The Contribution of Customary International Law to the Development of International Crimes: The Role of International Courts and Tribunals

A Thesis Submitted to the Middlesex University in Partial Fulfilment of the Degree of Doctor of Philosophy

By

Manjida Ahamed

School of Law
Middlesex University London

April 2021

Abstract

The development of international crimes rightly touches the statement, 'desperate ills need desperate medicines', made by Mr C.B. Burdekin, a representative from New Zealand, during the thirty-sixth meeting of the United Nations War Crimes Commission on 17 October 1944. The thesis is intrigued by the fact that the development of international crimes suffers from an identity crisis. Finding sources of crimes within the rules of customary international law always appears with multiple complexities.

The thesis observes the evolution of international crimes under customary international law starting from World War I. It aims to analyse the evidence that were instrumental to the making, developing, identifying the elements of international crimes. The thesis intensively looks into the contribution of customary international law in the development process of international crimes. It analyses whether the sources referred by the international courts and tribunals as evidence of law satisfy the two-element approach of customary international law or have been used merely as a tool to reconcile with the principle of legality. The primary aim of the thesis is twofold: first, it examines the sources of international crimes identified by the international courts and tribunals, and second, it analyses whether there is any separate ascertainment of the sources justifying the presence of State practice and *opinio juris*.

Like other scholars, the thesis notices inconsistent methodologies of the custom identification process. Methodologies are diverse and highly influenced by several external variables. However, unlike others, the thesis does not entirely emphasise value-driven *opinio juris*; instead, it finds the existence of *opinio juris* appears from international legal norms, principles and instruments and suggests an international practice-based *opinio juris*.

Acknowledgements

I am immensely grateful to Professor William Schabas, my director of studies and Dr Anthony Cullen, my first supervisor. This work would never have finished without their constant guidance and support over the years. My words are not enough to thank Dr Cullen for his patient assistance and moral support.

I am greatly indebted to my husband for his endless support and encouragement till the end. Thanks to my mother, elder sister, other family members and friends for their inspiration to complete this journey. Thanks are due to a number of individuals who have read and commented on parts of this thesis. These include Dr Sonia Zaman Khan, Michelle Coleman, Mohammad Taqi Yasir and Mohua Jalali, Durga Vellore Nagarajan.

The Contribution of Customary International Law to the Development of International Crimes: The Role of International Courts and Tribunals

TABLE OF CONTENTS

INTRODUCTION

This thesis examines the contribution of customary international law to the development of international crimes identified, mainly by the international criminal courts and tribunals. The main research goal is to analyse whether the development of international crimes satisfies the requirements of customary international law. The thesis finds and shows the development of international crimes, at various levels, through the efforts of international criminal courts and tribunals. It also looks into the contribution of two major international institutions: a) The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties 1919 (Commission on Responsibilities 1919) and b) the United Nations War Crime Commission (UNWCC) to address the research goal. This thesis attempts to answer two questions: first, how did international organisations identify international crimes and what were the sources used by them? Second, do these sources support the classic definition of customary international law?

The thesis consists of five substantive chapters which address the research aim set out above. The development of international crimes under customary international law has been documented from the contribution of the Commission on War Responsibilities 1919, UNWCC and other international courts and tribunals. Their efforts have been described as instrumental in defining, construing or interpreting international crimes under customary international law.

The first chapter of the thesis discusses the development of customary international law in general, particularly the formation and validity of the customary international law. It discusses significant aspects of the constituent elements, State practice and *opinio juris*, of customary international law. The appearance of both elements have been discussed in the light of the decisions of the International Court of Justice (ICJ) and reports of the International Law Commission (ILC). Both the ICJ and ILC advanced the presence of the two-element approach to the formation of customary international law. This chapter shows the complex nature of State practice and *opinio juris*. It also questions whether *opinio juris* can alone form customary international law. The chapter further reveals that the custom formation process is dynamic yet complex. The dynamism of customary international law has been observed in the light of modern views of customary international law. This view introduces a flexible use of State practice and *opinio juris.* The agreement between State practice and *opinio juris* is a paradox. This paradox, sometimes, fails to identify a norm under customary international law. The first

chapter therefore provides a basic understanding so that the peculiarities associated with the development of international crimes can be cautiously observed.

The second chapter of the thesis discusses the development of international crimes following World War I. It shows that the Commission on Responsibilities 1919 played a central role in making the list of international crimes. This was the first concerted effort of an international organisation to provide a list of war crimes, by collecting criminal facts from various sources. These include national law, international conventions, the laws and customs of war, the law of nations and laws of humanity. The chapter analyses the reports submitted by the members of the Commission on Responsibilities 1919. It acutely observes the creation of a list of war crimes as international crimes. To identify crimes, the Commission referred to the Lieber Code, the Geneva Convention 1864, St. Petersburg Declaration 1868, Brussels Declaration 1874, Oxford Manual 1880, the Hague Convention 1899, the Hague Convention 1907. The chapter shows how the limited application of the Hague Conventions was resolved by the Commission, resorting to other sources such as the law of nations or laws and customs of war. However, the 'laws of humanity' as a source, was opposed to be included as there was no legal foundation for it. No crimes received a place in the list of war crimes for the violation of 'laws of humanity'. Despite the Commission's strenuous efforts, there was no international prosecution for war crimes. Nonetheless, the Commission's work carried significant legal importance. Subsequently, the legacy of identifying international crimes was maintained by the United Nations War Crime Commission (UNWCC), the Nuremberg and other trials.

The third chapter analyses the development of international crimes following World War II. It looks into the work of the UNWCC, the Nuremberg and other trials. This chapter observes their efforts of identifying sources to the development of international crimes such as crimes against peace, war crimes and crimes against humanity. This chapter revisits the key reasonings provided by them to identify the presence of crimes under international law, particularly under customary international law. It analyses whether the sources cited by them met the classic definition of customary international law. To this end, it examines State practice and *opinio juris* from the natural law and positive law perspectives. The chapter also discusses the prevailing concept of the principles of humanity, following World War II, while the presence of it was omitted from the final list of war crimes prepared by the Commission on Responsibilities 1919 after World War I. The 'principles of humanity' was regarded as one of the basic foundations to determine the concept of crimes against humanity.

The fourth chapter of the thesis focuses on the contribution of customary international law in developing the substantive elements of international crimes. This chapter mainly discusses the role of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The ICTY and ICTR (the *Ad Hoc* Tribunals) had pledged to prosecute war crimes, crimes against humanity and genocide. The chapter looks into the sources applied by the *Ad Hoc* tribunals to the evolution of customary international law. A separate examination of State practice and *opinio juris* from the materials cited by the *Ad Hoc* Tribunals remained obscure. This chapter shows that their interpretative methods do not provide any concrete answer to the identification of State practice and *opinio juris*, rather result in indecisive conclusions. The chapter looks into the interpretative independence of the judges to find the existence and content of customary international law from three approaches: judicial decision-based approach, human rights-based approach and instrument-based approach. The chapter analyses whether these approaches meet the requisite elements of customary international law or just reflect the dominant presence of the one element of custom, i.e., *opinio juris.* Further, this chapter observes whether other international criminal tribunals such as the Special Court for Sierra Leone (SCSL), Special Tribunal for Lebanon (STL), Extraordinary Chambers in the Courts of Cambodia (ECCC), International Criminal Court (ICC) follow the same footstep marked by the *Ad Hoc* Tribunals or do they have their own methodologies to identify rules of customary international law.

The fifth chapter of the thesis discusses the origin of the crime of genocide. Unlike other crimes, the crime of genocide has not been introduced by international criminal tribunals. It started its journey through the adoption of the Genocide Convention. The prohibition of genocide is codified as an international crime. However, there was no conviction for the crime of genocide until 1998. The definition of the crime of genocide was broadly discussed by the judges of *Ad Hoc* Tribunals in the late 1990s. They provided expansive interpretation of the customary rules of genocide. The chapter highlights this expansive interpretation with respect to two elements of genocide: 'intent' and 'group'. This chapter also analyses the interconnectedness between expansive interpretation and the two-approach of customary international law.

The thesis analyses the reference of sources to determine international crimes under customary international law using primary and secondary sources. The question on customary rules of international crimes is mainly approached through the application of primary materials, particularly: the minutes, meetings and reports of the Commission on Responsibilities 1919,

the UNWCC, and the International Law Commission (ILC). Primary materials also include statutes, rules and case law of the Leipzig trials, the International Court of Justice (ICJ), the Nuremberg and other trials, ICTY, ICTR, STL, SCSL, ECCC, ICC. These sources significantly contributed to the development of international crimes. The thesis dissects the contribution of customary international law to the development of international crimes in four stages. The first stage discusses the efforts of making international crimes after World War I. The second stage looks into the development of international crimes under international law following World War II. The third stage observes the identification of international crimes under customary international law by the international criminal courts and tribunals established after 1990. The fourth stage discusses the expansive interpretation of international crimes under customary international law.

This research contributes to the knowledge in different ways. Firstly, it brings together the historical development of international crimes under customary international law. There is no comprehensive work showing the development of international crimes compiling three phases in one document. Several works have been done in a limited way, focusing on one or two international organisations' contribution. The research further provides an overall picture analysing the role of all significant institutions. It analyses how the above-mentioned international institutions applied diverse sources to identify international crimes under customary international law.

Secondly, the lack of actual State practice to the determination of international crimes opens several avenues for discussion. This thesis shows that *opinio juris* (acceptance as law) appears first in the identification process of customary rules of international crimes based on international practice, where State practice plays a supportive role subsequently.

Finally, the thesis discerns the above-mentioned international organisations' justification to comply with the principle of legality. This principle has been tactfully maintained in line with the evolution of customary international law. The thesis observes a superficial adjustment with the principle of legality in the name of customary international law.

CHAPTER 1: THE IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW: STATE PRACTICE AND *OPINIO JURIS*

1.0 Introduction

Customs generally develop under international law based on the classic theory of customary international law, i.e., State practice and *opinio juris sive necessitatis* ("*opinio juris*"). The theory and doctrine of custom have been criticised for being incoherent, irrelevant, fictitious and confusing.[1] This chapter, taking the relative impact of State practice and *opinio juris* into account, showcases approaches to the formation of customary international law. The nature of customary international law, in particular the relationship between State practice and *opinio juris*, has been fraught with controversies.

This discussion on the classic notion of customary international law largely relies on the reports of the International Law Commission (ILC) and decisions of the International Court of Justice (ICJ). While the ILC and ICJ emphasised the two-element approach to form customary international law, recent scholarships look into the one-element approach to form customary international law. There are disagreements as to whether *opinio juris* precedes State practice or supplants it, leading towards a new concept of customary international law. This chapter shows the interconnectedness between State practice and *opinio juris* on which other chapters of the thesis rely on to find solutions.

1.1 Customary International Law: Demonstration of General and Consistent State practice

The justification of an emerging norm involves demonstrating general and consistent practice, followed by a sense of legal obligation. In recent years, the significant task on the identification of customary international law has been carried out by the work of the ILC. Sir Michael Wood was assigned as Special Rapporteur in this matter. The ILC suggested, in its report to the General Assembly in 2011, that the topic should discuss two important issues, among others, first the underlying issues and collection of materials, and second, some central

[1] Andrew T Guzman, 'Saving Customary International Law' (2005) 27 Michigan Journal of International Law, 1, 117, pp. 116- 117.

questions concerning the identification of State practice and *opinio juris*.[2] The topic title was initially proposed as 'Formation and evidence of customary international law'. However, in 2013, the ILC, at its sixty-fifth session, decided to change the topic title to 'identification of customary international law'. The work of the ILC reflects more on the identification of the rules of customary international law based on various sources rather than its formation. The ILC invited States to provide information on their practice as provided in 'a) Official statements before legislatures, courts and international organizations; and b) Decisions of national, regional and subregional courts.'[3]

Michael Wood identified the presence of both State practice and *opinio juris* to form customary international law. It has been considered a difficult process to define the characteristics of customary international law following a 'coherent theory'.[4] The attributes of finding uniform or consistent practice are equally complex, as there may have differences between the members of a group. Some members of a group may follow practice, and some may not.[5] Michael Wood discussed the role of the two elements in the Second and Third Reports of the Special Rapporteur. The Second Report of the ILC meticulously presented the basis that the identification of a rule of customary law requires an assessment of both practice and the acceptance of that practice as law. The Second Report proposed 11 draft conclusions on the identification of customary international law. Draft conclusion 2 states that 'customary international law means those rules of international law that derive from and reflect a general practice accepted as law.'[6] The Report also stated that the two-element approach is adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice.[7] Cassese noted the significance of the work of the ICJ, stating that,'[G]iven the rudimentary character of international law, and the lack of both a central law-making body and a central judicial institution endowed with compulsory jurisdiction, in practice many decisions of the most authoritative courts (in particular the ICJ) are bound to

[2] Formation and evidence of customary international law, Note by Michael Wood, Special Rapporteur, A/CN.4/653, para. 27.
[3] First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur, A/CN.4/663, para. 4.
[4] Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 American Journal of International Law 757, p. 757.
[5] A. Mark Weisburd, 'The International Court of Justice and the Concept of State Practice' 31 University of Pennsylvania Journal of International law 2, p. 303.
[6] Second report on identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/672, p. 7.
[7] Ibid., para. 21.

have crucial importance in establishing the existence of customary rules, or in defining their scope and content, or in promoting the evolution of new concepts.'[8]

The existence of the two-element approach is considered as indispensable for any rule of customary international law.[9] The Second Report observed support of the two-element approach of custom in the State practice of different states such as Rwanda, Uruguay, the Netherlands, the United Kingdom and member states of the European Union.[10] It also noted examples of some courts supporting the existence of State practice and *opinio juris*, such as the Supreme Court of Singapore, the Constitutional Court in Slovenia, the Constitutional and Supreme Court of the Czech Republic, the New Zealand Court of Appeals. In the Sixth Committee debates in 2012 and 2013, the existence of both elements has been acknowledged by Austria, India, Israel, Iran, Malaysia, the Nordic countries, Portugal, Russia, South Africa, and Vietnam.[11]

The Second Report provided a non-exhaustive list of State practice. The Report assessed different forms of practice to identify customary international law. States include a 'great variety of forms' as practice in their 'interaction and communication', instead of limiting themselves to some 'determined types of acts'.[12] It includes 'physical actions of States' 'acts of the executive branch', 'Diplomatic acts and correspondence', 'Legislative acts', 'Judgements of national courts', 'Official publications in fields of international law', 'Internal memoranda by State officials', 'Practice in connection with treaties', 'Resolutions of organs of international organisations, such as the General Assembly of the United Nations, and international conferences'.[13] In 2016, the Text of the draft conclusions provisionally adopted by the Drafting Committee mentioned that 'forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.'[14] The ICJ in the *Nicaragua* case also pointed out similar kinds of State practice in 1986, including states' attitude towards certain

[8] Antonio Cassese, *International Law* (Oxford University Press 2001) 159.
[9] Second report on identification of customary international law, by Sir Michael Wood, Special Rapporteur, A/CN.4/672, para. 23.
[10] Ibid., para. 24.
[11] Ibid.
[12] Ibid., para. 39.
[13] Ibid., para 41.
[14] Draft Conclusion 6, Identification of Customary International Law, A/CN.4/L.872, p. 2.

General Assembly resolutions, statements by state representatives, obligations undertaken by states in international forums, findings of the ILC, etc.[15]

1.1.1 State practice

State practice requires the 'coherent and consistent' behaviour of the state. Lack of coherent or consistent behaviour of the organs on a particular subject matter may minimise the weight of State practice. Draft Conclusion 6 pointed out the requirement of coherent practice, on the matter in question, as significant between the organs of a state. According to this Conclusion, practice consists of conduct 'that is attributable to a State, whether in the exercise of executive, legislative, judicial or any other function'.[16] Draft Conclusion 8 (2) states that 'account is to be taken of all available practice of a particular State. Where the organs of the State do not speak with one voice, less wight is to be given to their practice.'[17] In practice, there is no evidence that the international criminal courts and tribunals cross-examine among the organs of a state while looking at judicial decisions to identify rules of customary international law.

The nature of State practice requires 'generality of practice'. The Second Report of the ILC stated that 'for a rule of general customary international law to emerge or be identified the practice need not be unanimous (universal); but, it must be "extensive" or, in other words, sufficiently widespread.'[18] The practice of a State does not require the participation of all nations. Most pertinently, 'the participating States should include those that had an opportunity or possibility of applying the alleged rule.'[19] It is impossible to know the practices of about 200 States on a particular issue. Niles Petersen noted that 'a survey of customary international law is often highly selective and takes into account only major powers and most affected states.'[20] Similarly, Judge Lachs, in his dissenting opinion in the *North Sea Continental Shelf Case*, stated that 'to become binding, a rule or principle of international law need not pass the test of

[15] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*), ICJ Reports 1986, para. 186.
[16] Second report on identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/672, p. 19.
[17] Ibid., p. 36.
[18] Ibid., para 52.
[19] Draft Conclusions on Identification of Customary International Law Commission, 2018, A/73/10, p. 136.
[20] Niels Petersen, 'Customary Law without Custom- Rules, Principles, and the Role of State Practice in International Norm Creation' (2007) 23 *American University International Law Review* 275, p. 277.

universal acceptance.'[21] He stated that evidence of widespread practice could be drawn not only from the state parties to the Convention but also from the subsequent practice of other states. Subsequent practice of states includes agreements, national legislation, States' acquiescence in various legislative matters.[22] He added that 'the evidence should be sought in the behaviour of a great number of States, possibly the majority of States, in any case, the great majority of the interested States.'[23] The Second Report of the ILC also noted and emphasised the participation of 'those states whose interests are specially affected.' [24] It also added that the practice of most 'affected or interested' states may prevent a rule from emerging.[25] the ICJ clarified in the *North Sea Continental Shelf* case that:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[26]

States' frequent recognition and consent play a significant role to support 'generality of practice'. In the *North Sea Continental Shelf* case, the ICJ stated that a general rule of customary international law requires conscious consent of states either supporting or opposing a practice in question.[27] Judge Ammoun observed in the *North Sea Continental Shelf* case that Article 38(1)(b) of the Statute of International Court of Justice requires a State to demonstrate its practice and consent to reflect the generality of States.[28] Also, in the same decision, the

[21] *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands),* ICJ Reports 1969, pp. 229-230.
[22] *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands),* (Dissenting Opinion of Judge Lachs), p. 229.
[23] *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, (1969) ICJ Reports 3, pp. 229-230.
[24] Second report on identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/672, para. 52.
[25] Ibid., para.52.; See also, *North Sea Continental Shelf, Judgment,* ICJ Reports 1969, p. 3, at p. 42, para. 73
[26] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*), ICJ Reports 1986, p. 43.
[27] *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, (1969) ICJ Reports 3, p. 131.
[28] Ibid., p. 104.

Court discussed the unilateral practice of States as State practice. However, sometimes the unilateral behaviour of the State may fail to achieve universal acceptance. In the case of *Fisheries Jurisdiction*, the unilateral extension of Fisheries Jurisdiction based on custom was considered unacceptable by the British delegation. It was submitted by the British delegation that the 'rule would not only have to reflect the practice of many States but also be generally accepted, i.e., established by general consent and recognised as such by the International Court of Justice.'[29] Similarly, in the *Anglo-Norwegian Fisheries* case, Judge Read stated in his dissenting opinion that 'customary international law is the generalisation of the practice of States. This cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships. Such claims may be important as starting points, which, if not challenged, may ripen into historic title in the course of time.'[30] In contrast, some scholars consider that concept of 'general practice' to justify the evidence of custom could be 'misleading'.[31] Sometimes, customary rules can emerge within a region or between two States.[32]

The International Court of Justice drew attention to 'constant and uniform usage' as evidence of customs in several cases. The ICJ in the *Asylum* case did not find any 'constant and uniform usage' due to the number of uncertainties, contradictions, fluctuations, discrepancies to diplomatic asylum.[33] However, in the *Continental Shelf* case, Judge Lachs in his dissenting opinion stated that the term 'uniformity' does not place much importance on indicators such as: 'few uncertainties or contradictions, real and apparent.'[34] The ICJ in the *Asylum* case emphasised these two attributes in response to Colombia's reliance on some regional or local customs. The ICJ stated that 'the Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question…'[35] Although the

[29] *Fisheries Jurisdiction Case* (*United Kingdom of Great Britain and Northern Ireland v Iceland)*, ICJ Reports 1974 (Dissenting Opinion of Judge Gros), p. 132.
[30] *Anglo-Norwegian Fisheries case* (*UK v Norway*) (1951) ICJ Reports 116, (Dissenting Opinion of Judge J.E. Read), p. 79.
[31] Dominique Francois De Stoop, *An Outline of International Law* (Calwell, ACT: ASPG 2019) 7.
[32] Ibid., p. 7.
[33] *Asylum Case (Columbia v Peru)*, ICJ Reports 1950, p. 277.
[34]*Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands),* ICJ Reports 1969, (Dissenting Opinion of Judge Lachs), p. 229; *Fisheries Jurisdiction case,* ICJ Reports 1951, p. 138.
[35] *Asylum Case (Columbia v Peru)*, ICJ Reports 1950, p. 276.

Colombian government referred to many treaties on extradition, the ICJ did not find the existence of customs which could be applied against Peru.[36] Similarly, the ILC also mentioned that 'complete consistency' is not a requirement; some inconsistencies do not impair the search for 'general practice'.[37] However, repeated contradictions of States opposing the common, consistent, and concordant practice usually prevent the emergence of customary law.[38] In the *Nicaragua* case, the ICJ noted about the significance of 'consistent State practice' that:

> It does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.[39]

In addition to consistent practice, the duration of State practice also plays a significant role in the formation of customary international law. Judge Chagla pronounced in his dissenting opinion that a local custom could turn into an international obligation if that right were exercised for a considerable period.[40] Sometimes, State practice requires passage of a long period. However, from Judge Lachs's pronouncement in the *North Sea Continental Shelf* case, it can be understood that a long period was not a requirement. Rather, it was emphasised that 'the great acceleration of social and economic change, combined with that of science and technology, have confronted law with a serious challenge: one it must meet, lest it lag even farther behind events than it has been wont to do.'[41] State practice can be formed even in a short period, provided that the 'period in question' includes 'practice of States whose interests are especially affected'.[42] The question of 'frequency or continuity' will only be raised if there

---

[36] Ibid., p. 277.
[37] Draft Conclusions on Identification of Customary International Law Commission, 2018, A/73/10, p. 137.
[38] *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v Iceland)*, ICJ Reports 1974 (Joint Separate Opinion of Judges Forster, Bengzon, Jimenez De Arechaga, Nagendra Singh and Ruda), p. 50.
[39] *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)*, ICJ Reports 1986, p. 88.
[40] *Right of Passage Case (Portugal v India)*, (1957) ICJ Reports 1957 (Dissenting Opinion of Judge Chagla), p. 56.
[41] *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, ICJ Reports 1969, p. 231.
[42] *Fisheries Jurisdiction Case (United Kingdom and Northern Ireland v Iceland)*, ICJ Reports 1974, (Joint Separate Opinion of Judges Forster, Bengzon, Jimenez De Arechaga, Nagendra Singh and Ruda), p. 52.; See also

are multiple opportunities to act on that rule, whereas in terms of delimitation - as it is a one-time act - the 'lasting consequences' can satisfy the requirement of continuity.[43]

Evidence of State practice is also found in States' assertion and enforcement of claims on contentious issues. For example, in the *Anglo-Norwegian Fisheries* case, the 'actual assertion and enforcement' of the States was emphasised by the coastal States claiming their sovereignty over the water in question.[44] In addition to this assertion, Judge Read also discussed whether the 'acquiescence' of States over a disputed subject could play a role in forming customary international law.[45] In the context of considering 'acquiescence' as 'consent' of States, Distefano stated that 'a state can acquiesce only to what it knows.'[46] Acquiescence in the process of custom formation means an 'acquiescence by the international community as a collective entity, rather than acquiescence by a particular state or group of states.'[47] Similarly, a practice that depends on the discretionary power of another State does not reflect consent and thus cannot be properly defined as State practice. For example, in the *Rights of Passage* case, the ICJ held that:

> It would thus appear that, during the British and post-British periods, Portuguese armed forces and armed police did not pass between Daman and the enclaves as of right and that, after 1878, such passage could only take place with previous authorisation by the British and later by India, accorded either under a reciprocal arrangement already agreed to, or in individual cases. Having regard to the special circumstances of the case, this necessity for authorisation before passage could take place constitutes, in the view of the Court, a negation of passage as of right. The practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does

ICJ Reports 1950, p. 277.; ICJ Reports 1969, p. 43. *North Sea Continental Shelf* cases 'that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform'.

[43] *Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands),* ICJ Reports 1969, (Dissenting Opinion of Judge Lachs) p. 229.

[44] *Anglo-Norwegian Fisheries Case* (*United Kingdom v Norway*), ICJ Reports 1951, (Dissenting Opinion of Judge J.E. Read), p. 79.

[45] Ibid., p. 90.

[46] Giovanni Distefano, 'The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law' (2006) 19 Leiden Journal of International Law 1041, p.1060.

[47] Etienne Henry, 'Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law (with special reference to the jus contra bellum regime)' 18 Melbourne Journal of International Law 2, p. 9.

> not, in the opinion of the Court, affect the legal position. There is nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation.[48]

The consensus of the international community is also a form of State practice. The legal positions of the State representatives at the Geneva Conference reflect their consensus on a particular matter. Judge Ammoun mentioned in his separate opinion that 'this aggregate body of elements, including the legal positions taken up by the representatives of the majority of the countries at the Geneva Conference, even by those who expressed reservations, amounts here and now to a consensus constituting an international custom …'[49] In the *Fisheries Jurisdiction* case, one of the two unresolved questions was the extent of fisheries rights which was crystallised as customary international law based on consensus at the Conference.[50] Waldock claims that State practice might also emerge from the consensus of the international community. He describes declarations of the UN General Assembly as the best reflection of such consensus.[51] Menon similarly states that 'general consensus in any conference can play a vital role in forming customary international law.'[52] Whatever the form of State practice, it is always accompanied by a legal obligation.

Communication as a matter of mere grace or concession alone is not sufficient to establish international obligation. Any action of States that arises mostly out of 'comity, courtesy or habit' cannot contribute to the development of the customary law. This type of development lacks the normative requirements for being custom.[53] Thus, a practice should arise not merely from the comity, but also the conscious behaviour of States. The ICJ in the *Lotus* case held that an abstention by a State from instituting criminal proceedings on the collision cases could not constitute customary law because this abstention was not out of duty.[54] Hence it is possible for State practice to emerge from the State's conscious abstention from taking

---

[48] *Right of Passage Case (Portugal v India)*, ICJ Reports 1957*,* p. 40.
[49] *Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands),* ICJ Reports 1969, p. 107.
[50] *Fisheries Jurisdiction Case (United Kingdom and Northern Ireland v Iceland)*, ICJ Reports 1974, para. 52.
[51] Humphrey Waldock, 'Human Rights in Contemporary International Law and the Significance of the European Convention' (1965) 11 International and Comparative Law Quarterly Supplementary Publication No. 1, p. 15.; Niels Petersen, 'Customary Law without Custom- Rules, Principles, and the Role of State Practice in International Norm Creation, (2008) 23 American University International Law Review 275, p. 282.
[52] PK Menon, 'Primary, Subsidiary and other Possible Source of International Law' (1989) 1 Sri Lanka Journal of International Law 113, p. 150.
[53]Restatement (Third) of the Foreign Relations Law of the United States, (St. Paul, MN: American Law Institute, 1987) para. 102.
[54] *S.S Lotus (France v. Turkey)*, (1927) PCIJ Series A, No. 10, p. 42.

action. In the situation of territorial and maritime disputes, 'the inaction of all interested third states is […] relevant.'[55] For example, in the *Legality of the Threat or Use of Nuclear Weapons* case, when examining the prohibition of the threat or use of nuclear weapons under customary international law, the ICJ focused on the 'substance of the law' that exist primarily in the actual practice and *opinio juris* of the States.[56] To classify the use of nuclear weapons as illegal under customary international law, the Court noted the views of States who supported the non-utilisation of nuclear weapons since 1945. Subsequently, this practice has been consistently followed or maintained by other States. The Court concluded that the State's abstention reflects an expression of *opinio juris* to those States who possess such weapons.[57] On the other hand, the Court also noted an opposite view, namely that 'if nuclear weapons have not been used since 1945, it is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen.'[58] The resolutions, nonetheless, concerning nuclear weapons did not manifest the existence of *opinio juris,* as a significant number of States either abstained or voted against the resolution.[59] It seems logical to mention that o*pinio juris* cannot emerge from the division of opinion among the members of the community. The court did not rule based on a practice known as the 'policy of deterrence'.[60]

Exception

The 'persistent objector' is an exception wherein States are not compelled to follow a customary norm because of their continuous objections to that practice since its inception. This rule obstructs the consent of States and thus weakens the legal obligation of States. Nonetheless, the Draft Conclusions of the ILC states that States must raise their objections before or after the emergence of the rule of customary international law.[61] A rule of customary international law does not apply to a State which opposes and maintains the objection. However, the rules of customary international law apply if the objection to the question is dropped or withdrawn by the State itself.[62] This objector helps removing confusion and

[55] Etienne Henry, 'Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law (with special reference to the jus contra bellum regime)' 18 Melbourne Journal of International Law 2, p. 14.
[56] *Legality of the Threat of Use of Nuclear Weapons (ICJ Advisory Opinion),* ICJ Reports 1996, p. 31.
[57] Ibid., p. 31.
[58] Ibid., p. 32.
[59] Ibid., p. 255.
[60] Ibid., p. 32.
[61] Draft Conclusions on Identification of Customary International Law with Commentaries, 2018, A/73/10, p. 153.
[62] Ibid., p. 153.

uncertainties to the acceptance of a practice by states. In this regard, it is important to answer how essential it is to have a legal obligation to follow the practice. The following section discusses the significance of *opinio juris.*

1.1.2 *Opinio Juris*

Customary international law requires 'much more than a piling up of a large number of instances.' These instances are always required to be supported by 'mental or psychological' element.[63] The Second Report on Identification of Customary International Law stated that *opinio juris* provides legal obligation and should not be confused with considerations of 'social or economic nature'.[64] 'Mere adherence' to an alleged rule is considered as insufficient.[65] Similarly, a large number of '"concordant acts" or the fact that such cases have been occurring "over considerable period of time" may not satisfy the existence of *opinio juris* unless these facts may indeed give rise to the acceptance of the practice as law.'[66] The legal obligation to follow a practice is paramount in determining what should come under customary international law. The understanding of *opinio juris* requires a distinction between practices that appear out of legal obligation and those that merely develop from 'courtesy, morality or fairness'.[67] The test of *opinio juris* is sometimes problematic for states because they may believe something as legal which is not the case always. Thus, ill-founded beliefs can give birth to custom.[68]

The identification of a rule of customary international law requires motivation behind a certain practice. The presence of motivation is essential to objectify a 'legal' custom from nonlegal 'usage'.[69] In terms of treaty obligation, motivation to comply with treaty obligation may not give rise to the existence of *opinio juris*. In this regard, the existence can be discernible from the treaty compliance of the states who are not parties to it.[70] Hence, it is not possible to identify the 'inner motivation' of states as evidence of law only from the treaty obligation.

---

[63] Second report on identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/672, para. 60.; See also, *Asylum Case*, ICJ Rep 1950, p. 266
[64] Ibid., para. 61.
[65] Ibid., para. 72.
[66] Ibid., para. 73.
[67] Olufemi Elias, 'The Nature of the Subjective Element in Customary International Law' (1995) 44 International and Comparative Law Quarterly 3, p. 502.
[68] Ibid., p. 503.
[69] Second report on identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/672, para. 70.
[70] Ibid., para. 62.

The expression of *opinio juris* is also detectible from the various behaviours of the States. In the *Nicaragua* case, the ICJ held that *opinio juris* stems not only from the behaviour of the States who support the matter in dispute but also from the States' opposite reaction.[71] In other words, the test of *opinio juris* should be applied upon the interested parties because they are in a position to act or react on the matter in question.[72] The conduct of the interested parties is significant to understand their legal obligation.[73] The ILC Report presented a list of materials that may show the existence of *opinio juris*. First, the intergovernmental (diplomatic) correspondence may reflect *opinio juris.* In this regard, a careful analysis is needed to observe state's opinion as to the existence of a legal rule. The Report does not indicate all correspondences as the evidence of *opinio juris.* Second, the jurisprudence of national courts bears the evidence of *opinio juris*. In this regard, the evidence of *opinio juris* is reflected when 'such judgements apply the rule in question in a way which demonstrates, mostly by way of its reasoning, that it is accepted as required under customary international law,…'[74] Third, the opinions of government legal advisers also contain the evidence of *opinio juris*, in particular their opinion as to the existence or non-existence of customary international law is significant. Fourth, official publications in fields of international law. Fifth, Treaties may potentially determine the existence of 'acceptance as law', provided that '[c]onventions continue to be a very important form for the expression of the *juridical* conscience of peoples.'[75] However, in this regard, caution must be given so that 'such juridical consciousness' must remain as a rule of law, regardless of treaty obligation.[76] Treaties or certain provisions in it easily discernible as evidence of accepted as law if they are considered as 'declaratory of existing customary international law.'[77] Sixth, 'resolutions of deliberative organs of international organizations, such as the General Assembly and Security Council of the United Nations, and resolutions of international conferences'. Resolutions are not accepted as law automatically. It is significant in this regard to look at 'its content and the conditions of its adoption' whether normative character of resolutions reflects *opinio juris* or nor.[78] Ntoubandi found the use of human rights instruments by the United Nations member states demonstrates the growth of the evidence of

[71] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, (1986) ICJ Rep 14, para. 207.
[72] Second report on identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/672, para. 64.
[73] Ibid.
[74] Ibid., para. 76.
[75] Ibid.
[76] Second report on identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/672, para. 76.
[77] Ibid., para. 76.
[78] Ibid., para. 76.

opinio juris. These include conventions, declarations, and resolutions of the United Nations General Assembly to prevent human rights abuses.[79]

The deduction of *opinio juris* is readily available. In the *Paquete Habana* case, 'the evidence of the *opinio juris* included mediaeval English royal ordinances, agreements between European nations, orders issued to the U.S. Navy in earlier conflicts, and the opinions of legal writers.'[80] Judge Ammoun in his separate opinion observed that any reservation in conventions generally hinders the evidence of *opinio juris*.[81] Despite the fact that *opinio juris* manifests the development customary international law, it has always been in a state of uncertainty due to the lack of 'generality and non-opposition.'[82]

The discussion above shows that treaty and resolution reflect both State practice and *opinio juris*. States' 'conduct' in connection with treaties and resolutions is required to prove State practice, while '*juridical* conscience' of people must exist as a rule of law to consider a treaty as evidence of *opinio juris*. To consider a resolution as reflective of *opinio juris*, it is significant to observe 'content and the conditions of its adoption.' The section below describes the discrete ascertainment of State practice and *opinio juris* from the provisions of treaty and resolutions.

1.2 Treaty and Resolution: Evidence of State practice and/or *opinio juris*?

1.2.1 Treaty

Written texts may ascertain the rules of customary international law in three different ways: by codifying existing rules, by crystalising emerging law, by stating what would be a new law.[83] The Third Report stated that 'the provisions of treaties do not in and of themselves constitute rules of customary international law, but such provisions, as "an explicit expression of the will of states", may offer valuable evidence of the existence (or otherwise) and content

[79] Faustin Z. Ntoubandi, *Amnesty for Crimes Against Humanity Under International Law* (Martinus Nijhoff Publishers 2007) 138.
[80] *The Paquete Havana Case,* 175 US 677 (1900).
[81] *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, ICJ Reports 1969, p. 131.
[82] Paola Gaeta, Salvatore Zappala, Jorge E. Vinuales (eds), *Cassese's International Law* (Oxford University Press 2020) 364.
[83] Third report on identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/682, para. 28; See also, Report on the work of the sixty-seventh session (2015) (document A/70/10) Chapter VI, Identification of Customary International law, para. 68.

of such rules.'[84] The treaty texts can only serve as conclusive evidence of customary international law when 'the rule must find support in external instances of practice coupled with acceptance as law.'[85] The crystallization of the rules of customary international law is possible when law evolves 'through the practice of States on the basis of the debates and near agreements at the conference … arising out of the general consensus revealed at such conference.'[86]

Treaty and custom are significantly intertwined, particularly when the subject matter is human rights or relates to humanity. However, a treaty provision cannot oblige a court to rely on custom. The customary obligation is independent of treaty obligation when the subject matter reflects both treaty and custom.[87] The ICJ in the *Continental Shelf Case* similarly stated that '[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.'[88] In the *Nicaragua* case, the ICJ similarly expressed the idea that custom and treaty can run parallel. The ICJ found 'Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.'[89] However, Judge Sir Robert Jennings found in his dissenting opinion that the Court drew an artificial postulation through paralleling customary and treaty provisions.[90] He stated that the Charter was neither a codification of existing custom about self-defence, nor did any subsequent custom develop in this regard to influence the Charter provisions.[91] In his view, any proposition to consider the Charter provisions as custom would fail to extract 'even a scintilla of relevant practice on these matters

[84] Ibid., para, 33.
[85] Ibid., para. 34.
[86] Ibid., para. 38.
[87] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*), ICJ Reports 1986, p. 83.
[88] *Continental Shelf Case (Libyan Arab Jamahiriya/Malta),* ICJ Reports 1985, pp. 29-30, para. 27; See also *Nicaragua Case*, p. 87.
[89] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*), ICJ Reports 1986, p. 84.
[90] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*), ICJ Reports 1986 (Dissenting opinion of Judge Sir Robert Jennings) p. 521.; on page 520, Judge Jennings states that 'A multilateral treaty may certainty be declaratory of customary international law either as incorporating and giving recognition to a rule of customary international law that existed prior to the conclusion of the treaty or, on the other hand, as being the *fons et origo* of a rule of international law which subsequently secured the general assent of States and thereby was transformed into customary law'
[91] Ibid., p. 521.

from the behaviour of those few States which are not parties to the Charter; and the behaviour of all the rest, and the *opinio juris* which it might otherwise evidence, is surely explained by their being bound by the Charter itself.'[92] The ICJ in the *Nicaragua* case reaffirmed the *North Sea Continental Shelf* case and relied on Article 51 of the UN Charter to recognise the existence of customary law rights of self-defence alongside the treaty provisions The ILC's view on finding treaties as evidence of law with 'external instances of practice' reflects the view of Judge Jennings.

The general applicability of treaties and their acceptance by other States may gradually develop as important evidence of international custom.[93] An interpretation of treaty provisions can show the existence of custom. In this regard, the interpretation should be consistent with general international law and the principle of *jus cogens*.[94] However, Judge Ammoun, in his separate opinion in the *North Sea Continental Shelf* case, discouraged the deduction of proof of the formation of custom from statements in the text of a convention. He emphasised the importance of national practice as evidence of custom.[95] In his view, a norm creating Convention may go against the spirit and letter of Article 38 (1) of the ICJ Statute when it provides an influence on the formation of custom.[96] A country is not bound to follow treaty provisions as a part of customary international law unless that provision was already a custom at the time of drafting the Convention.[97] In the *North Sea Continental Shelf* cases, Germany was not obligated by Article 6 of the Geneva Continental Shelf Convention 1958. Denmark and the Netherlands contended that the Continental Shelf law was only at the seminal stage before the Geneva Conference. There was a lack of uniformity in State practice. However, the ICJ considered that the delimitation provision was proposed by the Geneva Conference as a '*de lege ferenda*, not at all *de lege lata* or as an emerging rule of customary international law.'[98] It gives an indication that *lex ferenda* was not considered as a part of customary international law by the ICJ in this case.

