarian law.

There are also theories, which even refer to a 'sliding-scale' concept that takes into account the variety of different approaches to custom.¹² Although these approaches work upon the premise of the two-fold concept of Art. 38 ICJ Statute, they admit that for the formation of custom in the various areas of international law, a varying emphasis must be laid its individual elements.¹³

Lastly, for the area of international human rights law, writings have also dismissed the concept of custom altogether. Norms belonging to this field should better be conceived as general principles of international law.¹⁴ Of course, there are many more suggestions made in an attempt to tackle the difficulties which arise when trying to define the applicable customary rule of international criminal law in a particular case.¹⁵

As seen from this short overview, most of the different approaches to customary international criminal law unfold upon the underlying premise that the developments in customary international law are due to the ongoing 'constitutionalisation' of international law.¹⁶ Views hinge upon the assertion that international law contains some 'core-rights' or principles which are conceived to exist on a hierarchically higher level than other norms of international law

¹⁰ C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', (note 6), 291 et seq; *id.*, 'General Course on Public International Law', (note 6), 334; *id.*, 'The Complementarity of International Treaty Law, Customary International Law, and Non-contractual Law-Making', in: R. Wolfrum, V. Röben (eds.) *Developments of International Law in Treaty Making*, Berlin, 2005, 405.

¹¹ C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', (note 6), 300, 301.

¹² F. Kirgis, 'Custom on a Sliding Scale', 81 AJIL, p 146; cf. *id.*, 'Fuzzy Logic and the Sliding Scale Theorem', 53 Alabama Law Review (2001/2002), 421; J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', 16 OJLS (1996), 111; E. Roberts, 'Traditional and Modern Approaches to International Law', 95 AJIL (2001), 757

¹³ J. Tasioulas, (note 13), 113; E. Roberts, (note 13), 781.

¹⁴ B. Simma / P. Alston, 'The Sources of Human Rights Law: Custom Jus Cogens and General Principles', Australian YBIL, Vol. 12 (1988/89), p. 81-108.

¹⁵ cf C. Powell and A. Pillay, 'The Development of Customary International Criminal Law', (2001) 17 SAJHR 496, for a differentiation between 'ascending' and 'descending' approaches to customary international law; or J. Goldsmith and E. Posner, 'A Theory of Customary International Law', John M. Olin Law and Economics Working Paper No. 63 (2nd series) at: <http://www.law.unchicago.edu/publications/working/index.html> (last visited 28.11.2004), 93-4, for an approach based upon the Game Theory.

¹⁶ Cf. only: T. Meron, (note 8), 9; *id.*, 'General Course on Public International Law', RdC, Vol 301, (2003), 110; Simma, 'From Bilateralism to Community Interest', RdC, 1994, Vol 250, 242; C. Tomuschat, 'Obligations Arising for States Without or Against their Will', RdC, Vol. 241, (1993), 298.

and from which other norms of international law could be derived by way of deduction.¹⁷ They emphasise the central aim of international criminal law, which is the protection of the individual human being from the most heinous crimes or its ‘humanising’ purpose.¹⁸ By defending the rights of the individual, international criminal law, and more particularly, international human rights and humanitarian law are invoked to protect common values of the international community. Accordingly, norms of international criminal law have been held to protect rights which are owed to the international community as a whole¹⁹ or even to belong to the category of *jus cogens*.²⁰

The findings of ICTY and ICTR

The jurisprudence of the two *ad hoc* international criminal tribunals, even on the matter of customary international law, is vast and expansive. A complete assessment of the relevant case law would go beyond the scope of this paper. Thus, our assessment will utilise just some of the most outstanding judgments of ICTY and ICTR as examples of the general tendencies which can be observed in the jurisprudence of the two *ad hoc* international criminal tribunals on customary international law.

On the whole, it may be discerned from the findings of ICTR, and even more clearly from those of the ICTY, that the tribunals do not focus upon a single approach to custom but employ various methods when assessing the applicable law in a particular case. Use is still made of the rather ‘conservative’ two-fold approach to custom, which relies upon evidence of the two elements of Art. 38 (1) (b) ICJ Statute: *opinio juris* and state practice. However, on the other hand one also encounters *opinio juris*-based approaches, which barely take into account corresponding state practice, as well as deductive reasoning, which tries to derive rules of customary international criminal law from ‘core’ principles of international humanitarian law.