---

[92] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*), (1986) ICJ Reports 14, (Dissenting opinion of Judge Sir Robert Jennings), p. 521.
[93] Clifford J. Hynning, 'Sources of International Law' (1956) 34 Chicago-Kent Law Review 2, pp. 124-125.
[94] Bing Bing Jia, 'The Relations between Treaties and Custom' (2010) 9 Chinese Journal of International Law 81, p. 87.
[95] *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, (1969) ICJ Reports 3, p. 104.
[96] Ibid., p. 128.
[97] *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, ICJ Reports 1969 (Declaration of Judge Sir Muhammad Zafrulla Khan), p. 55.
[98] *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, ICJ Reports 1969 para. 62.

1.2.2 Resolution

Uncertainties related to the identification of State practice can be alleviated by ascertaining *opinio juris* in ancillary sources such as UN resolutions.[99] The ICJ only highlighted the 'normative value' of General Assembly resolutions, subject to the 'content and the conditions' of its adoption to examine the status of *opinio juris*.[100] In this *Advisory Opinion*, the ICJ also emphasised on having series of resolutions to 'the gradual development of the *opinio juris* required for the establishment of a new rule.'[101] The ICJ accepted the view that the adoption of resolution exposes the desire of the international community on the prohibition of nuclear weapons. On the other hand, Judges Forster, Bengzon, Jimenez De Arechaga, Nagendra Singh, and Ruda in their separate opinion in the *Fisheries Jurisdiction* case noted that the 'declarations and statements and the written proposals submitted by representatives of States are of significance to determine the views of those States as to the law on Fisheries Jurisdiction and their *opinio juris* on a subject regulated by customary law.'[102] Guzman, nonetheless, listed UN General Assembly resolutions as a qualifying piece of practice.[103]

In the *Nicaragua* case, *opinio juris* was deduced from the approach and assertiveness of State parties to the Resolution 2625 (XXV), entitled *The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*.[104] The ICJ noted that various activities of the United States also reflect *opinio juris.* It included the United States' support for the resolution of the Sixth International Conference of American States condemning Aggression (18 February 1928) and the ratification of the Montevideo Convention of Rights and Duties of States (26 December 1933) as evidence of *opinio juris*.[105] The ICJ stated that the 'acceptance of a text in these terms confirms the existence of an *opinio juris* of the participating States

[99] Leonard M. Hammer, 'Reconsidering the Israeli Courts' Application of Customary International Law in the Human Rights Context' (1998-1999) 5 ILSA Journal of International and Comparative Law 23, p. 26
[100] *Legality of the Threat of Use of Nuclear Weapons,* ICJ Reports 1996, para. 70, p. 33.
[101] Ibid., para. 70, p. 33.
[102] *Fisheries Jurisdiction Case, (United Kingdom and Northern Ireland v Iceland)*, ICJ Reports 1974 (Joint Separate Opinion of Judges Forster, Bengzon, Jimenez De Arechaga, Nagendra Singh and Ruda) p. 49.
[103] Andrew T. Guzman, 'Saving Customary International Law' (2005) 27 Michigan Journal of International Law 115; See also, Phillip R. Trimble, 'A Revisionist View of Customary International Law' (1986) 33 The UCLA Law Review 665, p. 709.
[104] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) ICJ Rep 1986, pp. 90-91.; The ICJ states that 'the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question'.
[105] Ibid., p. 90.

prohibiting the use of force in international relations.'[106] It added that the evidence of *opinio juris* in the principle of non-intervention was later supported by the established and substantial practice of the States.[107]

1.3 Interconnectedness of Two Elements: State Practice and *Opinio Juris*

The Third Report presents the interconnectedness of two elements, clearly pointing out the weaknesses of the rules of customary international law when based on one element. Two constituent elements of customary international law have been described as 'not two juxtaposed entities, but rather only two aspects of the same phenomenon: a certain action which is subjectively executed or perceived in a certain fashion.'[108] The ICJ in the Nicaragua case reaffirmed the simultaneous presence of both elements[109] and stated that States were obliged to conform by taking their conduct as evidence of belief.[110] In most cases, the acts of a State turn into State practice when the State in question proves the legal obligation to follow that practice without objection. Sometimes, persistent objections hinder the emergence of customary international law. Separate ascertainment of the two components is suggested by the report of ILC, making 'double counting' unacceptable.[111] The Draft Conclusions of the ILC provide an obvious suggestion during the application of both elements to the formation of custom. It stated that:

> the existence of one element may not be deduced merely from the existence of the other, and that a separate inquiry needs to be carried out for each. Nevertheless, the paragraph does not exclude that the same material may be used to ascertain practice and acceptance as law (*opinio juris*). A decision by a national court, for example, could be relevant practice as well as indicate

[106] Ibid., p. 90.
[107] Ibid., 202, p. 96.
[108] Third report on identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/682, para.13, p. 5.
[109] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, (1986) ICJ Reports 14, para. 207, p. 98.
[110] Ibid.
[111] Third report on identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/682, para.16, p. 7.; see also, Report on the work of the sixty-sixth session (2014), (Document A/69/10), Chapter X, Identification of Customary International Law, Para.175, 178, para.183; See also Report on the work of the sixty-seventh session (2015) (document A/70/10) Chapter VI, Identification of Customary International law, para. 98

> that its outcome is required under customary international law. Similarly, an official report issued by a State may serve as practice (or contain information as to that State's practice) as well as attest to the legal views underlying it. The important point remains, however, that the material must be examined as part of two distinct inquiries, to ascertain practice and to ascertain acceptance as law.[112]

The ICJ in the *North Sea Continental Shelf* case also affirmed that 'an *opinio juris* alone is not sufficient to form customary international law,'[113] instead that 'existence of *opinio juris* needs to be confirmed by the practice.'[114] The ICJ stated that:

> Not only must the acts concerned amount to settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*. The States concerned must therefore feel that they are conforming to what amounts to their legal obligation. The frequency, or even habitual character, of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.[115]

The importance was given to both elements to establish rule of customary international law, regardless of their 'temporal order'.[116] The ILC did not accept the argument that the extensive presence of one element can compensate the absence of other elements.[117] A notable point in the Third Report is the possibility of an *opinio juris* before State practice exists. The

---

[112] Draft Conclusions on Identification of Customary International Law with Commentaries, 2018, A/73/10, p. 129.
[113] *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, ICJ Rep 1969, para. 43.
[114] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, ICJ Rep 1986, para. 97.
[115] *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, ICJ Rep 1969, para. 77.
[116] Third report on identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/682, para.16, p. 7.
[117] Report on the work of the sixty-seventh session (2015) (document A/70/10) Chapter VI, Identification of Customary International law, para. 98

Report stated that 'it is possible that an acceptance that something ought to be the law (nascent *opinio juris*) may develop first, and then give rise to practice that embodies it so as to produce a rule of customary international law.'[118] All rules of customary international do not have to be originated from the actual usage. It is not mandatory to follow any order of examination. It can 'begin with appraising a written text allegedly expressing a widespread legal conviction and then seeking to verify whether there is a general practice corresponding to it.'[119] It can be argued that the appearance of *opinio juris* before State practice reflects *lex ferenda* or what laws should be, instead of what laws are.

Another importance of interconnectedness between State practice and *opinio juris* lies in finding 'inaction' as evidence of *opinio juris*. The possibility of identifying *opinio juris* from 'inaction' before knowing State practice may not be possible because inaction serves as evidence of *opinio juris* when it 'represents concurrence in a certain practice.'[120] Inaction is construed as concurrence only when it indicates 'qualified silence'.[121] Referring to ICJ's decision on the *Sovereignty over Pedra Branca/ Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/ Singapore)*, the Report noted that '[t]he absence of reaction may well amount to acquiescence...[t]hat is to say, silence may also speak, but only if the conduct of the other State calls for a response.'[122]

Despite the efforts of the ILC on the identification of customary international law, there is controversy about the exact nature of State practice and *opinio juris* and how they complement each other to form customary international law. Uncertainty arises as to whether State practice alone is sufficient for norm formation or whether it always needs to be substantiated by the presence of *opinio juris*. Kammerhofer discussed some uncertainties and challenges surrounding the formal sources of international law.[123] The problem also lies in finding the 'independent relative importance of each of these elements, and the proper reference materials for determining their normative content.'[124] Similarly, Goldsmith and

[118] Third report on identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/682, para.16, p. 7.
[119] Draft Conclusions on Identification of Customary International Law with Commentaries, 2018, A/73/10, p. 129.
[120] Third report on identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/682, para.16.
[121] Ibid., para. 21.
[122] Ibid., para.16, p. 23.
[123] Jorg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems' (2004) 15 European Journal of International Law 3, pp. 523-553.
[124] Leonard M. Hammer, 'Reconsidering the Israeli Courts' Application of Customary International Law in the Human Rights Context' (1998-1999) 5 ILSA Journal of International and Comparative Law 23, p. 26.

Posner discuss the paradoxical findings of State practice and *opinio juris*. In their view, a State practice alone can form a rule of customary law in the legal context, and *opinio juris* works as an associated factor in determining the status of State practice in international law.[125] Similarly, Mendelson stated that 'in standard cases, the subjective element of *opinio juris* is superfluous. It is not an invariable requirement that *opinio juris* be present for a practice to constitute CIL.'[126] When a particular practice reaches a general level of acceptance, that uniform generality demands a legitimate expectation from the other States to follow the same. The International Law Association declares that '[a] rule of customary international law is one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a *legitimate expectation* of similar conduct in the future.'[127] That legitimate expectation may refer to an indication of the legal obligation of states. The uncertainties surrounding State practice and *opinio juris* has been recnceptualised by a number of modern scholars. Some authors find it important to have the co-existence of State practice and *opinio juris*, while some do not consider both elements as important.

1.4 The Reconceptualisation of the Theory of Customary International Law

Lepard reconceptualised the classic definition of customary international law and stated that it 'arises when states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain conduct.'[128] He emphasised the desire of States instead of the practice of States in considering a particular conduct as a customary norm of human rights law. In his opinion, the concept of *opinio juris* has a prevalent role in determining certain obligations under international human rights law. Lepard stated that in the field of human rights, 'courts have often examined human rights declaration and treaties, and statements of governments in favour of human rights, in finding that a norm is one of customary law, and have paid less attention to state practice contrary to the putative human rights norm.'[129] No systematic and adequate method of finding State practice is required. Petersen mentioned that 'compliance with human rights standards

[125] Goldsmith Jack L. and Posner Eric A., *The Limits of International Law* (Oxford University Press 2005) 24.
[126] Maurice Mendelson, 'The Subjective Element in Customary International Law' (1995) 66 British Yearbook of International Law 177, p. 206-207.
[127] International Law Association, 'Statement of Principles Applicable to the Formation of General Customary International Law', adopted by Resolution No 16/2000, London Conference (2000), Section 1(i) (Emphasis added).
[128] Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press, 2010) 8.
[129] Ibid., p. 12.

concern internal relations within states and are thus independent of the cross-border interaction of states, which are addressed by state practice.'[130] On the other hand, Richard Baxter considered State's firm statement is much far better evidence instead of closely knitting different pieces of state's action at different times in different contexts.[131] Amato distinguished between actions and statements of the States.[132] State action needs to be 'accompanied by an articulation of the legality of the action', whereas State statements have to be 'statements of belief rather than actual beliefs'.[133] Henkin found it challenging to determine the source of human rights laws, since there is always a lack of State practice or consent.[134]

Petersen preferred an 'interpretative approach to customary law' where State practice only served an 'auxiliary function to determine *opinio juris'*.[135] An inductive approach to State practice places emphasis on collective, systematised facts of State behaviour. State behaviour in this context is not limited to the explicit conduct of States; it extends to different kinds of 'paper practices', including the conduct and pronouncements of international organisations.[136] Petersen referred to the contradictory views of Guggenheim and Kelsen, who had proposed to dispense with the idea of *opinio juris* as a constituent element of custom. He also focused on the declining importance of State practice as a constituent element, as seen in the case of *Nicaragua*. He noted that the ICJ had given priority to the concept of *opinio juris* even without examining the State practice on the disputed matter.[137] The struggle to understand which concept will receive priority leads some authors to reconceptualise the theory of customary international law, as we shall examine next.

The classic theory of custom emphasises widespread and consistent State practice in determining the customary rights and obligations of sovereign states. It considers that *opinio juris* only deals with *lex lata,* referring to the necessity and legality of the continuous practice. For example, Kelly found that the law on diplomatic immunity is a form of traditional custom emerging from the co-operation between sovereign States, without having any connection to

[130] Niels Petersen, 'Customary Law without Custom- Rules, Principles, and the Role of State Practice in International Norm Creation' (2008) 23 American University International Law Review 275, p. 286.
[131] Richard Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965-1966) 41 British Yearbook of International Law 275, p. 300.
[132] Anthony D' Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) 49.
[133] Ibid., p. 35-39.
[134] Louis Henkin, 'Human Rights and 'State Sovereignty' (1995) 25 Georgia Journal of International and Comparative Law 31, p. 38.
[135] Niels Petersen, 'Customary Law without Custom- Rules, Principles, and the Role of State Practice in International Norm Creation' (2008) 23 American University International Law Review 275, p. 280.
[136] Ibid., p. 278.
[137] Ibid., p. 280; See also *Nicaragua Case* pp. 98-104.

the moral content.[138] On the other hand, there is a tendency to avoid evidence of customary international law in the 'practice-based' methodological orientation. The effort to employ methods to find the source of customary international law in the normative framework is known as 'modern custom'.[139] Roberts termed this new concept a 'modern approach' to customary international law. This term received widespread attention after the publication of her influential paper on traditional and modern approaches to customary international law.[140]

Some recent works show the formation of customary international law in different settings. This new concept emphasises other factors; for example, Guzman proposed viewing customary international law 'through a rational choice lens'.[141] This approach stated that:

> A rational choice approach, however, looks to compliance and incentives affecting state behaviour. This, it turns out, leaves no room for a practice requirement. Because the consequences of violating a legal rule depend only on the attitudes of other states, state practice plays no direct role. Practice may affect the attitudes of states, of course, but it does not directly contribute to the existence of a rule of CIL. Practice may also be relevant as evidence of *opinio juris*, but this is a different role than the one traditionally assigned to it, and has different implications.[142]

There have been numerous efforts to shape customary international law by considering other factors instead of State practice and *opinio juris.* Hammer considered the States' claim as State practice, instead of States' physical acts.[143] In his view, the norms of customary international law may stem from claims made by States without having any enforcement of those claims. He, nonetheless, acknowledged that subsequently formed physical acts of States may contradict an articulated norm that has no enforcement. On the other hand, Bodansky emphasised the States' self-interest and the role of powerful States in forming norms of

[138] Patrick Kelly, 'The Twilight of Customary International Law' (2000) 40 Virginia Journal of International Law 449, pp. 479-80.
[139] Roozbeh (Rudy) B. Baker, 'Customary International Law: A Reconceptualization' (2016) 41 Brooklyn Journal International Law 2, p. 10.
[140] Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 American Journal of International Law 4, p. 757.
[141] Andrew T. Guzman, 'Saving Customary International Law' (2005) 27 Michigan Journal of International Law 115, p.118.
[142] Ibid., p. 122.
[143] Leonard M. Hammer, 'Reconsidering the Israeli Courts' Application of Customary International Law in the Human Rights Context' (1998-1999) 5 ILSA Journal of International & Comparative Law 23, p. 28.

customary international law.[144] He also mentioned several elements in the formation and development of customary international law, such as economic, social, psychological, and political processes.[145] He referred to a few psychological factors to the development of customary international law. The psychological factor includes expectations, fears, or interests of States in forming customary international law.[146] D'Aspremont also carried out discussions on the 'new custom theory', indicating that intergovernmental bodies can create a new norm of customary international law.[147]

Roberts wrote that under a 'modern approach', there is a possibility of producing custom more quickly following a deductive process. Evidence of customary international law is found in the statement of treaties and declarations, instead of State practice.[148] Referring to the *Military and Paramilitary Activities in and against Nicaragua* case, Roberts mentioned that 'the court paid lip service to the traditional test for custom but derived customs of non-use of force and non-intervention from statements such as General Assembly resolutions.'[149] She also noted that the traditional custom emphasises on descriptive accuracy, whereas modern custom concentrates on normative appeal.[150] Baker also discussed 'modern custom' and how it de-emphasises the continuous cautious process of customary law formation, rather presenting an alternative view stating that the formation is 'dynamic and overnight' based on *opinio juris* alone.[151] Under this concept, State practice is criticised for having 'no exact model of extent and regularity of practice'.[152]

Kirgis relied on both elements of custom in a balanced way to determine the formation of customary international law. He reduced the complex nature of State practice and *opinio juris* by alternative use of the elements of customary international law known as 'sliding scale' theory.[153] The continuous exercise of State practice lessens the need for *opinio juris* in the

[144] Daniel M. Bodansky, 'The Concept of Customary International Law' (1995) 16 Michigan Journal of International Law 667, p. 668.
[145] Ibid., p. 668.
[146] Ibid., p. 669.
[147] Jean d'Aspremont, *Formalism and the Source of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011) 23.
[148] Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 American Journal of International Law 757, p. 758.
[149] Ibid., p. 758.
[150] Ibid., p. 764.
[151] Roozbeh (Rudy) B. Baker, 'Customary International Law: A Reconceptualization' (2016) 41 Brooklyn Journal of International Law 2, p. 9.
[152] Ibid., p. 9.
[153] Frederic L. Kirgis 'Custom on a Sliding Scale' (1987) 81 American Journal of International Law 1, p. 149.; Roozbeh (Rudy) B. Baker, 'Customary International Law: A Remonetisation' (2015-2016) 41 Brooklyn Journal of International Law 2, p. 439.

formation of customary international law. On the other hand, a clear manifestation of *opinio juris* may also form customary international law without extensive behaviour of the State supporting that rule.[154] Arajarvi found this theory almost similar to the idea of the traditional concept of customary international law.[155] However, Roberts criticised this theory for having a potential risk of prioritising one element over others.[156]

On the other hand, Scharf discussed the context of fundamental changes. The context of fundamental changes works as an 'accelerating agent' in the formulation of customary international law. In this context, no particular focus is given to the use of State practice.[157] He drew on the example of the Kyocera Corporation in Japan, which created diamonds, emeralds, and rubies under intense heat and pressure.[158] That scenario led him to think about the context of fundamental change for intensifying and accelerating the formation of customary international law. He considered placing the General Assembly resolutions and the judgements of international tribunals as an accelerated form of customary international law. Simma and Alston also acknowledged the works of international instruments as evidence of State practice.[159] Scharf described the 'Grotian Moment' as 'an instance in which there is such a fundamental change to the international system that a new principle of customary international law can arise with exceptional velocity.'[160] Although Scharf put less emphasis on the exercise of State practice, Simma and Alston found State practice to have a more significant role to play than *opinio juris,* as it means 'deeds' of the State, not 'just words'.[161] Referring to the famous *Lotus* case, these authors stated that '*opinio juris* was an elusive and rather ephemeral creature…'[162] However, as already mentioned above, the importance of *opinio juris* is found in the *Nicaragua* case, where the ICJ focused on General Assembly Resolutions as evidence of *opinio juris.*[163] The unanimous UN resolutions constituted instant customary international

[154] Ibid., p. 149.
[155] Noora Arajarvi, 'The Role of the International Criminal Judge in the Formation of Customary International Law' (2007) 1 European Journal of Legal Studies 2, p. 4.
[156] Anthea E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 American Journal of International Law 757, p. 774.
[157] Michael P. Scharf, 'Accelerated Formation of Customary International Law' (2014) 20 ILSA Journal of International and Comparative Law 305, p. 306.
[158] Ibid., p. 307.
[159] Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General principles' (1989) 12 Australian Yearbook of International Law 82, p. 89-90.
[160] Michael P. Scharf, 'Accelerated Formation of Customary International Law' (2014) 20 ILSA Journal of International and Comparative Law 305, p. 332.
[161] Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General principles' (1989) 12 Australian Yearbook of International Law 82, p. 88.
[162] Ibid., p. 88.
[163] *Military and Paramilitary Activities in and against Nicaragua Case* (*Nicaragua v United States of America*), ICJ 1986, pp. 101-102.

law, without having any further proof of State practice. Schwebel stated that 'while discerning *opinio juris* from the attitude of states towards draft resolutions and in their voting, habit should be treated with caution.'[164] Sometimes, the changing nature of 'State motives' deters them from conferring any significant impact on *opinio juris* from the State's actions. In terms of the formation of customary international law from General Assembly resolutions, Judge Trindade noted that 'such a resolution expresses *opinio juris communis* – a juridical cognisance of the international community as a whole.'[165] On the other hand, Bodansky stated that UN General Assembly resolutions 'do not directly create customary law (because they constitute neither State practice nor *opinio juris*), but instead have only an indirect effect on the customary law-making process.'[166]

Goldsmith and Posner proposed 'game theory' as a tool to understand the 'positive theoretical account of customary international law'.[167] This theory challenged the positivist notion of customary international law, explaining 'state immunity' under customary international law with a reflection of coincidence of interest and coercion. They stated that:

> Our theory holds that a nation would grant ambassadorial immunity either when it is in its private interest to do so or when it participates in bilateral repeat games in which payoffs from co-operation (as opposed to defection) are relatively high, discount rates are relatively low, and conduct is sufficiently observable.[168]

The theory described how international behaviours are traditionally engaged with different behavioural logics such as coincidence of interest, coercion, co-operation, and coordination,[169] based on which custom is created. They mentioned that 'the payoffs from co-operation or deviation are the sole determinants of whether States engage in the cooperative behaviours that are labelled as customary international law.'[170] They were not convinced that

[164] Schwebel Stephen, 'The Effect of Resolutions of the UN General Assembly on Customary International Law' (1979) 73 Proceedings of the Annual Meeting (American Society of International Law) p. 301.
[165] UN General Assembly as a Law-Making Body, available at- *https://www.federalism.eu/assets/2016/10/UN-Charter_The-UN-General-Assembly.pdf*
[166] Daniel M. Bodansky, 'The Concept of Customary International Law' (1995) 16 Michigan Journal of International Law 667, p. 670.; Karol Wolfke, *Custom in Present International Law* (2d rev. ed. 1993) p. 40-51.
[167] Jack L. Goldsmith and Eric A. Posner, 'A theory of Customary International Law' (1999) 66 University of Chicago Law Review 1113. pp. 1113-1177.
[168] Ibid., p. 1152.
[169] Ibid., pp. 1114-1115.
[170] Ibid., p. 1120.

behavioural regularities among States can constitute evidence of 'general and consistent practice'. This theory overlooks the common ground shared by concepts such as *opinio juris*, legality, morality, and other related concepts. It prioritises States' self-interest rather than their obligation.[171] States' 'coincidence of interest' or 'coercion' gets priority in this theory and reflects *opinio juris*.[172] In terms of explaining the customary rules of human rights, the theory focuses more on co-operation among States rather than coincidence of interest.[173] Behavioural regularity among States through co-operation is possible when States find themselves 'in a bilateral prisoner dilemma.'[174] Chinen criticised Goldsmith and Posner's applications of game-theoretic models. He opined that this theory only shows 'relatively low levels of co-operation among states' and ignores 'the plethora of international treaties, which evidences relatively high levels of co-operation.'[175] In response to this criticism, Goldsmith and Posner replied that 'the number of treaties, or their growth rate, tell us little about the existence of international co-operation.'[176]

Judicial interpretations of the national and international tribunals also formulate norms of custom based on moral considerations. Arajarvi discussed how judges of the international tribunals identify norms of customary international law based on moral considerations. In this respect, normative attentions prevail over a positivist approach. [177] She drew on the example of the *Nicaragua* case, where the judges' decision on international peace and security, the protection of fundamental human rights, and the preservation of life played prime roles in the construction of customary international law.[178] Treves stated that States reach consensus among themselves by referring a matter in dispute to international courts and tribunals for settlement. States transfer a right to exercise international law to international courts and tribunals.[179] States' consent and participation in international courts and tribunals justify the reason for considering judicial decisions as State practice. Roberts also noted that 'judicial

[171] Ibid., p. 1177.
[172] Jack L. Goldsmith and Eric A. Posner, 'Further Thoughts on Customary International Law' (2001-2002) 23 Michigan Journal of International Law 191, p. 191.
[173] Jack L. Goldsmith and Eric A. Posner, 'A theory of Customary International Law' (1999) 66 University of Chicago Law Review 1113, p. 1172-1177.
[174] Ibid., p. 1125-26.
[175] Mark A. Chinen, 'Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner' (2001) 23 Michigan Journal of International Law 143, p. 145.
[176] Jack L. Goldsmith and Eric A. Posner, 'Further Thoughts on Customary International Law' (2001-2002) 23 Michigan Journal of International Law 191, p. 196.
[177] Noora Arajarvi, 'The Role of the International Criminal Judge in the Formation of Customary International Law' (2007) 1 European Journal of Legal Studies 2, p. 1.
[178] Ibid., p. 4.
[179] Tullio Treves, 'Customary International law' in *Max Planck Encyclopaedia of Public International Law*, (Heidelberg and Oxford University Press 2010) 10.

decisions can have a formative effect on custom by crystallising emerging rules and thus influencing the state behaviour.'[180] However, she also mentioned the downside of such State practice, as 'past case laws' are different from 'past practices'.[181] Although Arajarvi discussed judicial interpretations as State practice, she was nonetheless concerned that this sort of interpretation on occasion might cause uncertainty towards the substance and methodology of customary law. Similarly, Mendelson rejected the idea of considering judicial decisions as State practice, since judges are independent of States.[182]

The repetitive exercise of the code of conduct can also contribute to the development of customary international law. Euteneier explained the role of multinational enterprise (MNEs) by referring to the Sullivan Principles, known as a 'corporate code of conduct', which were outlined as a result of public outcry over MNEs' operation in South Africa during the apartheid era.[183] The stated goal of these principles was to 'eliminate discrimination in the workplace in South Africa'.[184] Subsequently, these principles were introduced and globally endorsed by MNEs to develop codes of conduct. These codes are followed in most of the areas of MNEs such as human rights, equal opportunity, environmental health, labour rights, etc.[185] However, the application of these principles is not consistent across industries and not mandatory in nature. Mostly, these principles are the result of 'external public pressure.'[186] Euteneier stated that 'notwithstanding the criticisms of codes of conduct, the mere existence of international codes to which States are parties indicates growing international consensus on the principle that corporations should accept greater responsibility in the field of human rights.'[187] He pointed out the significant normative force of a MNE's voluntarily accepted code of conduct, which may end up with 'quasi-contractual obligation'.[188] Relying on two specific norms, the prohibition against child labour and the norm of environmental protection, he shows how codes adopted by MNEs reflect the broad consensus and form customary international

[180] Anthea E Roberts, 'Traditional and Modern Approaches of Customary International law: A reconciliation' (2001) 95 American Journal of International Law 757, p. 757.
[181] Ibid., p. 757.
[182] Maurice H. Mendelson, 'The Formation of Customary International Law' (1998) 272 *Recueil des Cours* 155, p. 206.
[183] Gregory T. Euteneier, 'Towards a Corporate 'Law of Nations' Multinational Enterprises' Contributions to Customary International Law' (2007) 82 Tulane Law Review 757, p. 767.
[184] Zeb Larson, 'The Sullivan Principles: South Africa, Apartheid, and Globalization' (2020) 44 Diplomatic History 3, pp. 479-503.
[185] Ibid., pp. 479-503.
[186] Nicola M.C.P Jagers, *Corporate Human Rights Obligations: In Search of Accountability* (Intersentia 2002) 133.
[187] Gregory T. Euteneier, 'Towards a Corporate 'Law of Nations' Multinational Enterprises' Contributions to Customary International Law (2007) 82 Tulane Law Review 757, p. 769.
[188] Ibid., p. 769.

law.[189] Dixon also stated that the actions of non-state actors, such as actions of individuals, groups, or even the multilateral companies, may play a vital role in developing the practice of States.[190]

Whereas the classical notion of customary international law requires consistent, widespread, or uniform State practice with a sense of legal obligation, new concepts focus on several attributes in the identification of custom. New concepts also show particular attention to the repetition of principles in different international instruments. However, this study finds the modern concept, to some extent, uncertain and ambiguous. Roberts also criticised the modern concept of customary international law, stating that this is 'appealing but risks creating utopian rules, so it is criticised for producing norms that are divorced from reality.'[191] Koskenniemi similarly wrote that:

> A law which would base itself on principles which are unrelated to State behaviour, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way. To show that international law exists, with some degree of reality, the modern lawyer needs to show that the law is simultaneously normative and concrete – that it binds a State regardless of that State's behaviour, will or interest, but that its content can nevertheless be verified by reference to actual State behaviour, will or interest.[192]

Baker has identified the inadequacy of new theories and termed them as 'heavily state-centric'.[193] Simma and Alston [194] and Jennings [195] criticise the 'modern custom'. They state that the prioritisation of *opinio juris* reflects 'aspirational goal' instead of 'set standards' to make it

[189] Ibid., p. 770.
[190] Martin Dixon, *Textbook on international law* (7th ed. Oxford University Press 2013) 43.; See also *Texaco v Libya* (1977) 53 ILR 389.
[191] Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 American Journal of International Law 757, p. 767.
[192] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006) 17.
[193] Roozbeh (Rudy) B. Baker, 'Customary International Law: A Reconceptualization' (2016) 41 Brooklyn Journal of International Law 2, p. 48
[194] Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General principles' (1989) 12 Australian Yearbook of International Law 82, p. 83.
[195] Robert Y. Jennings, 'The Identification of International Law', in B. Cheng (ed.), *International Law: Teaching and Practice* (London: Stevens, 1982) 5.

highly normative. Simma and Alston asserted that customary international law suffers from an 'identity crisis'.[196]

1.5 Conclusion

In recent years, the ILC carried out a pivotal project to remove doubts as to the identification of customary international law. The ILC emphasised more on the allocation or identification of sources, instead of the formation of customary international law. It pointed out the nature of materials that reflect State practice and *opinio juris*. Nonetheless, customary international law and its contents, State practice and *opinio juris*, revolve around complexities. Modern views, although highly criticised, are introduced by scholars to minimise the paradox of the classic concept. This view portrays a naturalistic approach, while the traditional view is very much positivistic. Although the two-pronged test of custom has been asserted both by the ICJ and ILC, the prominent behaviour of one element is noticeable on various occasions. Critics find modern views are flexible yet uncertain. In contrast, the classic concept of customary international law is very much rigid in nature but receives widespread recognition. The problem associated with modern views is its changeable variables to determine the element *opinio juris*. The custom identification process based on State practice and *opinio juris* is even more arduous when it deals with international crimes.

The other chapters of the thesis will show the international criminal tribunals' endeavour to strike a balance between the two classic elements of customary international law. The significant catalyst to identify international crimes under customary international is yet unknown. Jennings mentioned that 'it is time to face squarely the fact that the orthodox tests of custom – practice and *opinio juris* – are often not only inadequate but even irrelevant for the identification of much new law today.'[197]

[196] Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General principles' (1989) 12 Australian Yearbook of International Law 82, p. 83

[197] Robert Y. Jennings, 'The Identification of International Law', in B. Cheng (ed.), *International Law: Teaching and Practice* (London: Stevens, 1982) p. 5.

CHAPTER 2. THE MAKING OF INTERNATIONAL CRIMES: THE ROLE OF THE COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES 1919

2.0 Introduction

This chapter examines the contribution of 'the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties 1919' (hereinafter 'Commission on Responsibilities 1919') to the development of international crimes. The Commission took into account numerous offences submitted by the Allied and Associated Powers following the atrocities of World War I. That was the first unified initiative undertaken by the Commission to discover the nature of international crimes. It carried out an extensive amount of work through the collection of facts and evidence, highlighting the efforts of the Commission members, and it was the first international platform that seriously debated making a list of war crimes. This chapter reviews the contribution of the Commission, in particular, to the concept, formation and categories of international crimes. It attempts to observe the brief historical background of laws and customs of war. The historical details provide an understanding of how rules of warfare had been instrumental in determining the list of war crimes as an international crime.

The main part of the chapter divides the Commission's effort to identify sources in developing international crimes into three parts. The first part discusses the sources and lists of crimes submitted by the members of the Commission, with reference to the laws and customs of war from various national and international instruments. The second part deals with the Commission's reliance on the provisions of international conventions, referring to the Hague Conventions. The third part discusses the Commission's debates to identify international crimes from the concept of the 'laws of humanity'. The chapter identifies various infractions of sources to intensify the existence of crimes in the law of nations. This chapter seeks to eschew commenting on the two-element approach of customary international law because the list of international crimes was at a very embryonic stage following WWI. Nevertheless, the Commission members' concerted effort shows consensus and thus carried legal significance. Nonetheless, one can undertake the Commission's contribution to the evolution of customary international law in making international crimes from this point of time.

2.1 Laws and Customs of War: A Brief Historical Background

The rules of war have an ancient history based on many principles, such as protecting the weak against oppression, showing respect to the inhabitants of an enemy city which has surrendered, or respecting the wounded.[198] It was easier to find the customary rules of warfare because many civilisations show the presence of State practice in this regard. Thomas Erskine Holland stated that the origin of the rules on the conduct of warfare derived:

> Partly from sentiments of humanity, partly from the dictates of honourable feeling, and partly from considerations of general convenience, have grown up gradually, and are still in the process of development. They have existed, till comparatively recent times, only as a body of custom, preserved by military tradition, and in the works of international jurists. Their authority has been derived from the unwritten consent of nations, as evidenced by their practice.[199]

The origin of the rules of warfare indicated two authoritative manners to address the subject-matter: the first was national, and the second was international. Many nations had issued instructions to their respective armies following the example set by the United States for their troops in 1863. At the same time, many international discussions took place 'to systemise the laws of war and to procure general acceptance of a uniform code of those laws.'[200] The use of the rules of warfare at the national and international levels provided evidence of general acceptance of the practices prevalent at the time concerning warfare.

The United States' national document, the Lieber Code, was issued by President Abraham Lincoln on 24 April 1863. It was the first compilation of the customary rules of warfare emphasising general principles such as military necessity, the public and private property of the enemy, the distinction between combatants and civilians, prisoners of war, permissible means and methods of warfare.[201] The Lieber Code reflects the 'customary practices of armies of that period — practices that had evolved over hundreds of years of warfare.'[202] The Treaty of Paris in 1856 was the first international assembly that dealt mainly

[198] Mary Ellen O'Connell, 'Historical Development and Legal Basis', edited by Michael Bothe, *The Handbook of International Humanitarian Law*, (3rd ed., Oxford University Press (2013) 107.
[199] Thomas Erskine Holland, *The Laws of War on Land*, (The Clarendon Press 1908) 1.
[200] Ibid., 2.
[201] Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press 2010) 39.
[202] Ibid., 40.

with the rules of warfare.[203] This treaty was signed to settle the Crimean War in 1854. Higgins, however, did not find the Treaty of Paris to be the best-codified international instrument. He considered the Geneva Convention 1864 to be the best-codified instrument for the protection of the victims of armed conflicts.[204] In 1868, Emperor Alexander II of Russia assembled a conference to sign the St. Petersburg Declaration to restrict the use of weapons of war, both in land and maritime warfare, known as the St. Petersburg Declaration 1868.[205] Bring mentioned that 'at the conference seventeen nations adopted a Declaration which was seen as a first step in a work "to conciliate the necessities of war with the laws of humanity".'[206] Higgins stated that the Declaration precisely formulated the restrictive rules of warfare and was 'marked by a high feeling of humanity.'[207] This Declaration did not reflect any comprehensive compilation of common usages and practices of the rules of war. Instead, it fixed a 'standard valid for all subsequent negotiations on rules for armed conflicts.'[208]

On the other hand, Dowdeswell considered the Brussels Declaration 1874 was the first international code on land warfare.[209] The Brussels Declaration was signed after the Franco-Prussian War (1870-1871) to codify the existing rules and customs of war. Emperor Alexander II of Russia had taken the initiative of drafting the Declaration, and 15 European states examined the Draft and adopted it with minor alterations. The Brussels Declaration was never ratified by the states and had no successful achievements.[210] This Declaration, nonetheless, contained specific provisions on the use of military authority over hostile territory. It includes the means of injuring the enemy, sieges and bombardments, spies, prisoners of war, the sick and wounded, military power over private persons, taxes and requisitions, *parlementaires*, capitulations, and interned belligerents and wounded cared for by neutrals, etc.[211]

---

[203] A. Pearce Higgins, *The Hague Peace Conference and other International Conference Concerning the Laws and Usages of War: Text of Conventions with Commentaries* (Cambridge University Press 1909) 3.
[204] Ibid., 13.
[205] Ove Bring, 'Regulating Conventional Weapons in the Future. Humanitarian Law or Arms Control' (1987) 24 Journal of Peace Research 3, p. 275.
[206] Ibid., p. 276.
[207] A. Pearce Higgins, *The Hague Peace Conference and other International Conference Concerning the Laws and Usages of War: Text of Conventions with Commentaries* (Cambridge University Press 1909) 7.
[208] Ove Bring, 'Regulating Conventional Weapons in the Future. Humanitarian Law or Arms Control', (1987) 24 Journal of Peace Research 3, p. 275.
[209] Tracey Leigh Dowdeswell, 'The Brussels Peace Conference of 1874 and the Modern Laws of Belligerent Qualification', (2017) 54 Osgoode Hall Law Journal 3, p. 805.
[210] Published in *The Spectator,* 29 August 1874, p.1.
[211] Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874. D. Schindler and J. Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publishers 1988) 22-34.

In 1874, the Institute of International Law appointed a committee to study and submit proposals on the Brussels Declaration. The Institute's effort led to the successful adoption at Oxford in 1880 of a Manual on the Laws and Customs of War known as the Oxford Manual.[212] Both the Brussels Declaration and the Oxford Manual formed the basis of the two Hague Conventions on land warfare and the Regulations annexed to them, adopted in 1899 and 1907 respectively. The endeavour to codify the laws and customs of war was comprehensively materialised with the adoption of the 1899 and 1907 Hague Conventions. On 24 August 1898, Count Mouravieff, the Russian Foreign Minister, circulated a letter to the representatives of the states accredited to St Petersburg for 'the maintenance of the general peace and a possible reduction of the excessive armaments which were burdening all nations.'[213] On 11 January 1899, he addressed all the Russian ministers accredited to the states represented at St. Petersburg to consider many issues, including the revision of the Brussels Declaration of 1874.[214] On 20 May 1899, the representatives from 26 states attended the Conference at the Hague under the presidency of M. De Staal, the first Russian Plenipotentiary.[215] There was no representation from the Central and South American countries in the First Peace Conference, 1899.[216]

There were over 100 delegates and staff divided into three committees. After two months of continuous meetings and reports, the Final Act included three conventions: The Convention for the Pacific Settlement of International Disputes; The Convention for the Laws and Customs of War on Land; and The Convention for the Adaptation of the Maritime Warfare of the Principles of the Geneva Conventions of 22 August 1864.[217] There were also three Declarations, prohibiting the 1) discharge of projectiles and explosives from balloons or by other similar new methods, 2) use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases, 3) use of bullets which expand or flatten easily in the human body.[218] These three Declarations were not adopted with unanimity; for example, Great Britain

[212] D. Schindler and J. Toman, *The Laws of Armed Conflicts* (Martinus Nihjoff Publishers 1988) 36-48.
[213] A. Pearce Higgins, *The Hague Peace Conference and other International Conference Concerning the Laws and Usages of War: Text of Conventions with Commentaries* (Cambridge University Press 1909) 39.
[214] A. Pearce Higgins, *The Hague Peace Conference and other International Conference Concerning the Laws and Usages of War: Text of Conventions with Commentaries* (Cambridge University Press 1909) 39.
[215] Ibid., p. 39.
[216] A. Pearce Higgins, *The Hague Peace Conference and other International Conference Concerning the Laws and Usages of War: Text of Conventions with Commentaries* (Cambridge University Press 1909) 56.
[217] The Proceedings of the Hague Peace Conference, Translation of the Official Texts prepared in the Division of International Law of the Carnegie Endowment for International Peace under the supervision of James Brown Scott, The Conference of 1907, Volume 1 (Oxford University Press 1920) 228.
[218] Ibid., p. 228.

did not sign Declarations 2 and 3 until 30 August 1907. However, it observed all the rules contained in these Conventions during the war in South Africa from 11 October 1899 to 31 May 1902.[219] Similarly, the United States did not sign Declarations 2 and 3, and Portugal signed only on 29 August 1907.[220]

The Second Peace Conference was initially proposed by the President of the United States of America. Afterwards, it was convened by His Majesty the Emperor of All Russia and by Her Majesty the Queen of the Netherlands. They all assembled in The Hague to 'give a fresh development to the humanitarian principles which served as a basis for the work of the First Conference in 1899.'[221] The Second Peace Conference had some provisions of the First Peace Conference such as the rights and duties of neutrals, the private property of belligerents at sea, the bombardment of ports, towns, etc. The Second Peace Conference also adopted several new conventions and declarations. A total of 44 Powers participated in the Final Act of 1907, and those who did not attend the First Peace Conference signed the Second Convention as if it had commenced in 1899.[222] These two Conferences were a landmark in codifying the laws and customs of war. The preamble of the 1907 Hague Convention demonstrated the intention of carrying out a mutual relationship and developing common practices among the nations.[223] The provisions of the two Conventions were meticulously referred to by the Paris Peace Conference in 1919 to identify the list of war crimes under international law from the violations of laws and customs of war.