A ‘core-rights approach’ to custom-formation

Tadic

The first example of ICTY jurisprudence which is frequently cited by ‘constitutionalists’ to reflect the tribunals’ new approach to custom formation²¹ is the first judgment of the court, i.e. the *Tadic Interlocutory Appeal* decision.

The judgment constitutes one of the most groundbreaking decisions of the court, in many aspects. It not only examines its own lawful establishment by the Security Council, it also assesses in great detail the *rationae materiae* scope of its jurisdiction. In particular, it scrutinises

¹⁷ C. Tomuschat, ‘Obligations Arising for States Without or Against their Will’, (note 6) 292; T. Meron, (note 18) 378.

¹⁸ T. Meron, ‘The Humanisation of Humanitarian Law’, 94 AJIL 2000, 239 et seq.

¹⁹ ICJ, Barcelona Traction, Light and Power Company, Limited, Second Phase, ICJ Reports 1970, 32, para 33; Kupreskic, Trial Chamber Judgment, Case No. IT-95-16-T, 14.01.2000, para 519.

²⁰ Cf., for example: ICTY, Celebici, Appeals Chamber Judgment, Case No. IT-96-32-A, 20.02.2001, para 149; Simma, From Bilateralism to Community Interest, RdC, Vol 250, (1994), 291- 293.

²¹ C. Tomuschat, ‘General Course on Public International Law’ (note 6), 334.

and finally affirms that Art. 3 of its Statute penalised violations of common Art. 3 to the Geneva Conventions to internal as well as to international armed conflicts. The court held that, amongst others, this also resulted from the development of customary international law in this field.²²

To establish these findings, the tribunal started from the classical two-fold conception of customary international law. Yet, it also emphasised that not every piece of evidence would reflect state practice and *opinio juris*. Military practice, for example, is more reflective of operational tactics than considerations which supported the establishment of a legal rule.²³ Thus, it was the “bigger picture” which contributed to the emergence of a new rule. Various situations showed that there existed some ‘core rules’ of international humanitarian law which were applicable to international as well as to internal armed conflicts. This was also supported by the findings of the ICRC, whose work could be regarded as ‘international’ practice in the customary process.²⁴

Having thus established the customary application of common Art. 3 to internal as well as to international armed conflicts, the chamber had no doubt about the customary nature of individual criminal responsibility, which followed from a violation of these rights:

“We have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect “elementary considerations of humanity” widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.”²⁵

As Tomuschat has aptly illustrated, one needs “no prophetic gifts” to encounter considerations of the Martens clause behind this reasoning.²⁶ Yet, what is new to the ICTY’s approach is that it did not base its *interpretation* of the Statute or the GCNs upon the considerations entailed in this clause, but its findings on the applicable *customary international law*.

The invocation of ‘elementary considerations of humanity’ to evidence the customary character of certain norms of international criminal law was adopted by several subsequent judgments of the court.²⁷ In particular, the *Celebici* Appeals Chamber judgment, as well as the recent *Halilovic* Trial Chamber decision reemphasised these findings.²⁸

The approach chosen by the court in the *Tadic* case and in subsequent decisions strongly supports ‘constitutionalist’ tendencies. It underlines the existence of certain core principles, which dominate the formation customary international criminal law. Nevertheless, the said ‘elementary considerations’ of humanity were hardly ever employed on their own to evidence the customary character of a certain norm of international criminal law. Most of the time, the court

²² Tadić, Decision on Defence Motion for Interlocutory Appeal, 02.10.1995, para 96.

²³ *ibid.*, para 99.

²⁴ *ibid.*, para 109.

²⁵ *ibid.*, para 129.

²⁶ Cf. C. Tomuschat, ‘General Course on Public International Law’, (note 6), 356.

²⁷ Cf. *Celebici*, (note 22), para 149; Aleksovski, Trial Chamber Judgment, 23 June 1999, Case No.: IT-95-14/1-T, para 50; Blaskic, Appeals Chamber Judgment, Case No.: IT-95-14-A, 03.03.2000, para 166, 167; Kunarac, Trial Chamber Judgment, 22.02.2001, Case No.: IT-96-23-T& IT-96-23/1-T, para 406, 408; Kunarac, Kovac et al, Appeals Chamber Judgment, 12.06.2002, Case. No. IT-96-23 & 96-23/1-A, para 68; Jokic, 17.01.2005, Trial Chamber judgment, Case No. IT-02-60-T, para 539; for the ICTR see Akayesu, Trial Chamber Judgment, Case No. ICTR-96-4-T, 02.09.1998, para 616; Akayesu, Appeals Chamber Judgment, Case No.: ICTR-96-4-A, 01.06.2001, para 442; Musema, Trial Chamber Judgment, Case No. ICTR-96-13, 20.01.2000, para 287.

²⁸ Halilovic, Trial Chamber Judgment, Case No. ICTY-01-48-T, 16.11.2005, para 25.

relied on additional evidence to prove the customary character of a certain provision, such as resolutions of the UNSC or the UNGA.²⁹

Kupreskic

Another judgment which is quite far-reaching and controversial in terms of customary international law is the *Kupreskic* Trial Chamber decision, which continues to constitute a major indicator of the ICTY's methods with regard to customary international law.³⁰

First and foremost, the judgment reemphasised the importance of the “elementary considerations of humanity” contained in the Martens clause for the interpretation of rules of international humanitarian law.³¹ The tribunal further assessed the customary nature of Art. 51 (2) and 52 (6) the Additional Protocol I to the Geneva Conventions (AP I). Although several influential states like the U.S, Israel and India thus far had not ratified the Protocol –a fact which would usually speak *against* the assumption of the customary character of its provisions- the chamber held that the “demands of humanity or the dictates of public conscience” could foster the emergence of a new rule of customary international law.³²

It further maintained that this constituted a ‘new’ approach to customary international law which resulted from a general transformation of humanitarian law, i.e. from the ‘humanisation of armed conflict’, a trend which had been confirmed by the ILC work on state responsibility.³³

In the subsequent paragraphs, the court sought for additional evidence which would support its findings on the customary character of Art. 51 (2) and 52 (6) of API. Although several military manuals provided quite contradictory evidence to this respect, the tribunal concluded that a widespread ‘*opinio necessitates*’ was ‘discernible in international dealings’.³⁴ Further evidence was drawn from a UNGA resolution, the high number of States which had ratified API (*sic!*), a memorandum of the ICRC issued on occasion of the Iran-Iraq war and from the findings of the ICTY Trial Chamber in the *Martic* case.³⁵ According to the chamber, all this supported the contention that an *opinio juris* supporting the emergence of a customary rule had become apparent.³⁶

Such reasoning in respect of the customary nature of Art. 51 and 52 of API appears almost ironic. The court's analysis of the customary international nature of the said provisions remains thin and contradictory. The examples of *opinio juris* cited, i.e. military manuals from the Netherlands and the U.S., represent contentions of only two states, whose evidentiary value is further diminished by the fact that there are military manuals which explicitly admit that reprisals against civilians occurred.³⁷ Moreover, several important states have not ratified API.³⁸ Despite

²⁹ Tadić, (note 24), para 133.

³⁰ The Kupreskic Appeals Chamber Judgment, Case No. IT-95-16-A 23.10.2001 did not concern the findings on customary international law.

³¹ Kupreskic, Trial Chamber Judgment, (note 22), para 524.

³² *ibid.*, para 527.

³³ *ibid.*, para 529.

³⁴ *ibid.*, para 532.

³⁵ *ibid.*, para 533.

³⁶ *ibid.*, para 533.

³⁷ *ibid.*, para 532.

³⁸ *ibid.*, para 527.

all this, the chamber contended that such a prohibition had emerged in customary international law, due to ‘elementary considerations of humanity’.

Hence, the ‘core rights approach’ which has been identified previously, again seems to determine the courts findings on the customary nature of the provisions of API, and even more radically than before.

Nevertheless, the *Kupreskic* trial chamber judgment allows some further observations on the importance of the ‘elementary considerations of humanity’ for the process of formation of customary international law. As the trial chamber established, these ‘considerations’ have two effects: 1/ they influence the interpretation of existing humanitarian norms which need more concretisation to find application in international criminal law. 2/ supported by *opinio juris*, they contribute to the formation of customary international criminal law. The *Kupreskic* judgment thus elevates the principles enshrined in the Martens clause (the ‘dictates of public conscience’ and ‘elementary considerations of humanity’) to the status of a ‘general principle of international law’ which dominates and determines the field of international humanitarian law and its formation.