Before starting the discussion on the Paris Peace Conference in 1919, it is pertinent to look into the preparatory work undertaken by Great Britain and the United States of America in 1918. The preparatory work offers some significant insights into the concept and structure of criminal facts, crimes and criminal responsibilities.

---

[219] The Proceedings of the Hague Peace Conference, Translation of the Official Texts prepared in the Division of International Law of the Carnegie Endowment for International Peace under the supervision of James Brown Scott, The Conference of 1907, Volume: III (Oxford University Press 1921) 29.
[220] A. Pearce Higgins, *The Hague Peace Conference and other International Conference Concerning the Laws and Usages of War: Text of Conventions with Commentaries* (Cambridge University Press 1909) 50.
[221] Ibid., p. 62.
[222] Ibid., p. 63.
[223] Laws and Customs of War on Land (Hague, IV) 18 October 1907, 36 Stat. 2277; Treaty Series 539

2.2 Pre-Paris Peace Conference Efforts: The Preparatory Works by the United Kingdom and the United States of America

2.2.1 Imperial War Cabinet 1918

Several meetings were held between the Prime Ministers of the United Kingdom and the overseas Dominions and the British War Cabinet at 10 Downing Street in London in 1918 as World War I was marking its end in the autumn of 1918. The British Cabinet turned into an Imperial War Cabinet while it was conducting the session with its overseas members. There was an extended discussion outlining all essential areas of imperial policy. It included the decision that would enable them to 'prosecute the war criminal with increased unity and vigour, and which will be of the greatest value when it comes to the negotiation of peace.'[224] The Prime Minister of the United Kingdom chaired the meeting. Referring to the question of the peace terms, Prime Minister David Lloyd George considered it important that 'Germany should first be beaten'. He stated that 'Germany had committed a great crime, and it was necessary to make it impossible that anyone should be tempted to repeat that offence. The Terms of Peace must be tantamount to some penalty for the offence.'[225] However, the decision on who would be punished for the commission of crimes was left to be decided at the Paris Peace Conference.[226]

During the preliminary discussion on procedure at the Imperial War Cabinet, the Prime Minister David Lloyd George settled certain matters, including the question of representation at the Paris Peace Conference. In this context, he referred to the informal suggestion of M. Clemenceau, the Prime Minister of France, who recommended that one person each from the Allied countries be present at the Peace Conference.[227] The preliminary discussion also considered the attitude of the Allied Governments towards the last German Emperor and King of Prussia, Kaiser Wilhelm II. Lord Curzon mentioned in that meeting that he met M. Clemenceau, who was concerned about the British Government's views on the trial of the ex-Kaiser and the establishment of an international tribunal composed of Allied representatives. He also referred to M. Clemenceau's suggestion on conducting a trial in absentia in case the demand to extradite the ex-Kaiser failed. If the ex-Kaiser was found guilty, M. Clemenceau

[224] Robert Livingston Schuyler, 'The British War Cabinet' (1918) 33 Political Science Quarterly 3, p. 378.
[225] Minutes of a Meeting of the Imperial War Cabinet, 10 Downing Street, 15 August 1918, 11.30 am, p. 5.
[226] Minutes of a Meeting of the Imperial War Cabinet, 10 Downing Street, 5 November 1918, 12.30 p.m., p. 3.
[227] Minutes of the Thirty-seventh Meeting of the Imperial War Cabinet, 10 Downing Street, 20 November 1918, 12 noon, p. 4.

also recommended that 'the ex-Kaiser could be treated as a universal outlaw, so that there would be no land on which he could set his foot.'[228] Mr Lloyd George stated that 'he did not see that it was necessary to lay down any limit of punishment. If the ex-Kaiser were guilty, he was guilty of a capital offence, for by his action he had recklessly put to death several millions of people.'[229] In his view, 'the ex-Kaiser had committed the greatest crime possible against humanity.'[230] The Law Officers of the Crown answered to the Imperial War Cabinet 1918 concerning the question of impunity or punishment of the ex-Kaiser. It stated that:

> The ex-Kaiser's personal responsibility and the supreme authority in Germany have been constantly asserted by himself and his assertions are fully warranted by the constitution of Germany. Accepting, as we must, this view, we are bound to take notice of the conclusion which follows: namely, that the ex-Kaiser is primarily and personally responsible for the death of millions of young men; for the destruction in four years of 200 times as much material wealth as Napoleon destroyed in twenty years; and he is responsible--and this is not the least grave part of the indictment--for the most daring and dangerous challenge to the fundamental principles of public law which that indispensable charter of international right has sustained since its foundations were laid centuries ago by Grotius.[231]

In contrast, Prime Minister W.M. Hughes of Australia was concerned about defining the nature of crimes to punish the ex-Kaiser. He found it difficult to indict him for making war although, indisputably, he committed the crime against international law.[232] Prime Minister Robert Borden of Canada expressed the opinion of prosecuting him for the 'crime against humanity in willing and preparing for his war'.[233] The Imperial War Cabinet decided to invite the Law Officers of the Crown to examine the question of framing charges against the ex-Kaiser of Germany:

> (i.) For the crime against humanity of having caused the war; and

[228] Minutes of the Thirty-seventh Meeting of the Imperial War Cabinet, 10 Downing Street, 20 November 1918, 12 noon, p. 5. Secret 8/37, available at http://filestore.nationalarchives.gov.uk/pdfs/large/cab-23-42.pdf
[229] Ibid., p.6.
[230] Ibid., p.6.
[231] Minutes of a Meeting of the Imperial War Cabinet, 10 Downing Street, 28 November 1918, 11.45 am, p.8; Secret 3/43; Available at http://filestore.nationalarchives.gov.uk/pdfs/large/cab-23-42.pdf

[232] Minutes of the Thirty-seventh Meeting of the Imperial War Cabinet, 10 Downing Street, 20 November 1918, 12 noon, p. 7. Available at http://filestore.nationalarchives.gov.uk/pdfs/large/cab-23-42.pdf
[233] Ibid., p.7.

(ii.) For offences, by one or both, against international law during the war.[234]

Sir F. E. Smith, Attorney General, pointed out the offences for which the ex-Kaiser should be tried: first, for his responsibility for the war as a whole; second, for his responsibility for the invasion in Belgium including all the consequential sufferings, and third, for his responsibility in approving submarine warfare.[235] He emphasised the responsibility of subordinates to the ex-Kaiser in determining responsibility of unrestricted submarine warfare. He further added that the charge or punishment of the subordinate is impossible if the ex-Kaiser escapes his liability.[236] To ensure the future reference and to count submarine warfare within the category of international crimes, he stated the following:

> It is surely vital that if ever there is another war, whether in ten or fifteen years, or however distant it may be, those responsible on both sides for the conduct of that war should be made to feel that unrestricted submarine warfare has been so branded with the punitive censure of the whole civilised world that it has definitely passed into the category of international crime.[237]

Although the Imperial War Cabinet's discussion provided no exhaustive definition of international crimes, the discussion hinted at insights that were defined as international crimes subsequently. On 2 December, 'the conclusions of the Allied conversation' decided to include the Allied countries' attitude toward the ex-Kaiser and the representation of the Allies at the Peace Conference.[238] The Imperial War Cabinet's main concern was to ensure the trial of the ex-Kaiser. On the other hand, the American plans and preparations for the Peace Conference shows a specific endeavour to observe the employment of new methods of committing crimes.

2.2.2. American Plans and Preparations for the Peace Conference

On 11 November 1918, the Armistice brought World War I to an end. On that day President Wilson announced that 'everything for which America fought has been

[234] Ibid., p.7.
[235] Minutes of a Meeting of the Imperial War Cabinet, 10 Downing Street, 28 November 1918, 11.45 am, p. 3; Available at http://filestore.nationalarchives.gov.uk/pdfs/large/cab-23-42.pdf
[236] Minutes of a Meeting of the Imperial War Cabinet, 10 Downing Street, 28 November 1918, 11.45 am, p.10; Available at http://filestore.nationalarchives.gov.uk/pdfs/large/cab-23-42.pdf
[237] Ibid., p.10.
[238] Minutes of a Meeting of the Imperial War Cabinet, 10 Downing Street, 3 December 1918, 10.30 am, p. 2; Available at http://filestore.nationalarchives.gov.uk/pdfs/large/cab-23-42.pdf

accomplished.'[239] He called upon his fellow countrymen to assist in every possible way for the establishment of just democracy throughout the world.[240] Interestingly, America started having plans and preparations for the Paris Peace Conference even before the Armistice was signed. On 15 September 1917, the Confidential Memorandum on Preparatory Work for the Peace Conference decided to include subjects under the heads of History, Commerce, and International law.[241] Matters coming under the nuances of international law were peace and war, rules of war, maritime law, etc.[242]

Major General F.J. Kernan, Secretary of the American Commission to Negotiate Peace, submitted in the memorandum that, 'we are just emerging from the greatest war in the history of mankind where the rights and obligations of neutrals and the rules of land and sea warfare have undergone the most searching test in modern times.'[243] World War I witnessed extensive use of weapons in the battlefield, including poisonous gases, bombardment from aerial machines and submarines. Unfortunately, there were no decisive authoritative rules on the use of weapons.[244] Therefore, Kernan proposed a revision to include the employment of new methods of committing crimes that were undertaken during WWI as a matter of urgent necessity.[245] However, Kernan felt the political climate was unsuitable for any legal modification to the laws of war. He instead suggested postponing the revision until the world returned to normal conditions. Conversely, he also perceived that the revision would have been easier because of experience, fresh knowledge and keen interest. On this note, he stated the following:

> There are in Europe today men who have worked on submarines and men who have been employed in every way for their destruction; there are men who have directed the employment of bombing aerial machines as well as

[239] Papers Relating to the Foreign Relations of the United Sates, the Paris Peace Conference, 1919, Volume 1, Document 17; Announcement by President Wilson of the Signing of the Armistice, November 11, 1918. Reprinted from official 2 U.S. Bulletin 460, Nov.11, 1918.
[240] Ibid.
[241] Papers Relating to the Foreign Relations of the United States, the Paris Peace Conference, 1919, Volume 1, Document 17; Confidential Memorandum on Preparatory Work for Peace Conference submitted on September 15, 1917; p.12, Paris Peace Conf. 182/1; This was an unsigned memorandum.
[242] Ibid.
[243] Papers Relating to the Foreign Relations of the United States, the Paris Peace Conference, 1919, Volume 1, Document, Document 324; Submitted by Major General F.J Kernan to the Secretary of the Commission to Negotiate Peace on 12 January 1919; Memorandum for the American Commission to Negotiate Peace 12 January 1919 (Paris), The Paris Peace Conference 1919, Vol 1 pp. 327, 328.
[244] Ibid.
[245] Ibid.

> others who have actually conducted the bombardments, and also men who have knowledge of the effects of this species of warfare; similarly, there are men who have undergone life in prison camps and others who have had charge of such camps; and so throughout all the varied experiences on land and sea which this war has given rise to at all seasons of the year and in many lands scattered around the world.[246]

In the memorandum, he proposed that all delegations of the great Powers, represented at the Paris Peace Conference, should come forward and appoint a committee to 'codify the rules of warfare on land and sea and the rights and obligations of neutrals in wartimes.'[247] His proposed reason was to ensure that the great Powers could complete their work promptly before submitting it to the Peace Delegation.[248] Similarly, the *chargé* in France, Bliss, submitted a plan emphasising the representation of states with notes, which was known as the Henry White Papers.[249] He found that the meeting was significant to decide the representation of the Great Allied and Associated Powers in all sessions and commissions along with the representation of belligerent and neutral states at different stages of the negotiations.[250] The Henry White Papers proposed several key principles at the Conference, including the 'responsibility of the authors of the war.'[251] This proposal's view was later reflected in the work of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties 1919 (the Commission on Responsibilities 1919). The Commission on Responsibilities 1919 was set up by the Paris Peace Conference 1919. The chapter discusses below the role of the Paris Peace Conference in setting up the Commission on Responsibilities 1919, which for the first time made a list of international crimes.

[246] Papers Relating to the Foreign Relations of the United States, the Paris Peace Conference, 1919, Volume 1, Document, Document 324; Submitted by Major General F.J Kernan to the Secretary of the Commission to Negotiate Peace on 12 January 1919; Memorandum for the American Commission to Negotiate Peace 12 January 1919 (Paris), The Paris Peace Conf. 185.1/14, Vol 1 pp. 327, 328.
[247] Ibid.
[248] Ibid.
[249] Papers Relating to the Foreign Relations of the United States, the Paris Peace Conference, 1919, Volume I, Document 345, p. 386; Submitted by the *chargé* in France (Bliss) to Mr. Henry White on 9 January 1919. This paper explains the necessity of the preparatory meeting of the members of Supreme Council of Versailles.
[250] Ibid.
[251] Ibid.

2.3 The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties 1919: The Identification of International Crimes

The Hague Conventions 1899 and 1907 were widely ratified international documents on laws and customs of war at that time. Although the Conventions had provisions on the laws and customs of war, they did not contain any provision defining crimes that might arise due to the violation of the laws and customs of war given in the Conventions. The appearance of war crimes as international crimes were first identified by the Paris Peace Conference, and specifically by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties 1919 (The Commission on Responsibilities 1919). During the identification of the development of international crimes the Commission broadly relied on different sources, including a) the violation of laws that constituted international crimes; b) the identification of the sources that were used as a basis of the criminal acts; c) the status of the 1907 Hague Convention of laws and customs of war; d) the determination of the elements of the crimes under the heading of war crimes, and e) the widespread use of the principles of humanity to frame the crimes under international law.

2.3.1 The Plenary Session of the Preliminary Peace Conference

On 18 January 1919, the representation of states at the Paris Peace Conference was confirmed, when the Allied and Associated Powers assembled in the *Salle de la Paix* of the French Ministry Affairs following the end of World War I. The meeting took place among the United States of America, the British Empire, France, Italy and Japan. Countries that had severed their ties with the enemy powers of World War I were also invited to send their representatives.[252] The composition and function of the Paris Peace Conference was divided into four categories: 1) plenipotentiary delegates; 2) delegates and technical advisers; 3) technical experts; and 4) the secretariat general.[253] The representation at the Peace Conference included Belgium, Brazil, Canada, China, Cuba, Czechoslovakia, France, Greece, Guatemala, Haiti, the Hejaz, Honduras, Italy, Japan, Liberia, Lithuania, Montenegro, Nicaragua, Panama, Poland, Portugal, Romania, San Marino, Siam, the United Kingdom, the United States, the Kingdom of Serbs, Croats and Slovenes.[254]

---

[252] Papers Relating to the Foreign Relation of the United States, the Paris Peace Conference, 1919, Volume III; Preliminary Peace Conference, Protocol No. 1, session of January 18, 19191; Paris Peace Conf. 180.0201/1 pp. 158, 159.
[253] Paper Relating to the Foreign Relations of the United States, the Paris Peace Conference, 1919, Volume; Composition of the Conference on 1 April 1919; Paris Peace Conf. 182/70.
[254] Ibid.

The experience of World War I led world leaders to discuss and explore a new international platform for identifying crimes committed by the Central Powers of Germany and Austria-Hungary. The President of the United States, Woodrow Wilson, suggested resolving the 'question of national and individual crimes against decency' within the comparative privacy of the Supreme Council, the highest organ of the Peace Conference.[255] On the other hand, the British Prime Minister, David Lloyd George, emphasised the establishment of an international investigative commission to inquire into penal responsibility.[256] At the plenary session of the Preliminary Peace Conference on 25 January 1919, a decision was taken to set up a Commission to hold the authors of the war accountable and enforce penalties.[257] The Commission consisted of 15 members: two members from each of the Allied Powers – the United States of America, the British Empire, France, Italy and Japan – and one member from each of the Associated Powers – Belgium, Greece, Poland, Romania and Serbia. A total of ten states were chosen to represent the Commission. Robert Lansing, the Secretary of State of United States of America, was selected as Chairman of the Commission. Initially, Andre Tardieu of France proposed the establishment of two sub-committees: one related to the facts and the other with legal questions. Rolin Jaequemyns of Belgium agreed to the establishment of sub-commissions but requested two sub-commissions on the legal questions, one for war responsibility and the other for war crimes.[258] The Commission finally decided to establish three sub-commissions. Sub-Commission I was assigned to discover and collect evidence on criminal acts; Sub-Commission II was assigned to work on the facts based on the findings of Sub-Commission I to determine the responsibility for starting the war, and Sub-Commission III was instructed to work on the responsibility for the violation of the laws and customs of war.[259] Lansing suggested that 'each subcommittee would receive the documents submitted by all governments and emphasised the fact that the Commission was sitting as a 'Grand Jury', that is, they were not there to determine guilt but rather to determine whether there was a *prima*

[255] Jackson Nyamuya Maogoto, 'The 1919 Paris Peace Conference and the Allied Commission: Challenging Sovereignty Through Supranational Criminal Jurisdiction' in Morten Bergamo, Cheah Wui Ling and Yi Ping (eds), *Historical Origin of International Criminal Law*: Volume I (Torkel Opsahl Academic EPublisher 2014) 176; See also, U.S Department of State, 'Papers Relating to the foreign Relations of the United States', Paris Peace Conference-F.R., P.P. c., Vol 2, pp. 71-72.
[256] Ibid.
[257] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, (Jan-Apr. 1920) 14 American Journal of International Law 1/2, pp. 95-154.
[258] The Minutes of a Meeting of the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties, 3 February 1919, Paris Peace Conf. 181.121/1. pp. VI.
[259] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, (Jan-Apr. 1920) 14 American Journal of International Law 1/2 (Jan-Apr. 1920) pp. 95-154.

facie case'.[260] This chapter discusses the Commission on Responsibilities 1919's efforts of identifying sources from the criminal facts submitted by the representative States. In particular, the Commission's members focused on three broad areas such as crimes under national laws, provisions of the international conventions, the law of nations, and principles of humanity.

2.4 Sources of War Crimes as International Crimes: The Commission on Responsibilities 1919

The Commission's contribution to the identification of international crimes extends to a variety of sources of international law, including customary international law. Before discussing the criminal acts in the international context, the Commission attempted to enquire whether the states considered these collected acts as crimes under their penal laws. Sub-Commission 1 worked with 'criminal facts' to discover the evidence to establish the existence of the alleged acts. William F. Massey, Chairman of the Sub-Commission 1 and Prime Minister of New Zealand, in the case of condemnable acts, suggested collecting pieces of evidence which were initially available.[261] He suggested contacting representatives of various organisations to gather more evidence. The structure or nature of these organisations was not clear from his discussion. Subsequently, Dean Larnaude of France added that the Commission should take into account the work of the Russian affairs. He also proposed collecting evidence through the Russian Society or Russian Embassy.[262] James Brown Scott of the United States recommended that the Commission make a formal request to every government represented at the Paris Peace Conference to submit its materials.[263] On the other hand, Nikolaos Politis, the Greek Minister of Foreign Affairs, suggested collecting facts using a geographical perspective. The Chairman of Sub-Commission I opposed to the collection of information by a geographical standpoint. The Chairman clarified that it can be made 'with reference to approaching the representative of the different countries who are in Paris at the present time, for the purpose of obtaining from or through them, all the information at their disposal which may be of use to us.'[264] It was a broad method of document collection, as it sought to reflect the general practice of the then-representative states present at the Paris Peace Conference.

[260] The Minutes of a Meeting of the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties, 3 February 1919, Paris Peace Conf. 181.121/1. p. VI.
[261] Proceedings of a First Meeting of Sub-Commission No. 1 of the Commission on the Responsibilities for the war. Held at 10:30 am, Monday, 17 February 1919 at the Ministry of the Interior, 96, Place Beauvau, Paris, Minutes: USNA 181.12101/2, p. 3.
[262] Ibid.
[263] Ibid. p. 4.
[264] Ibid, p. 4.

The members of the Commission engaged in a debate to identify sources for the violation of criminal facts that took place during World War I. One of the contentious issues was whether Sub-Commission I should collect documents from official and semi-official sources. The preference of one source over others implies that not every impression or action of the state reflects State practice along with *opinio juris*. It is generally assumed that the actions of 'low-level organs' has less weight than the practice of higher organs, in the absence of any predetermined hierarchy.[265] In this case, Mr Politis's views can be identified as significant, as he primarily preferred the proposal to collect documents from official sources to classify the sources for extracting documents.[266] He also drew the Commission's attention to the work of Grecian affairs, which included an investigation into Bulgarian and Turkish crimes.[267] He later added the work of Serbian Professor Slobodan Yovanovitch, who carried out a thorough investigation on Serbia.[268] The Commission did not make any distinct category of sources clarifying the official, semi-official or unofficial documents. For example, sources such as Russian or Grecian affairs reflect the official nature of the document, whereas works of professors reflect work of an unofficial nature. Rolin Jaequemyns of Belgium was also concerned about the facts gathered from both official and semi-official sources.[269] James Brown Scott agreed with Mr Politis's point of view, emphasising that official documents should be preffered over the semi-official sources.[270] This chapter shows that the Commission members were more engaged in making crimes following World War I than identifying crimes. In general, in terms of State practice, official or semi-official sources reflect a greater connection to state behaviour and conduct than those of an unofficial nature. Facts from unofficial sources are less authoritative in terms of providing guidance as to the states' legal obligation. The Commission accepted the decision to collect criminal facts with instructions to communicate the official and semi-official information to the Sub-Commission through their representatives. The Commission also invited the governments represented at the Paris Peace Conference to submit their reports if any investigation continued through their efforts. The

[265] Report on the work of the sixty-sixth session (2014), (Document A/69/10), Chapter X, Identification of Customary International Law, Para.175, 178, para. 181.
[266] First Meeting of Sub-Commission I, 17 February 1919, Minutes: USNA 181.12101/2 (M 820, Roll 143, 17-33) p. 4.
[267] Ibid. p. 4.
[268] Ibid. p. 5.
[269] Ibid. p. 5.
[270] Ibid. p. 5.

Commission decided to sort out the criminal facts based on the geographical references of the enemies and the advice of the British memorandum.[271]

PART I

2.4.1 Sources and Lists of Crimes: Reports Submitted by States

The Commission relied on various documents submitted to the Commission by representative governments. These representative governments investigated facts of violation of the laws and customs of war on land, sea and air by the forces of the German Empire and its Allies during World War I. The evidence of outrages was provided by: a) the British Commission report drawn up by Lord Bryce; b) the French Commission presided over by M. Payelle; c) publications and memorandum by the Belgian Government; d) the memorandum of the Greek delegation; e) the documents lodged by the Italian Government; f) the formal denunciation by the Greeks at the Conference of the crimes committed against the Greek populations by the Bulgars, Turks and Germans; g) the memorandum of the Serbian delegation; h) the report of the Inter-Allied Commission on the violations of The Hague Conventions and of international law in general committed between 1915 and 1918 by the Bulgars in occupied Serbia; and i) the summary of the Polish delegation, together with a Romanian memorandum.[272] An analysis of these reports can show the gradual emergence of international crimes, taking relevant principles of national and international documents into consideration.

2.4.1.1 Sources and Lists of Crimes Submitted by British Delegation

The evidence of outrages submitted by the British memorandum contained the violation of international standards of warfare. This memorandum had no mention of any specific violation of national law. Instead, it largely relied on the violation of conventional provisions to identify the sources of crimes. It drew general attention to earlier work, such as the report of the Bryce Commission and the report of the Commission chaired by John MacDonnell.[273] In the late spring of 1915, an official British Commission chaired by Viscount James Bryce

[271] Meeting of Sub-Commission No 1 held at the Ministry of the Interior at 10.30 am on Monday 17th February 1919, p. 271-272. See also, Notes of Meeting of Sub Committees. Sub Committee on offences. February 17, 1919, Paris Peace Conference F. W 181. 12101/1.
[272] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (Jan-Apr., 1920) 14 The American Journal of International Law 1/2, pp. 95-154.
[273] Annex IV to Minutes of the second meeting: Memorandum submitted by the British Delegation: [Deposited February 13, 1919, and attached pursuant to the direction of Sub commission III, given on 8 March 1919] USNA 181.1201/16, pp. 27-33, p. 29.

prepared a Report of the Committee on Alleged German Outrages, known as the Bryce Report. This report shows the 'evil and unjust acts' committed by the Germans and the violation of international standards of warfare.[274] This Committee was appointed on behalf of His Majesty's Government 'to collect evidence as to outrages alleged to have been committed by German troops during the present war, cases of alleged maltreatment of civilians in the invaded territories, and breaches of the laws and established usages of war; and to prepare a report for His Majesty's Government showing the conclusion at which they arrive on the evidence now available.'[275] The report described many atrocities committed against the German Military Code. Evidence was collected based on the deliberate and systematically organised massacre of the civilian population in parts of Belgium, in addition to ill-treatment of women and children, the use of civilians as shields, looting, burning and destruction of property and firing on hospitals or Red Cross ambulances or stretcher-bearers.[276]

The memorandum of the British delegation circulated on 13 February 1919 presented a list of crimes under certain titles as follows: a) systematic terrorism in Belgium, France and elsewhere; b) wanton devastation, destruction of property and pillage; c) illegal levies; d) illegal executions; e) deportation of civil population in occupied territories and forced labour; f) murder of hostages; g) indiscriminate bombardment from the air; h) indiscriminate bombardment from the sea; i) illegal methods of submarine warfare; j) destruction of hospital ships; k) wilful and reckless bombardment of hospitals; l) wrongful employment and ill-treatment of prisoners of war; m) directions to give no quarter; and n) use of illegal methods of warfare generally.[277]

On 21 February 1919 Sir Ernest Pollock submitted a memorandum containing a list of crimes to the Sub-Commission III. He submitted a similar list of crimes to that introduced on 13 February 1919. Interestingly, this memorandum only added the breach of treaties for the invasion of Belgium and Luxembourg. This memorandum focused on the systematic terrorism

[274] Report of the Committee on alleged German Outrages appointed by His Majesty's Government and presided over by the right Hon. Viscount Bryce, O.M., &c., &c. (Formerly British Ambassador at Washington) (London: Printed under the authority of His Majesty's Stationery Office by Hayman, Christy and Lilly, ltd, 1915) p.7.
[275]Ibid., p. 8.; See also Patrick J. Quinn, *The Conning of America: The Great War and American Popular Literature* (Amsterdam-Atlanta, GA 2001) 35.
[276] Report of the Committee on alleged German Outrages appointed by His Majesty's Government and presided over by the right Hon. Viscount Bryce, O.M., &c., &c. (Formerly British Ambassador at Washington) (London: Printed under the authority of His Majesty's Stationery Office by Hayman, Christy and Lilly, ltd, 1915) 12.
[277] Annex IV to Minutes of the second meeting: Memorandum submitted by the British Delegation: [Deposited February 13, 1919, and attached pursuant to the direction of Sub commission III, given on 8 March 1919] USNA 181.1201/16, pp. 27-33, p. 29.

that had taken place in Belgium and France only.[278] While referring to sources used for finding the crimes, Sir Pollock mentioned: a) The Hague Convention II of 1899 and Geneva Convention dealing with maritime warfare; b) The Hague Convention IX of 1907 pertaining to naval bombardment; c) The Hague Convention X of 1907 forbidding the destruction of hospital ships; and d) The Declaration of St. Petersburg 1868 dealing with illegal methods of warfare. The Solicitor General also added several national instruments as a source of crimes such as naval codes and prize laws of the chief maritime states, the decision of the Prize Courts, and the opinion of authoritative text writers. The list of crimes submitted both on 13 and 21 February 1919 indicated violations of many principles of the Hague Convention 1907,[279] except for systematic terrorism and submarine warfare. The chapter discusses later the efforts of the Commission on Responsibilities 1919 to define the systematic terrorism within the list of war crimes.

The British memorandum's submission located several sources as the basis of criminal acts. Among them, the most prominent source was the international conventions available at that time. In contrast, the violation of the laws and customs of war, whether mentioned in conventions or not, as source of international crimes seems more accepted within the list submitted by the United States' Delegates.

2.4.1.2 List of 'Inhuman and Improper' Conduct of War Submitted by the United States Delegate to the Drafting Committee

The position of the United States' delegates demonstrated the readiness to prosecute and punish crimes for the violations of the laws and customs of war. This list did not make any separate classification between the violations of 'the laws and customs of war' and the 'laws of humanity' in two distinct categories. It stated that there was no such explicit provision on the 'laws of humanity' in the Hague Convention on Laws and Customs of War 1907. The Americans declared the preambular reference to the laws of humanity 'as an undefined standard of laws of humanity'.[280] In their opinion, the concept 'laws of humanity' is different than 'individual conscience', and considered this reference as 'arbitary'.[281] They preferred to discuss violations of the laws and customs of war according to the mandate of the Commission.

[278] Memorandum of Solicitor General, 21/2/19, USNA 181/12301/3 (M820, Roll 143, 729-731).
[279] Ibid.
[280] James F. Willis, *Prologue to Nuremberg- The Politics and Diplomacy of Punishing War Criminals of the First World War* (Greenwood Press 1982) 75.
[281] Ibid.

Gabrielle Kirk McDonald mentioned that the Americans 'confined themselves to law in its legal sense, believing that in so doing they accorded with the mandate of submission, and that to have permitted sentiment or popular indignation to affect their judgement would have been violative of their duty as members of the Commission on Responsibilities.'[282] The American memorandum, submitted by Lansing, included a list of 'inhuman and improper' conduct of war, with no specific reference to the term 'laws of humanity'. It was annexed as an 'Annex I' to the American dissenting memorandum.[283] The memorandum submitted a list of 'inhuman and improper' conduct of war including '[s]laying and maiming men' as per generally accepted rules of war, which are contrary to the modern conception of humanity. [284] It also had 'methods of destruction of life and property' with a particular reference to the 1907 Hague Convention.[285] The American view was more positivistic. However, the inclusion of the 'crime against civilisation' had no specific mention of sources as such. Their strict attitude in terms of the positive existence of laws of warfare seems to have chosen a somewhat relaxed stance while including the 'crime against civilisation'. Nevertheless, the Report of Sub-Commission III considered this memorandum as one of the very useful and interesting documents in terms of deciding the categories of outrages for violating the laws and customs of war[286], irrespective of the sources of the crimes, whether found in conventions or in penal provisions. In addition to international conventions and the laws of humanity, the sources of criminal acts submitted by the French delegation listed a number of penal laws.

2.4.1.3 Sources and List of Crimes by the French Delegation

An official report of the French Commission described the atrocities committed in France. The French Commission reported a number of facts to the Commission on Responsibilities 1919, stating that 'we have indeed believed it to be our duty only to place on record those facts which, being established beyond dispute, constitute with absolute certainty what may be clearly termed crimes…'.[287] This report mentioned many examples of common

[282] Gabrielle Kirk McDonald, *Substantive and Procedural Aspects of International Criminal Law* (Brill/ Nijhoff 2000) 53.
[283] Report of the Commission on Responsibilities, USNA 181.1201/16, pp. 115-176, at pp. 173-174.
[284] Annex I, Summary of Examples of Offences Committed by the Authorities or Forces of the Central Empires and Their Allies Against the Laws and Customs of War and the Laws of Humanity. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (Jan-Apr., 1920) 14 The American Journal of International Law 1/2, pp. 95-154. See also: Gabrielle Kirk McDonald, *Substantive and Procedural Aspects of International Criminal Law* (Brill/Nijhoff 2000) 53.
[285]Ibid, pp. 95-154. See also: Gabrielle Kirk McDonald, *Substantive and Procedural Aspects of International Criminal Law* (Brill/Nijhoff 2000) 53.
[286] Report of Sub-Commission III on the Laws and Customs of War, USNA 181.1201/16, pp. 50-54, p. 53.
[287] Black Book of the War: German Atrocities in France and Belgium (The Daily Chronicle 1915) 1.; See also

practice by enemies that occurred in France, such as pillage, rape, arson, taking hostages and murder. The report also noted criminal acts, explaining that the 'personal liberty, like human life, is the object of complete scorn on the part of German military authorities. […] Arson has been employed either as a means of systematic devastation or as a means of terrorism, […] and the incident of Rheims, which was bombarded by the Germans for eighty days.'[288] It contained a number of acts, such as the murder of the wounded or prisoners, and attacks on doctors and stretcher-bearers. The nature of the crimes they listed in the categories of crimes included 'crimes against common rights', 'crimes against women and young girls', 'crimes against property', and 'crimes against the person'.[289] The report mentioned a complete violation of the laws and customs of war and of international conventions.[290] On 3 February 1919, two French professors, Ferdinand Larnaude and Albert Geouffre de Lapradelle, submitted a specific list of war crimes. It included the following acts as violations of the laws and customs of war:

> Use of forbidden arms, the poisoning of air or of water, the ill-treatment of prisoners, the arrest and massacre of hostages, the destruction of towns and of ships, even of hospital ships, the violation of family life by means of deportation *en masse* of peaceful inhabitants and deliberate violations of the honour of young girls, the submarine warfare, torpedoing of ships loaded with women and children, the bombarding of cities, sometimes undefended, by aeroplane or by long-range guns, with no other object than to terrorise an inoffensive population.[291]

In addition, they made a list of war crimes, noting the atrocities carried out by Kaiser Wilhelm II during more than four years of war. They found him responsible for the crimes and wanted to bring him before the Allied and Associated Military Tribunals.[292] The list added a

German Atrocities in France: A Translation of the Official Report of the French Commission; Report presented to the President of the Council by the Commission Instituted with a view to investigating Acts Committed by the Enemy in Violation of International Law. Decree of 23 September 1914; see also John Selden Willmore, *The Great Crime and Its Moral* (Hodder and Stoughton 1917) 175.

[288] German Atrocities in France: A Translation of the Official Report of the French Commission; Report presented to the President of the Council by the Commission Instituted with a view to investigating Acts Committed by the Enemy in Violation of International Law. Decree of 23 September 1914, p. 9. Available at https://cudl.colorado.edu/MediaManager/srvr?mediafile=MISC/UCBOULDERCB1-58-NA/1508/i73304645.pdf

[289] Ibid.

[290] Ibid., p. 32.

[291] Annex to Minutes of First Meeting, 3 February 1919 at 3 p.m., at the Ministry of the Interior, under the temporary Chairmanship of Mr. Tardieu, USNA 181.1201/1 (M 820, Roll 140, 376-384), p. 5.

[292] Ibid., p. 5.

number of national legislations that define war crimes, such as Article 441 of the 1914 Great Britain Manual of Military Law, Article 249 of the French Code of Military Justice for the Army.[293] The French Commission referred mostly to national law while formulating its list of criminal acts.

On 24 February 1919, during the meeting of Sub-Commission I, Dean Larnaude submitted a comprehensive list of war crimes illustrating: a) violations of the laws of war in combat including crimes against combatants, crimes against the wounded and sick, and crimes against the person; and b) attacks against a peaceful population including a number of crimes under the violence against persons and violence against property.[294] He also submitted a list of crimes contrary to the law of nations. The list included a short report on submarine warfare and torpedoing of French ships.[295] The interim report also stated that there were acts of aggression by Germans in the French territory even before the declaration of war on 3 August 1914.[296] Dean Larnaude had to rely on the violation of the Hague Convention on Laws and Customs of War 1907 to define criminal acts, because there was no reference to the crime of 'systemic terrorism' in the French national law. To categorise sources of crimes, he proposed the submission of facts based on two important categories: first, individual acts; second, acts committed on the orders of superiors.[297] He mentioned that individual criminal acts, such as rape and cases of robbery, would be tried by the French judicial authorities. French judicial authorities were not able to prosecute any crimes committed in the execution of an order, although it was a regular practice of war. In response to this, Mr Massey stated that 'under the English law atrocities committed under an order are not immune from punishment'; thus, the international tribunal created by the Commission would have sufficient power to punish such offences.[298] Dean Larnaude approved the proposal by Mr Massey.[299] The absence of common law application in France made Dean Larnaude rely mostly on national statutes.

[293] Ibid., p. 6.
[294] Liste des crimes contre le droit des gens, 24 February, *Recueil des actes de la conférence*, pp. 343-345.
[295] Proceedings of meeting of Sub-Commission No 1 on the 'Commission on the Responsibilities for the War' 24 February 1919, 11 am, TNA FO 608/246; See also, USNA 181.12101/3, p. 310.
[296] Interim Report of Sub-Commission I, 24 February 1919, TNA FO 608/246; USNA 181.12101/3, p. 7.
[297] Proceedings of Meeting of Sub-Commission No 1 on the 'Commission on the Responsibilities for the War' 24 February 1919, 11 am, p. 310, USNA 181.12101/3.
[298] Ibid.
[299] Ibid.

2.4.1.4 Source and List of Crimes Submitted by the Italian Delegation to Sub-Commission I

Senator Mortara, President of the Court of Cassation, chaired a committee of inquiry constituted by the Italian Government for obtaining information on the violations of the rules of international law by Austria-Hungary. The Commission obtained evidence from the report by Commandant Catellani, Professor of International Law at Padua University, who was also attached to the Headquarters of the Italian Army. The report was corroborated with data from the pamphlet including reports by Captain Ximenes, Military Almoner Abbo, and Medicin-Major Cavelotte, published under the Secretary of State for Propaganda. It appeared from the said documents that there was hardly a single article of international conventions that was not systematically violated by the enemies. The report categorically specified a number of violations of international conventions, such as: a) treatment of wounded and sick (Art. 1 of the Geneva Convention 1906); b) ill-treatment of prisoners: violation of the obligation to give quarter (Rules annexed to the IV the Hague Convention 1907, Art. 4, 23); c) use of forbidden arms and ammunition, for example expanding or explosive bullets (Declaration of St. Petersburg Nov 19/11 December 1868, the Hague Convention 1907, Art. 23); d) asphyxiating gas (Declaration of St. Petersburg, 11 December 1868, the Hague Convention 1907, Article 23 a and e); e) treacherous ruses by making use of the enemy flag (the Hague Convention 1907, Art. 23); f) bombardment of undefended places by air attacks (Hague Convention 1907, Art. 25-IX of the Hague Convention 1907, Art. 1); g) pillage and the confiscation or destruction of private property (the Hague Convention 1907, Art. 28, 46, 53); h) destruction of educational and charitable institutions (Hague Convention 1907, Art. 27, 56); and i) forced labour and the deportation of civilians (Hague Convention 1907, Article 52).[300] This memorandum stated, in its conclusion, that the acts of war conducted by Austria-Hungary were contrary to the laws of international conventions, the customs of war, and the most elementary principles of humanity.[301] The Italian memorandum was more specific to the violations of the provisions of international conventions while making the list of crimes.

[300] British Secretary's notes on a Meeting of Sub-Commission I on Criminal Acts, held at the Ministry of the Interior on Monday, 24 February 1919, 11 am, USNA 181.12101/3. pp. 297-301.
[301] Memorandum Submitted by the Italian Delegation to the Sub-Commission I on the 24 February 1919. British Secretary's notes on a Meeting of Sub-Commission I on Criminal Acts, held at the Ministry of the Interior on Monday, 24 February 1919, 11 am, USNA 181.12101/3, pp. 297-301.

2.4.1.5 Report of the Serbian Government

The Serbian delegation placed more emphasis on the Hague Conventions to categorise the list of criminal offences.[302] The Serbian Government reported murder, massacres, torture, the use of human shields, collective penalties, arrest, execution of hostages, the requisitioning of service for military purposes, arbitrary destruction of public and private property, aerial bombardment of open towns without the presence of a regular siege, destruction of merchant ships without a previous visit and without precautions for the safety of passengers and crew, massacre of prisoners, attacks on hospitals ships, poisoning of springs and wells, outrages and profanations without regard for religion or the honour of individuals, issue of counterfeit money, and methodical and deliberate destruction of industries with no other object than to promote German economic supremacy after the war.[303] This report did not indicate any new crimes arising due to violations of the laws of nations, laws of humanity, or any specific violation of the Serbian penal code.

Schabas mentioned that 'several of the submissions make reference to treaty law as authority for the identification of specific war crimes.'[304] He has pointed out that in addition to the Hague Convention 1907, there were specific references to the Geneva Convention of 1906 and the St Petersburg Declaration of 1868 as legal sources in the Italian report, the Hague Declaration of 1899 on expanding bullets by the French report, the ninth Hague Convention dealing with naval bombardment and the tenth Hague Convention forbidding the destruction of hospital ships by the British memorandum. [305] This discussion above shows that the Commission had made a concerted effort to identify criminal facts from various sources. One may argue that the engagement of Allied representatives in making the list of international crimes based on the provisions of penal code, treaties, the laws of humanity and the law of nations does not reflect what we understand customary international law today. Nevertheless, the effort was significant as a starting point to identify the formal nature of international crimes.

[302] Proceedings of Meeting of Sub-Commission No 1 on the 'Commission on the Responsibilities for the War', 24 February 1919 11 am, USNA 181.12101/3., p. 307.
[303] Annex to Minutes of Eighth Meeting: Draft Report of the Commission; as prepared by the drafting committee and submitted to the Commission on 24 March 1919, USNA 181.12101/3, p. 89.
[304] William A. Schabas, *The Trial of the Kaiser* (Oxford University Press 2018) 145.
[305] Ibid., p. 146.

The Hague Convention 1907 was instrumental in defining criminal acts but was not an absolute law to determine international crimes. The section below describes complexities involved in applying the Hague Convention as an absolute law of international crimes.

PART II

2.4.2 The Hague Conventions and the List of War Crimes

The Hague Conventions had a great impact on the work of the Commission on Responsibilities 1919 in identifying international crimes. Sub-Commission III was assigned to determine the responsibility for the violation of the laws and customs of war.[306] Sub-Commission III was entrusted to consider the facts established by Sub-Commission I on criminal acts to determine responsibility based on the conduct that took place during the hostilities. Sub-Commission III declared that it was 'unnecessary to examine and rely in detail upon Conventions drawn up at the Hague and elsewhere.'[307] It considered these conventions as reflecting 'main declaratory principles and applied these principles to certain matters sure to arise in the course of a war.'[308] This chapter points out several reasons why the Hague Conventions were not considered as a source of international crimes, such as: 1) the limited application of Hague Conventions, as they only applied to member states; 2) absence of penal provisions in the Hague Convention; 3) introduction of many new crimes that were outside the scope of the Convention.

2.4.2.1 Limited Application of the 1907 Hague Convention

The Hague Convention 1907 was not applied as a matter of law because of the presence of 'general participation' clause. The general participation clause stipulates that the Hague Convention is only binding upon the belligerents who are party to the Convention. Serbia was not a party to the Hague Convention 1907; therefore, Serbia was not bound by the provisions of the Hague Convention and, thus, its application was limited. Sub-Commission III was concerned since 'the Convention serves as general rules for the belligerents in their mutual relations and for the inhabitants of the invaded territory.'[309] However, what the status of Hague Conventions should be was articulated well by Mr Lansing. He stated that 'there is no absolute

[306] Annex I to Minutes of Second Meeting, USNA 181.1201/16, p. 26.
[307] Draft Report of Sub-Commission III, 4 March 1919, Paris Peace Conference 181.12302/2, p. 1.
[308] Ibid.
[309] Draft Report of Sub-commission III, prepared by the Drafting Sub-Committee and Submitted to the Sub-Commission, 4 March 1919, Paris Peace Conference 181.12302/2.

international law in regard to laws and customs of war. We are more or less bound by the general principles of international law for the reasons that at the very instant war was declared there were certain belligerents that were not signatories of the Hague Convention. That swept the Hague Conventions aside as absolute law and left them merely as guides to the conscience of the world as to what international law was'.[310] He also suggested counting the London Declaration concerning the Laws of Naval War 1909 as a general guide to deal with maritime warfare.[311] To cover a wide range of crimes, Commission members were inclined to rely on sources such as the law of nations, the laws of humanity, or laws of ordinary penal codes. Thus, it was possible to cover all other states who were not parties to the Hague Conventions.

2.4.2.2 Absence of Penal Provisions

The Hague Convention 1907 does not contain punishments for the violation of any of its provisions; it has, however, articles for compensation. Article 3 of the Hague Convention 1907 states that 'a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation…'[312] A discretionary power was given only to the signatory states to limit the violation of provisions through disciplinary and punitive measures.[313] Due to the lack of a definite penalty for violation, Mr Lansing, President of Sub-Commission III, suggested invoking the codes of various countries to determine what acts were punishable.[314] He referred to the American Rules of Land Warfare (1914) for specific penal provisions. Articles 112, 181, 340, and 366 of the American Rules of Land Warfare (1914) provide specific provisions for the laws of war. In fact, Mr Lansing considered all of the crimes specified in national criminal codes as punishable. Many manuals and military codes, nonetheless, stated that certain acts committed by soldiers in the course of the war are only ordinary crimes, and punishment is only imposed once they fall into the hands of the belligerents.[315]

[310] Minutes of Sub-Commission III, 21 February 1919, Minutes: USNA 181/12301/3 (M 820, Roll 143, 715-726), p. 8.
[311] Ibid.
[312] Laws and Customs of War on Land (Hague, IV) 18 October 1907, 36 Stat. 2277; Treaty Series 539; See also, Adam Roberts, *Documents of the Laws of War* (Oxford University Press, 1982) 67.
[313] George Manner, 'The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War' (1943) 37 The American Journal of International Law 3, pp. 407-435.
[314] Minutes of Sub-Commission III, 21 February 1919, USNA 181/12301/3 (M 820, Roll 143, 715-726) p. 8.
[315] James W. Garner, 'Punishment of Offenders Against the Laws and Customs of War' (1920) 14 American Journal of International Law 1/2, pp. 70-94.

The Hague Conventions, undoubtedly, contain several significant provisions on the laws and customs of war; however, the Commission was not able to frame every outrage that was committed by Germany within the meaning and provisions of the Conventions. Since there were no conventional and traditional rules available concerning penal matters, Mr Rolin Jaequemyns suggested, 'I have thought of a solution which to me appears quite equitable and against which the Germans will not be able to protest, and that is to choose one single law, and that would be the law of the nation to which the country belonged. In that case, it would consist in choosing the German law to punish crimes committed by the Germans: if we select the Germans' own law, what can they complain of?'[316] In response to that, Mr Lansing made it clear that the recognition of 'civil penal law' was beyond the power of the Commission.[317] Then, Mr Rolin Jaequemyns changed his statement slightly and supported the insertion of penal law based on the law of nations.[318] Eventually, the Commission had to look into other materials, since the Hague Convention 1907 did not detail any specific penalty for the violation of the 'laws and customs of war' or the 'violation of neutrality'. Quincy Wright, an American political scientist, mentioned that the Commission ignored the suggestion given by the Law Officers of the Crown in 1918 to the Imperial War Cabinet. It suggested the imposition of responsibility and penalties on the rulers of nations and their subjects for violating the law of nations, including the breach of neutrality treaties.[319] The Draft report of the Commission noted the significance of having penal provisions, considering the severity of the outrages committed by Germany.[320] The nature of international crimes from the law of nations and the laws of humanity was discussed at length in the Commission. However, the laws of humanity as a source of international crimes were vehemently opposed by some members of the Commission and dropped from the final list of crimes. The section below shows the interconnectedness between the law of nations and natural law, which could have provided a justification for the presence of the laws of humanity.

[316] Minutes of Sub-Commission III, 21 February 1919, USNA 181/12301/3 (M 820, Roll 143, 732-746), The Sub-Commission on the violation of the laws and customs of war met at the Ministry of the Interior, 21 February 1919 at 11.30 0'clock.
[317] Ibid.
[318] Notes of the meeting of the Subcommittees, Sub Committee No. III, Meeting held 11:50 a.am Thursday, 21 February 1919 pp. 2, 3.
[319] Quincy Wright, 'The Outlawry of War' (1925) 19 American Journal of International Law, p. 86, fn. 44.
[320] Annex to Minutes of Eighth Meeting: Draft Report of the Commission; As prepared by the drafting committee and submitted to the Commission on 24 March 1919, pp. 89.

PART III

2.4.3 The Commission's debates on the laws of humanity: Consensus and Reservations

The Commission on Responsibilities 1919 excluded from its final report a lengthy discussion on 'laws or principles of humanity'.[321] It was omitted, as there was no presence of crimes due to the violation of 'laws of humanity'. Offences under the laws of humanity, in some cases, were implicit within the list of laws and customs of war. For example, the basic laws of humanity refer to the treatment of civilians, non-combatants, the sick, wounded and prisoners of war. The Commission further discussed that the basic laws of humanity were part of *jus gentium* derived from natural law.[322] The classification and insertion of a list of crimes against the laws of humanity could have been justified following the natural law concept.

The principles of humanity, this chapter argues, remain rooted in natural law, which has been developing inherently through the moral sense of mankind. As per the theory of Vattel, natural law lies within the law of nations.[323] He said that 'the natural law of nations is a particular science, consisting of a just and rational application of the law of nature to the affairs and conduct of nations or sovereigns.'[324] If the laws of humanity were considered a part of natural law, then it would be easier to find their application in the law of nations. The law of nations means 'a natural reason which has established among all mankind, and which is equally observed by all people, is called the law of nations, as being a law which all nations follow.'[325] Vattel asserted that 'produced captivity' and 'servitude' are against the law of nature because the law of nature indicates that human beings have 'equality' and 'freedom'. The law of nations refers to international law or, more particularly, customary international law because it reflects:

> First, from the long and ordinary practice of nations, which affords evidence of a general custom, tacitly agreed to be observed until expressly abrogated; second, the recitals of what is acknowledged to have been the law or practice of nations, and which will frequently be found in modern treaties; third, the writings of eminent authors, who have long, as it was by a concurrence of

[321] Draft Report of the Commission, USNA 181.1201/16, pp. 83-96, at p. 89.
[322] Ibid.
[323] Joseph Chitty (ed) *The Law of Nations; or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* from the French of Monsieur De Vattel (T and J.W Johnson and Co., Law Booksellers, No. 535 Chestnut Street 1853) v, vii.
[324] Ibid. p. 50.
[325] Ibid.

> testimony and opinion, declared what is the existing international jurisprudence.[326]

Hence, it may be argued that the laws of humanity are always exercised by the state as a part of natural law and their violation is always prohibited. This thesis hypothetically presents that customary international law contributes to the rise of the laws of humanity through the natural law approach.

2.4.3.1 The Appearance of the 'Laws of Humanity'

A number of legal instruments have specified the 'laws of humanity', for example, Article 86 of the Oxford Manual specified that the parties must comply with the laws of humanity and morality in all cases.[327] The laws of humanity have always had a significant influence on determining crimes. For example, the preamble of the Hague Conventions, known as the Martens Clause, states that 'until a more complete code of the laws of war has been issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and empire of the principles of the law of nations, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience'.[328] Similarly, the Declaration of St Petersburg referred to the laws of humanity, and it stated that 'the employment of arms which uselessly aggravates the sufferings of disabled men or renders death inevitable would be contrary to the laws of humanity.'[329] The Declaration argued about conciliating the necessities of war with the laws of humanity.[330] In addition, although many categories of outrages fell outside the headings of the Convention, Sub-Commission III used the expression of German Delegate Marschall von Bieberstein as a standard, who stated in relation to The Hague Conference 1899, that:

---

[326] Ibid.
[327] The Laws of War on Land, Oxford, 9 September 1880; See also, D. Schindler and J. Toman, The Laws of Armed Conflicts (Martinus Nijhoff Publishers 1988) 36-48.
[328] Draft Report of Sub-Commission III, prepared by the Drafting Sub-Committee and Submitted to the Sub-Commission, 4 March 1919.; See also, Ben Saul and Dapo Akande, *The Oxford Guide to International Humanitarian Law* (Oxford University Press 2020) 126.
[329] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November/11 December 1868. Available at - https://ihl-databases.icrc.org/ihl/full/declaration1868
[330] A. Pearce Higgins, The Hague Peace Conferences and other International Conferences Concerning the Laws and Usages of War, (Cambridge University Press 1909) 6-7.; Adam Roberts, *Documents of the Laws of War* (Oxford University Press 1982) 53.

> Military acts are not solely governed by stipulations of international law. There are other factors. Conscience, good sense, and the sense of duty imposed by the principles of humanity will be the surest guides for the conduct of sailors and will constitute the most effective guarantee against abuses. The officers of the German Navy, I loudly proclaim it, will always fulfil in the strictest fashion, the duties which emanate from the unwritten law of humanity and civilisation.[331]

The Joint Declaration of the Allies in 1915, the Commission of Responsibilities1919, and the Treaty of Sèvres played a key role in better understanding the rise of international crimes for the violation of the 'laws of humanity'. The significance of the Declaration 1915 can be traced back to the first official appearance of the concept of the crime against humanity. The most remarkable aspect of this Declaration is the expression of willingness to create a new concept denouncing a particular form of atrocity. France, Great Britain and Russia condemned the atrocities committed by the Young Turk Government.[332] The Declaration 1915 stated that 'in view of those new crimes of Turkey against humanity and civilisation the Allied Governments announce publicly to the Sublime-Porte that they will hold personally responsible for these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres.'[333] This was also printed on 24 May 1915 in the *New York Times* article entitled 'Allies to Punish Turks who Murder'.[334] The attempt to prosecute the Turkish leader on legal grounds was only observable in the Commission debate in 1919.[335] The Commission's reference to the massacres of the Armenian population in its final report possibly offers a guide to the insertion of many Articles in the Treaty of Sèvres 1920 for the prosecution of Turkish leaders. However, the Commission's discussion of 'laws and customs of war' and 'crimes against humanity' was never mentioned in the treaty.[336] In particular, Article 230 of the Treaty of Sèvres specified the obligation of the Turkish Government to surrender those who were

[331] Report of Sub-Commission III on the Laws and Customs of War, USNA 181.1201/16, pp. 50-54, p. 51.
[332] France, Great Britain and Russia Joint Declaration, (Telegram sent to Embassy Constantinople on May 29, 1915) 867.4016/67.
Available in http://www.armenian-genocide.org/Affirmation.160/current_category.7/affirmation_detail.html last accessed on 31 July 2018.
[333] Ibid.
[334] 'Allies to Punish Turks who Murder; Notify Porte That Government Heads Must Answer for Armenian Massacre' published by *New York Times* on 24 May 1915.
[335] Proceedings of a Meeting of Sub-Commission No 1 of the Commission on The Responsibilities for the War, etc., 5 March 1919 at 7 am, USNA 181.12101/4, NA FO 608/246, p. 2.
[336] Sévane Garibian, 'Declaration to the 1920 Treaty of Sèvres: Back to an International Criminal Law in Progress' (2010) 1 Armenian Review 2, p. 87-102.

responsible only for committing 'massacres' and not for any other crimes.[337] The Commission specified numerous violations that had been committed by the Turks, such as massacre, the murder of hostages, torture, deliberate starvation, rape, deportation, abduction, and enforced enlistment.[338]

2.4.3.1 Concept of the 'Laws of Humanity': Debate within the Commission

There was debate among members of the Commission as to whether they would insert the phrase 'laws of humanity'. Mr Lansing, Chairman of the Sub-Commission III, proposed to omit the reference to the 'laws of humanity'.[339] He wished the final term to be the 'breaches against the laws and customs of war'.[340] In fact, the United States and Japan objected to using the term 'laws of humanity'.[341] They were also reluctant to establish a high tribunal for the prosecution of crimes which were, at that time, unknown to the world. The American delegates objected, stating that 'there were two classes of responsibilities, those of a legal nature and those of a moral nature, that legal offences were justiciable and liable to trial and punishment by appropriate tribunals, but that moral offences, however iniquitous and infamous and however terrible in their results, were beyond the reach of judicial procedure, and subject only to moral sanctions.'[342] In response to continuous objections by the United States, Dean Larnaude recalled that when the Lusitania was sunk, it was the United States who had cried loudly against such outrages, but now the United States was standing against the insertion of the laws of humanity.[343] He objected to the United States proposition, as reference to laws of humanity occurred many times in the Report of Sub-commission III on the violations of the Laws of War.[344]

---

[337] Treaty of Sevres, UKTS No. 11 (10 August 1920); Article 230 states that 'Turkish Government to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on, 1 August 1914'.

[338] Proceedings of a Meeting of Sub-Commission No 1 of the Commission on The Responsibilities for the War, etc, 5 March 1919 at 7 am, USNA 181.12101/4, TNA FO 608/246, p. 2.

[339] Report of Sub-commission III on the violations of the Laws of War, 8 March 1919, subject to reserves by the United States of America in respect of Section IV, para (c), and section V. para. (d): and Japan and Belgium in respect of Section IV (c).

[340] Ibid.

[341] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, (Jan-April 1920) 14 American Journal of International Law 1/2, pp 95-154.

[342] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, (Jan-April 1920) 14 American Journal of International Law 1/2, pp 95-154.

[343] Minutes of the Sub-Commission III, 4 March 1919, USNA 181.12301/5 (M 820, Roll 144, 63-83) p 6.

[344] Report of Sub-commission III on the violations of the Laws of War, 8 March 1919, subject to reserves by the United States of America in respect of Section IV, para (c), and Section V. para. (d): and Japan and Belgium in respect of Section IV (c).

Sir Pollock echoed Dean Larnaude's view, stating that although one included the other – that the laws and customs of war do include the principles of humanity – it is pertinent to emphasise the term 'principles of humanity', especially for non-lawyers.[345] He referred to the remarks of Marschall von Bieberstein at the Hague Conference 1899 to reflect the importance of using the term 'principles of humanity'.[346] Dean Larnaude insisted on keeping the words 'laws of humanity' because it strengthened the law of nations rather than creating new crimes. Also, he stated that it is important to show the 'new sensibility of the opinion of mankind.'[347] On the other hand, Mr Rolin Jaequemyns agreed with Mr Lansing's view that if it remained in the text, it could give the impression that the Commission was limiting its work to the Articles enumerated in the Conventions. [348] Mr Lansing was also concerned about the terms of the reference, which only referred to 'breaches of the laws and customs of war'.[349] He declined to subscribe to a statement that was not familiar with the practice of states, such as the 'laws of humanity'. Sir Pollock reiterated that it would be a mistake to delete the term 'laws of humanity' because the Commission members were aware that both expressions had the same meaning.[350] He considered it important to include the laws of humanity to avoid the unnecessary suffering of human civilisation and to abide by the rules of war and.[351] In the previous meeting, Mr Politis made two observations: one was on 'criminal acts', and the other was on the 'personal guilt of the culpable acts'.[352] He agreed that the 'Sub-Commission should prosecute those acts which did not constitute crimes in an exact sense, but that violated what might be called the laws of humanity and the moral law.'[353] He discourgaed the full reliance on Hague Conventions for the determination of laws and customs of war. It would be no wrong if certain categories of offences had been drawn from the public conscience of civilised humanity, Mr Politis added.[354]

---

[345] Ibid.
[346] Ibid.
[347] Minutes of the Eighth Meeting of Commission on Responsibility of the Authors of the War, 24 March 1919 at 11 am, pp 81-82 (Franck L. Polk Papers, Yale University Library Manuscript Collection, subject files, Mexico (1919)-Navy, Group No. 656, series No. III, Box No.30).
[348] Ibid.
[349] Ibid.
[350] Ibid.
[351] Ibid.
[352] Minutes of the Second Meeting of Commission on Responsibility of the Authors of the War, 7 February 1919 at11:30, p 19 (Franck L. Polk Papers, Yale University Library Manuscript Collection, subject files, Mexico (1919)-Navy, Group No. 656, series No. III, Box No.30).
[353] Ibid.
[354] Annex III to Minutes of the Third Meeting of Commission on Responsibility of the Authors of the War, p 53 (Franck L. Polk Papers, Yale University Library Manuscript Collection, subject files, Mexico (1919)-Navy, Group No. 656, series No. III, Box No.30).

From the discussion above, it is clear that some of the Commission members were convinced of considering the laws of humanity as a source of international crimes. However, the discussion of the crimes of violation of the laws of humanity was not firmly settled at the time of World War I. Apart from a few references in various international instruments, as stated above, the prohibited acts for the violation of 'laws of humanity' was absent. Drawing a list of international crimes was the most complex task as there was no precedent to follow. Notwithstanding, the Commission made a list of war crimes based on the sources mentioned above. The section below analyses the legal nature of the offences that constitute international crimes.

2.5 The Legal Nature of International Crimes

The Commission's discussion on the nature of crimes that require investigation highlights the legal status of the rules that had been violated. An important point of contention within the Commission concerned which violations would constitute international crimes. The memorandum presented by the British was deemed appropriate for investigation. Offences in the list of the memorandum were against the laws and customs of war, the laws of humanity, and the law of nations.[355] The memorandum covered a wide range of sources so that none of the offences remains unrecognised due to the lack of precision. The reference to 'laws and customs of war in general' not only referred to the 1907 fourth Geneva Convention on Laws and Customs of War on Land, but to all customary rules of war including those not codified in the Convention.[356] Dean Larnaude admired the British memorandum.[357] He looked at the questions by classifying facts in order to understand the relevant penal code of nations at war, which applies to crimes committed.[358] However, he found one inconvenience: the transformation of 'violations of the law of nations into facts – into crimes against the ordinary criminal law, and to transfer these crimes – to submit these crimes to the judgement of national tribunals, which are only competent in those cases recognised by the penal code of their own country.'[359] He also admitted that the war waged by the Germans was beyond the scope of any

[355] Memorandum of British Solicitor General, 17 February 1919, USNA 181.12201/2 (M 820, Roll 143, 434-435).
[356] Ibid.
[357] Ibid.,; The British point of view was to consider 'the question from the point of view of the law of nations, and to investigate the violations which have been committed by the Germans against this law of nations.'
[358] Proceedings of a First Meeting of Sub-Commission No. 1 of the Commission on the Responsibilities for the war. Held at 10:30 am, Monday, 17 February 1919 at the Ministry of the Interior, 96, Place Beauvau, Paris, USNA 181.12201/2 (M 820, Roll 143, 434-435) p. 9.
[359] Ibid., p. 10.

national tribunal to prosecute.[360] Belligerent states' national tribunals were not competent to try the offence, which was unknown to the penal code. Eventually, despite some complications, Dean Larnaude agreed to the principle of the British memorandum and noted that these crimes violated the law of nations.[361]

Similarly, Rolin Jaequemyns preferred using the law of nations instead of limiting Sub-Commission I's work to territorial and penal laws.[362] His concern was to know the legal means of punishment where crimes resulted in the violation the laws of humanity, the laws and customs of war, or the various laws of different countries. He raised several questions on the legal means of punishment to Mr Lansing, the Chairman of Sub-Commission III, asking: 'Do you think there is a legal means to punish them?' and 'What law is to be applied? Is it essential laws of humanity? Is it laws and customs of war? Or is it internal penal law?'[363] Eventually, he suggested punishing only those criminal facts that fell within the scope of the internal laws of different countries. Mr Lansing, on the other hand, preferred to find facts that were only contrary to the laws and customs of war, such as torpedoing, shelling of open towns, and looting of private property.[364] Robert Rosenthal of Romania supported Mr Lansing, stating that this option was one of the easiest ways to determine the extent of violations of the laws and customs of war.[365] Meanwhile, he was waiting for Sub-Commission I on criminal acts to finish some tasks so that Sub-Commission III could continue its work.[366] He suggested waiting for the Sub-Commission I report so that it would become easier to decide the appropriate jurisdiction and laws.[367]

Sir Pollock, however, disagreed with Mr Rosenthal's suggestion, as he did not want to prolong the investigation. Instead, Sir Pollock found it useful to prepare a catalogue of crimes in accordance with the 1907 Hague Convention, and the 1864 Geneva Convention and the laws and customs of war in general.[368] Mr Lansing, Chairman of Sub-Commission III, however, was unwilling to sign a catalogue that did not include offences committed in violation of the laws

[360] Ibid.
[361] Ibid.
[362] Ibid.
[363] Minutes of Sub-commission III, 18 February 1919, USNA 181/12301/3 (M 820, Roll 143, 649-662), TNA FO 607/246.
[364] Minutes of Sub-commission III, 18 February 1919, USNA 181/12301/3 (M 820, Roll 143, 649-662), TNA FO 607/246.
[365] Ibid.
[366] Ibid.
[367] Ibid.
[368] Ibid.

and customs of war. He emphasised that 'we are the commission to whom the laws and customs of war are referred.'[369] Sir Pollock and Dean Larnaude seems to be inclined to discuss every possible means of determining the crime for violating the laws and customs of war or the laws of humanity. Thus, they were trying to reach a consensus to identify a list of international crimes and penalties. Mr Lansing, on the other hand, opposed the international prosecution of war crimes, citing a lack of precedent.[370]

2.5.1 Formulating a Common Code of Legal and Illegal Acts

The concern was about the determination of legal questions related to criminal facts within the limits of the tribunal, which the members of the Commission on Responsibilities intended to set up. Dean Larnaude stated that the Sub-Commission I was not set up to classify facts but to collect evidence to justify incrimination.[371]. He was concerned about how they would be able to incriminate facts to bring them within the scope of the tribunal.[372] Some of the criminal acts that were not confined to the fourth Convention on the Laws and Customs on Land actually reflected on other sources such as the 'law of nations' or the 'principles of humanity'. He looked into the principles upon which this classification could be made.[373] He raised questions such as 'is it going to be the principle adopted by the British delegation and based upon the consideration of the law of nations? Or is it going to be another principle, drawing its force from the convention obtained by the various legislatures of combatant countries?'[374] Mr Lansing appreciated Larnaude's points and proposed drawing up a 'common code' relying on the rules of warfare issued at various times by the belligerents.[375] The 'common code' was proposed in order to understand what is 'right' and 'illegal' in the conduct of warfare. In so doing, Mr Lansing suggested including rules of warfare that were in force before World War I. Specifically, he named countries including Great Britain, Germany, Austria, France and the United States. He wanted to make comparisons among these countries to see 'whether or not they differ and whether there is reason for such difference which can be supported by the general principles of international law.'[376] The common purpose of

[369] Ibid.
[370] James F. Willis, *Prologue to Nuremberg- The Politics and Diplomacy of Punishing War Criminals of the First World War* (Greenwood Press 1982) 69.
[371] Minutes of Sub-Commission III, 18 February 1919, USNA 181/12301/3 (M 820, Roll 143, 649-662), TNA FO 608/246, p. 2.
[372] Ibid.
[373] Ibid.
[374] Ibid., p. 3.
[375] Ibid.
[376] Ibid.

Commission members was to reach a consensus based on common practice. To that purpose, the laws and customs of war were taken from Germany, Bulgaria and Austria.[377] Dean Larnaude found it useful, but he was concerned about crimes that were not known before World War I.[378] He did not want the new categories of crime adopted by Germany to go unpunished. In particular, his concentration was on the use of new technologies, for example, submarine warfare. Sir Pollock preferred using the 'common sense and knowledge' that had developed over the past four years of experience to understand what should be punished.[379] Sir Pollock disagreed with Chairman Lansing's view on defining what is legal and what not and stated that:

> It is not any part of our duty to determine what is right and what is illegal, or collect the rules of warfare. To my mind that would be anticipating the duties of the tribunal which is going to be set up. If we are going to set up a tribunal to try these persons, it is before that tribunal you will have to determine what are the proper rules of warfare, and what is the law. And we mustn't prejudice by collecting rules of warfare, we must not come to a decision as to what is right or legal--that is no part of our duties. Our duty is to say that, assuming that the certain facts that ought to be punished, we ought to set up a tribunal, so that both sides may have a fair hearing to decide whether or not the rules of warfare which would be referred to that tribunal are legal or illegal.[380]

On the other hand, Mr Lansing stated that 'unfortunately I would be very unwilling to sign a report stating that certain offences should be punished when we have not determined that an offence has been committed against the laws of war or customs of war.'[381] Dean Larnaude reconciled the two sides and argued that if they drew up a list of facts that arose due to the violation of the law of nations this would not contradict Mr Lansing, who stated, 'we must know first of all what laws have been violated.'[382] Subsequently, Sir Pollock mentioned that he had an opportunity to talk to the Chairman and agreed to conclude to set up a tribunal. He stated that—

---

[377] Draft Report of Sub-commission III, prepared by the Drafting Sub-Committee and Submitted to the Sub-Commission, 4 March 1919.
[378] Minutes of Sub-Commission III, 18 February 1919, USNA 181/12301/3 (M 820, Roll 143, 649-662), TNA FO 608/246, p. 3.
[379] Ibid., p. 4.
[380] Ibid., p. 4.
[381] Ibid., p. 8.
[382] Ibid., p. 9, 11.

> First of all, this sub-committee should declare or lay down the law that is applicable, such as the law that is to be found in The Hague Convention, and that law which will be found in the German's [sic] own manuals, and our other sources from which law which will be binding upon the Germans and the Austrians themselves, and that ought not to take us very long time; and having formulated these, or collected them, not in detail, but under a broad catalogue as being suitable for examination hereafter, then we could take up the next task. And we desire that if there are established by Sub-Commission number 1 a the number of outrages such as terrorism, deportation of populations, hostages put in front of fighting troops, improper use of prisoners, and the like, taking those as a catalog, if I follow the President, he would then say these cases are clearly,- would clearly be breaches of the laws which we have collected, and as such would be punishable, and that they are of a character and so serious that they ought to be punishable. Then the fourth task that he would then say, if we got so far, -- then he would say we must decide that a tribunal should be set up, and he would ask the attention of the Sub Commission to...[383]

Mr Lansing interrupted and clarified that he mentioned 'the jurisdiction', not the tribunal. Sir Pollock also emphasised on to include the Hague Convention 1907 while classifying laws because the concept 'principles of humanity' are rooted in the Convention.[384] Sir Pollock preferred to frame a broad catalogue of legal sources, including the principles of humanity, because some of the charges might not fall under the principles of the 1907 Hague Convention. His plan was to make a catalogue of the laws on criminal acts and then to proceed to the charges.[385]

Members of the Commission laid down guidelines for classifying crimes committed during the war, although some of the acts were new to the world. The sources and legal nature were eventually stated by Sir Pollock, as suggested by the Chairman, that 1) the law should be laid down along broad lines; 2) a list of obvious outrages against these laws should be made; 3) a decision should be made that outrages ought to be punished, and 4) the jurisdiction should

[383] Ibid., p. 12.
[384] Ibid., pp. 11-12.
[385] Ibid.

be fixed. Sir Pollock disagreed with the last point and supported setting up a tribunal instead of dealing with the question of jurisdiction.[386] Eventually, the Chairman of Sub-Commission III decided that the members of the Committee should report to the Commission all violations of the laws and customs of war that were carried out by the Germans.[387] Overall, the impact of The Hague Convention on laws and customs of war was considered as notable in deciding what crimes should be within the framework of war crimes. The Hague Convention 1907 was one of the primary codified instruments on the laws and customs of war to decide war crimes at the time. Nevertheless, the discussion above stated the reasons why The Hague Convention was not used as an absolute law in defining war crimes.

2.6 Introduction of New Crimes Outside the Scope of the 1907 Hague Convention

The Commission presented a non-exhaustive list mentioning 32 categories of crimes. It was engaged in a frequent analysis of available evidence submitted by the Allied and Associated Powers regarding the laws and customs of war primarily based on the provisions of the Hague Convention 1907, the law of nations and the laws of humanity. In some cases, members of the Commission referred to the survey of professors. However, the laws and customs of war played an extensive role in the Commission's work in finding war crimes as international crimes. On the other hand, the Commission's member looked beyond the framework of the Hague Convention to define the new agencies of crime, invoking the laws of humanity or the law of nations. However, the final report of the Commission refrained from making any specific mention of crimes for violating the laws of humanity.

Sub-Commission I detailed 31 categories of offences and took the simplest and most practical path, due to the impracticability of dividing various classes of offences into exclusive categories. These offences were listed as 'offences against the Laws and Customs of War and the Principles of Humanity'.[388] The list contained 31 categories of crimes, such as: 1) massacres of civilians; 2) putting hostages to death; 3) torture of civilians; 4) deliberate starvation of civilians; 5) rape; 6) abduction of girls and women for the purpose of enforced prostitution; 7) deportation of civilians; 8) internment of civilians under inhuman conditions; 9) forced labour of civilians or others in connection with the military operations of the enemy; 10) usurpation

[386] Ibid., p. 13.
[387] Ibid., p. 14.
[388] Annex 1 to Minutes of Third Meeting, 12 March 1919, at 11am, Report of Sub-Commission 1 on Criminal acts, pp. 40, 41.

of sovereignty during military occupation; 11) compulsory enlistment of soldiers among the inhabitants of occupied territory; 12) attempts to denationalize the inhabitants of occupied territory; 13) pillage; 14) confiscation of property; 15) exaction of illegitimate or of exorbitant contributions and requisitions; 16) debasement of the currency and the issue of spurious currency; 17) imposition of collective penalties; 18) wanton devastation and destruction of property; 19) deliberate bombardment of undefended paces; 20) wanton destruction of religious, charitable, educational, and historic buildings and monuments; 21) destruction of merchant ships and passenger vessels without examination and without working; 22) destruction of fishing boats and of relief ships; 23) deliberate bombardment of hospitals; 24) attack on and destruction of hospital ships; 25) breach of other rules relating to the Red Cross; 26) use of deleterious and asphyxiating gases; 27) use of explosive or expanding bullets, and or inhuman appliances; 28) directions to give no quarter; 29) ill-treatment of wounded and prisoners of war; 30) misuse of flags of truce; and 31) poisoning of wells. However, this list was not considered exhaustive, and additions could be made if required.[389]

On the other hand, Sub-Commission III provided a list of criminal acts for violations of the laws and customs of war. It supplied the evidence of violations in three categories: 'violation affecting civilians', 'violation affecting combatants', and 'violations affecting both civilians and combatants' referring to violations of the Hague Convention.[390] Sub-Commission III particularly invoked Articles 46, 47, 50, 51, 53, 52, and 56 of the Fourth Hague Convention on the Laws and Customs of War on Land. Article 46 of this Convention specifies that '[f]amily honour and rights, the lives of persons, and private property as well as religious convictions and practice, must be respected. Private property cannot be confiscated.'[391] Sub-Commission III categorises crimes, such as systematic terrorism, torture, the use of civilians as shields, the honour of women and the confiscation of private property, in accordance with the implicit meaning of Article 46 of the Hague Convention 1907. The Commission contributed to the codification of war crimes either drawing direct provisions or interpretating the provisions of the Hague Conventions.

The Commission referred to the provisions of the Hague Convention 1907 in various cases, for example, Article 47 for 'pillage' and Article 50 for collective penalties including

[389] Ibid.
[390] Report of Sub-Commission III on the Laws and Customs of War, USNA 181.1201/16, pp. 50-54, at pp. 50-51.
[391] Article 46, Laws and Customs of War on Land (Hague, IV) 18 October 1907, 36 Stat. 2277; Treaty Series 539.

arrest and the execution of hostages. The Commission relied on Article 1 of IX of the 1907 Hague Convention to specify 'deportation', 'forced labour', 'execution of civilians on false allegations of war crimes', and 'bombardment of undefended places from the sea'. It also relied on Article 1 of the Geneva Convention 1906 for 'treatment of wounded' and 'attack on hospital ships'. The Commission identified 'bombardment from the air' as a violation of the laws and customs of war in general. Until World War I, there was prohibition on 'the bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings...'[392] World War I witnessed, for the first time, German Zeppelins and aircraft indiscriminately dropping bombs on cities in France and Belgium.

The final report of Commission on Responsibilities almost contained the same offences as listed in the report of the Sub-Commission I. This report had 32 categories of offences including 'employment of prisoners of war on unauthorised works' and 'murder and massacre' instead of adding 'massacres of civilians'.[393] Eventually, no international tribunal had actually been set up to try war crimes. Nonetheless, the Commission's effort to create a list of war crimes was commendable. The Treaty of Versailles (Article 228-231) reflected the Commission's efforts, requiring Germany to surrender those accused of such offences. However, the Treaty of Versailles, in particular, did not prescribe any list of crimes or penalties for violating the laws and customs of war. The treaty included provisions for the trial of war criminals in military trials, as well as Germany's responsibility for incurring damages and losses to the Allies.[394]

Articles 228 to 231 of the Treaty of Versailles mention the right of the 'Allied and Associated Powers to bring before military tribunals'.[395] Article 228 noted that 'the German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishment laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.'[396] Article 227 was included particularly for the trial

[392] Article 1, Bombardment by Naval Forces in Time of War (Hague, IX) 18 October 1907, 36 Stat. 2351; Treaty Series 542.
[393] Report of the Commission on Responsibilities, USNA 181.1201/16, pp. 115-176, at pp. 122-123.
[394] 'Antagonists Face to Face', Reported by *The Manchester Guardian,* 8 May 1919, p.1.
[395] Treaty of Versailles, UKTS No. 4 (28 Jun 1919)
[396] Ibid.

of Kaiser Wilhelm II, who committed 'a supreme offence against international morality and sanctity of treaties'.

The incorporation of articles reflected the general consensus among the victorious powers for violating treaty provisions. However, the consensus did not truly reflect what was discussed in the Commission on Responsibilities 1919 or in the meetings of Imperial War Cabinet 1918. Due to the unsettled political conditions in Germany, it was impossible to take immediate steps to comply with the provisions of the Treaty of Versailles and to arrest all the persons in the list specified by the Allies, because they were national heroes to the German public.[397] Also, there were procedural difficulties in the judicial systems of the United Kingdom and her allies.[398] Hence, in early 1920 the Allies agreed to have a selected number of trials before the German Court.[399] The final list of the accused was 850-900, and out of those only 45 cases were submitted to the German Government.[400] Eventually, twelve trials took place before the *Reichsgericht*, resulting in only six convictions.[401] The following part of this study discusses the impact of the Commission's identification of customary rules of crimes on the trials led by the Supreme Court of Leipzig (hereinafter "Leipzig trials").

2.6.1 Leipzig War Crimes Trials

Trials of war criminals took place in Leipzig between 23 May and 6 July 1921. British cases were first prepared for trial. There was a total of six cases: three cases were against the commanders of submarines, and the other three were related to prison camps.[402] The list was provided by the Allies under Article 228, paragraph 2 of the Treaty of Versailles. Here, this study discusses the impact of the Commission's findings on the list of war crimes during the trial of Commander Karl Neumann, Lieutenant Ludwig Dithmar and John Boldt, Karl Heynen, and Emil Muller.