Deductive Reasoning

One case which illustrates the issues arising with the formation of customary international criminal norms quite aptly is the *Hadzihasanovic Interlocutory Appeal* decision.³⁹ In this decision, the court examined the applicability of the principle of command responsibility in international as well as in internal armed conflicts. Of course, there was no state practice available to support the contention that the principle would apply to internal armed conflicts. Hence, the Appeals chamber deduced its customary application to internal armed conflicts from the principle of responsible command, reflected in common Art. 3 of the Geneva Conventions and in Art. 3 of its Statute, without ever referring to the two ‘traditional’ elements of custom, reflected in Art. 38 (1) (b) ICJ Statute.⁴⁰

On the other hand, however, the tribunal in the very same case rejected the application of the customary principle of command responsibility to acts committed by subordinates before the commander’s assumption of command. It contended that there was not sufficient evidence of state practice and *opinio juris* to support these findings, thus referring again to the traditional approach to custom of Art. 38 (1) (b) ICJ Statute.⁴¹

As seen above, even though the *Hadzihasanovic* case can be held to constitute an application of a more ‘constitutionalist’ approach to customary international law, this ‘new’ concept of customary international criminal law, being applied to the second question, found its limits in the very same traditional elements of Art. 38 (1) (b) ICJ Statute. Though this does not diminish the argumentative force of a deductive approach to custom formation, it certainly diminishes its actual value as a truly alternative approach to custom formation

Human rights law based findings on customary international criminal law

³⁹ Hadzihasanovic, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16.07.2003 at <http://www.un.org/icty/cases/indictindex-e.htm>.

⁴⁰ *ibid.*, para 18.

⁴¹ *ibid.*, para 45

One last approach to the formation of customary international criminal law invoked by ICTY and ICTR is human rights-law based reasoning. Two cases which illustrate this methodology quite aptly are the *Celebici* Appeals Chamber judgment and the *Jokic* Trial Chamber decision.⁴²

In the *Celebici* case, the Appeals Chamber pointed out that the rules and values entailed in common Art. 3 were of such a fundamental character that this had also found expression in the international human rights regime. International humanitarian law and international human rights law both had at their centre considerations of human dignity. This understanding formed the "basis of fundamental minimum standards of humanity"⁴³, a notion which had already been used by the ICRC in its commentary on the Additional Protocols. Accordingly, the universal and regional human rights instruments as well as the Geneva Conventions shared a common "core" of fundamental standards which were applicable at all times, in all circumstances and to all parties, and from which no derogation was permitted.⁴⁴

The recent *Jokic* case concerned the criminality of the "terrorisation of the civilian population" as a war crime under customary international law. It was held that the prohibition of terrorisation of a population was encompassed by the right to security of a person, which as a human right was contained in the major human rights instruments (ICCPR and ECHR), and in national jurisdictions. From this the chamber concluded that terrorisation would violate a fundamental right recognised both in customary and in treaty law.⁴⁵

Several other judgments of ICTY and ICTR have rejected or affirmed the customary character of certain norms of international criminal law on the basis of interpretations derived from international human rights law.⁴⁶

As the *Celebici* findings demonstrate, a human rights-law based approach to custom further reinforces the so called 'core-rights-approach' of the tribunal, identified above. The court refers to international human rights law to emphasise the 'humanitarian character' of the provisions of the Geneva Conventions. Nevertheless, invocation of such reasoning to support the customary international law nature of norms of international criminal law is founded upon relatively thin ice.

The drawbacks of such an approach are illustrated by the *Stakic* case. In this decision, the chamber pointed out that human rights law is only of a limited utility for the interpretation of norms of international criminal law. Norms of international criminal law had to be considered carefully according to their meaning within the context of the statute. This is due to the standard set by the *nullum crimen sine lege* principle, which requires that norms are considered only within the context of the statute, which is "beyond doubt" part of international humanitarian law.⁴⁷

The *Stakic* Trial Chamber also demonstrate some of the weaknesses of any 'constitutionalist' approach to customary international law. As the Trial Chamber confirmed, the *nullum crimen sine lege principle*, in particular the rule of strict construction as well as aspects of

⁴² Celebici Appeals Chamber Judgment, (note 22); Jokic, Trial Chamber judgment, Case No. IT-02-60-T, 17.01.2005,.

⁴³ Celebici Appeals Chamber Judgment, *ibid.*, para 149.

⁴⁴ *ibid.*, para 149.

⁴⁵ Jokic, Trial Chamber Judgment, Case No. IT-02-60-T, 17.01.2005, para 592.

⁴⁶ Cf. only: Kupreskic, Trial Chamber Judgment, (note 22), para 566; Kunarac, Trial Chamber judgment, IT-96-23-T& IT-96-23/1-T, 22.02.2001, para 466; Funrundzija, Trial Chamber Judgment, Case. No.: IT-95-17/1-T, 10.12.1998, para 170.

⁴⁷ Stakic, Trial Chamber Judgment, Case No. IT-97-24-T, 31.07.2003, para 721.

foreseeability, influences and restricts a court's findings on the customary nature of a particular norm of international criminal law. Yet, this will be shown in an own paragraph later on.

A more flexible approach to custom adopted by the international ad hoc criminal tribunals

From the cases considered above, it may be concluded that although the 'traditional' concept of customary international law can still be found in the court's jurisprudence, the ICTY and the ICTR seem to have adopted a more flexible approach regarding the evidence and application of each particular element of customary international law.

To name but a few, the two tribunals examined the jurisprudence of national courts, of the International Military Tribunals established after World War II, military manuals, international treaty law, the findings of the ICRC as well as resolutions of the UN General Assembly and Security Council, without hardly ever discussing whether they constituted evidence of either *opinio juris* or state practice according to Art. 38 (1) (b) ICJ Statute.

It is particularly striking that amongst the evidence considered for the formation of a new norm of customary international law were the opinions expressed by the ICRC. Though it is the most important non-governmental organisation in the field of international humanitarian law with a recognised status under the Geneva Conventions⁴⁸, it still remains a so called non-state actor. Nevertheless, as it has been outlined earlier on, its writings and findings were even regarded as 'international practice' in the customary process by the *Tadic Interlocutory Appeal* decision.⁴⁹ Also the writings of the ICRC on the Geneva Conventions and its Additional Protocols, including its latest study *Customary International Humanitarian Law*⁵⁰ have frequently been referred to in the jurisprudence of the ICTY and the ICTR.⁵¹

Reference to the work of the ICRC by both tribunals reveals a 'revolutionalised' approach to customary international law. For the first time, opinions of a so called non-state actor are being considered in the customary process. Although – as it has been mentioned shortly before – this organisation enjoys a special status under the Geneva Conventions, the particular significance of a recognition of its views in the customary process, which was perceived previously as an entirely state-oriented law-making process, cannot be underlined often enough.

Moreover, the obvious lack of differentiation by the ICTY and the ICTR between evidence invoked for the proof of *opinio juris* or state practice illustrates the difficulties which arise in ascribing a particular piece of evidence to a particular element of customary international law. Most of the time, the same evidence can be utilised to prove the existence of both elements of custom.

⁴⁸ Art. 125 GC III. On the functions and tasks of the ICRC within the framework of the Geneva Conventions see: Arts. 3 (2), 9, 10, 11, 22 GCI, Arts. 3 (2), 9, 10, 11 GC II; Arts. 3 (2), 9, 10, 11, 56, 72, 73, 75, 79, 81, 123, 125, 126 GCIII; Arts. 3 (2), 10, 11, 14, 30, 59, 61, 76, 96, 102, 104, 108, 109, 111, 140, 142 GC IV; Arts. 5 (3), (4), 6 (3), 33 (3), 78 (3), 81 (1), 97, 98 API.

⁴⁹ Tadić, (note 24), para 109.

⁵⁰ ICRC, J.-M. Henkaerts et al. (eds.), *Customary International Humanitarian Law*, Cambridge, 2005.

⁵¹ Celebici Appeals Chamber Judgment, (note 22), para 143, 145; Akayesu, Appeals Chamber Judgment, Case No. ICTR-96-4-T ,01.06.2001, para 442; Kayishema, and Ruzindana, Trial Chamber Judgment, Case No. ICTR-95-1-T, 21.05.1999, para 165; Kayishema, and Ruzindana, Case No. ICTR-95-1-T, 21.05.1999, para 165.

Yet, it also has to be borne in mind that this more flexible approach to custom is hardly differentiable any more from aspects of treaty interpretation. A historical, object and purpose or systematic interpretation of the applicable rules or principles of international law would take into account the very same evidence shortly mentioned before which serve as proof of the existence of a new customary norm.