In the *Dover Castle* case, Karl Neumann, Merchant, Commander of Breslau, was charged with torpedoing and sinking the English hospital ship *Dover Castle* without warning

[397] Mullins Claud, *The Leipzig trials; an account of the war criminals' trials and a study of German mentality*, (London: H.F. & G. Witherby 1921) 26.
[398] Ibid.
[399] Ibid.
[400] Albert Gunter David Levy, The Law and Procedure of War Crime Trials (1943)6 American Political Science Review 37, p. 1062.
[401] Mullins Claud, *The Leipzig trials; an account of the war criminals' trials and a study of German mentality*, (London: H.F. & G. Witherby 1921) 9.
[402] Ibid., p. 27.

and causing the death of six men in the Tyrrhenian Sea on 26 May 1917.[403] This British hospital ship had been treating the sick and wounded of war for several years, travelling from England to Malta and Salonica. An investigation was carried out to see whether Commander Karl Neumann had committed an offence as per Section 211 of the German Criminal Code. Chapter Sixteen of the Code indicates 'crimes against life' and Section 211 specifically mentions the offence of 'murder'. Despite the Leipzig trials being different from other ordinary trials due to the distinct nature of the crimes, they mostly followed the ordinary principles of the German Criminal Code.[404] The application of Section 211 indicates 'murder' based on 'greed or motives', which was obviously a crime distinct from the 'murder and massacre' as identified by the Commission on Responsibilities 1919. The application of Section 211 shows that the Leipzig trials did not make an effort to differentiate between war crimes as international crimes and war crimes as ordinary crimes. The Leipzig trials did not find Karl Neumann Merchant criminally responsible, since 'the admiralty staff was the highest service authority over the accused. He was in duty bound to obey their orders in service matters. So far as he did that, he was free from criminal responsibility.'[405]

On the other hand, the *Llandovery Castle* case shows the application of the law of nations. In this case, Ludwig Dithmar, First Lieutenant and Adjutant of the Cuxhaven Command, and John Boldt, retired First Lieutenant, were accused of torpedoing *Llandovery Castle* in the Atlantic Ocean from a German U-boat, resulting in 234 drownings.[406] The Commander of U-boat 86, First Lieutenant Helmut Patzig, was held liable for committing homicide as per Section 212 of the German Penal Code, however, he was not found liable for prosecution.[407] The Court in the Leipzig trials also found Commander Patzig liable for violating the law of nations in warfare.[408] The Court had found these offences against the law of nations as it is prohibited to kill an unarmed enemy even in the war at sea. The Court noted the similarity of this prohibition with Article 23 (c) of The Hague Regulations concerning the Laws

[403] German War Trials: Judgement in Case of Commander Karl Neumann, (1922) 1 American Journal of International Law 4, pp. 704-708.
[404] Mullins Claud, *The Leipzeig trials; an account of the war criminals' trials and a study of German mentality*, (London: H.F. & G. Witherby 1921) 26.
[405] German War Trials: Judgement in Case of Commander Karl Neumann, (1922) 16 American Journal of International Law 4, pp. 704-708.
[406] German War Trials: Judgement in Case of Commander Karl Neumann, (1922) 16 American Journal of International Law 4, pp. 704-708.
[407] German War Trials: Judgement in Case of Lieutenant Dithmar and Boldt, (1922) 16 American Journal of International Law 4, pp. 708-724.
[408] Ibid.

and Customs of War on Land, 1907.[409] The Court found no difficulty in applying the rules of international law because 'the rule, which is here involved, is simple and is universally known.'[410] Nevertheless, the application of national law was prevalent in most of the cases. The above-mentioned two defendants were held liable to be punished under Section 49 of the German Penal Code for assisting Commander Patzig in committing these offences.[411] In other cases, the Leipzig Trial condemned Karl Heynen and Emil Muller for ill-treating subordinates, for insulting subordinates, and for not treating subordinates in accordance with the Military Penal Code and the Imperial Penal Code of Germany.[412]

The list of cases submitted by Belgium and France focused mainly on the maltreatment of prisoners of war and those wounded in the field. There were charges against Max Ramdohr, Lieutenant Karl Stenger, Major Benno Crusius, First Lieutenant Adolf Laule, Lieutenant General Hans Von Schack, and Major General Benno Kruska.[413] Of these, Major Crusius was only convicted for two years. Max Ramdohr, who headed the secret police department at Grammont, was charged with torturing children during interrogation. Although Articles 46 and 50 of the Hague Convention 1907 prohibit torture of civilians, the Court did not look into the violation of the laws and customs of war. Instead, he was acquitted due to the lack of evidence against him.

Similar outcomes were observed in the case against General Karl Stenger and his subordinate officer, Major Benno Crusius. General Karl Stenger was accused of ordering to his troops to give no quarter to French soldiers. The allegation was for the violation of Article 23 (c) (d) of the Fourth 1907 Hague Convention. His subordinate, Major Benno Crusius, acknowledged his involvement in the killing of French prisoners under superior order. Major Benno Crusius was convicted of manslaughter and imprisoned for two years.[414] However, General Karl Stenger denied any such allegations, which was later confirmed by other subordinates. The Court was silent on the applicability of principles of international law.

[409] Ibid.
[410] Ibid.
[411] Ibid.
[412] German War Trials: Judgement in the Case of Karl Heynen, (1922) 16 American Journal of International Law 4, pp. 674-684; German War Trials: Judgement in the Case of Emil Muller, (1922) 16 American Journal of International Law 4, pp. 684-696.
[413] James F. Willis, *Prologue to Nuremberg- The Politics and Diplomacy of Punishing War Criminals of the First World War* (Greenwood Press 1982) 135.
[414] Michael Bryant, *A World History of War Crimes: From Antiquity to the Present*, (Bloomsbury Publishing 2016) 153.

However, the primary allegation was made under Article 23 of the Hague Conventions on Laws and Customs of War on Land.[415]

All the other defendants were acquitted in the case brought by the French authority. First Lieutenant Adolf Laule was accused of the murder of a French soldier. General Hans von Schack and Benno Kruska were accused of killing prisoners of war, in violation of the Fourth Hague Convention of Laws and Customs of War on Land. However, all were acquitted due to the lack of testimony from the French mission. The French mission suddenly left Germany, dissatisfied with the decision of the Leipzig trials.[416]

From the above discussion, it is apparent that the War Crimes Trial in Leipzig was a domestic trial with minor reference to the law of nations or customary international law. The Commission's work had no reflection in the Leipzig trials. The Leipzig trials followed the national laws of Germany. Schabas considered the trial held in Leipzig had international features, since it was dictated by the Treaty of Versailles for the violation of the laws and customs of war.[417] He does not find the consensus of the victorious Powers and Germany as sufficient to qualify the Leipzig Tribunal as international. Generally, a Treaty does not apply to non-states party.[418] Bassiouni stated that 'although the Leipzig trials were a failure, they nonetheless serve as an important historical precedent for war crimes trials. Moreover, the Leipzig trials helped establish a principle.'[419]

2.7 Conclusion

It is apparent from the history of the war that the atrocities committed by the Central Powers together with their Allies, Turkey and Bulgaria, not only violated the established laws and customs of war which caused a threat to peace and security of mankind, but also affected the commonly shared values of the world community, which are elementary to the principles

[415] Ibid., p.153; See also, Laws and Customs of War on Land (Hague, IV) 18 October 1907, 36 Stat. 2277; Treaty Series 539.
[416] James F. Willis, *Prologue to Nuremberg- The Politics and Diplomacy of Punishing War Criminals of the First World War* (Greenwood Press 1982) 136.
[417] William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, (Oxford University Press 2012) 8.
[418] Ibid.
[419] M. Cherif Bassiouni, 'The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780' (1994) 88 American Journal of International Law 4, pp. 786-787.

of humanity.[420] Although it has been widely claimed that international criminal law started its journey with the Nuremberg and Tokyo trials, the contribution of the Commission on War Responsibility should not be overlooked. The Commission played a pivotal role with respect to the development of international crimes. This Commission brought to light a number of specific and enduring issues of international criminal law, which were never discussed prior to that time. The Commission was the first international platform that attempted to establish an enforcement mechanism for the prosecution of international crimes, thus it left its legacy to be maintained by subsequent international courts and tribunals. The Commission contributed to the development of international crimes by pointing out numerous national and international sources which may, to some extent, satisfy the criteria of customary international law. The following chapters will discuss how the international bodies during and after World War II continued the legacy of determining international crimes that were left by the efforts made after World War I.

[420] Report of the Commission on Responsibilities, USNA 181.1201/16, pp.115-176, p. 125

CHAPTER 3: THE DEVELOPMENT OF INTERNATIONAL CRIMES: THE ROLE OF THE UNITED NATIONS WAR CRIMES COMMISSION, THE NUREMBERG AND OTHER TRIBUNALS

3.0 Introduction

This chapter discusses aspects of the origin and development of international crimes following the atrocities of World War II. It highlights the role of the United Nations War Crimes Commission (UNWCC), the Nuremberg and other trials involved in this development. The underlying challenge was to identify the sources of international crimes under customary international law, especially to comply with the principle of legality. With no precedent as such, the members of the UNWCC, the judges of the Nuremberg and other trials identified diverse sources under international law following various novel approaches.

This chapter analyses the application of novel approaches whether satisfied the existence and content of customary international law. In the context of World War II, customary law appeared in different forms and played an extraordinary role in the development process. The chapter shows intricacies and concludes the finding with the primary existence of *opinio juris* from the natural law perspective. This chapter does not attempt to summarize the formation of the UNWCC or the Nuremberg and other trials in detail; the observations here seek to explain to what extent the origin of international crimes is related to customary international law.

3.1 The Role of United Nations War Crimes Commission, Nuremberg And Other Trials: The Making of International Crimes

3.1.1 The United Nations War Crimes Commission

British Prime Minister Winston Churchill proposed to set up a commission to investigate war crimes in the first Inter-Allied Conference in London on 13 January 1942. During Churchill's visit to the United States, the proposal received the approval of the US President

Roosevelt.[421] Viscount Cecil of Chelwood submitted this matter during the discussion on punishment of war criminals in a House of Lords sitting on 7 October 1942. The proposed commission name was the United Nations Commission for the Investigation of War Crimes, which would be responsible for the collection of necessary documents. The members of the commission would comprise nationals of the United Nations member states selected by their governments.[422] To emphasise the importance of the commission, Viscount Cecil further stated that 'a corresponding statement as to this proposed Commission for the Investigation of War Crimes is being issued in Washington by the President of the United States this afternoon.'[423] The Lord Chancellor (Viscount Simon) presented the ambit and purpose of the United Nations Commission for the Investigation of War Crimes:

> [I]n making this proposal for an investigating Commission the aim is not to promote the execution of enemy nationals wholesale; the aim is the punishment of individuals, obviously very few in number in relation to the total enemy population—individuals who are proved to be themselves responsible, whether as ring-leaders or as actual perpetrators, for atrocities—atrocities which violate every tenet of humanity and have involved the murder of thousands, of tens of thousands, of innocent persons.[424]

The Earl of Elgin and Kincardine added to this by explaining the atrocities committed by Hitler's authorities during their occupation in Poland were 'in every way outraging both international law and the laws of humanity…'[425]

In October 1943, the 17 Allied Nations met at the British Foreign Office in London and established the body known as the United Nations War Crime Commission (UNWCC).[426] It was established through a declaration at St. James's Palace in London and given the mission of documenting international crimes. The St. James Declaration also laid the foundation for the International Military Tribunal.[427] The Moscow Declaration 1943 went on to specify the scope

---

[421] Zhaoqi Cheng, *A History of War Crimes Trials in Post 1945 Asia-Pacific* (Shanghai Jiao Tong University Press 2017) 15.
[422] 'Punishment of War Criminals' HL Deb 07 October 1942 vol. 124 cc 555-94. https://api.parliament.uk/historic-hansard/lords/1942/oct/07/punishment-of-war-criminals
[423] Ibid., p. 584.
[424] Ibid., p. 584.
[425] Ibid., p. 587.
[426] Dan Plesch and Shanti Sattler, 'Before Nuremberg: Considering the Work of the United Nations War Crimes Commission of 1943-1948', in Morten Bergsmo, Cheah Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law:* Volume 1, (Torkel Opsahl Academic EPublisher, 2014) 438.
[427] Kai Ambos, *Treatise on International Criminal Law: Volume 1*, (Oxford University Press 2013) 4.

of the UNWCC[428] in supporting prosecution at the national level. The Declaration proposed 'the laws of liberated countries' as the basis of punishment.[429] The UNWCC was a collaborative effort of the Allied Nations to respond to unprecedented atrocities following World War II.[430] The UNWCC was active until March 1948.

However, in the *Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General*, it was noted that 'the labors of the Commission have not resulted in any governmental agreement as to the tribunals to try or the procedures for trying war criminals. The Commission has been widely and publicly criticized for the paucity of the results of its work.'[431] Concerning the preparation of cases, the memorandum also stated that the UNWCC could not be satisfactorily employed in this regard. There was a recommendation to set up a full-time executive group consisting of one military representative from each of the British Commonwealth, the United States, the Soviet Union, and France.[432] The memorandum also stated that the UNWCC should deal with 'a second class of offender' whose prosecution would not interfere with the major war criminal trials.[433]

3.1.2 The London Charter of The International Military Tribunal

The Moscow Declaration 1943 was the first step towards the London Charter (also known as Nuremberg Charter) reflecting the consensus of the three powers who assembled for the prosecution and punishment of war criminals.[434] On 1 November 1943, President Roosevelt, Prime Minister Churchill and Marshal Stalin issued this declaration stating that-

[428] United Nations War Crimes Commission, Declarations by United Nations Governments and Leaders on the Subject of War Crimes, Doc. C. 29 (14 June 1944).
[429] Declarations by United Nations Governments and Leaders on the Subject of War Crimes, Doc. C. 29 (14 June 1944); United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of thirty-sixth meeting 17 October 1944, p. 19.
[430] Dan Plesch and Shanti Sattler, Before Nuremberg: Considering the Work of the United Nations War Crimes Commission of 1943-1948, in Morten Bergsmo, Cheah Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 1*, ((Torkel Opsahl Academic EPublisher 2014) 438.
[431] Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945, Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) 4.
[432] Ibid., 8.
[433] Dan Plesch, *America, Hitler and the UN: How the Allies Won World War II and Forged a Peace*, (Bloomsbury 2010) 113. Report to the President by Mr. Justice Jackson, June 6, 1945, Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) p. 44.
[434]Arieh J. Kochavi, 'The Moscow Declaration, the Kharkov Trial, and the Question of a Policy on Major War Criminals in the Second World War' (1991) 76 History 248, p. 401.

> [T]hose German officers and men and members of the Nazi Party who have been responsible for, or have taken a consenting part in [Nazi] atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated courtiers and of the free governments which will be created therein … The above declaration is without prejudice to the case of the major criminals whose offences have no particular geographical localisation and who will be punished by a joint decision of the Government of the Allies.[435]

The wording 'laws of these liberated countries' mirrors the intention of the victorious powers to prosecute and punish according to the laws of the countries affected by the Nazi atrocities. The American memorandum presented in San Francisco on 30th April 1945 stated that 'the Moscow Declaration did not cover the whole problem of the Trial and Punishment of the War Criminals.'[436] The memorandum stated that the declaration did not have a policy on:

> a. the punishment of the major war criminals, whose offenses have no particular geographical localization beyond the announcement that they would be punished by a joint decision of the governments of the Allies; or b. the methods of punishment of those members of the principal Nazi organizations, such as the Gestapo and S.S., who voluntarily engaged in carrying out the ruthless policies of the Nazi regime but who cannot readily be proved to have participated personally in the execution of specific atrocities.[437]

The memorandum advanced a policy proposing the Axis leaders be tried before Allied military tribunals composed of officers of the four principal Allies. The judicial action of a military tribunal would decide on the guilt and punishment of the Axis leaders.[438] The policy

---

[435] 'The Moscow Declaration (Nov. 1, 1943)', in Bradley F. Smith ed. *The American Road to Nuremberg: The Documentary Record 1944-1945*, (Hoover Institution Press 1982) pp. 13-14; Bradley F. Smith. *The American Road to Nuremberg: The Documentary Record 1944-1945*, (Hoover Institution Press 1982) pp. 13-14.
[436] American Memorandum Presented at San Francisco, April 30, 1945, Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) p. 28-29.
[437] International Conference on Military Trials: London, 1945, American Memorandum Presented at San Francisco, April 30, 1945. Available at Lillian Goldman Law Library, Yale Law School. https://avalon.law.yale.edu/imt/jack05.asp
[438] Ibid.

was proposed to the governments of the United States, the Soviet Union, and the United Kingdom, and the Provisional Government of France.[439] This proposal stated that 'the application of this law may be novel because of the scope of the Nazi activity has been broad and ruthless without precedent.'[440] However, the basic principles intended to be applied were not novel. Instead, the application of the principles needs to be 'wise' because 'international law must develop to meet the needs of the times just as the common law has grown, not by enunciating new principles but by adapting old ones.'[441] In fact, a number of domestic criminal law doctrines were incorporated into the international criminal law system.[442] The UK government accepted the United States' draft as the basis of discussion among the allied governments to prosecute war criminals.[443] On 11 June 1945, the British ambassador in Washington presented an *aide-memoire* to the Secretary of State inviting the United States, Soviet and French governments to send their representatives to London to discuss the prosecution of war criminals. [444] On 14 June 1945, Nikolai V. Novikov, Minister Counselor of the Soviet Embassy in Washington, delivered an *aide-memoire* supporting the proposal of the United States regarding 'the necessity of an urgent establishment of an international tribunal for trial [sic] of principle war criminals…'[445] The French delegate also agreed to work on the American proposal as a basis for discussion.[446]

Henry L. Stimson, Secretary of War under Presidents Franklin D. Roosevelt and Harry S. Truman, proposed to punish these arch-criminals and other criminals in a manner consistent with the advancement of civilization, following the rudimentary aspects of the Bill of Rights.[447]

---

[439] American Memorandum Presented at San Francisco, April 30, 1945, Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) 29.
[440] Ibid., p. 37.
[441] Ibid.
[442] Shane Darcy, *Collective Responsibility and Accountability under International law* (Transnational Publishers 2007) 197.
[443] *Aide-Memoire* from the United Kingdom, June 3, 1945, Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) 37.
[444] Revision of American Draft of Proposed Agreement, June 14, 1945, Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) 55.
[445] Aide-Memoire from the Soviet Government, 14 June 1945, Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) 61.
[446] Observations of French Delegation on American Draft, 28 June 1945, Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) 89.
[447] 'The Moscow Declaration (Nov. 1, 1943)', in Bradley F. Smith. ed. *The American Road to Nuremberg: The Documentary Record 1944-1945*, (Hoover Institution Press 1982) 14.

In the later executive agreement issued by the U.S. Supreme Court, Justice Robert H. Jackson, Chief of Counsel for the Prosecution of Axis Criminality, defined numerous criminal acts such as 'launching a war of aggression' and 'post-1933 atrocities and offenses including atrocities and persecutions on racial and religious grounds that were in violation of any applicable provision of the domestic law of the country in which committed.'[448] Along with the violation of domestic laws, the Jackson Report also noted those acts as crimes which offended the conscience of the people. For that reason, he took into account standards generally accepted in 'civilised countries'.[449] Prior to that, the public statement issued by the United States on 1 February 1945 had indicated an intention to punish Nazi leaders for disregarding 'the very foundation of law and morality, including offences wherever committed against the rules of war and against minority elements, Jewish and other groups and individuals.'[450] Telford Taylor, a lawyer on Jackson's staff, similarly stated that 'no one will be shocked by the doctrine that people who direct or do inhuman and barbarous things in the course of losing a war will be punished.'[451] Adherence to standards of law and morality was the centre of the discussion surrounding the development of international crimes.

It is always accepted that the moment of Nuremberg was historic as it gave birth to a 'new system to international criminal justice', one which has subsequently introduced the prosecution of international crimes in different national and international tribunals.[452] This chapter pays equal attention to the Nuremberg trials and the UNWCC in identifying what came to be defined as international crimes. Schabas mentioned that 'the record and practice of the United Nations War Crimes Commission is one of the "best-kept secrets" in the field'.[453]

---

[448] 'Executive Agreement Relating to the Prosecution of European Axis War Criminals (Drafts 3 & 4) (May 19, 1945)', in Bradley F. Smith ed. *The American Road to Nuremberg: The Documentary Record 1944-1945*, (Hoover Institution Press 1982) 206.

[449] Report of Robert H. Jackson to the President, (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) 48. (Available at- https://www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf) He stated that "those acts which offended the conscience of our people were criminal by standards generally accepted in all civilized countries, and I believe that we may proceed to punish those responsible in full accord with both our own traditions of fairness and with standards of just conduct which have been internationally accepted."

[450] 'Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals' in Bradley F. Smith ed. *The American Road to Nuremberg: The Documentary Record 1944-1945*, (Hoover Institution Press 1982) 119.

[451] Telford Taylor, 'An approach to the Preparation of the Prosecution of Axis Criminality (Early June, Axis Criminality)', in Bradley F. Smith ed. *The American Road to Nuremberg: The Documentary Record 1944-1945*, (Hoover Institution Press 1982) 209.

[452] Philippe Kirsch, 'Applying the Principles of Nuremberg in the International Criminal Court' (2007) 6 Washington University Global Studies Law Review 501, p. 501.

[453] William Schabas, Carsten Stahn, Joseph Powderly, Dan Plesch and Shanti Sattler, 'The United Nations War Crimes Commission and the Origins of International Criminal Justice' (2014) 25 Criminal Law Forum 1-7, p. 1.

3.2 The Ascertainment of International Crimes: Legal Challenges

Ascertaining international crimes and determining their sources was a challenge as there was no evidence of international crime other than the 32 categories of war crimes prepared by the Commission on Responsibilities 1919. Uncertainty as to the nature of atrocities was reflected in several materials, including the American memorandum. It noted that the 'pre-war atrocities are neither war crimes in the technical sense, nor offenses against international law; and the extent to which they may have been in violation of German law, as changed by the Nazis, is doubtful.'[454] On 6 June 1945, Justice Jackson stated that violations of international law includes the violation of the Hague Convention 1907 including the laws of humanity and the dictates of the public conscience.[455] The draft on 'Executive Agreement Relating to the Prosecution of European Axis War Criminals' pointed out that '"international law" shall be taken to include treaties between nations and the principles of the law of nations as they result from the usage established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.'[456] In addition to treaties, the United Kingdom's proposal added 'agreements and assurances' as parts of international law.[457] Despite there was no law, code or statute specifying international crimes, the discussion shows the foreseeable nature of the atrocities existed in the violation of treaties, agreements, assurances and in the principles of the law of nations. Moreover, during the process of finding international crimes, one of the most explicit and frequently discussed issues was the grounds of humanity or principles of justice. For example, in the report to the United States president on 6 June 1945, Justice Jackson noted that the legal position which the United States maintained was based on 'the common sense of justice'.[458]

---

[454] Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945, Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) p. 5.

[455] Report to the President by Mr. Justice Jackson, June 6, 1945, Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) 49."Our people felt that these were the deepest offenses against the International Law described in the Fourth Hague Convention of 1907 as including the laws of humanity and the dictates of the public conscience."

[456] Revision of American Draft of Proposed Agreement, June 14, 1945, Report to the President by Mr. Justice Jackson, June 6, 1945, Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) 58.

[457] Amendments Proposed by the United Kingdom, June 28, 1945, Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) 87.

[458] Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) 51.

The aftermath of World War II introduced two new international crimes, crimes against peace and crimes against humanity, alongside war crimes. The emergence of three crimes follows breaches of separate sources. The trio of crimes against peace, war crimes and crimes against humanity did not derive from a 'homogeneous block'.[459] Any general statement can infer that 'crimes against peace' stem from breaches of treaties, 'war crimes' from laws and customs of war, and 'crimes against humanity' from breaches of laws that define inhumanity as held by international community. Unlike war crimes, the other two crimes – 'crimes against peace' and 'crimes against humanity' – were not introduced until World War II.

Justice Jackson's report seems provided a very well-defined sources of atrocities committed since 1933. He noted that the established and generally accepted laws, rules and customs of nations as the sources of rules of warfare. The report also stated that the 'atrocities and offenses, including atrocities and persecutions on racial or religious grounds, committed since 1933' are recognized in the principles of criminal law because these are generally observed in 'civilized states'. In terms of 'invasions of other countries and initiation of wars of aggression', the report referred to the violation of international law and treaties.[460] It was noted in the meeting of the UNWCC that the Moscow Declaration contained provisions of international law and the criminal law of the invaded countries as a guide to the designation of crimes against peace.[461] The sources mentioned above, no doubt, indicate the existence of offences to some extent. However, the question remains as to how these sources become evidence of customary international law satisfying State practice and *opinio juris.* To answer this question, the following discussion explores the contribution of the UNWCC, the Nuremberg and other trials to the development of international crimes during the Nuremberg era. This chapter divides the development of international crimes into three parts to discuss crimes against peace, crimes against humanity and war crimes respectively.

[459]Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 Journal of International Criminal Justice 4, pp. 830, 844.
[460] Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) 51.
[461] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of thirty-sixth meeting 17 October 1944, p. 19.

PART I

3.2.1 International Instruments as Evidence of Law: Crimes Against Peace

3.2.1.1 Was Aggressive War a Crime under International Law?

The UNWCC, Nuremberg and other trials devoted most space to ascertain 'crimes against peace' as an international crime. At the very earliest stage of discussion, there was an attempt to discuss an aggressive war in connection with two other crimes, crimes against humanity and war crimes. In March 1944, the representative of Czechoslovakia raised the question of whether an aggressive war was a 'crime', in conjunction with crimes against humanity, in the first meeting of the legal committee of the UNWCC.[462] The Czechoslovak report reflected on 'humanitarian considerations' when considering whether an aggressive war was an existing crime under international law. For example, applying methods to enslave and destroy foreign civilisations and to physically annihilate a significant portion of the population on racial, political or religious grounds signified a deep disregard for the humanitarian considerations lying at the root of the laws and customs of war.[463] Initially, the legal committee appeared to have agreed to include aggressive wars as crimes, along with crimes against humanity, in the draft resolution on the Scope of the Retributive Action of the United Nations.[464] The legal committee included aggressive wars as 'war crimes in the wider sense', defining them as 'the crimes committed for the purpose of preparing or launching the war, irrespective of the territory where these crimes have been committed.'[465] However, the proposal was not adopted by the commission and was sent back to the legal committee for further reconsideration.

The UNWCC appointed a special sub-committee, composed of expert representatives from Britain, Czechoslovakia, the Netherlands and the United States, to deal with the matter. The point raised by the British expert on *lex lata* and *lex ferenda* is still relevant to identify the presence of customary international law. The British expert, Sir Arnold McNair, expressed the view that an 'aggressive war, however reprehensible, did not represent a crime in international law.'[466] His argument was from the point of view of *lex lata* and *lex ferenda*. In his view, the state could not be the subject of criminal liability based on *lex ferenda*. Referring to the absence

[462] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationary Office 1948, p. 180.
[463] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationary Office 1948, p. 180.
[464] Ibid.
[465] Ibid.
[466] Ibid.

of a judicial and arbitral decision on the penal liability of states, he asked whether when a state breaches a rule of international law, is the situation analogous to a breach of contract or to a delict but not a crime?[467] He also referred to the report of the Commission on Responsibilities 1919, which had not held the head of state, the ex-Kaiser, criminally responsible for crimes in World War I. He also referred to the Kellogg-Briand Pact of 1928, pointing out that the launching of war did not 'convert a state into a *caput lupinum*.' Relying on these points, he concluded that 'if these views were wrong and the procuring of aggressive war by individuals was a crime, it was certainly not a "war crime".' The majority of the sub-committee and the legal committee agreed with the British report, but not Czechoslovakia.[468] The report submitted the opinion that 'acts committed by individuals merely for the purpose of preparing for and launching aggressive wars, are, *lege lata*, not war crimes.'[469] The lenient approach of identifying international crimes on the basis of customary international law was missing in the British expert's view.

In contrast, the impact of custom to identify an aggressive war as a crime in international law was noticeable in the minority report. The minority report was submitted by Czechoslovak representative with the support of Australia, China, New Zealand, Poland and Yugoslavia.[470] Lord Wright, the Chairman of the UNWCC, agreed with the Czech view and referred to the common law method of law finding. He noted 'in English law, for instance, there was no specific statutory provision making murder a crime, and yet murder has been treated as a crime for centuries.'[471] In his view, the rules of international law are extracted from several sources as there is no specific code of international law.[472] Lord Wright, quoting Bohuslav Ecer from Czechoslovakia, stated that 'the mass of expert opinion of instructed writers on international law constitutes satisfactory evidence of a general consensus of authoritative opinion as to the principle that launching a war like the present is a crime; this corresponds to what moral sense of humanity demands. Thus, the most essential source of international law is established.'[473]

[467] Ibid., p. 181.
[468] Ibid., p. 182.
[469] Ibid.
[470] Ibid., p. 183.
[471] Ibid., p. 183.
[472] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of thirty-fourth meeting 3 October 1944, p 8.
[473]Ibid., p. 8.

To justify aggressive wars as criminal, Ecer referred to the statement of Sir Cecil Hurst, the British representative, whose primary focus was to find reasons for the 'policy of committing crimes'.[474] Ecer agreed to the view that the 'present war' became criminal due to the presence of the 'whole policy of total war'. He also stated, 'we shall be able to judge them according to the real substance, i.e. not as simple "violations of laws and customs of war" but as instruments of a general criminal policy and as part of a criminal war.'[475] He found it significant to examine the preliminary works of criminal acts. He also pointed the tension raised by Lord Birkenhead at the meeting of the Imperial War Cabinet on 28 November 1918.[476] Birkenhead was concerned about the criminal responsibility of the Kaiser for the invasion of Belgium and all the criminal acts that had taken place during World War I.[477] Birkenhead stated in one of his speeches that if the master criminal was not tried, his subordinates could, logically, escape punishment. In the meeting, Ecer reiterated that the invasion of a country was always criminal, whether it was against Belgium in WWI or the Netherlands in WWII. No one can abuse the principles of international law or invoke military necessity on this ground.[478] Later, the International Military Tribunal (IMT) stated that 'the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.'[479]

In the minority report, Ecer added further points about the illegality of aggressive war. First, he highlighted the work of the Commission on Responsibilities 1919, stating that 'we should not go further back than our predecessor in 1919. It would be *marche en arrière*.' Second, he noted that two conventions of the League of Nations in 1937 had detailed the proposal to punish the preparation of war. He argued that the two conventions could be used as a means of interpreting the notion of legal conviction, even if they were unratified. He

[474] Ibid., p. 4.
[475] Ibid., p. 4.
[476] Ibid., p. 4.; See also Report of the Sub-Committee appointed to consider whether the preparation and launching of the present war should be considered 'war crimes', Doc. C. 55.
[477] Ibid., p. 4.
[478] Ibid., p. 5.
[479] Trial of the Major War Criminals before the International Military Tribunal, Volume 1, Nuremberg 14 November 1945-1 October 1946 (Published at Nuremberg, Germany 1947) 220.

emphasised the importance of examining how instruments adopted since 1919 have been interpreted, instead of just relying on the text.[480]

The illegality of waging aggressive war also reflected in the words of Justice Jackson. He made a statement to strengthen the force of law for the sake of peace. He stated that human minds must not accept the fact that all wars are legal, especially not aggressive wars.[481] He stated that the view of international law in the nineteenth and early twentieth centuries had taught us that 'war-making was not illegal and is no crime at law' because both parties of war possess 'identical legal positions'.[482] The view was, nonetheless, a departure from the view of Hugo Grotius, the father of international law, who stated that there were two types of war: 'just war' and 'unjust war,' or 'war of defence' and 'war of aggression'.[483] Subsequently, the illegality of war was reflected in the trials of the International Military Tribunals. The IMT stated that:

> [T]he charges in the indictment that the defendants planned, and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[484]

To find aggressive wars as international crime, the Charter of the International Military Tribunal assigned the violation of international treaties, agreements, and assurances to the development of crimes against peace.[485] The discussion below reviews how the violation of

---

[480] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of thirty-fourth meeting 3 October 1944, p. 5. Ecer stated that "[t]here is no doubt that the League of Nations expressed in both conventions the same fundamental legal conviction as was expressed in the Geneva Protocol, namely, that the preparation and launching of aggressive war are international crimes."

[481] Published in *New York Times Magazine* on 9 September 1945.

[482] Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) 51.

[483] Ibid.

[484] Nazi Conspiracy and Aggression: Opinion and Judgement, Office of United States, Chief of Counsel for Prosecution of Axis Criminality (United States Government Printing Office, Washington 1947) p. 16; Avaiable at https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Nazi-opinion-judgment.pdf; See also, Machteld Boot, *Genocide, Crime Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia 2002) 192.

[485] Hersch Lauterpacht, 'Draft Nuremberg Speeches' (2012) 1 Cambridge Journal of International and Comparative Law 1, pp.47-48.

treaties, assurances or promises bears the evidence of law to recognise aggressive war as an international crime.

3.2.1.3 Violations of the Kellogg-Briand Pact and Other Treaties

The discussion within the UNWCC, Nuremberg and other trials referred to the violation of international treaties to ascertain the existence of crimes against peace. The discussion below explains in detail whether the violation of treaties has given rise to a new international crime, i.e., the crime against peace. This section also shows to what extent international treaties satisfy the international consensus in order to justify the existence of crimes against peace. The first step in the prosecution of an individual for initiating and participating in a war started with discussions at the Commission on Responsibilities 1919. The findings of the Commission on Responsibilities 1919 reflected the pre-existence of the crime against peace.[486] Nevertheless, no insertion was made in the commission's report due to its absence in the positive law.

Prior to that, the Hague Convention 1907 indicated evidence of law on the prohibition of the employment of certain means of waging war. The Nuremberg tribunal stated that an act of aggressive war constituted greater turpitude than the violation of any single provision of the Hague Convention. The waging of aggressive war was equally illegal and even more dangerous than violating one single rule of the Hague Convention.[487] The IMT also referred to the Hague Convention 1899, where the signatory states recommended that 'before an appeal to arms … to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly powers.'[488] Similar provisions were inserted in the Convention for the Pacific Settlement of International Disputes of 1907. The Convention explicitly stipulates 'previous and explicit warnings', either in the form of a declaration of war or as an ultimatum with a conditional declaration of war.[489] The tribunal also noted that Germany had violated Articles 42-44, 80, 99 and 100 of the Versailles Treaty.[490]

---

[486] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty's Stationary Office, London 1948) 553.
[487] Trial of the Major War Criminals before the International Military Tribunal, Volume 1, Nuremberg 14 November 1945-1 October 1946 (Published at Nuremberg, Germany 1947) 221.
[488] Nazi Conspiracy and Aggression: Opinion and Judgement, Office of United States, Chief of Counsel for Prosecution of Axis Criminality (United States Government Printing Office, Washington 1947) 46.
[489] Ibid.
[490] Ibid., p. 47.

Several treaty violations led to the identification of crimes against peace. For instance, in a typical speech in Munich on the 13th April 1923, Hitler demanded the setting aside of the Treaty of Versailles. The IMT mentioned that 'the abrogation of the Treaty of Versailles was to become a decisive motive in attempting to justify the policy of the German Government.'[491] The committee report of the UNWCC contained what von Neurath, a German diplomat, told the Czech Minister: that Germany would respect the Czechoslovak-German Arbitration Treaty concluded at Locarno on 16 October 1925.[492] The invasion of Czechoslovakia thus violated the Locarno Treaties. The Locarno Treaties were guided by three main principles, namely non-aggression, the compulsory settlement of disputes and the clause of mutual assistance.[493] The preamble of the arbitration treaty was not respected by Germany. The preamble was particularly relevant to maintaining peace between Germany and Czechoslovakia.[494] In October 1933, Germany's withdrawal from the International Disarmament Conference and the League of Nations indicated preparation for aggressive war.[495] The UNWCC members highlighted the importance of the Pact of Paris because the state parties, including Germany and other Axis powers, were obliged to abide by it and thus refrain from taking part in any future wars.

The humanitarian grounds of treaties were also discussed in several ways to identify customary law. The words of Jackson emphasised the international community's obligation based on the common sense of mankind instead of the treaty obligation. The most important international instrument that was regarded as the general treaty to renounce the war was the Kellogg-Briand Pact, also known as the 'Pact of Paris'. In 1928, the Kellogg-Briand Pact drew up provisions on the legality of war for the first time. Jackson relied on the Pact to determine the existence of aggressive wars because it validated the harmonisation of international law and human common sense.[496] Any attack on the foundations of international relations could

[491] Ibid., 5.
[492] United Nations War Crimes Commission, Committee Reports C.101-C.240, May 1945 to Dec 1945; Including Report on Buchenwald, Political (External) Department Collection, Reference IOR/L/PS/12/4521, Coll 44/38(5), Czechoslovak Report Part II, London 10 September 1945, p. 3.
[493] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty's Stationary Office, London 1948) 60.
[494] United Nations War Crimes Commission, Committee Reports C.101-C.240, May 1945 to Dec 1945; Including Report on Buchenwald, Political (External) Department Collection, Reference IOR/L/PS/12/4521, Coll 44/38(5), Czechoslovak Report Part II, London 10 September 1945, p. 3.

[495] Nazi Conspiracy and Aggression: Opinion and Judgement, Office of United States, Chief of Counsel for Prosecution of Axis Criminality (United States Government Printing Office, Washington 1947) 6.
[496] Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) 52.; See also Allan A. Ryan 'Nuremberg's contributions to international law.

constitute a crime against the international community. The Jackson Report proposed a 'war of aggression as crime'.[497] In his view, the absence of judicial precedent was not an obstacle. He stated that:

> [i]t is true of course, that we have no judicial precedent for the Charter. However, international law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between nations and of accepted customs. Yet every custom has its origin in some single act, and every agreement has to be initiated by the action of some states. Unless we are prepared to abandon every principle of growth for international law, we cannot deny that our own day has the right to institute customs and to conclude agreements that will themselves become source of a newer and strengthened international law. International law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in international law are brought about by the action of governments designed to meet a change in circumstances. It grows, as did the Common Law, through decisions reached from time to time in adapting settled principles to a new situation. The fact is that when the law evolves by the case method, as did the common law and as international law must do if it is to advance at all, it advances at the expense of those who wrongly guessed the law and learned too late their error. The law, so far as international law can be decreed, had been clearly pronounced when these acts took place. Hence, I am not disturbed by the lack of judicial precedent for the inquiry it is proposed to conduct...[498]

(Sharpening the Cutting Edge of International Human Rights Law: Unresolved Issues of War Crimes Tribunals)' (2007) 30 Boston College International and Comparative Law Review 1 , p. 69.

[497] Robert H. Jackson, 'Atrocities and War Crimes: Report from Robert H. Jackson to the President' (1945) 12 Department of State Bulletin V, p. 1076.; Report of the 7th June 1945, by Justice Robert H. Jackson, reprinted in 39 American Journal of International law, 1945.

[498] Report to the President by Mr. Justice Jackson, June 6, 1945, Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) p. 50-52.; See also, Report of the 6th June 1945, by Justice Robert H. Jackson, reprinted in the American Journal of International law, Vol 39, 1945; See also, Nazi Conspiracy and Aggression, Volume 1, Office of United States, Chief of Counsel For Prosecution of Axis Criminality (United States Government Printing Office, Washington 1946), p165; A Collection of Documentary Evidence and Guide Materials Prepared by the American and British prosecuting Staffs for Presentation before the International Military Tribunal at Nuremberg.