Finally, it may be concluded that although there seems to prevail a more flexible approach to custom in the jurisprudence of the ICTY and the ICTR, this approach appears to be driven more by the particular constraints of each case, than by entirely 'constitutionalist' considerations: application of the different methods identified to ascertain a customary rule by those two courts does not follow any particular pattern.

The downsides of new 'constitutionalist' tendencies – implications of the *nullum crimen sine lege* principle

Introduction

The *nullum crimen sine lege* principle⁵² exists in all legal systems of the world, whether of common law, or civil law origins⁵³ It is entailed in all major human rights covenants and its universal recognition and application appears to be without doubt.⁵⁴ In the context of the establishment of the ICTY, the principle gained particular importance. In his report on the establishment of the tribunal the UN Secretary General had warned that the court should apply only those norms of international criminal law which "beyond doubt" had attained a status of customary international law.⁵⁵

Yet, when examining the implications of the principle at the international level, it has to be borne in mind that its scope is usually perceived to be much broader at this level than at the national level. It is understood as describing some greater principle of legality, which encompasses various prohibitions, i.e. the prohibition of retroactivity, the provision of legal clarity and the prohibition of ambiguity (analogy).⁵⁶

⁵² For an in depth presentation of the principle of *nullum crimen sine lege* in international criminal law see: M. Boot, *Genocide, Crimes Against Humanity, War Crimes, - Nullum crimen sine lege and the Subject Matter jurisdiction of the International Criminal Court*, Intersentia, Antwerp et al., 2002, 127 et seq.; for an analysis of the principle oriented upon German criminal law: B. Krivec, *Von Versailles nach Rom – der lange Weg des nullum crimen nulla poena sine lege*, Hamburg, 2004, at: http://deposit.ddb.de/cgi-bin/dokserv?idn=975505114&dok_var=d1&dok_ext=pdf&filename=975505114.pdf.

⁵³ Cf.: Carl Schmitt, *Das internationalrechtliche Verbrechen des Angriffskrieges und der Grundsatz „Nullum crimen, nulla poena sine lege“*, Helmut Quaritsch (ed.), Berlin, 1991, 20-22.

⁵⁴ Cf.: Art. 11 (2) Universal Declaration of Human Rights, Art. 7 (1) European Convention on Human Rights, Art. 15 (2) International Covenant on Civil and Political Rights, Art. 9 Pact of San Jose, Art. 7 (2) Charta on Human and Peoples Rights of the Organisation for African Unity, Art. 10 ILC Draft Code against Peace and Security of Mankind.

⁵⁵ Report of the UNSG to the UNSC on the ICTY, UN Doc. S/25704 (1993), 9, para 34.

⁵⁶ Bassiouni, *Crimes Against Humanity in International Law*, The Hague 1992, 88; M. Nowak, Art. 15, in: *ICCPR, Commentary*, Kehl, 1993, 275, 276, para 4; S. Joseph/J. Schultz/M. Castan, *The International Covenant on Civil and Political Rights, Cases, Materials and Commentary*, OUP, Oxford, 2004, 462; M. Bossuyt, *Guide to the „Travaux préparatoires“ of the*

It is also generally accepted that customary international law can serve as a source of criminal convictions, without necessarily violating the rule of strict construction. This is expressed in the various codifications of the principle in the international human rights covenants, but particularly by Art. 15 of the ICCPR and Art. 7 of the ECHR, which at their very outset, encompass custom in their reference to ‘international law’⁵⁷ Moreover, it is further underlined by the reference to the “general principles of law” in the second paragraphs of Art. 7 and 15 respectively, as these articles were inserted into the conventions to confirm the legality of the Nuremberg judgments and the affirmation of the Nuremberg Charta by the UNGA.⁵⁸

A wide interpretation of the principle is also reflected in the jurisprudence of the ICTY and the ICTR.⁵⁹ Especially the *Celebici* Trial Chamber judgment needs mentioning here, since it pointed out that the implications of the *nullum crimen* principle, which are usually known at the national level, could not be readily transposed to the international level. Rather, the peculiarities of international criminal law, i.e. the *ad hoc* nature of many law-making processes at the international level, or the absence of legislative standards had to be taken into account when assessing the scope of the principle.⁶⁰ In particular, the tribunal emphasised on two aspects of the principle, i.e. on the rule of strict construction and the prohibition of retroactivity.⁶¹

The principle’s constraints on ‘constitutionalist’ reasoning on customary international criminal law

Several judgments of the ICTY have illustrated the tension which exists between the *nullum crimen sine lege* principle and findings on customary international law.