The IMT's efforts concerning the nature and legal effects of the Pact in defining crimes against peace were equally significant. The tribunal stated that Germany had violated the Pact of Paris by committing the crime of aggressive war. However, the tribunal did not interpret the violation of the Pact of Paris as a treaty violation, rather painstakingly explained that ' …it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure.'[499] The judges of the tribunal also cited certain unratified protocols of the League of Nations justifying a war of aggression as an international crime.[500] Germany also violated the Declaration for the Maintenance of Permanent Peace with Poland, the creation of which was based on the Pact of Paris. The declaration was signed on 26th January 1934. It prohibited the use of force for ten years.[501] The Pact's legal obligation was not confined to the state parties; instead, it imposed an obligation to the entire world.

Some scholars also identified the impact of custom started with the enforcement of the Kellogg-Briand Pact. In other words, precisely, the Charter of the IMT seems to have begun its journey in 1928 with the enforcement of the Kellogg-Briand Pact to establish the law on aggressive war. The jurisprudence that emerged from the Pact reached a stage by 1945, whereby it fulfilled the signatories' dreams. F. Regan Nerone stated that 'the seeds planted in 1928 sprouted into full blossom so as to inform the entire community of nations that aggressive war is a crime.'[502] Nerone also noted the international consensus rooted in the Kellogg-Briand Pact as the basis to identify aggressive war.[503] David Turns specified the significance of the Pact of Paris and stated, citing Henry L. Stimson, that 'a war between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world… an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law… We denounce them as lawbreakers. By that very act, we have made obsolete many legal

[499]Trial of the Major War Criminals before the International Military Tribunal, Volume 1, Nuremberg 14 November 1945-1 October 1946 (Published at Nuremberg, Germany 1947) 221; See also, Nazi Conspiracy and Aggression: Opinion and Judgement, Office of United States, Chief of Counsel for Prosecution of Axis Criminality (United States Government Printing Office, Washington 1947) 51.
[500] Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945-1 October 1946, Proceedings 30 September – 1 October 1946 (Published at Nuremberg, Germany 1948) 464-465.
[501] Trial of the Major War Criminals before the International Military Tribunal, Volume 1, Nuremberg 14 November 1945-1 October 1946 (Published at Nuremberg, Germany 1947) 218.
[502] Regan F. Nerone, 'The Legality of Nuremberg' (1965) 4 Duquesne University. Law Review 146, p.155.
[503] Ibid.

precedents.'[504] Along with the violation of the treaty provisions, the atrocities of World War II also witnessed breaches of assurances and promises.

3.2.1.4 Breach of Assurances and Promises

Germany did not provide any justification for the invasions of Belgium, Holland and Luxemburg on 10 May 1940. Assurances which had been given to these nations to avoid an aggressive war were violated. For example, on 22 August 1939, Hitler paid tribute to the neutrality of the three countries. On 6 October 1939, he repeated the same assurance.[505] Despite the signing of a non-aggression treaty between Denmark and Germany on 31 May 1939, Germany invaded Denmark on 9 April 1940.[506]

The invasion of Czechoslovakia was also a violation of the Munich Agreement. Two facts were emphasised in this regard: first, Germany never fulfilled its pledge of guarantee; second, Germany violated the agreement by occupying large parts of Czechoslovakia from 1 October to 10 October 1938.[507] On 15 March 1939, Hitler occupied Bohemia and Moravia, violating the solemn pledge and the Munich Agreement. Hitler stated in a speech in the Berlin Sportpalast three days before the conclusion of the Munich Agreement that 'before us stands the last problem that must be solved and will be solved. It is the last territorial claim I have to make in Europe. I have assured Chamberlain that at the moment when Czechoslovakia solves her problems with her own minorities peaceably, I have no further interests on the Czechoslovak State and that is guaranteed to Chamberlain …'[508] It was apparent that Hitler had occupied the territory for further aggression and to complete his preparation for World War II.[509] He did not keep his promise to Neville Chamberlain, the British Prime Minister when

[504] David Turns, 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law' (2003) 2 Chinese Journal of International Law 1, pp. 114-115; See also Judgement of the International Military Tribunal Against Major Nazi War Criminals and Criminal Organisations, 20 Temple Law Quarterly 168, 212 (1947).; see also, Nazi Conspiracy and Aggression: Opinion and Judgement, Office of United States, Chief of Counsel For Prosecution of Axis Criminality (United States Government Printing Office, Washington 1947) p. 50.
[505] Nazi Conspiracy and Aggression: Opinion and Judgement, Office of United States, Chief of Counsel for Prosecution of Axis Criminality (United States Government Printing Office, Washington 1947) 40.
[506] Ibid., p. 34.
[507] United Nations War Crimes Commission, Committee Reports C.101-C.240, May 1945 to Dec 1945; Including Report on Buchenwald, Political (External) Department Collection, Reference IOR/L/PS/12/4521, Coll 44/38(5), Czechoslovak Report Part III, London 10 September 1945, p. 1.
[508] Ibid., p. 3.
[509] Ibid., p.3.

Great Britain entered World War II. Even the assurance given to the Czech Minister in Berlin by von Neurath and Goring never materialized.[510]

The *Ministries Trial* stated that Germany's economic policy led to systematic exploitation in the occupied territories. This was considered as a sign of further aggression.[511] The twenty-five-point program of the German Worker's Party had the evidence of aggressive war, which was drafted by Hitler and which remained unchanged until 1945. To pursue their aggressive policy, announced on 24 February 1920, the Nazi Party strengthened their control by reducing the power of local and regional governments, securing control of the civil services, controlling the judiciary, persecuting and murdering their opponents, including the Jews, establishing their party as the only legal political party, prohibiting others from forming any other political party, abolishing independent trade unions and youth organisations, limiting the influence of churches, and increasing their power over the German population by controlling education and the media. The twenty-five-point program is indicative of obtaining power in order to impose a totalitarian regime, enabling the Nazi Party to pursue their aggressive policies.[512] The elements of crimes against peace can be adduced from these unlawful demands, which were generally considered prohibited by the provisions of international agreements or principles of the civilised nations.

The discussion shows that the criminalisation of aggressive war under customary international law developed by the UNWCC and Nuremberg Tribunal's use of treaty and several non-binding or unratified sources.[513] The section below discusses whether these sources can be indicative of both State practice and *opinio juris.* Although the Nuremberg Principles are accepted as evidence of customary law today concerning the criminalisation of this crime, jurists in the 1950s 'were of the view that the derailing of this project represented the *abandonment*, rather than the formation, of law on this question.'[514]

[510] Ibid., p. 3.
[511] *The Ministries Case*, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume XII, p. 183.
[512] Historical Review on Developments Relating to Aggression, Volume. 673 (United Nations Publication 2003), p. 9, 10. Available at https://www.un.org/law/books/HistoricalReview-Aggression.pdf (accessed on 02.04.2021).
[513] See also, Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th ed., Cambridge University Press 2019) 118; Sellers, 'Crimes against peace' chapter 4 & 5.
[514] Kristen Sellers, *Crimes against Peace and International Law* (Cambridge University Press 2013) 262

3.2.1.5 Impact of Custom and Crimes Against Peace

i. Analogical Interpretation

Cowles, a Lieutenant- Colonel of the Judge Advocate General's Department for the US, had looked at aggressive war and war crimes through the same lenses. In his view, aggressive war was a violation of the Kellogg-Briand Pact. It was also a war crime as a violation of the Hague Conventions. He addressed the challenge of *lex lata* for aggressive war by making a comparative analysis of the two sets of criminal acts.[515] Similarly, Ecer noted an interesting point, stating that if there were national mechanisms to punish crimes for violating article 46 and 47 of The Hague Regulations, why could the same claim not be made for violating the Kellogg-Briand Pact? None of the instruments specified any provision for punishment for the commission of crimes. He also mentioned another legal basis, stating that 'the present total war is the collective name for an indefinite series of acts which are plainly crimes according to the criminal law of the invaded countries.'[516] Dr Radomir Zivkovic, the Yugoslav representative, also echoed the views of Lt Colonel Cowles and Ecer. He pointed out that the pact had the same force as regulations from a legal point of view.[517] Similarly, Quincy Wright in his article on *The Law of the Nuremberg Trial* suggested applying an analogy between state responsibility as provided for in the Pact of Paris and individual liability under the Hague Conventions on land warfare.[518] The provision of criminal liability was missing in both the international documents. Oppenheim indicated that rules of the Kellogg-Briand Pact prohibited aggressive war, thus the violation of any rule was a crime.[519] Leo Gross stated that 'the argument holds that if an individual act is of a criminal character, that is *mala in se*, and is in violation of the state's international obligation, it is a crime against the law of nations.'[520]

On the other hand, Lt Colonel Cowles relied on the interpretation of the pact, instead of drawing analogies, in defining whether 'preparation and launching of a war was a 'war

[515] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of thirty-sixth meeting 17 October 1944, p. 16.
[516] Ibid., p. 19.
[517] Ibid., p. 12.
[518] Quincy Wright, 'The Law of the Nuremberg Trial' (1947) 41 American Journal of International Law 39, p. 63.
[519] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of thirty-sixth meeting 17 October 1944, p. 19.
[520] Leo Gross, *International Law in the Twentieth Century*, (Ardent Media 1969) p. 648

crime''.[521] Article 1 of the Kellogg-Briand Pact interprets 'individual criminal responsibility', whereas, Article 2 shows the intention of having 'state responsibility'. Lt Colonel Cowles found that state responsibility existed for violation of the Kellogg-Briand Pact, not individual criminal responsibility. He concluded by stating that 'the preparation and launching of the present war cannot, under existing law, be considered a 'war crime.''[522] General R.A Rudenko, the chief prosecutor for the USSR in the Nuremberg trials, similarly stated that there was no international law that imposed individual criminal responsibility. However, he found the legal system of international relations depended on different legal principles and considered a treaty to be a source of law or the legal basis for regulating certain aspects of national justice.[523] The resolution, passed in 1929 at the Congress of the International Association of Criminal Law at Bucharest, provided evidence for the establishment of an international penal judicial system to declare the state and individual responsible for acts of aggression.[524] Article 56 of the Hague Convention 1907 also indicated the criminal responsibility for violations of laws and rules of warfare by stating that these violations 'shall be made the subject of legal proceedings'. The IMT also identified the presence of criminal responsibility in Article 3 of the Washington Conference on the Reduction of Armaments and for the Pacific and Far Eastern problems 1922.

i) Common consent of states

The discussion on the common consent of states brings several issues into consideration. In the meeting of the UNWCC, 'consent' was defined as 'consent of the majority of the family of the nations' who recognise these rules as rules of general international law.[525] For example, the Pact of Paris reflects the common consent of states to influence public opinion against aggressive war. R.D. Lumb argued in his article that Pact of Paris could not be a product of international law because it did not reflect the 'general agreement of all civilised states.'[526] However, he admitted that 'the Pact of Paris is not simply a treaty binding because of the

[521] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of thirty-sixth meeting 17 October 1944, p. 12.
[522] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of thirty-sixth meeting 17 October 1944, p. 12.
[523] Trial of the Major War Criminals before the International Military Tribunal, Volume VII, Nuremberg 14 November 1945-1 October 1946 (Published at Nuremberg, Germany 1947) 148.
[524] Ibid., 149.
[525] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of thirty-sixth meeting 17 October 1944, p. 19.
[526] R. D. Lumb, 'Individual Responsibility for Aggressive War: The Crime Against Peace'(1956) 3 The University of Queensland Law Journal 4, p. 353.

expressed will of states. It is rather a declaration of those principles which uphold peace and harmony in the international order.'[527] This chapter has argued that a treaty reflects evidence of customs based on the consent of states, especially those whose interests have been severely damaged due to non-fulfilment of a promise. It supports the idea of criminologist Sheldon Glueck to some extent in this regard.

ii) Nexus between the foundation of treaties and principles of humanity

Glueck categorised a number of different treaties and international instruments as reflective of customary international law. He considered the 1923 Draft Treaty of Mutual Assistance, the 1924 Geneva Protocol, the 1927 Eighth League Assembly resolution and the 1928 Kellogg-Briand Pact as authoritative evidence of widely prevalent custom, which was 'sufficient to energize a juristic climate favourable to the regarding of a war of aggression as …downright criminal.'[528] Specifically, Glueck considered the Kellogg-Briand Pact as evidence of *opinio juris*, as it expanded the practice of calling aggressive wars not as 'unjust' or 'illegal' but 'downright criminal' among civilised nations. In support of the emergence of custom, Glueck stated that: 'Every recognition of custom as evidence of law must have a beginning some time; and there has never been a more justifiable stage in the history of international law than the present, to recognise that by the common consent of civilised nations as expressed in numerous solemn agreements and public pronouncements the instituting or waging of an aggressive war is an international crime.'[529] The above discussion shows that the foundation of humanity lies primarily in international conventions that essentially influences the identification of aggressive warfare as an international crime.

Similar attitudes were visible in the meetings of the UNWCC; members of the UNWCC stated that the Geneva Protocol 1924 was evidence of the 'conviction of the whole of civilised humanity', and expressly declared war to be an international crime.[530] Ecer mentioned that when an international convention declares aggressive war a crime and stipulates its punishment, it does have far greater importance to humanity than a platonic announcement by

[527] Ibid., p. 353.
[528] Sheldon Glueck, The Nuremberg Trial and Aggressive War (New York: Alfred A. Knopf 1946) 34; See also Finch, Review of *The Nuremberg Trial and Aggressive War* by Sheldon Glueck, (New York: Alfred A. Knopf, 1946) 41 American Journal of International Law 1, p. 334.

[529] Ibid.

[530] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationary Office 1948, p. 182.

the commission.[531] The IMT also stated the Kellogg-Briand Pact reinforced a number of preceding international treaties, including the Draft Treaty of Mutual Assistance 1923 and the preamble to the League of Nations 1924 Protocol for the Pacific Settlement of International Disputes.[532] The Protocol for the Pacific Settlement of International Disputes 1924 was an unratified protocol of which Germany was not a party.[533] The tribunal, nevertheless, stated that this protocol represented the opinion of the vast majority of the civilised world - which reflected strong evidence of 'the intention to brand aggressive war as an international crime.'[534] The Justice Jackson Report similarly stated that there were several international instruments which declared that 'a war of aggression constitutes … an international crime', such as the Geneva Protocol 1924, the Eighth Assembly of League of Nations in 1927, or the Sixth Pan-American Conference of 1928.[535]

On the other hand, George Finch argued that the treaty interpretation did not reflect the judicial presence of custom because sometimes provisions were not strictly followed by the signatories. He also noted the lack of 'legal effects' of the unratified protocols or public and private resolutions.[536] He stated that the consent or acceptance of states cannot be proved from the unratified protocols as these protocols did not have any binding effect. The binding effect depends on the enforcement by national or international action. Hence, those unratified instruments could never evidence the evolution of an international custom against aggression.[537] The same view was expressed by de Moor, one of the Commission's members. He stated that:

---

[531] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of thirty-sixth meeting 17 October 1944, p. 10.
[532] Nazi Conspiracy and Aggression: Opinion and Judgement, Office of United States, Chief of Counsel for Prosecution of Axis Criminality (United States Government Printing Office, Washington 1947) 51.; Trial of the Major War Criminals before the International Military Tribunal, Volume 1, Nuremberg 14 November 1945-1 October 1946 (Published at Nuremberg, Germany 1947) 221.
[533] Ibid.
[534] Ibid.
[535] Report to the President by Mr. Justice Jackson, June 6, 1945, Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) 3.
[536] George A. Finch, Review of *The Nuremberg Trial and Aggressive War* by Sheldon Glueck, (1947) 41 American Journal of International Law 1, p. 334; He stated that "custom could not be judicially established 'by placing interpretations upon the words of treaties which are refuted by the acts of the signatories in practice, [or] by citing unratified protocols or public and private resolutions of no legal effect."
[537] George A. Finch, 'The Nuremberg Trial and International Law' (1947) 41 American Journal of International Law 1, p. 26.

> In my opinion, it is impossible to conclude from the Briand-Kellogg Pact - the most important, because it has not only been accepted by the representatives of many states, but has also been ratified by so many states - that aggressive war has already become a punishable crime, in a criminological sense. Sanctions for criminal states are not determined, nor penalties for personal leaders. The question of personal responsibility has not even been raised. A competent court does not exist. A clear description of the crime itself - so important in criminology - is lacking.[538]

He was unsure of the accurate identification of aggressive war and the establishment of mechanisms to punish this crime.[539] Similarly, Justice Pal of India disagreed with the argument that international customary international law had been developed under the Pact of Paris. He found no evidence that individual responsibility for waging aggressive war was a crime.[540] Justice pal 'denied that crimes against peace were a part of existing international law and noted that, in the absence of a clear definition, the concept of aggression was open to "interested interpretation".'[541] Finch made the same argument, specifying inconsistent practice of states as to individual criminal responsibility for aggressive war.[542] The Soviet's conduct of engaging with an aggressive war against the Baltic states and Finland illustrated the lack of customary international law, demonstrating the inconsistent practice of the states.[543]

[538] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of thirty-sixth meeting 17 October 1944, p.17.
[539] Ibid., "…it is our duty to point out to the United Nations Governments that it is of the greatest importance for the future of mankind that aggressive war be fixed, and that machinery and a competent international criminal court be created, etc., etc."
[540] International Military Tribunal for the Far East Judgement, Dissentient opinion of Judge Pal, (Kokusho - Kankokai, Inc., Tokyo, 1999) pp. 73-75. He stated that 'herein comes THE USAGE which is wanting in the present case. The people should not merely be conscious of their law but they must live their law, ---- they must act and conduct themselves according to it.', p. 62.
[541] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4 ed., Cambridge University Press 2019) 118.
[542] George A. Finch. 'The Nuremberg Trial and International Law' (1947) 41 American Journal of International Law 1, p. 35.
[543] Bernard D Meltzer. 'Robert H. Jackson: Nuremberg's Architect and Advocate' (2004) 68 Albany Law Review 1, p. 60.; See also, Restatement (Third) of Foreign Relations Law of the United States 102 (2) (1987)

PART II

3.2.2 Presence of 'Humanity' as Evidence of Custom: Crimes Against Humanity

3.2.2.1 Generic Presence of the Term 'Humanity'

The origin of crimes against humanity is linked to the concept of the 'laws' of humanity. Lord Wright found significant development of the laws of war based on the foundation of the 'principles of humanity'.[544] The generic presence of humanity is found in all related documents and enactments, either as 'interests of humanity' or as 'laws of humanity'. He drew a thin line between the 'interests' and 'laws' of humanity. In his view, the 'interests of humanity' could be perceived from the objectives that a convention intended to serve, whereas the 'laws of humanity' originate from the law of nations.[545] The preamble of the Hague Convention 1907 refers to the 'laws of humanity'. Lord Cave stated in his article that 'the laws of humanity and the requirements of the public conscience of the preamble as "lex non scripta", i.e. as law, and says expressly that this law is to be extracted etc.'[546] Nevertheless, it was not incumbent upon the parties to follow the preamble as declaratory of crimes against humanity. The Hague Convention 1907 was not a complete code of the laws and customs of war. The preamble was intended to protect humanity and humanitarian values in the scope of international armed conflicts.[547] In the Egon Schwelb (Czechoslovak) report, it was stated that 'most of the common crimes of the municipal law of civilised nations offend somehow or other against "humanity".'[548]

The idea of humanity was also present in the opening statement of prosecutor Benjamin B. Ferencz, in the case of *Einsatzgruppen Case* and *RuSha*, when he noted that 'the conscience of humanity is the foundation of all law.'[549] He showed a link between Nazi doctrine and origin of crimes against humanity. In the opening statement, Prosecutor Ferencz declared 'now comes this recrudescence - this Nazi doctrine of a master race - an arrogance blended from tribal

[544] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationary Office 1948, p. 26.
[545] Ibid., p. 26.
[546] Lord Cave, 'War Crimes and their Punishment' (1923) 8 Transactions of the Grotious Society, p. XXI, as printed in The Problem of "War Crimes" in connection with the second World War, Explanatory and Additional Note by Dr Ecer to his Report (Doc. III/4), Committee III, III/4 (a), 12 May 1944, p. 4. Available at https://www.legal-tools.org/doc/6335bd/pdf (accessed on 04.04.2021).
[547] M. Cherif Bassouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011) XXVII.
[548] United Nations War Crimes Commission "Material for the Preparation of a Definition of 'Crimes against Humanity'", compiled by Egon Schwelb, III/33, 22 March 1946, p. 9. Available at: https://www.legal-tools.org/doc/c52df5/ (accessed on 04.04.2021).
[549] *The Einsatzgruppen Case* and *RuSha Case*, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume IV, p. 32.

conceit and a boundless contempt for man [sic] himself. It is an idea whose toleration endangers all men. It is, as we have charged, a crime against humanity.'[550] The Tribunal in the *Einsatzgruppen trial* noted these acts exist as crimes 'in the hearts of mankind'; in this regard, international law 'may develop through custom and usage and through the application of the common law.'[551] Bassiouni mentioned that the idea of humanity had existed for centuries 'within laws and writings, throughout Western, Judeo Christian, Islamic and other civilizations' with the belief that life, liberty, physical integrity and personal dignity were the fundamental rights of humanity.[552]

3.2.2.2: Definition of Crimes Against Humanity: Efforts of the UNWCC

The final report of the Commission on Responsibilities 1919 did not include provisions for crimes against the laws of humanity. This was denied due to the lack of available practice or precedent. No decisive explanation concerning elements of crimes against humanity was made until World War II. The effort of the UNWCC was significant to the development of characterisations of crimes against humanity.

The work of the UNWCC provided an enormous contribution to the development of 'crimes against humanity'. To define the scope of the retributive action of the United Nations, the London International Assembly recommended not only to include the customary violations of the laws of war but also other serious crime against the local law committed in time of war.[553] Committee III (the legal committee) of the UNWCC, chaired by the Czech representative, Bohuslav Ecer examined the notion of 'crimes against humanity' to assertively define and form some general statements on it.[554] The legal committee was looking for a solution to include atrocities, not covered by war crimes, committed on the grounds of racial, religious or political reasons in the enemy territories.[555] In the memorandum entitled '*Scope of the Retributive Action of the United Nations According to their Official Declarations - The*

[550] Ibid., p. 31-32.
[551] Ibid., pp. 497, 458.
[552] M. Cherif Bassiouni, 'Crimes Against Humanity': The Need for a Specialized Convention' (1994) 31 Columbia Journal of Transnational Law 3, p. 488.
[553] United Nations War Crimes Commission (Committee III), Material for the Preparation of a Definition of 'Crimes against Humanity', (III/33. 22 March, 1946) p. 2.
[554] United Nations War Crimes Commission, Committee Reports C.101-C.240, May 1945 to Dec 1945; Including Report on Buchenwald, Political (External) Department Collection, Reference IOR/L/PS/12/4521, Coll 44/38(5), General proposition defining the term 'Crime Against Humanity' under the Charter of the International Military Tribunals and the Control Council Law No. 10., 30 May 1946, C. 201. p.1.
[555] Ibid. p. 3.

Problem of War Crimes in connection with the Second World War', Ecer argued that expanding the concept of war crimes would not go beyond the UNWCC's expertise. He also supported the use of the term 'crimes against humanity'.[556] He referred to the Martens Clause and Versailles achievements. He found the Martens Clause as significant because it refers the term 'humanity'. The Committee III report on the 'material for the preparation of a definition of "crimes against humanity"' compiled by Egon Schwelb, legal office, attempted to present the definition of 'crimes against humanity' based on earlier use of this term and its similar expressions.[557] The earliest development indicating the presence of the term was referred from the Hague Convention 1907. The paragraph two of the preamble of the Hague Convention 1907 states 'the interests of humanity and the ever-progressive needs of civilization'.[558] The paragraph eight of the preamble also refers this term, stating that 'the Contracting Parties declared, inter alia, that the inhabitants and belligerents remain under the protection and governance of the law of nations, derived from the usages established among civilised peoples, *from the laws of humanity*, and from the dictates of the public conscience.'[559]

The narrowest and technical sense of the term 'humanity' emerges in a document that deals with violation of the laws and customs of war. The Legal Committee report also noted about Article 227 of the Treaty of Versailles which arraigns Wilhelm II of Hohenzollern, the German Emperor, for a 'supreme offence against international morality and the sanctity of treaties.'[560] The report had included the mention of Commission on Responsibilities 1919, which stated that 'in spite of the explicit regulations, of established customs and of the clear *dictates of humanity,* Germany and her Allies have piled outrage upon outrage.'[561] The report also noted about a letter (the text of which was approved by the Commission on 30 My 1944) written by Sir Cecil Hurst to Rt. Hon. Anthony Eden, British Foreign Secretary, on 31 May 1944, which stated that 'a category of enemy atrocities which has deeply affected the public mind, but which does not fall strictly within the definition of war crimes, is undoubtedly the atrocities which have been committed on racial, political or religious grounds in enemy territory'.[562] On 26 September 1944, the UNWCC discussed the matter, referring the statement

[556] Bohuslav Ecer, "Scope of the Retributive action of the United Nations according to their official Declarations- The Problem of War Crimes in connection with the Second World War" UNWCC III/4 (a), 27 April 1944, p. 6.
[557] United Nations War Crimes Commission (Committee III), Material for the Preparation of a Definition of 'Crimes against Humanity', (III/33. 22 March, 1946) p.1.
[558] Ibid
[559] Ibid.
[560] Ibid.
[561] Ibid., p. 2
[562] Ibid., p. 3.

of President Roosevelt given on 12 June 1944, that '…this nation is appalled by the systematic persecution of helpless minority groups by the Nazis. To us the unprovoked murder of innocent people simply because of race, religious or political creed is the blackest of all possible crimes.'[563]

In order to differentiate crimes against humanity from other crimes, the report stated that 'it is necessary to keep in mind that in a certain general sense, every crime, or nearly every crime, is inhuman and therefore a crime against humanity'.[564] The UNWCC suggested two categories of crimes against humanity: the 'murder type' and the 'persecution type'. Crimes of the 'murder type' included murder, extermination, enslavement, deportation and other inhuman acts. It included offences committed against civilian populations, not against the belligerent forces.[565] On the other hand, the 'persecution type' crimes against humanity were defined based on political, racial or religious grounds.[566] The UNWCC discussed the 'persecution type' offences in the execution of or in connection with the crime against peace or the laws and customs of war under international military tribunal's jurisdiction.[567] Lord Wright was aware of the hurdles of defining the characteristics crimes against humanity. He asked the members of the commission to consult with their respective governments first in this respect.[568] In the general proposition to define crimes against humanity, the UNWCC indicated that the origin of crimes against humanity from three sources. First, from the violation of the laws and customs of war; second, from the positive municipal provisions of criminal law; third, from the general principles of criminal law derived from the criminal law of all civilised nations.[569] Although Mr. Lansing mentioned about the violation of the general principles of international law in the Commission on War Responsibilities 1919, there was no authoritative statement considering the general principles of law as a part of international law until the establishment of ICJ in

[563] Ibid., p. 4.
[564] Ibid., p. 9.
[565] United Nations War Crimes Commission, Committee Reports C.101-C.240, May 1945 to Dec 1945; Including Report on Buchenwald, Political (External) Department Collection, Reference IOR/L/PS/12/4521, Coll 44/38(5), General proposition defining the term 'Crime Against Humanity' under the Charter of the International Military Tribunal and the Control Council Law No. 10., 30 May 1946, C. 201. p. 2.
[566] Ibid.
[567] Ibid., p. 3.
[568] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of Ninety-one Meeting held on 30 January 1946, p. 2.
[569] United Nations War Crimes Commission, Committee Reports C.101-C.240, May 1945 to Dec 1945; Including Report on Buchenwald, Political (External) Department Collection, Reference IOR/L/PS/12/4521, Coll 44/38(5), General proposition defining the term 'Crime Against Humanity' under the Charter of the International Military Tribunal and the Control Council Law No. 10., 30 May 1946, C. 201. p. 2.

1945.[570] Subsequently, the tribunal acting in the *Doctors' Trial* cited almost similar sources, as stated above, in the characterisation of the crimes against humanity.[571] In 1945, Hans Kelson also stated that 'almost all ordinary crimes according to the municipal laws of the persons to be accused, were valid at the moment they were committed.'[572]

The UNWCC also discusses the complexity of using the law of the country as evidence of crimes against humanity. The report of the UNWCC stated that the provision of *lex loci* to be irrelevant in deciding the issue of crimes against humanity. The legislation of a country may sometimes authorise the commission of crimes by legalising unjustified killing, deportations, racial discrimination, suppression of civil liberties, etc.[573] For example, the injurious acts committed by officials of the leadership corps was to uphold the rule of law, providing validity to the large volume of Nazi legislation designed to degrade, stigmatize and eliminate the Jewish people of Germany and German-occupied Europe.[574] While holding Brandt liable for the extermination of foreign nationals by participating in a euthanasia program, the tribunal in the case of *United States of America v Brandt* raised the question of legality and pointed out that 'whether or not a state may validly enact legislation which imposes euthanasia upon certain classes of its citizens is likewise a question which does not enter into the issue. Assuming that it may do so, the Family of Nations is not obliged to give recognition to such legislation when it manifestly gives legality to plan the murder and torture of defenceless and powerless human beings of other nations.'[575]

The context of crimes against humanity is yet unknown. A recent scholar argued that the determination of a context as 'inhumane' to understand crimes against humanity is controversial.[576] The *Justice Trial* also noted a German professor of law who stated in 1878 that 'States are allowed to interfere in the name of international law if "humanity rights" are

[570] Statute of the International Court of justice, June 26, 1945, art.38. 59 Stat. 1055, 1060, T.S. No. 995, at 25, 30.
[571] *The Medical Case,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume I.
[572] Hans Kelson, 'The Rule Against Ex Post Facto Law and the Prosecution of the Axis War Criminals' (1945) 2 The Judge Advocate Journal 3, p. 10.
[573] United Nations War Crimes Commission, Committee Reports C.101-C.240, May 1945 to Dec 1945; Including Report on Buchenwald, Political (External) Department Collection, Reference IOR/L/PS/12/4521, Coll 44/38(5), General proposition defining the term 'Crime Against Humanity' under the Charter of the International Military Tribunals and the Control Council Law No. 10., 30 May 1946, C. 201. p. 3.
[574] Law Reports of Trials of War Criminals Selected and Prepared by The United Nations War Crimes Commission, Volume VI, Digest of Laws and Cases (Published for the United Nations War Crimes Commission by His Majesty's Stationary Office 1949, London) 21.
[575] *The RuSha and Pohl Case*, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume V, p. 161.
[576] Margaret M. deGuzman, 'Crimes Against Humanity' in William A. Schabas and Nadia Bernaz, *Routledge Handbook of International Criminal law*, (1st ed., Routledge 2011) 122.

violated to the detriment of any single race.'[577] The *Justice Trial* identified the nature of crimes against humanity in several contexts: namely, when Britain, Russia and France intervened to end the atrocities in the Greco -Turkish war in 1827; when President Van Buren intervened with the Sultan of Turkey in 1840 on behalf of the persecuted Jews; when the French intervened over the religious atrocities in Lebanon in 1861; when the United States, Germany, and five other powers protested to Romania in 1872; when Germany joined a reproachful protest against Turkey in 1915.[578] Schabas noted the presence this term, or similar terms, referring back to contexts like the slave trade, slavery, the atrocities involved with colonialism in Africa or elsewhere in the late eighteenth and early nineteenth century.[579] On the other hand, Cherif Bassiouni noted its origin in the declaration issued in 1915 by the Allied governments (France, Great Britain and Russia). This declaration condemned the mass killing of Armenians in the Ottoman Empire and referred to the use of the term as a distinct category under international crimes.[580]

3.2.2.3 Prosecution of Crimes Against Humanity: Nuremberg and Other Trials

During World War II, the laws of humanity reflected the provisions of war crimes more than crimes against humanity. The IMT delivered very few convictions on crimes against humanity independent of the charge of war crimes, except the case of Julius Streicher, Baldur Von Schirach and Seyss-Inquart.[581] Frick and Von Neurath were also convicted of crimes against humanity committed in Czechoslovakia.[582] There were no trials of crimes against humanity committed before the war started. Due to the uncertainty concerning the basis of this crime, most of the trials at Nuremberg linked crimes against humanity with war crimes.[583] Guido Acquaviva noted that crimes against humanity were considered punishable because of

[577]The Justice Case, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume VI. p. 982.
[578] Ibid., p. 981.
[579] William Schabas, *Unimaginable Atrocities- Justice, Politics and Rights at the War Crimes Tribunals* (Oxford University Press 2012), p 51-53.
[580] M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, (Martinus Nijhoff Publishers 1999) 62.
[581] Guido Acquaviva 'At the Origins of Crimes Against Humanity: Clues to a Proper Understanding of the *Nullum Crimen* Principle in the Nuremberg Judgement' (2011) 9 Journal of International Criminal Justice 4, p. 886.
[582] Nuremberg judgment, France et al. v *Göring* (Hermann) et al., Judgment and Sentence, (1946) 41 American Journal of International Law 172.
[583] Charles Chernor Jalloh. 'What makes a Crime against Humanity a Crime against Humanity' (2013) 28 American University International Law Review 2, p. 395.

their connections to war crimes.[584] David Scheffer argued that crimes against humanity were linked to war crimes to strengthen the illegality of the acts in the context of an overall aggressive war.[585] There were hardly any independent charges of crimes against humanity.

Ascertaining distinct sources that constituted crimes against humanity was a complex task before the Nuremberg and other trials. The *Ministries Trial* identified violation of almost similar sources of law that constitute war crimes and crimes against humanity. The sources included violations of international conventions, laws and customs of war, general principles of criminal law derived from the criminal laws of all civilized nations, the internal penal laws of the countries where such crimes were committed, and Article II of Control Council Law No. 10.[586] The *Justice Trial* described numerous factors such as 'moral pressure' as a contributing factor to the development of international crimes under customary international law. The Tribunal stated that 'the force of circumstance, the grim fact of world-wide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law.'[587] Therefore, under Control Council No. 10, the defendants did not need to be indicted for or convicted of crimes against peace to establish their guilt for crimes against humanity.[588]

The tribunal in the *Ministries Trial* argued that 'crimes against humanity are a well-recognised concept in international penal law, and that they are quite independent of war crimes and crimes against peace.'[589] Unlike war crimes related to plunder and spoilation under Article 46 and 52 of the Hague Regulations, the *Ministries Trial* did not refer to any specific violation of provisions justifying crimes against humanity.[590] The reference to the elements of crimes against humanity has been drawn from the implicit provisions of international treaties. For example, no international law instruments suggested any illegality concerning 'civilian forced labour'. The Hague Convention of 1899 and 1907 only dealt with the 'forced labour of the

[584] Guido Acquaviva 'At the Origins of Crimes Against Humanity: Clues to a Proper Understanding of the *Nullum Crimen* Principle in the Nuremberg Judgement' (2011) 9 Journal of International Criminal Justice 4, p. 886.
[585] David Scheffer. 'Nuremberg Trials' (2008) 39 Studies in Transnational l Legal Policy 155, p. 171.
[586] *The Ministries Case,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume XII, p. 50.
[587] The Justice Case, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume VI. p. 58
[588] The *Justice* Case, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume III, p. 65.
[589] T*he Ministries Case*, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume XII, p. 230.; See also *United States vs Friedrich Flick,* et al., volume VI.
[590] Ibid., p. 169.

prisoner of war'. The defence in the *Ministries Trial* argued having the requirement that an act should be offensive according to the penal laws of the civilised nations to be considered as crimes against humanity.[591] Reference was also made to the official U.S. army textbook Handbook for Military Government in Germany, which declared that 'it must be admitted that the Hague Land Warfare Regulations and international practice permit forced labour'.[592] However, the absence of explicit reference to the term 'civilian forced labour' in clear terms does not unnecessarily restrain the prosecution of it under crimes against humanity. The tribunal in the *Flick* and *I.G Farben Trials* did not discuss any details of the relevant law.[593] The IMT stated that 'the laws relating to forced labour by the inhabitants of occupied territories are found in Article 52 of the Hague Conventions.'[594] In fact, Article 46 and 52 of the Hague Convention 1907 formed a basis for the elements of crimes against humanity. The IMT stated that 'the deportation of the civilian population for forced labour is, of course, a crime both according to international customary law and to conventional international law as expressed in the Hague Convention.'[595] The section that follows discusses below the contribution of customary international law to the development of the notion of crimes against humanity following World War II.

3.2.2.4 Customary Character of Crimes Against Humanity

The discussion of the UNWCC and decisions of the Nuremberg and other trials herald a breakthrough in settling crimes against humanity under international law. Cherif Bassouni stated that certain elements of crimes against humanity have always existed in the laws of most national legal systems because it is generally prohibited to kill, rape, deport, enslave someone.[596] The basis for crimes against humanity was the belief that 'laws of humanity' formed the basis of higher law, from which states would choose what they agreed to make compulsory as international legal instruments.[597] Nonetheless, the particular concern was with

[591] Ibid., p. 412.
[592] Ibid., p. 414.
[593] Law Reports of Trials of War Criminals Selected and Prepared by The United Nations War Crimes Commission, Volume XV, Digest of Laws and Cases (Published for the United Nations War Crimes Commission by His Majesty's Stationary Office 1949, London) 120.
[594] Ibid.
[595] The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part 19. (Published for the United Nations War Crimes Commission by His Majesty's Stationary Office 1949, London) 430.
[596] M. Cherif Bassouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011) 2.
[597] Ibid., p. XXVIII.

the crime of 'persecution' as an element of crimes against humanity as there was no evidence in national criminal law legislation.[598]

Generally, it is a difficult task to know the exact point of time from when a norm begins to ripe into a custom. The presence of this crime under customary international law appears with controversies. Schabas mentioned that 'reference to the debates in the United Nations War Crimes Commission and the London Conference should be enough to show just how unclear the state of customary law actually was.'[599] Margaret de Guzman argued that crimes against humanity did not develop under customary international law before the Nuremberg trials. She cited it as one of the reasons for maintaining a link between crimes against humanity and two other treaty-based crimes: war crimes and crimes against peace. This connection acted as a shield so that the question of violation of the principle of legality did not arise.[600] Matas stated that 'one cannot say that before World War II there was a general practice, accepted as law, of prosecuting persons for crimes against humanity.'[601] In his view, the development of custom was limited to crimes committed in execution or in connection with war crimes or crimes against humanity.[602] He stated that practice subsequently developed through the statements of the Nuremberg tribunal and United Nations General Assembly Resolutions.[603] Charles Chernor Jalloh found that failure to enforce international penal responses under the Treaty of Sevres had reduced the scope of defining the substantive elements of crimes against humanity under customary international law.[604] The Treaty of Lausanne 1923 also failed to make the provision for crimes against humanity. As mentioned in the previous chapter, the term 'crimes against humanity' did not receive a place in the Treaty of Versailles due to the persistent objections of the United States. The United States, on the other hand, was not a party to the Treaty of Sevres[605]; therefore, the term could have been included in that treaty. Unfortunately, the treaty neither included the term 'crimes against humanity' nor 'laws of humanity'. It just

[598] Ibid., p. 32.
[599] William A. Schabas, 'Origins of the Genocide Convention: From Nuremberg to Paris' (2007-2008) 40 Case Western Reserve Journal of International Law 1, p. 46.
[600] Margaret M. deGuzman, 'Crimes Against Humanity' in William A. Schabas and Nadia Bernaz, *Routledge Handbook of International Criminal law*, (1st ed., Routledge 2011) 122.; See also Charles Chernor Jalloh, what makes a Crime against Humanity a Crime against Humanity, 28 American University of International Law Review 381 (2013) p. 394.
[601] David Matas, Prosecuting Crimes Against Humanity: The Lessons of World War I, (1989) 13 Fordham International Law Journal 1. p. 95.
[602] Ibid., p. 95.
[603] Ibid., p. 95.
[604]Charles Chernor Jalloh. What makes a Crime against Humanity a Crime against Humanity' (2013) 28 American University International Law Review 2, p. 392.
[605] David Matas, 'Prosecuting Crimes Against Humanity: The Lessons of World War I' (1989) 13 Fordham International Law Journal 1. p. 90.

spoke of offenses that would be tried without specifying the nature of the crimes. Similarly, the Treaty of Lausanne was signed in 1923, and it amnestied all offenses committed between 1914 and 1922,[606] though failing to point out what the offenses were given amnesty. The lack of presence of the crime in treaties of international law led the drafters of the Nuremberg Charter to experience difficulties while they were defining it as an international crime for the first time.[607]

In contrast, the laws of humanity and fundamental human rights as evidence of law may justify the existence of the crime, and thus satisfy the status of customary international law. Bassiouni mentioned that the development of customary international law varies from one subject matter to another as 'it represents the evolving practices of states in the light of state interests and the international community's shared values and expectations.'[608] Jalloh stated in his paper that deGuzman, categorised the notion of crimes against humanity as a threat to international peace and security and the conscience of humanity, with state involvement and action.[609] This chapter finds that deGuzman' categorisation reflects the act of Nazi foreign labour policy, a policy of mass deportation and mass enslavement by force, by fraud, by terror, or by arson.

Similarly, Allan A. Ryan stated that the IMT formed a new custom based on the degradation, brutality and inhumanity visited upon civilians in general, which is unrelated to combat, weapons and armies.[610] For example, the United States Military Tribunals in the *Doctors' Trial* elaborated some principles regarding 'the responsibility of illegal experiments' as war crimes or crimes against humanity. The Tribunal stated that inhuman experiments involving brutality, torture and such conditions were contrary to 'the principles of the laws of nations as they result from the usages established among civilised peoples, from the laws of

[606] The Treaty of Lausanne, signed on January 30, 1923, UKTS, No. 16 (1923)
[607] Guido Acquaviva. 'At the Origins of Crimes against Humanity – Clues to a Proper Understanding of the Nullam Crimen Principle in the Nuremberg Judgement' (2011) 9 Journal of International Criminal Justice 4, p. 884.; Also see J. Nilsson. 'Crimes Against Humanity', in A. Cassese (ed.) *Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 284.
[608] M. Cherif Bassouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011) xxvii.
[609] Charles Chernor Jalloh, 'What makes a Crime against Humanity a Crime against Humanity' (2013) 28 American University International Law Review 2, p. 385.
[610]Allan A. Ryan. 'Nuremberg's contributions to international law: Sharpening the Cutting Edge of International Human Rights Law: Unresolved Issues of War Crimes Tribunals' (2007) 30 Boston College International and Comparative Law Review 1, p. 56.

humanity and from the dictates of public conscience.'[611] Justice Robert Jackson, the Chief U.S. Prosecutor at the IMT, stated in his opening statement that:

> The wrongs which we seek to condemn and punish have been so calculated, so malignant, so devastating, that civilisation cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of the law is one of the most significant tributes that Power has ever paid to Reason.[612]

The pre-existing nature of the laws of humanity has reduced the gravity of the scope of *ratione materiae* of the *nullum crimen* rule. Martti Koskenniemi, in his article on *Hersch Lauterpacht and the Development of International Criminal Law,* noted that Lauterpacht did not make much comment on the retroactivity of crimes against humanity, but he affirmed the fundamental human rights which are in a higher position than the law of the land.[613]

PART III

3.2.3 International Conventions as Evidence of Custom: War Crimes

3.2.3.1 The Concept of War Crimes

The section shows institutional efforts leading to the development of war crimes after World War II, e.g. UNWCC, Nuremberg and other trials. The Charter of the International Military Tribunal extended the Commission on War Responsibility list of war crimes. The origin and concept of laws of warfare are discussed elsewhere in the thesis. This part of the chapter concentrates entirely on the development of war crimes beginning with the 32 categories of war crimes introduced by the Commission on Responsibilities 1919, following World War I.

---

[611] The *Doctor's Trial* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume XII, p. 230, Vol. VII. pp. 49-50.
[612] Trial of the Major War Criminals before the International Military Tribunal, Volume 1, Nuremberg 14 November 1945-1 October 1946 (Published at Nuremberg, Germany 1947).
[613] Martti Koskenniemi, 'Hersch Lauterpacht and the Development of International Criminal Law' (2004) 2 Journal of International Criminal Justice 3, p. 818.

What was the concept of war crimes during World War II has been discussed before the European Court of Human Rights (ECHR) in 2008 in the case of *Kononov v Latvia*.[614] The Latvian government drew the attention of the ECHR to the historical concept of war crimes since the American Civil War and its evolution through the First World War and the 1919 Treaty of Versailles.[615] The Latvian Government also mentioned 'the judgments of the Nuremberg and Tokyo Tribunals as evidence that by the beginning of the Second World War the substantive provisions of the Hague Convention of 1907 had been accepted in their entirety by the international community irrespective of whether or not individual States had acceded to that instrument.'[616]

Sir Lauterpacht stated that there is a distinction between the 'violation of rules of warfare' and 'war crimes'.[617] The argument in the case of *Kononov v Latvia* before ECHR echoed the same, stating that there is a distinction between the 'violation of laws and customs of war' and 'war crimes'.[618] International law determines what constitutes and therefore violates the laws and customs of war, but no punishment has been imposed on those found guilty of such violations.[619] In the context of the *Hagendorf* case in 1946, it has been noted in the book *War Crimes in International Law* that, 'not every violation of the laws of warfare would of necessity constitute a punishable act.'[620] Generally, the violation of provisions such as Articles 2, 3, 4, 46 and 51 of the Geneva Convention 1929, and Articles 46, 50, 52 and 56 of the Hague Convention of 1907 constituted crimes which are punishable.[621] The UNWCC also mentioned that the Nuremberg trials did not consider the Hague Convention 1907 as the only instrument for violations of all kinds. Not every possible breach of the said Convention constitutes war crimes - except a few that came before the court.[622] This section discusses the challenges of applying the Hague Convention 1907 due to the presence of the 'general participation clause' enshrined in Article 2 of the Hague Convention 1907.

---

[614] *Kononov v Latvia*, (ECHR) 24 July 2008 (Application no. 36376/04) p. 32.
[615] Ibid., p. 32.
[616] Ibid.
[617] Hersch Lauterpacht, 'The Law of Nations and the Punishments of War Crimes' (1944) 21 British Yearbook of International Law 58, pp. 58, 77.
[618] *Kononov v Latvia*, (ECHR) 24 July 2008 (Application no. 36376/04) p. 32.
[619] Ibid., p. 32.
[620] Yoram Dinstein and Mala Tabory (eds), *War Crimes in International Law*, (Maritnus Nijhoff Publishers 1996) 3.
[621] The Trial of the Major War Criminals before the International Military Tribunal, 14 November 1945- 1 October 1946, Vol. I (1946) pp. 252-254.
[622] Law Reports of Trials of War Criminals Selected and Prepared by The United Nations War Crimes Commission, Volume XIII, Digest of Laws and Cases (Published for the United Nations War Crimes Commission By His Majesty's Stationary Office 1949, London) 148.

Unlike crimes against humanity and crimes against peace, the Nuremberg trials noted that elements of war crimes arose from the violation of treaty provisions, and therefore war crimes were considered as the least controversial form of international crime under international law. This is important to bear in mind as war crimes include not only violations of the international conventions, but also internal penal laws and general principles of criminal law derived from the criminal law of all civilized nations.[623] The section that follows reviews sources identified by the UNWCC, Nuremberg and other trials to show the extent of contribution of customary international law to the development of international crimes.

3.2.3.2 Definition of War Crimes: Efforts of the UNWCC, Nuremberg and Other Trials

The UNWCC considered the work of the Commission on Responsibilities 1919 as a 'standard certain' because it accumulated principles which were identical or common to all countries. The members of the Commission on Responsibilities 1919 came forward with the 'traditional rules' to frame certain rules on warfare.[624] As stated elsewhere in the thesis, the 32 categories of war crimes listed by the Commission on Responsibilities 1919 was non-exhaustive. There was no authoritative list of war crimes in international law which obliged all nations to follow.[625] After World War I, the Leipzig trials prosecuted war criminals for violations of Germany's penal code, with a very limited reference to the work of the Commission on Responsibilities 1919. The scope of war crimes definition given in the Charter of the International Military Tribunal was even broader, covering each and every outrage committed by the Nazis. The expression of 'such violation shall include, but not limited to…' conveys acceptance of an extensive categories of crimes. The Charter refrained from confining war crimes to violations of the Fourth Hague Convention 1907. The definition indicates a broader approach that goes beyond the boundaries of the Hague Convention 1907. The statement below explained the reasons why the Sub-committee of the UNWCC refrained from making an exhaustive list. The committee stated that:

> It will be better for the Commission not to attempt to draw up any list of war crimes which will tie the hands of the Governments of the United Nations, if

[623] Nazi Conspiracy and Aggression, Volume 1, Office of United States, Chief of Counsel for Prosecution of Axis Criminality (United States Government Printing Office, Washington 1946) 31.
[624] Law Reports of Trials of War Criminals Selected and Prepared by The United Nations War Crimes Commission, Volume XV, Digest of Laws and Cases (Published for the United Nations War Crimes Commission by His Majesty's Stationary Office 1949, London) viii.
[625] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Report of the Sub-Committee, War Crime Commission (Amended as decided by the Commission on 2 December 1943) pp.1-2.

> such a list is prepared it may be brought necessary in some countries to give it statutory force so as to ensure that the courts which are given jurisdiction to try war criminals are competent to try such offences. It seems as if the ingenuity of the enemy is even now finding new ways of violating the laws and customs of war and it would be inconvenient that in countries where a list of war crimes has been given statutory force there should have to be new legislation to deal with new crimes which come to light. The Commission should proceed upon the footing that international law recognises the principle that a war crime is a violation of the laws and customs of war, and that no question can be raised as to the right of the United Nations to put on trial as a war criminal in respect of such violations any hostile offender who may fall into their hands irrespective of the place in which the war crime was committed, nor as to the right of the United Nations to determine the forum before which such war criminal should be brought to justice.[626]

In the beginning, the UNWCC recommended defining war crimes referring to Marshal Stalin's Declaration of 6th November 1943 and the United Nations' Declaration of 17th December 1942.[627] The UNWCC compiled various official and unofficial lists of war crimes that fell within the language of the 1919 list, but no complete list was framed so that any additions could be made, if necessary.[628]

The members of Committee III of the UNWCC held an opinion that the definition of 'war crime' should be given as per the present international law. The UNWCC noted the definition of 'war crimes' from two perspectives. In the narrower sense 'war crimes' related to the violations of the laws or customs of war. In the wider sense 'war crimes' included 'crime against humanity' and 'crime against peace.'[629] The narrower sense of 'war crimes' includes Article 29 of the Italian Terms of Surrender, Article 11 (a) of the Declaration regarding the Defeat of Germany dated 5th June 1945, the Potsdam Declaration and Article 6 (para. 2), lit (b) of the Charter of the International Military Tribunal.[630] The wider sense of 'war crimes'

[626] Ibid.
[627] Conclusions of the Commission on the Trial and Punishment of War Criminals, London, p. 185.
[628] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Report of the Sub-Committee, War Crime Commission (Amended as decided by the Commission on 2 December 1943) pp. 1-2.
[629] United Nations War Crimes Commission, Committee Reports C.101-C.240, May 1945 to Dec 1945; Including Report on Buchenwald, Political (External) Department Collection, Reference IOR/L/PS/12/4521, Coll 44/38(5), Preliminary Report by the Chairman of Committee III, 28 September 1945, C. 156, p. 2.
[630] Ibid.

indicated the existence of elements of war crimes in the Armistices with Rumania (Article 14), Finland (Art. 13), Bulgaria (Article 6) and Hungary (Art.14), Finland (Art.13), Bulgaria (Art. 6) and Hungary (Art.14), the preamble and Article 3, 4 and 6 of the Agreement for the prosecution and punishment of the Major War Criminals of the European Axis, dated 8th August 1945, and Article 1, 6 (para 1) and 14 of the Charter of the International Military Tribunal.[631]

Article 6 (b) of the Charter of the International Military Tribunal includes murder, ill-treatment or deportation to slave labour or for any other purpose of the civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing hostages, the plunder of public and private property, wanton destruction of cities, towns or villages, or devastation not justified by the military necessity, almost following the similar list introduced in the report of the Commission on Responsibilities 1919. The Charter excluded the aerial bombing from Article 6 (b). David Scheffer wrote that the parallel incident of American and British bombings in German cities may have stopped the Allies from adding this crime to the list of war crimes.[632] The Hague Convention 1907 and the Geneva Conventions of 1929 were the basis of Article 6 (b) of the Charter of the International Military Tribunal. The United States Government's proposal on Far Eastern War Crimes included not only the violation of the laws and customs of war but also the planning and waging of aggressive war and inhuman acts.[633] The notion of accepting inhuman acts as war crimes was unique in nature and it was later added as crimes against humanity in Article 5 (c) of the Charter of International Military Tribunal for the Far East.

As mentioned above, the Hague Convention 1907 was applied not as a sole source but as a main source of law. In this regard, this section highlights the complexities of referring to the violation of the provisions of the Hague Convention as war crimes due to the presence of a 'general participation clause'. Article 2 of the Hague Convention of 1907, stated that 'the provisions contained in the regulations (Rules of Land Warfare) referred to in Article 1 as well as in the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the Convention.' Many belligerents, for example, Czechoslovakia, were not parties to the Convention. Nonetheless, the IMT at Nuremberg

[631] Ibid.
[632] David Scheffer 'Nuremberg Trials' (2008) 39 Studies in Transnational Legal Policy 155, p. 160.
[633] Minutes of Extraordinary Meeting of War Crimes Advisory Committee held on Monday, November 5, 1945, in the Legal Division Conference Room, N.P.O., External Affairs Records, File No 4060-C-40C, p. 1.

followed the provision of the Hague Conventions, as by 1939 The Hague Conventions became 'mere codifications of existing customary law, at least insofar as their general principles are concerned.'[634] The Tribunal acting in the *High Command Trial* confirmed the same argument adopted by the IMT that the Hague Convention No. IV of 1907 is merely declaratory of existing international law, and its provisions are binding for all despite the 'general participation' clause.[635] The presence of the 'general participation' clause is considered irrelevant, and thus the Convention applies to non-state parties as well.[636]

Sometimes, the presence of the 'general participation clause' was considered a downside of the Hague Convention 1907. Georg Schwarzenberger, citing both International Military Tribunals, stated that 'the effectiveness of some of the Conventions signed at the Hague on 18th October 1907, as direct treaty obligations were considerably impaired by the incorporation of a so-called "general participation clause" in them.'[637] Subsequently, the general participation clause was modified in some other international instruments. For example, the Protocol of 1925 concerning the use of poisonous gases in the war included a reservation to the effect that 'the instrument shall cease to be binding towards any belligerent power whose armed forces, "or the armed forces of whose Allies" fail to respect the prohibitions laid down in the Protocol.'[638] The reservation clause provides flexibility to the restriction on the general participation clause, ensuring the application of the Protocol to all belligerents. The section explores the contribution of the UNWCC, Nuremberg and other tribunals in determining the presence of the contents of war crimes, finding certain and uncertain areas of the law of war. A few elements of war crimes such as ill-treatment of civilian populations are self-evidently war crimes. They cannot be affected by some uncertain areas of law such as new technologies of warfare (aerial bombardment) or the use of reprisals.[639] This section sets forth the discussion providing examples of war crimes relying on the direct

[634] Law Reports of Trials of War Criminals Selected and Prepared by The United Nations War Crimes Commission, Volume XV, Digest of Laws and Cases (Published for the United Nations War Crimes Commission By His Majesty's Stationary Office 1949, London) 12.
[635] Ibid.
[636] Ibid.
[637] Georg Schwarzenberger, *International Law,* Volume 2 (Stevens & sons, limited, 1945) 20; See also, Law Reports of Trials of War Criminals Selected and Prepared by The United Nations War Crimes Commission, Volume XV, Digest of Laws and Cases (Published for the United Nations War Crimes Commission By His Majesty's Stationary Office 1949, London) pp. 10, 12.
[638] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationary Office 1948, p. 28.
[639] Martti Koskenniemi, 'Hersch Lauterpacht and the Development of International Criminal Law' (2004) 2 Journal of International Criminal Justice 3, p. 820.; See also Hersch Lauterpacht, 'The Law of Nations and the Punishments of War Crimes' (1944) 21 British Yearbook of International Law 58, p. 75.

provisions of treaties and which are certain- and from the interpretation of treaty provisions- uncertain areas of law.

3.2.3.3 Treaty Provisions: War Crimes under Custom

Multilateral treaties are often regarded as authoritative statements of customary international law in two cases: first, when such treaties codify principles, 'which already form part of customary international law prior to the conclusion of the treaty.'[640] Second, when treaties contain principles and gradually convert them as customs through a wide acceptance by States.[641] Hague Conventions are always considered to have a significant effect as they 'serve to confirm the customary rule and remove doubts which may have existed about its continued existence.'[642]

Numerous treaty provisions played a central role in making war crimes during World War II. Most of the elements of war crimes enshrined in Article 6 (b) of the Charter of IMT seem to have derived from Articles 46-52 of the Hague Convention 1907. Articles 46-52 of the Hague Convention 1907 have been considered as powerful sources of war crimes since World War I. The reference to the 'wanton destruction of cities, towns or villages' as war crimes is also present in Articles 16 and 44 of the 1863 Lieber Code, Article 23 (g) of the 1907 Hague Regulations and in the list of Commission on Responsibilities 1919. The Geneva Protocol 1925 was another source of war crimes. The Protocol provided that 'to the end that this prohibition shall be universally accepted as part of International Law, binding alike the conscience and the practice of nations.'[643] Similarly, the IMT at Nuremberg also held that the violation of any provision of the Geneva Convention of Prisoners of War 1929 was also considered a war crime under international law.[644] Christopher Greenwood, citing *United States v Von leeb*, mentioned that many provisions of the Geneva Convention of Prisoners of War 1929 were accepted as rules of customary law even before the outbreak of the war.[645] The Tribunal in the *High*

[640] Christopher Greenwood, *Essay on War in International Law*, (Cameron May Ltd 2006) 181, pp. 180-182.
[641] Ibid.
[642] Ibid.
[643] Protocol for the Prohibition of the Use in War of Asphyxiating Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925 L.N.T.S. No. 2138, p. 67.
[644] Judgement of the International Military Tribunal for the Trial of German Major War Criminal (Nuremberg 30 September and 1 October 1946) 253; See also American Journal of International Law, Vol. 41, 1947, pp. 248-249.

[645]Christopher Greenwood, *Essay on War in International Law* (Cameron May Ltd, 2006) 181, 182.

Command Trial declared Articles 4, 7, 9, 10, 11,12, 13, 25, 29 and 32 of Geneva Convention 1929 as declaratory of customary international law.[646]

In contrast, there was doubt concerning the extent and scope of war crimes of causing prisoners of war to perform work having a direct connection with the operations of war. The Tribunal in the *High Command* case did not count Article 31 of the Geneva Convention 1929 among those it considered as being an expression of existing customary international law.[647] It held that "'in view of the uncertainty of the international law" as to the question of the "use of prisoners of war in the construction of fortifications" (which might not unreasonably have been regarded as work having a direct connection with the operations of war) "orders providing for such use from superior authorities, not involving the use of prisoners of war in dangerous areas, were not criminal on their face..".'[648] In contrast, Judge Phillips in the *Milch Trial* stated that 'the Tribunal holds as a matter of law that it is illegal to use prisoners of war in armament factories and factories engaged in the manufacture of airplanes for use in the war effort.'[649]

Another example as to the uncertainty of an act as war crime was discussed in the report of UNWCC. The report of the UNWCC discussed a case submitted by Marcel de Baer, a representative for Belgium, on behalf of his government concerning the prohibition of a Catholic priest to preach in the French language in the district of Malmédy. The concern was whether this was a crime, and particularly a war crime under international law. [650] Colonel Hodgson, from the United States, found this act to be a war crime under Article 46 of the Hague Convention 1907, which protects religious convictions and practice.[651] In contrast, the exercise of international conventions varies in national military courts. It was not mandatory for a state to follow the Hague Regulations. For example, an 'infringement of the religious rights of prisoners of war' was not regarded as a separate punishable offence to war crimes in the Trial

[646] Law Reports of Trials of War Criminals Selected and Prepared by The United Nations War Crimes Commission, Volume XV, Digest of Laws and Cases (Published for the United Nations War Crimes Commission By His Majesty's Stationary Office 1949, London) 102.
[647] Law Reports of Trials of War Criminals Selected and Prepared by The United Nations War Crimes Commission, Volume XV, Digest of Laws and Cases (Published for the United Nations War Crimes Commission By His Majesty's Stationary Office 1949, London) 12.
[648] Ibid., 104.; Article 27 of the Geneva Convention 1929 provides that "Belligerents may employ as workmen prisoners of war who are physically fit, other than officers and persons of equivalent status according to their rank and their ability."
[649] The *Milch Case,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume II*; The Medical Case,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume I, p. 47.
[650] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Report of the Sub-Committee, War Crime Commission (Amended as decided by the Commission on 2 December 1943) p. 8.
[651] Ibid., p. 8.

of Tanaka Chuichi, [652] despite Article 18 of the Hague Regulations 1899 provides that 'prisoners of war shall enjoy every latitude in the exercise of their religion….'[653]

The evidence of law can be quite easily discernible from the repeated insertion of one principle in different international instruments. The repeated insertion undoubtedly demonstrates the willingness, consent and obligation of the States to bring them under international law. However, difficulties arise when the presence of the evidence of law is justified through the interpretation of treaty provisions. The chapter draws a few examples of the elements of war crimes that were applied through interpretation reflecting customary international law as a source.

3.2.3.4 Interpretation of Treaty Provisions: War Crimes under Custom

The UNWCC, Nuremberg and other trials looked into the existence of international crimes through the interpretation of treaty provisions. Professor Stephan Glaser, Polish representative and the Chairman of Committee III of the UNWCC, had appointed Dr Ecer and Professor Preuss[654] to deal with the definition of war crimes.[655] The polish proposal enlisted a few new elements of war crimes with no specific reference to the provisions of international conventions. Glaser introduced a report along with the polish proposal, mentioning the act of 'indiscriminate mass arrests for the purpose of terrorising the population' to be added in the war crimes list of taking hostages.[656] The proposal also included the adoption of 'procedures aimed at lowering human dignity'.[657] Commission III left it to the competency of Commission I to examine based on the preamble of the Hague Convention on laws and customs of war on land.[658] The preamble of the Hague Convention 1907 intended to cover a large number of unforeseeable acts. The authors of the Convention were able to anticipate that it would not be possible to know in advance what would happen in future. So, they drew the famous preamble declaring that when an act was not covered by a specific clause of the Hague Regulations, it

[652] Law Reports of Trials of War Criminals Selected and Prepared by The United Nations War Crimes Commission, Volume XV, Digest of Laws and Cases (Published for the United Nations War Crimes Commission By His Majesty's Stationary Office 1949, London) p. 105.
[653] Article 18, Laws and Customs of War on Land (Hague, II) 1899, 32 Stat. 1803; Treaty Series 403.
[654] Dr Lawrence Preuss, Member of the Committee III in 1944, He assisted in drafting the Convention for International War Crimes Court.
[655]United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of Twelfth Meeting held on 7 March 1944, p. 2.
[656] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of Seventeenth Meeting held on 9 May 1944, p. 3.; This list can be found in C. 15 (i).
[657] Ibid., p. 3.; This list can be found in C. 15 (i).
[658] Ibid., p. 3.

must be examined according to principles derived from 'the laws of humanity and the requirements of the public conscience'. Dr Ecer mentioned in his report that 'the ambition of the Hague Conference was not to give a complete code of rules of warfare. The Conference expressly admitted it in the Preamble. But at the same time the Conference declared that this imperfection of the Convention and the Regulations does not mean that acts not expressly forbidden by the Regulations are legitimate acts.'[659] Dr Ecer mentioned the views of three authors[660] who support that the Hague Regulations, if found defective, is to be supplemented by ' approved usages and humanity'.[661] The preamble has legal value and is part of public international law, not just a non-obligatory 'monologue of the legislator.'[662] He noted two functions of the preamble: first, to help to interpret the particular provisions of the laws and customs of war and to supplement them when they have gaps.[663] This following section provides an example of an act i.e., denationalisation, which turned into a war crime under international law based on the interpretation of relevant provision of treaties.

In a meeting of the UNWCC, it was stated that when denationalisation would be interpreted following the intended spirit of some other articles, it will surely form sufficient basis to conclude that the act of denationalisation is prohibited under international law.[664] The Yugoslav National Office brought the charge of war crime of denationalisation against four Italian war criminals. The Preliminary Report by the Chairman of Committee III noted that:

> It is well known that, in 1919 the so-called Responsibilities Committee had already placed attempts of denationalisation on the List of War Crimes. In December 1943, the List had been adopted by the United Nations War

[659] The Problem of "War Crimes" in connection with the second World War, Explanatory and Additional Note by Dr Ecer to his Report (Doc. III/4), Committee III, III/4 (a), 12 May 1944, p. 4. Available at https://www.legal-tools.org/doc/6335bd/pdf

[660] Rolin. Le droit modern de la Guorre, Tome 1, p.9, 1920; Westlake. International Law, Cambridge 1910, Part 1, p. 61; Garner. Recent development in International Law, Tagore lectures, 1922, published by the University of Calcutta 1925. Dr Ecer noted that "all three authors agree that the fact that an act is not expressly forbidden in the Hague Regulations does not mean that such act is allowed. The question is whether it is or not contrary to the usages of civilised peoples, the laws of humanity, and the dictates of the public conscience, which are supreme rules of the human conscience."

[661] The Problem of "War Crimes" in connection with the second World War, Explanatory and Additional Note by Dr Ecer to his Report (Doc. III/4), Committee III, III/4 (a), 12 May 1944, p. 4. Available at https://www.legal-tools.org/doc/6335bd/pdf "Westlake 'grants to the laws of humanity the function of supplementary law when the written law is defective. Lord Cave in his article "War Crimes and their punishment" designates the laws of humanity and the requirements of the public conscience of the Preamble as "lex non scripta", i.e. as law, and says expressly that this law is to be extracted etc."

[662] Ibid.

[663] Ibid., p. 4.

[664] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of Seventeenth Meeting held on 9 May 1944, p. 2.

> Crimes Commission as a basis for its work, and therefore, that specific crime, among others, had been accepted. Dr Ecer maintained, however, that the Commission was not bound by the 1919 List and it would be useful to re-examine the problem afresh in view of the knowledge, gained since 1943….[665]

There was no concrete definition of this term 'denationalisation'. Committee III of the UNWCC decided to examine, first, a few 'certain concrete facts' that appeared from the charges submitted by national offices; second, under international law, keeping in mind not every contravention of a rule of international law was *ipso facto* a crime.[666]

Schwelb's valuable report indicated how the term 'denationalisation' could also be found within the meaning of Articles 46 and 56. Article 46 laid down that individual life must be protected; it was obvious that Article 46 did not refer only to the physical person but also to the spiritual life of a person. Article 46 mentioned family rights, implying that children should be educated in their national language, and Article 56 provided that cultural institutions should be protected. Article 56 covered not merely the building itself, but also the spiritual values which the building served. The interpretation of Articles 46 and 56 in the spirit of the preamble justified the act of 'denationalisation' as a war crime under international law.[667] Dr Ecer stated that 'the Hague Convention, and especially the Preamble, could very well help us to overcome some technico-legal difficulties and to save the law from an inevitable collapse if it could not meet the new criminlogical [sic] reality.'[668] In his opinion, denationalisation was not only a war crime in the traditional sense but a genuine international crime- a crime against the very foundations of the community of nations. An attempt to denationalise was considered as an attack against members of the international community- an attack against the foundations of the family of nations.[669] Dr Ecer found it 'ethical' to reach such a conclusion based on the experience of atrocities at that time.[670]

---

[665] United Nations War Crimes Commission, Committee Reports C.101-C.240, May 1945 to Dec 1945; Including Report on Buchenwald, Political (External) Department Collection, Reference IOR/L/PS/12/4521, Coll 44/38(5), Preliminary Report by the Chairman of Committee III, 28 September 1945, C. 148. p. 1.
[666] Ibid., p. 2.
[667] Ibid., pp. 2-3.
[668] The Problem of "War Crimes" in connection with the second World War, Explanatory and Additional Note by Dr Ecer to his Report (Doc. III/4), Committee III, III/4 (a), 12 May 1944, p. 3. Available at https://www.legal-tools.org/doc/6335bd/pdf
[669] United Nations War Crimes Commission, Committee Reports C.101-C.240, May 1945 to Dec 1945; Including Report on Buchenwald, Political (External) Department Collection, Reference IOR/L/PS/12/4521, Coll 44/38(5), Preliminary Report by the Chairman of Committee III, 28 September 1945, C. 148. p. 3.
[670] Ibid., p. 3.

Committee III of the UNWCC was of the opinion that fundamental rules of warfare and general principles of criminal law both had accepted 'denationalisation' as a crime under international law. The brutal nature of the crime, which is devoid of the sanctity of human life and personality, made this crime prohibited under international law.[671] Dr Zivkovic from Yugoslavia specifically attempted to locate this crime under customary international law in the eighty-first meeting of the UNWCC. He found 'the criminality of such acts was based on the general principles of criminal law and that it was fully confirmed on the other hand by the customary and conventional provisions of international law.'[672] In the end, the Committee III defined denationalisation from a wider perspective, including 'the colonisation of the occupied territory by nationals of the occupant, exploitation and pillage of economic resources, confiscation of property, permeation of the economic life by the occupying State or individuals of the nationality of the occupant.'[673]

The discussion above highlights the development of war crimes under customary international law from the uses of international conventions in two different ways. However, defining war crimes from the proposition as found in the preamble of international instruments may question the formation of customary international law. Dr Garner's remarks seem to be pertinent towards the development of international law. In his view, international law is '"the culmination of historical and evolutionary processes" which "can be satisfactorily studied only by beginning with their origins."'[674] The explanation below shows that international crimes developed specifically in the wake of World War II paying no attention to any specific treaty, code or statute.

[671] United Nations War Crimes Commission, Committee Reports C.101-C.240, May 1945 to Dec 1945; Including Report on Buchenwald, Political (External) Department Collection, Reference IOR/L/PS/12/4521, Coll 44/38(5), Criminality of Attempts to Denationalise the Inhabitants of Occupied Territory, Report Presented by the Chairman of Committee III, 4 October 1945, C. 149. p. 1.
[672]United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3) Minutes of Eighty-first Meeting, 16 October 1945.
[673] United Nations War Crimes Commission, Committee Reports C.101-C.240, May 1945 to Dec 1945; Including Report on Buchenwald, Political (External) Department Collection, Reference IOR/L/PS/12/4521, Coll 44/38(5), Report by Committee III to Committee I on the Czechoslovak Case No. 1962. (Reinhold Boecker) 14 February 1946, C. 175. p. 3.
[674] James Wilford Garner, *Recent Developments in International Law*, Tagore Law Lectures, 1922 (Calcutta: University of Calcutta; London and New York: Longmans, Green, and Company. 1925) 143.

3.2 Customary International Law: Proposition to Justify Two-Element Approach

The origin of international crimes covers a wide range of sources. One may perceive Justice Jackson's statement as a reason for investigating numerous sources of international law to find international crimes. He mentioned that 'it seems to me that we now have an opportunity, not likely soon to recur, to bring international law out of the closet where President Wilson found it and impress it upon the conscience of the people.'[675] The UNWCC, Nuremberg and other trials offered justification to the existence of crimes citing various sources of international law. Ascertaining the contribution of customary international law remains always significant in this context as the contents of international crimes were not clear before World War II. The section that follows focuses on the origin of international crimes under customary international law from both natural law and positive law perspectives.

Custom appears following World War II in different shapes and forms to adapt the change and continue the progressive development of international law. Given the complex and uncertain nature of international crimes, it is essential to perceive the contribution of custom from the perspective of natural law and positive law. Generally, the positive law of nations refers to conventional and customary law. A rule of customary international law satisfies the conditions of positive law when it fulfils the requirement of State practice and *opinio juris*. The chapter argues that the contribution of customary international law to the development of international crimes is barely practice-oriented and therefore debated. This is where, explained by Orakhelashvili, customary law overlaps with natural law. He stated that 'in certain cases, the rules of customary law, designated as fundamental or inherent rules whose normative status derives from the structural necessity of international legal system, are identified without much enquiry into the supportive State practice and *opinio juris*. Whether such fundamental or inherent rules can be seen as customary in the mainline sense of this term can be the subject of a debate.'[676] He considers the meaning and determinator of the natural law to be 'evolving and altering over different periods of history.'[677] Natural law applies when 'law applicable to

[675]Robert H. Jackson, 'The Rule of Law among Nations' (1945) 19 Temple Law Quarterly 3, p.138.
[676] Alexander Orakhelashvili, *Natural Law and Customary Law* (Max Planck Institute of International Law 2008) P. 106. Available at: https://www.zaoerv.de/68_2008/68_2008_1_a_69_110.pdf (accessed on 04.04.2021).
[677] Ibid., p. 71.

societies that have not yet established the organised legal community'.[678] Lord Wright noted the development of international law since World War I.[679] He stated that:

> International Law is a product of natural law, that is, it has grown and developed from the workings of the moral impulses and needs of mankind by a sort of instinctive growth, as well as by edicts or decrees or authoritative pronouncements. In this it resembles all customary law. Indeed, it is itself a body of customary law. It dictates take shape and definition particularly when they are acted upon and are recognised by the common consensus of mankind and are administered and enforced by competent courts.[680]

The origin of the word 'custom' is from the Latin word *moralis*.[681] On the other hand, McKinnon mentioned that natural law could be traced back from the 'Roman law of the *jus gentium* and the Stoic morality as correctives for the omissions and inequities of the *jus civilie*.'[682] This section finds Lord Wright's statement as a meeting point of custom and natural law due to the presence of some inherent factors such as 'moral impulses' or 'needs of mankind'. Similarly, The Tribunal in the *Justice Trial*, quoting the distinguished American statesman Henry L. Stimson, stated that international law is an outcome of the '[g]radual expression… of the moral judgements of the civilized world. As such, it corresponds precisely to the common law of Anglo-American tradition.'[683] Also, the foundation of common law rests upon custom.[684] In the report of the UNWCC, Lord Wright drew on the example of an English legal historian who equated the commercial and natural law horizontally. He also stated that the crystallisation and enforcement of moral ideas might result in the creation of codes after a particular stage of development.[685] However, he was reluctant to define anything as a crime under international law unless there is a specific section of a valid and binding code with

---

[678] Ibid., 71, 73.
[679] The *Justice Case,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume VI, p. 968; See also, Lord Wright, 'War Crimes under International Law' (1946) 61 The Law Quarterly Review, p. 51.
[680] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationary Office 1948, p. 8.
[681] Kenneth R Olwig, 'The Landscape of 'Customary' Law versus that of 'Natural' Law' (2005) 1 Landscape Research 3, p. 302.
[682] Harold R. McKinnon, 'Natural and Positive Law' (1948) 23 Notre Dame Law review, Issue.2, P.89
[683] The *Justice Case*, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume VI. p. 975.
[684] Kenneth R Olwig, 'The Landscape of 'Customary' Law versus that of 'Natural' Law' (2005) 30 Landscape Research 3, p. 301.
[685] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationary Office 1948, p. 8.

specific punishment of that crime.[686] Quincy Wright, citing Lord Wright's argument, stated that 'the Pact of Paris converted the principle that aggressive war is illegal from a rule of "natural law" to a rule of "positive law" which like the rules of war is binding on an individual as well as states.'[687] Here, the validity of positive law seems to have been derived from natural law. The challenges surrounding the crime against peace and its origin in the Pact of Paris was discussed at length to determine the content of the crimes against peace. In response to the argument, mentioned before in this chapter, of Finch or Justice Pal on the principle of legality, the application of natural law could be logically accepted considering Vattel's 'Necessary law of Nations'. Vattel's notion of natural law is '*necessary*, because Nations are absolutely bound to observe it.'[688] The Pact of Paris was the result of an international effort to outlaw war. The Pact aimed to renounce war as an instrument of national policy and to settle all international disputes by peaceful means. Maintaining peace and strengthening external relations among the states was the primary purpose. The content of aggressive war based on the Pact of Paris does not derive from any specific violation of the Pact provisions. Instead, the meaning and aim of the Pact rationalise the presence of crimes under custom- which is rooted in either moral principles or states' necessity to maintain treaty obligations. This form of custom can also receive justification from the natural law perspective because natural law applies to 'a state's external relations and forms external public law. Such external public law is a branch of the law of nations.'[689] The *opinio juris*-based custom tends to follow factors like morality, human conscience, sense of humankind etc. It may contain evidence of natural law because 'the evidence of natural law […] is so widespread as to be undeniable. In the first place, there is implicit evidence of it in all those laws which reflect the *jus gentium,* that is, laws which are so spontaneously expressive of the human conscience that they are characteristic of the legal systems of all civilized countries.'[690] In the context of World War II, the sources of international crimes were raw materials processed not by courts but by other inherent factors of humankind to satisfy progressive development of international law.

---

[686] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of thirty-fourth meeting 3 October 1944, p. 8.
[687] Quincy Wright, 'The Law of the Nuremberg Trial' (1947) 41 American Journal of International Law 39, p. 63.
[688] E. Vattel, 'The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns' in: J.B. Scott (ed.), *Classics of International Law* (Washington 1916) p. 4, 5. [Emphasis added]
[689] Alexander Orakhelashvili, *Natural Law and Customary Law* (Max Planck Institute of International Law 2008) pp. 71-73 https://www.zaoerv.de/68_2008/68_2008_1_a_69_110.pdf
[690] Harold R. McKinnon, 'Natural and Positive Law' (1948) 23 Notre Dame Law review 2, p. 127.

Despite the fact that this section above analyses the customary nature of international crimes from natural law perspective, it also admits that the rule of customary international law remains debateable if both required elements are not satisfied. The emergence of the substantive rules of international crimes from natural law perspective is questionable if not supported by moral impulses. Orakhelashvili mentioned that 'while natural law does not contribute to the mainline process of creation of customary rules, the natural law argument is necessary to ensure that the rules are applied in accordance with their rationale and the inherent nature of the relevant legal institutions is respected.'[691] Nonetheless, natural law is a significant principle of law to regulate human conduct.[692]

In contrast, there is no strict separation between the customary law and positive law of nations when a rule of customary law satisfies both the criteria of State practice and *opinio juris*. Statutes and other written laws clearly fall into the notion of positive law by being 'laid down' by the supreme authority of the international community. On the other hand, 'custom, equity, and precedents seem to get their authority not so much by being laid down as by being repeatedly "taken up" by successive judges in the course of administering justice.'[693] The Nuremberg and other trials did not have handful of evidence to identify the sources of international crimes. Nonetheless, few elements of war crimes satisfactorily met the criteria of customary international law, and thus satisfied the notion of positive law. The Law Reports prepared by the UNWCC report showed that 'the practices and usages of war' under international law does not require universal recognition. Instead, the threshold the available 'practices and usages of war' requires a general acceptance by civilised nations, not universal recognition.[694] Absolute unanimity was not a requirement for 'International Common Law' to exist.[695] Here, the expression 'customs and practices accepted by civilized nations generally' meant two alternative things[696] first, practices generally followed by states in their relations with one another (usually referred to as "state practice"); or second, practices generally followed by states in their own internal affairs. Therefore, 'if a practice is generally regarded by states in their conduct of internal affairs as representing a principle of justice, it is also

[691] Alexander Orakhelashvili, *Natural Law and Customary Law*, (Max Planck Institute of International Law 2008) p. 106 https://www.zaoerv.de/68_2008/68_2008_1_a_69_110.pdf p. 110.
[692] Harold R. McKinnon, 'Natural and Positive Law' (1948) 23 Notre Dame Law review 2, p. 137
[693] James Bernard Murphy, *The Philosophy of Positive Law: Foundations of Jurisprudence* (Oxford University Press 2005) 3.
[694] Law Reports of Trials of War Criminals Selected and Prepared by The United Nations War Crimes Commission, Volume XV, Digest of Laws and Cases (Published for the United Nations War Crimes Commission By His Majesty's Stationary Office 1949, London) 10.
[695] Ibid.
[696] Ibid., 5.

enforceable as a rule of customary international law.'[697] The presence of the elements of war crimes in national manuals or 'laws and customs of war' accepted by the civilised nations shows the consent, implicit or explicit, of states. Hence, the consent of states may signify the customary presence of international crimes from the perspective of positive law.