The first judgment is the *Aleksovski* Appeals Chamber decision which distinguished between interpretation of existing norms of international criminal law and the creation of new law, which would indeed violate the *nullum crimen* principle. The chamber held that the *nullum crimen sine lege* principle did not prevent the court from interpreting and applying existent law, and neither did it prevent the court from relying on previous decisions which ascribed some meaning to particular elements of a crime.⁶²

Subsequently, the *Vasiljevic* Trial Chamber judgment confirmed that also the findings of the court on the customary nature of a particular norm of international criminal law had to comply with the *nullum crimen sine lege* principle. As the chamber found, it would be a violation of the *nullum crimen* principle if the findings of the court on customary international law were either insufficiently precise or if a conviction were based upon a crime of which the accused had

International Covenant on Civil and Political Rights, Dordrecht, 1987, 326-329; K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts*, Berlin 2002, 42, 251.

⁵⁷ For Art. 15 (1) ICCPR see: M. Bossuyt, (note 62)324, 325; for Art. 7 (1) ECHR: see O. Triffterer, ‘Bestandsaufnahme zum Völkerstrafrecht’, in: G. Hankel/G. Stuby (eds.) *Strafgerichte gegen Menschheitsverbrechen*, Hamburg, 1993, 173.

⁵⁸ Cf. M. Nowak, Art. 15, in: *ICCPR Commentary*, Kehl, 1993, 281, para 18; J. Frowein, ‘Artikel 7 (Nulla poena sine lege)’, in: *EMRK Kommentar*, Kehl am Rhein, 1996, 327, para 8.

⁵⁹ Tadić, (note 24), 02.10.1995, para 42 – 48, at 46; Celebici, Trial Chamber Judgment, Case No. IT-96-21-T, of 26.11.1998, para 408.

⁶⁰ Celebici, Trial Chamber Judgment, Case No. IT-96-21-T, 26.11.1998, para 408.

⁶¹ *ibid.*

⁶² Aleksovski, Appeals Chamber Judgment, IT-95-14/1-A, 24.03.2000, paras 127.

not been reasonably aware at the time of the commission of the acts.⁶³ On the basis of these findings, the chamber rejected an argument of the prosecutor that ‘violence to life or person’ had already attained the status of customary international law. No corresponding state practice would support this contention. Furthermore, the ILC draft code of crimes invoked by the prosecution to prove the customary nature of the crime in question could only provide subsidiary evidence for the norm’s customary character; it could not be regarded as reflecting state practice.⁶⁴ According to these findings, proof of the customary international law nature of a provision of international criminal law seems to require supported of a minimum of state practice.

A third judgment, which dealt quite extensively with the implications of the *nullum crimen sine lege* principle for the findings in respect of customary international law is the *Ojdanic Appeals Chamber Decision on Joint Criminal Enterprise Liability*. First and foremost, it emphasised once again that the *nullum crimen* principle required a norm to exist at the time of the commission of the offence under international law, and that the law providing such liability must have been sufficiently accessible at the relevant time.⁶⁵

Moreover, the *Ojdanic* judgment pointed to the fact that customary international law itself posed some difficulty for the establishment of individual criminal liability in international law. It was not always as represented as written law and not always as easily accessible.⁶⁶ However, despite these uncertainties, this should not result in a watering down of the requirements of the *nullum crimen sine lege* principle. The court emphasised that especially the particular gravity or heinousness of an international crime were not sufficient to establish its customary international law nature⁶⁷ The clarity of the offence as well as its foreseeability still had to be established.

These findings clearly indicate that the Chamber disapproved of some of the earlier findings of the court with regard to the customary international law character of certain norms of international criminal law. It fired a warning shot in the direction of approaches to custom, which rely solely on a ‘core-rights-approach’ or deductive reasoning, without making reference to additional evidence of *opinio juris* or state practice.⁶⁸

Conclusion for the development of customary international criminal law

In light of all of the above jurisprudence, assessment of the ICTY and ICTR’s approach to customary international criminal law reveals some mixed tendencies. On the one hand, a trend away from the classical concept of custom, which is oriented solely upon evidence of the two elements of *opinio juris* and state practice of Art. 38 (1) (b) of the ICJ Statute is certainly discernible. There now seems to prevail a variety of approaches which are employed side by side, in addition to ‘traditional’ two-fold concepts. And even with regard to traditional approaches to

⁶³ Vasilievic, Trial Chamber Judgment, Case No. IT-98-32-T, 29.11.2002, para 193.

⁶⁴ *ibid.*, para 200.

⁶⁵ Ojdanic, Appeals Chamber Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction – Joint Criminal Enterprise –, Case No. IT-99-37-AR72, 22.05.2003, para 37.

⁶⁶ Ojdanic, Decision on Dragoljub Ojdanic’s motion challenging jurisdiction – joint criminal enterprise – Appeals Chamber Decision - IT-99-37-AR72, 22.05.2003, para 41.

⁶⁷ The tribunal quoted the Tadić decision as an example for the employment of such a technique for the finding of customary international law; cf. *ibid.*, para 42.

⁶⁸ For a most recent discussion of this issue see: Stakic Appeals Chamber Judgment, Case No. IT-97-24-A, 22.03.2006, para 302.

custom, the tribunals seem to move away from approaches which focus upon the evidence of each particular element of customary international law.

On the other hand, it also appears that the very same 'traditional' elements of custom seem to delimit new approaches to customary international law. Since evidence of norms of customary international law has to comply with the requirements of legal clarity and foreseeability of the *nullum crimen sine lege* principle, the tribunals seem to define the outer limits of a deductive approach or a human rights-based approach to customary international criminal law by reference to *opinio juris* and state practice.

Nevertheless, a court would not necessarily be required to actively prove the existence of a certain customary norm by *opinio juris* or state practice. It only would have to establish that there is no contrary evidence of state practice or *opinio juris* which disproves the existence of the norm developed by the 'new' approach. The new approaches identified thus seem to serve as a *prima facie* evidence for applicable customary international law.

Hence, approaches which utilise custom formation in international criminal law in order to proof the growing constitutionalisation of international law are right and wrong at the same time. They are right in that customary international criminal law has developed away from the traditional concept of custom, oriented solely toward state practice and *opinio juris*. However, they are wrong in that the new approaches somehow replace the traditional concept of custom. At least in the field of international criminal law traditional elements of custom still play an important role in delimiting these 'newly' developed approaches to customary international law and in securing compliance with the premises of the *nullum crimen sine lege* principle.

Lessons for the formation of general customary international law

Perhaps some of the foregoing considerations can also be fruitful for discussions about the development of general customary international law. In this regard, especially the implications of the *nullum crimen sine lege* principle need some closer scrutiny. Since this principle constitutes only one particular expression of the principle of legality, which prevails in all international proceedings, its implications for the formation of custom may also find application in the formation of new general customary international law. Thus, aspects of foreseeability and legal clarity will need consideration when determining the formation of general customary international law. This approach, however, proceeds on the basis that traditional two-element approaches to custom have not completely lost their importance in the determination of customary international law. *Opinio juris* and state practice still play a role in providing the outer limits of 'new' approaches to custom formation.

Moreover, as the jurisprudence of ICTY and ICTR has revealed, the evidentiary value of certain international acts (of states) for the element of *opinio juris* or state practice would also have to be reconsidered. If evidence could establish presence of either element of customary international law, this should find recognition as a whole. In some cases, a differentiation between the two elements of customary international law is hardly ever possible. General international law could thus profit from the more flexible approach to customary international criminal law. This could also include a widening of the spectrum of available evidence to prove the existence of a customary norm. Thus, an examination of UNGA or UNSC resolutions,

international treaty law as well as international and national jurisprudence to support the customary character of a certain rule of international law should no longer pose any difficulties.⁶⁹

In conclusion, ‘constitutionalist’ tendencies in international criminal law will certainly have an impact on the formation of general international law. Yet, it seems that the law reacts even more flexibly to new challenges than is stipulated by ‘new’ theoretical approaches to customary international law. It is a welcome development that the courts have not stuck to one particular ‘constitutionalist’ approach to customary international law, but rather employed a broad spectrum of methods to establish the applicable law. New approaches are thus not applied as uncompromisingly as some scholars maintain and at least at their outer limits are still delimited by the ‘traditional’ concept of customary international law.

⁶⁹ For earlier disputes about the character of UNGA resolutions: Bin-Cheng, ‘United Nations Resolutions on Outer Space: “Instant” Customary International Law?’, 5 *Indian Journal of International Law* (1965), 36ff.