The presence of international crimes from both, natural law or civil law, perspectives created confusion to the mind of lawyers from the civil law countries. The diverse views of the common law and civil law systems limit the scope of 'general and consistent practice' as to the existence of international crimes. For example, on 26 June 1945, the representatives of the four nations assembled to reconcile conflicting issues. The UK and the USA had common law systems, whereas France and the Soviet Union had continental systems. In addition, there were significant variations of the continental systems between France and Russia. French had its roots in the Roman law of the Western Countries, whereas Russian had its 'Roman ideas' influenced by the Eastern Empire. These various systems formed different approaches concerning the trial of war criminals. Most interestingly, the Soviet authorities were reluctant to accept the growth of customary law derived from the practice of western states.[698] In the civil law countries, it is common to follow the rules of warfare written in military manuals, whereas the common law countries follow both written and unwritten laws. The phase of World War II trials was complicated and raised a lot of questions in the minds of the 'civil law country lawyers' or 'municipal lawyer'. To the municipal lawyers, 'the idea of law for him will be something to be precisely ascertained from the Codes of Acts of the legislature or decisions of competent Courts, something fixed, precise, coercive, something which corresponds to the idea of analytical jurisprudence'.[699] The municipal lawyers were more concerned with the written law that determines the conduct. However, the argument set forth reasoning that:

> [t]here may be the customary or traditional rules which are so familiar that men obey them or act in accordance with them as a matter of ordinary course. The common lawyer [sic] is familiar with the idea of customs which develop into law and may eventually receive recognition from competent courts and authorities. But the Court does not make the law, it merely declares it or

[697] Ibid., 6.
[698] Report of Robert H. Jackson, United States Representative to International Conference on Military Trials (Department of State Publication 3080, International Organisation and Conference Series II, European and British Commonwealth 1, Released February 1949) V-VI.
[699]United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationary Office 1948, p. 548.

> decides that it exists, after hearing the rival contentions of those who assert and those who deny the law.[700]

However, this chapter finds that the approach to natural law perspective is more rational than positive law. The following section points out the reasons behind considering the development of international crimes as an *opinio juris*-based custom from the natural law perspective.

3.3.1 Adapt to Changing Circumstances

The development of international law following World War II appeared with unusual speed. The broader approach of the judges of the IMT and other tribunals found the 'law of war not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurist and practiced by military courts. The law is not static, but by continual adaptation follows the needs of a changing world.'[701] In the view of Telford Taylor**,** the nature of the international jurisprudence is closer to **'**historical than the analytical school, and international law is generally customary rather than positive.'[702] He seems to have drawn a line between the customary law and positive law because the role of custom in the development of international crimes was mostly based on reasons rather than practice. Generally, the development of rules under customary law rooted in practice, not in reason.[703] The significance of the positive law of nations in the development of international crimes was deemphasised. Referring to the *Justice Trial*, the UNWCC stated that 'international law is not the product of statute. Its content is not static. The absence from the world of any governmental body authorised to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law it has grown to meet the exigencies of changing conditions.'[704] The development of international crimes revolved around the concept of the law of nations. With respect to this development, the law of nations was guided by the principles of humanity or moral law.

---

[700] Ibid.
[701] *France et al. v Göring (Hermann)* et al., Judgment and Sentence, (1946) 41 American Journal of International Law 172.p. 219.
[702] Telford Taylor, 'The Nuremberg Trials' (1955) 55 Columbia Law Review 4. p. 516.
[703] Kenneth R Olwig, 'The Landscape of 'Customary' Law versus that of 'Natural' Law' (2005) 1 Landscape Research 3, p. 300.
[704] Law Reports of Trials of War Criminals Selected and Prepared by The United Nations War Crimes Commission, Volume XV, Digest of Laws and Cases (Published for the United Nations War Crimes Commission By His Majesty's Stationary Office 1949, London) p. 5.

3.3.2 The Law of Nations and its Roots in Custom

Sir Lauterpacht found a state's 'right of humanitarian intervention' to be an integral part of the law of nations. He stated that '[t]he community of nations has in the past claimed and successfully asserted the right to intercede on behalf of the violated rights of a man trampled upon by the State in a manner calculated to shock the moral sense of mankind.'[705] Justice Jackson states in his introductory speech at Nuremberg that 'we charge guilt on planned and intended conduct that involves moral as well as legal wrong.'[706] The origin of criminal liability mentioned in the Charter also deeply rooted in the laws of nations and customary international law. Glueck pointed out that 'much of the law of nations has its roots in custom. Custom must have a beginning; and customary usages of States in the matter of national and personal liability for resort to prohibited methods of warfare and to wholesale criminalism have not been petrified for all time. International Law was not crystallized in the seventeenth century but is a living and expanding code.'[707] The accessible or foreseeable nature of criminal acts was possible to observe on the basis of the law of nations.

3.3.3 Absence of *Lex Lata* and Moral Principles

The IMT is marked as a tribunal of unprecedented character.[708] Having no precedent was the greatest of hurdles for the Tribunal.[709] However, Schwarzenberger stated that there is no need of having precedent for this Tribunal. The reason for deemphasizing precedent reflected the embryonic nature of international law. Notwithstanding any precedent as such, these tribunals were empowered to deal with crimes against peace, war crimes and crimes against humanity based on existing international law. The IMT stated that *nullum crimen sine lege* was never a hindrance to the prosecution of international crimes because international crimes were utterly devoid of 'principle of justice'.[710] In the *Peleus Trial*, the Prosecutor argued

[705] Hersch Lauterpacht, 'Draft Nuremberg Speeches' (2012) 1 Cambridge Journal of International and Comparative Law 1, pp. 48, 49.
[706] United Nations War Crimes Commission (Committee III), Material for the Preparation of a Definition of 'Crimes against Humanity', (III/33. 22 March 1946) p. 11.
[707] Sheldon Glueck, *War Criminals: Their Prosecution and Punishment*, (New York: Alfred A. Knopf 1944) pp. 13-14.
[708]Georg Schwarzenberger, 'Judgement of Nuremberg' (1947) 21 Tulane Law Review 329 , p. 329.
[709] Justice Jackson's Final Report to the President Concerning the Nuremberg War Crimes Trial (1947) 20 Temple Law Quarterly 2, p. 338. See also Georges S. Maridakis, 'An Ancient Precedent to Nuremberg' (2006) 4 Journal of International Criminal Justice 4, p. 847.
[710] Nazi Conspiracy and Aggression: Opinion and Judgement, Office of United States, Chief of Counsel For Prosecution of Axis Criminality (United States Government Printing Office, Washington 1947) 49.

that this principle applied only to 'municipal and State law and could never be applicable to International Law'.[711] In this regard, Robert H. Jackson stated that:

> [t]he United States, at the close of World War II, found itself in possession of high-ranking prisoners. Many of them had been publicly branded with personal blame for precipitating the war and for incitement or perpetration of acts of barbarism in connection with its preparation and conduct. This country, through President Franklin D. Roosevelt, had joined in rather definite commitments to bring such men to justice, but no treaty, precedent, or custom determined by what method justice should be done.[712]

In the context of World War II, the position of *lex lata* or the law as it exists was questionable. Ryan mentioned that 'there was no precedent, no list of crimes to be charged, no guide as to how four different nations should proceed, and often no consensus on the purpose of the trial or what was to be achieved.'[713] This section, nonetheless, argues that the *lex lata* must not be contradictory to the moral principles. Dr Ecer's Minority Report clarified the point of *lex lata* in the context of World War II*,* pointing out that:

> The absence of *lex lata* would no doubt prevent a man being convicted and punished for something the culpability of which might fairly be regarded doubtful, the criminality of Hitler and his associates in launching the present total war for which he has been preparing for years, the aggressive purpose and character of which he had proclaimed, cannot be contested. There was no need of an express code nor was there need of an express sanction, unless international law has no teeth. All that was needed was an appropriate tribunal, capable of doing justice when the facts were proved before it. Any other conclusion would shock the moral sense of mankind. It cannot be said

[711] The *Peleus Trial*, British Military Court for the Trial of War Criminals held at the War Crimes Court, Hamburg (17 October – 20 October 1945) p. 10.
[712] Report of Robert H. Jackson, United States Representative to International Conference on Military Trials (Department of State Publication 3080, International Organisation and Conference Series II, European and British Commonwealth 1, Released February 1949) V.
[713] Allan A. Ryan, 'Nuremberg's contributions to international law (Sharpening the Cutting Edge of International Human Rights Law: Unresolved Issues of War Crimes Tribunals)' (2007) 30 Boston College International and Comparative Law Review 1, p. 56.

that international law in this context only concerned itself with matters between sovereign States.[714]

The relevance of *lex lata* was also reiterated by M Zivkovic. He emphasised the value of the UNWCC member's opinions because of the power entrusted on them to create legal regulations where the law was silent or imprecise. He viewed that the application of international law does not rely on the national law '[b]ecause international law is still only in its infancy, becoming degree by degree what we want it to become, as was the case yesterday and as it will be tomorrow.'[715] He emphasised on the 'ingenious juridical constructions' of the lawyer to create new provisions if not available in the positive law.[716] In the same meeting, Mr C. B. Burdekin, the representative from New Zealand, stated the nature of atrocities during World War II made it illogical or unreasonable to focus on precedent as there is an old proverb saying 'desperate ills need desperate remedies'.[717] Thereafter, a new precedent can be drawn up to punish the authors of the policies.[718] Mr Wunsz King, a representative from China, also found no difficulty to create precedent in the form of a convention to prosecute war criminals.[719] In this case, 'the United Nations must create precedent if necessary.'[720]

An example is illustrated below to show how the absence of judicial precedents was argued by defence during trials. In this regard, the British Military Court's observation in the *Peleus Trial* determining war crimes for 'the violation of laws and usage of war' is significant to discuss. The pressing concern was finding acts that constituted a violation. Was it 'the sinking of the steamship itself' or 'the killing of the members of the crew' of the said steamship by firing and throwing grenades at them? The Prosecution of the *Peleus Trial* argued that the

[714] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of thirty-fourth meeting 3 October 1944, p. 9.
[715] United Nations War Crimes Commission, Minutes of Meetings: 23 December 1943-2 January 1947, Political (External) Department Collection, Reference IOR/L/PS/12/4518, Coll 44/38(3), Minutes of thirty-sixth meeting 17 October 1944, p. 3.
[716] Ibid., M Zivkovic stated that 'the lawyer will, in fact, create a new provision which actually does not exist in the positive law, but which he will be able, by means of very ingenious juridical constructions, to present as directly deriving from the legal text, i.e. as being directly the application of the *lex lata*, which he is supposed to have merely interpreted'.
[717] Ibid., p. 6.
[718] Ibid., p. 6.
[719] Ibid., p. 15.
[720] Ibid., p. 20.

phrase 'in violation of the laws and usages of war qualified the words that follow it, and not the words that precede it, or in other words, that the prisoners were *not accused of* having violated the laws and usages of war by *sinking* the merchantman, but only by *firing* and *throwing grenades* on the *survivors* of the sunken ship.'[721] The *Peleus Trial* relied on the *Llandovery Castle* case to discuss whether firing on lifeboats was a violation of the laws of the nation or not. The Prosecutor of the *Peleus Trial* quoted the *Llandovery Castle case* decision to remind the court of the existence of international law.[722] In response to the prosecution's reference to the *Llandovery Castle case*, the defence clarified the legal difference between the Leipzig trials and the Nuremberg trials pointing that the Leipzig trials followed municipal law, whereas the Nuremberg trials followed principles of international law.[723] The defence was not sure of the exact application of the law and considered many rules of international law to be 'vague and uncertain'.[724] The defence also argued over how an individual would be liable for the violation of a rule of international law if the State itself is in dilemma and unaware of the exact meaning of that rule.[725] However, the Prosecutor made it clear that the accused were charged with 'being concerned in the killing of survivors of the ship in violation of the laws and usages of war.'[726] Given the fact that there were no precedents as such, the laws and customs of war was, always, considered as the law of nations.

3.3.4 Transformation of Custom through the Nuremberg Charter

The Charter of the International Military Tribunal was considered as a part of law of the nations or customary international law. Justice considered it as a landmark substantive code in defining 'crimes against the international community' and acting as an instrument to uphold justice.[727] Schwarzenberger stated that the judgment of the IMT's ruling considered international law as a 'growing and dynamic body' because it connects the past to the present.[728] The IMT was not only working to punish major war criminals, but also to develop

[721] Law Reports of Trials of War Criminals Selected and Prepared by the United Nations War Crimes Commission, Volume 1, Digest of Laws and Cases (Published for the United Nations War Crimes Commission By His Majesty's Stationary Office 1949, London) p. 20. [emphasis was in the original]
[722] Ibid.
[723] Ibid.
[724] Ibid, p. 8.
[725] Ibid., p.14.
[726] Ibid., p. 20.
[727] Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949) viii.
[728] Georg Schwarzenberger, 'Judgement of Nuremberg' (1947) 21 Tulane Law Review 329, p. 342. "[L]ike other courts- municipal and international -the Tribunal was entitled to consider international law as a growing and dynamic body and was not limited to leaving the law exactly where it found it. Such law-making in disguise must,

future international law. The function of the IMT reflected the aim and purpose of the Charter because 'the Charter was declaratory of existing international customary law and would be applicable to any future transgressor.'[729] The IMT also firmly stated that 'the Charter is not an arbitrary exercise of power on the part of the victorious nations […]. It is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.'[730] Similarly, Sir Lauterpacht stated the Nuremberg Charter was a declaratory of the law of nations. In his view, the belligerent's right to punish the enemy nationals was a century-old laws and customs of war.[731] The application of the Charter was limited to acts committed before the adoption of it. The creation of new crimes was out of its scope; instead, it developed only pre-existing principles based on the law of nations.[732] Raimondo focused on the inclusion of individual responsibility in the Charter defining its origin in 'the customary usages or the law of nations'. He noted Article 8 of the Nuremberg Charter to be in conformity with the law of nations. He stated that:

> [t]he provisions of this Article are in conformity with the law of nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.[733]

---

however, be organically connected with what has happened before in order to be accepted as a declaration of existing law."

[729] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationary Office 1948, p. 260.

[730] Trial of the Major War Criminals before the International Military Tribunal, Volume 1, Nuremberg 14 November 1945-1 October 1946 (Published at Nuremberg, Germany 1947) p. 218.

[731] Hersch Lauterpacht, 'Draft Nuremberg Speeches' (2012) 1 Cambridge Journal of International and Comparative Law, p. 45.

[732] Hersch Lauterpacht, 'Draft Nuremberg Speeches' (2012) 1 Cambridge Journal of International and Comparative Law 1, pp. 48, 49.

[733] Fabián O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff Publishers 2008) p. 79. See also, Georg Schwarzenberger, 'Judgement of Nuremberg' (1947) 21 Tulane Law Review, p. 329. Judgment of the International Military Tribunal for the Trial of German Major War Criminals (With the dissenting opinion of the Soviet Member), Nuremberg, 30th September and 1st October 1946, London, HMSO, 1946, p. 42.

Justice Jackson stated that 'the making of the Charter was the exercise of sovereign legislative power' – which received acceptance and recognition by the civilised world.[734] The principles of the Charter reflect its importance to the evolution of 'law-governed society of nations'.

In contrast, Carrie McDougall mentioned in his book that International Law Commission remained silent about the status of crimes under international law; however, the Commission accepted the Nuremberg principles as a part of international law.[735] She did not seem to have supported that the entire Charter was a part of customary international law at the time of its adoption. She stated that-

> [o]verall, it would seem that the World War II trials were unlikely in and of themselves to have created instant custom. Some of the rules that were applied in the trials no doubt belonged to customary international law before 1945. On the other hand, it seems quite clear that crimes against peace were invented by the Allies and were not part of customary law at that time. As such, even if the General Assembly believed it was lending moral weight to existing customary international law in adopting Resolution 95 (1), it could only have had this effect in relation to some of the principles it affirmed- and certainly not in relation to the existence or content of crimes against peace.[736]

In her opinion, the customary international law appeared once the Nuremberg Charter and Judgements were approved by GA Resolutions and when Governments had made their comments in relation to the 1951 Draft Code.[737] The chapter argues that the Charter always reflected existing norms from the natural law perspective, despite the Nuremberg and other trials had no judicial precedent. Custom as a source of international law plays a central role in the absence of written laws or treaties.[738]

---

[734] Trial of the Major War Criminals before the International Military Tribunal, Volume 1, Nuremberg 14 November 1945-1 October 1946 (Published at Nuremberg, Germany 1947) 218.; *The Justice Case*, p. 965.
[735] Carrie McDougall *The Crime of Aggression under the Rome Statute if the International Criminal Court* (Cambridge University Press 2013) 141.
[736] Ibid.
[737] Ibid., p. 142.
[738] Peter Tomka, 'Custom and the International Court of Justice' (2013) 12 The Law and Practice of International Courts and Tribunals 2, p. 195.

3.5 Conclusion

The dynamic development of international crimes following World War II raises challenges as to the sources in international law. The works of the UNWCC, Nuremberg and other trials defining crimes against peace and crimes against humanity are rooted in fundamental principles of justice. The consideration of fundamental principles of justice prevails over the so-called State practice and *opinio juris* criteria. Tomuschat noted that the common moral grounds of international instruments had an impact on the trials surrounding World War II.[739] The contribution of UNWCC representatives, particularly the work of Dr Ecer and Schwelb, was significant to the identification of international crimes. This chapter has discussed the impact of moral concepts on the development of legal concepts following World War II. The Nuremberg and other trials equally promoted the idea of the law of nations and customary international law to avoid violation of the principle of legality. Cryer and others stated that 'the Tribunal may have been on more solid grounds in relation to positive international law when it asserted that *nullum crimen sine lege* was not established as established principle at that time.'[740] In fact, judges sitting in both at the national and international trials exercised their power towards the progressive development of international law.

This chapter has argued that the efforts of the UNWCC, Nuremberg and other tribunals' use of sources supported the development of customary international law from the perspectives of positive law and natural law. Generally, customary international law requires the presence of both State practice and *opinio juris*. The chapter has identified the *opinio-juris* based custom relying on the natural law approach. This approach suggests the development of customary international law primarily based on one element, making the necessity of State practice less stringent. The absence of judicial precedent can be justified invoking this approach in the process of custom identification. In fact, 'the pressure of necessity stimulates the impact of natural law and moral ideas and converts them into rules of law deliberately and overtly recognised by the consensus of civilised mankind.'[741] In contrast, the positive law creates a practice-based custom, where states' consent plays a significant role. However, it was difficult

[739] Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 The Journal of International Criminal Justice 4,pp. 830-844.
[740] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4 ed., Cambridge University Press 2019) 118.
[741] Lord Wright, 'War Crimes under International Law' (1946) 62 Law Quarterly Review 40, p, 51.

to find ‘general and consistent’ practice due to the diverse views of the common law and civil law systems.

CHAPTER 4. THE IDENTIFICATION OF INTERNATIONAL CRIMES UNDER CUSTOMARY INTERNATIONAL LAW: METHODS APPLIED BY THE *AD HOC* AND OTHER INTERNATIONAL CRIMINAL TRIBUNALS

4.0 Introduction

Late twentieth century marked the identification of substantive elements of international crimes under customary international law. The chapter discusses the role of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) (the *Ad Hoc* Tribunals) to the formation of international crimes under custom. The chapter shows the *Ad Hoc* Tribunals' methods of identifying customary international law based on the teleological or purposive interpretation. The intriguing part is to observe the nature of instruments that reflect State practice and *opinio juris* in the process of custom formation. To this end, the mainstay of the chapter has divided the sources into three parts to show the evolution of customary international law. The first part discusses the judicial decision- based approach, referring to the use of national and international judicial decisions. The second part shows the *Ad Hoc* Tribunals' human rights-based approach relying on common Article 3 and the Martens Clause. The third part outlines the instrument-based approach, referring to several international instruments.

This chapter does not discuss broadly the methodology adopted by other international criminal courts and tribunals. Instead, it briefly discusses how other international criminal courts and tribunals affirm and follow the inconsistent methods set by the *Ad Hoc* Tribunals. Finally, the chapter outlines the formation of *opinio juris*-based custom relying on the sources used by the *Ad Hoc* Tribunals. The chapter does not state that the jurisprudence of the *Ad Hoc* and other Tribunals marks a total shift from 'practice-oriented' approach. However, it argues the tribunals' jurisprudence leans more on *opinio juris* based on 'international practice'.[742]

[742] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),* ICJ Reports 2012, P. 457; According to the ICJ, a widespread international practice 'appears in numerous international instruments of universal application.'

4.1 Subject-Matter Jurisdiction of the ICTY and ICTR

In 1993, the United Nations Security Council decided to create an *Ad Hoc* international tribunal for the 'prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.'[743] Similarly, another *Ad Hoc* Tribunal was set up by the Security Council in 1994 'for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda...'[744] Both *Ad Hoc* Tribunals have concurrent jurisdiction.[745] However, the Statutes of the ICTY and ICTR allow the primacy over national courts.[746] The UN Security Council limits the jurisdiction of the ICTY to the application of 'international humanitarian law which are beyond doubt part of customary international law.'[747] The same limitation applies when the ICTY invokes domestic law.[748]

The *Tadic* Jurisdiction Decision specified four requirements for understanding the jurisdictional limits of the ICTY.[749] Since the jurisdiction of the ICTY was limited to customary international law, it was a challenge to meet the criteria of jurisdiction for 'grave breaches of the Geneva Conventions of 1949' in the non-international armed conflict based on custom. The judges of the *Tadic* Jurisdiction Decision acknowledged that, 'we are aware that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights.'[750] To justify the presence of custom, the Decision also noted the legal significance of an *amicus curiae* submission by the Government of the United States, where the 'grave breaches' provisions cover both the international and non-international armed conflict. The Chamber stated that 'there is no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a

[743] UNSC, 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808' (3 May 1993) UN Doc S/25704, para. 1. P*rosecutor v Kunarac* (Trial Chamber Judgement) IT -96-23-T and IT-96-23-T/1 (22 February 2001) para.198.
[744] UN Security Council, Security Council resolution 955 (1994) [Establishment of the International Criminal Tribunal for Rwanda], 8 November 1994, S/RES/955 (1994) para. 1.
[745] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, SC Res 827/1993, reprinted in: (1993) ILM 1192, Art 9.; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda, SC Res 955/1994, reprinted in: (1994) ILM 1598, Art 8.
[746] Ibid.
[747] UN Security Council, 'Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704 of 3 May 1993, paras. 34-35.
[748] Ibid., paras. 36. '[t]he international tribunal should apply domestic law in so far as it incorporates customary international humanitarian law.'
[749] *Prosecutor v Tadic,* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para. 94.
[750] Ibid., para.82-83.

delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of 'grave breaches' system might gradually materialize.'[751] The assumption of finding *opinio juris* from the evidence of *amicus curiae* reflects a parochial approach of the Chamber. Alongside, there was reference to the German military manual's provisions, where violations of Common Article 3 falls within the grave breaches' regime.[752]

Article 3 of the Statute of the ICTY includes 'violations of the laws or customs of war', which cover all serious violations of international humanitarian law, provided they are part of customary international law.[753] The Chamber found no such difference of sources between the 'laws' and 'customs' of war. It is just a 'traditional term of art used in the past'.[754] There are two broad reasons why the Report of the Secretary-General uses this term in Article 3 of the Statute, first, to make a reference to the Hague Convention 1907 which is declaratory of customary law and to cover a significant area of international humanitarian law; secondly, the scope of 'Hague Regulations' is wider than that of Geneva Conventions because they do not only deal with the victims, prisoners of war or wounded and sick, but also conduct of hostilities. Article 3 of the Statute covers both Geneva and Hague rules of law. Article 3 intends to cover all international humanitarian law violations, except the provisions written under Article 2 of the Statute of the ICTY.[755] Judge Pocar stated that:

> [s]erious violations of common Article 3 of the Geneva Conventions also constituted war crimes under customary international law and could therefore fall within the jurisdiction of the ICTY through the reference made in its Statute to the 'laws and customs of war'. This interpretation has been regarded as a 'breakthrough', as it was equivalent to stating that most acts constituting war crimes in international armed conflicts also constitute war

[751] Ibid., para. 83.
[752] Ibid., para. 83.
[753] *Prosecutor v Kvocka et al.,* (Decision on Preliminary Motions Filed by *Mlado Radic*, and *Miroslav Kvocka* Challenging Jurisdiction) IT-98-30/1 (1 April 1999) para. 23.
[754] *Prosecutor v Tadic,* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para. 87.
[755] Ibid., para. 87, 88, 89 "In light of the above remarks, it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law."

> crimes when committed in non-international armed conflicts, despite the legal context where the existing treaty law disposed of such crimes in a different way.[756]

In contrast, the Security Council does not impose such a limitation on the subject-matter jurisdiction of the ICTR. The *Akayesu* Trial Chamber stated that:

> [t]he Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the Statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the Statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognised as part of customary international law, for the first time criminalizes common article 3 of the four Geneva Conventions.[757]

The ICTR's subject matter jurisdiction to prosecute war crimes is limited to serious violations of Common Article 3 of the Geneva Conventions and serious violations of Additional Protocol II.[758] To exercise jurisdiction over crimes against humanity, Article 5 of the ICTY requires the presence of either international or non-international armed conflict. In contrast, Article 3 of the Statute of the ICTR does not contain such requirements to prosecute crimes against humanity. In terms of genocide, the authority to exercise subject-matter jurisdiction is provided in Article 4 of the Statute of the ICTY and Article 2 of the Statute of the ICTR.

[756] Fausto Pocar, 'International Criminal Justice and the Unifying Role of Customary Law' (2016) 21 Uniform Law Review (2-3), p. 173.
[757] *Prosecutor v Akayesu*, (Trial Chamber Judgement) ICTR-96-4-T (2 September 1998) para. 604.
[758] Statute of International Criminal Tribunal for Rwanda as established by Security Council Resolution 955 (1994) and last amended by Security Resolution 1717 (2006) of 13 October 2006.

4.2: International Crimes: Methods of Interpretation

4.2.1 Foreseeable and Accessible Nature of Crimes

The contents of customary international law should be 'well foreseeable to the relevant actors.'[759] The *Ad Hoc* Tribunals attempted to identify the foreseeable nature of crimes in the violation of international humanitarian law, which exists both in customary law and conventional law.[760] The ICTY was entrusted with identifying international crimes with sufficient clarity under customary international law, ensuring the foreseeable and accessible nature of crimes at the time of commission.[761] In the case of the *Prosecutor v Mitar Vasiljevic*, the ICTY Trial Chamber noted that:

> [o]nce it is satisfied that a certain act or set of acts is indeed criminal under customary international law, the Trial Chamber must satisfy itself that this offence with which the accused is charged was defined with sufficient clarity under customary international law for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible. When making that assessment, the Trial Chamber takes into account the specificity of international law, in particular that of customary international law.[762]

The requirement of sufficient clarity in criminal offences is a part of the *nullum crimen sine lege* requirement and needs to be met in that context.[763] In the *Kunarac* case, prosecution argued for making a distinction between the principle of legality and specificity. In their view, the principle of legality was concerned with the existence of a criminal offence, whereas the principle of specificity indicated the definition or elements of that offence.[764] However, the *Kunarac Trial* Chamber rejected making such distinction between the legality and specificity.

---

[759] Hitomi Takemura, 'Inconvenient Truth About the identification of Customary International Law in International Criminal Law' (2020) 62 Japanese Yearbook of International Law 312, p. 334

[760] UNSC, 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808' (3 May 1993) UN Doc S/25704, para 33.

[761] *Prosecutor v Kunarac et al.*, (Trial Chamber Judgement) IT -96-23-T and IT-96-23-T/1 (22 February 2001) para. 199.

[762] *Prosecutor v Vasiljevic,* (Trial Chamber II) IT-98-32-T (29 November 2002) para. 201. See also Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10, Vol 3 (Justice Case) pp. 974-975. See also *Groppera Radio AG and Others v Switzerland,* Judgement, 28 Mar 1990, Ser A 173, para. 68.

[763] P*rosecutor v Kunarac at al.*, (Trial Chamber Judgement) IT -96-23-T and IT-96-23-T/1 (22 February 2001) para. 201.; See also *Sunday Times v United Kingdom*, Judgement, 26 Apr 1979. Ser A 20 (1979), para. 49 (ECHR); *Kokkinakis v Greece*, Judgment, 25 May 1993, Ser A 260-A (1993), para. 52 (ECHR); *EK v Turkey*, Judgement, 7 Feb 2002, para. 51.

[764] Ibid., para.199. (Footnote-Submission by the Prosecution on the Law with respect to 'Violence to Life and Person', 28 March 2002, para. 5.)

The Chamber stated that the ICTY was concerned about identifying crimes under customary international law with precision to comply with the principle of legality.[765] Moreover, specificity of crimes must be drawn from international law, not from the accused's domestic laws. International crimes are different from national crimes, and the definition of legality varies between international and national crimes. The Chamber in the *Celebici Trial* stated that 'the principles of legality in international criminal law are different from their related national legal systems with respect to their applications and standards.'[766] In developing international crimes, customary international law contributed quite differently from other branches of international law. Schabas stated that 'customary international law in the context of international criminal law means something different than customary international law in the context of traditional international law.'[767]

Furthermore, interpretive precision is significant to avoid indeterminate or flexible use of the identification of customary international law. Recent scholarship has argued that the flexible use of the constitutive elements of customary international law may lead to legal uncertainty and violate the principle of *nullum crimen sine lege*.[768] Any exercise of jurisdiction beyond customary law would be the utilisation of power, and not of law.[769] The utilization of power, which has no uniform framework, in many instances becomes 'crudely selective and arbitrary'.[770] The chapter ascertains whether the *Ad Hoc* Tribunals' efforts to identify sources satisfy the constituent elements of customary international law or not. Judge Pocar stated that the constant application of customary international law is significant 'in shaping and enforcing a homogeneous system of international criminal law and has helped to overcome divisions and inconsistencies that could occur in a strict application of the Geneva Conventions and the Additional Protocols.'[771] The *Furundzija* Appeals Chamber pointed out the impact of customary international law as interpretative aids to the ICTY provisions. The Chamber stated that 'if there is a relevant rule of customary international law, due account must be taken of it,

[765] Ibid., para.199.
[766] *Prosecutor v Delalic et al.*, (Trial Chamber Judgement) IT-96-21-T (16 November 1998) para. 431.
[767] William Schabas, 'Customary law or 'judge-made' law: Judicial creativity at the UN criminal tribunals' in *The Legal Regime of the International Criminal Court*, International Humanitarian Law Series, Volume 19 (Brill/Nijhoff 2009) p. 101.
[768] Alessandro Bufalini, 'The Principle of Legality and the Role of Customary International Law in the Interpretation of the ICC Statute' (2015) 14 The Law and Practice of International Courts and Tribunals 2, p. 234.
[769] *Prosecutor v Vasiljevic,* (Trial Chamber II) IT-98-32-T (29 November 2002) para. 202.
[770] Ilias Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law' (2006) 6 International Criminal Law Review 1, p. 121.
[771] Fausto Pocar, 'International Criminal Justice and the Unifying Role of Customary Law' (2016) 21 Uniform Law Review 171, p. 174.

for more than likely, it will control the interpretation and application of the particular provision.'[772] The section below shows the method of identifying customary international law based on the teleological approach.

4.2.2 Ascertainment of Customary International Law through Interpretation

The interpretation was significant because there was a difference between 'the prohibition of certain conduct' enshrined in the treaty provisions and 'the criminalisation of that conduct' as an international crime. The nexus between the interpretation and custom identification was indispensable. The separate existence of treaty interpretation does not appear with any individual usefulness in the *Ad Hoc* tribunals' work. Birgit stated that there was always an interplay between the 'ascertainment of customary norms' and 'treaty interpretation' in the jurisprudence of the *Ad Hoc* Tribunals.[773] In his opinion, there should not be any sharp dividing line between the methods since both methods are employed to justify particular provisions of international instruments. Further, he stated that 'the relationship between interpretation and the formation of new customary law appears as a grey zone in which methodologies have merged into one another, particularly in areas where both methods are applicable.'[774] The *Ad Hoc* Tribunals apply treaty provisions not out of a treaty obligation, instead of as a declaration of customary international law.[775] The *Ad Hoc* tribunals applied teleological interpretation to determine the existence of customary international law.

Unlike ICTR, the ICTY's statutory jurisdiction was limited to crimes those are customary in nature.[776] The ICTY Appeals Chamber in the *Kordic* and *Cerkez* case emphasised on the application of customary international law because treaty provisions do not incur any individual criminal responsibility.[777] Generally, the application of customary international law requires that the treaty needs to be reflective of custom either at the stage of its adoption or through its subsequent acceptance.[778] In this regard, State practice needs to be followed by a

---

[772] *Prosecutor v Furundzija,* (Appeals Chamber Judgement) IT-95-17/1-A (21 July 2000) para. 275.
[773] Birgit Schlutter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff Publishers 2010) 101.
[774] Ibid., p. 102.
[775] Dapo Akande, 'Sources of International Criminal Law' in Antonio Cassese (ed.) *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 41-46.
[776] *Prosecutor v Galic,* (Appeals Chamber Judgement) IT-98-29-A (30 November 2006) (Judgement Separate Opinion of Judge Shahabuddeen) para. 2.
[777] *Prosecutor v Kordic et al.*, (Appeal Judgement) IT-95-14/2-A paras. 41-42, 59-66; *Prosecutor v Stanislav Galic* (Appeals Chamber Judgement) IT-98-29-A (30 November 2006) para. 83.
[778] *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, ICJ Reports 1969, pp. 38-46.

legal obligation, which is different from a mere provision of international conventions.[779] On numerous occasions, States mostly sign a treaty out of necessity or belief and barely manifest an act out of that necessity. To this end, the ICTY, on several occasions, identified rules of customary international law, providing interpretation to several international instruments.[780] The work of the *Ad Hoc* Tribunals shows the prevalent use of the teleological approach. The *Ad Hoc* Tribunals follow the rules of interpretation as given in international law. Relying on the teleological approach, Judge Abi-Saab shows the development of custom in two different ways. He states that:

> As a matter of treaty interpretation - and assuming that the traditional reading of "grave breaches" has been correct - it can be said that this new normative substance has led to a new interpretation of the Conventions as a result of the "subsequent practice" and *opinio juris* of the states' parties: a teleological interpretation of the Conventions in the light of their object and purpose to the effect of including internal conflicts within the regime of "grave breaches." The other possible rendering of the significance of the new normative substance is to consider it as establishing a new customary rule ancillary to the Conventions, whereby the regime of "grave breaches" is extended to internal conflicts. But the first seems to me as the better approach. And under either, Article 2 of the Statute applies - the same as Articles 3, 4 and 5 - in both international and internal conflicts.[781]

The significant aspect of the teleological interpretation was to ensure that the rules of international criminal law fall within the scope of customary international law. Stephan stated that the *Ad Hoc* Tribunals' 'interpretative independence' was significant to comply with the principle of legality.[782] However, the ascertainment of customary international law through treaty interpretation lacks sufficient evidence to identify State practice and *opinio juris*. The *Celebici* Trial chamber stated that:

---

[779] Jean-Marie Hanckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law* (International Committee of the Red Cross and Cambridge University Press 2005) xlvii.; See also the Book Review published in Leiden Journal of International Law, 21 (2008) 255-288.
[780] *Prosecutor v Galic*, (Appeals Chamber Judgement) IT-98-29-A (30 November 2006) para. 82.
[781] *Prosecutor v Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) (Separate Opinion of Judge Abi-Saab on The Defence Motion for Interlocutory Appeal on Jurisdiction) para. 4.
[782] Paul B Stephan, 'Disaggregating Customary International Law' (2010) 21 Duke Journal of Comparative & International Law 1, p. 195.

> The evidence of the existence of such customary law - state practice and *opinio juris* – may, in some situations, be extremely difficult to ascertain, particularly where there exists a prior multilateral treaty which has been adopted by the vast majority of states. The evidence of state practice *outside* of the treaty, providing evidence of separate customary norms or the passage of the conventional norms into the realms of custom, is rendered increasingly elusive, for it would appear that only the practice of non-parties to the treaty can be considered as relevant. Such is the position of the four Geneva Conventions, which have been ratified or acceded to by most states.[783]

4.2.3 Interpretative Independence of the *Ad Hoc* Tribunals: Teleological Approach

The 1969 Vienna Convention is a significant international agreement that governs 'the creation, operation and legal effect of most treaties in effect today.'[784] The *Ad Hoc* Tribunals applied Vienna Convention to interpret provisions of the Statutes of ICTY and ICTR in the same way as it applies to treaty provisions.[785] In the *Nsengiyumva* Appeals Chamber, Judge Mc Donald and Judge Vohrah noted that:

> In interpreting the Statute and the Rules which implement the Statute, Trial Chambers of both the International Tribunal and the International Criminal Tribunal for the former Yugoslavia ("the ICTY"), as well as the Appeals Chamber have consistently resorted to the Vienna Convention of the Law of Treaties ("the Vienna Convention"), for the interpretation of the Statute. Although the Statute is not a treaty, it is a *sui generis* international legal instrument resembling a treaty. Because the Vienna Convention codifies logical and practical norms which are consistent with domestic law, it is applicable under customary international law to international instruments

[783] *Prosecutor v Delalic et al.*, (The Trial Chamber Judgement) IT-96-21-T (16 November 1998) para. 302. [Emphasis in the original]
[784] Rhona K.M. Smith, *Texts and Materials on International Human Rights* (4th ed., Routledge 2020) p. 2.
[785] *Prosecutor v Delalic et al.*, (Trial Chamber Judgement) IT-96-21-T (16 November 1998) paras. 158-165 and 1161.

> which are not treaties. Thus, recourse by analogy is appropriate to Article 31 (1) of the Vienna Convention in interpreting the provisions of the Statute.[786]

Thereby, the *Ad Hoc* Tribunals' methods of interpretation followed the elements of Article 31 of the Vienna Convention, that is, 'good faith, textuality, contextuality and teleology.'[787] The context includes 'the general purpose and policy of a provision, particularly the mischief it is seeking to remedy. This means that legislative history and extrinsic materials are important pieces of legislative context.'[788] The ICTY in the *Tadic* Appeal Chamber also mentioned of the teleological approach of interpretation. Under this rule of interpretation, the ICTY relied not only on the text and the drafting history of a treaty but also on its object and purpose.[789] The *Celebici* Trial Chamber explained the significance of the teleological interpretation (also known as purposive interpretation) in the judgement. The Chamber stated that:

> The teleological approach', also called the 'progressive' or 'extensive' approach, of the civilian jurisprudence, is in contrast with the legislative historical approach. The teleological approach plays the same role as the 'mischief rule' of common law jurisprudence. This approach enables interpretation of the subject matter of legislation within the context of contemporary conditions. The idea of the 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.[790]

The judges of the *Ad Hoc* Tribunals seem to have resorted to different methods of interpretation to adapt to the changed circumstances, instead of looking at how to justify the contents of customary international law in their interpretation. Fennelly also described the importance of this interpretation in his paper. He stated that:

> The breadth of source material for judicial inspiration is comprehensible and justifiable once the teleological or purposive method is adopted. The context of a legal text is part of the background to its adoption. Many contemporary

[786] *Prosecutor v Nsengiyumva*, (Appeals Chamber Judgement) ICTR-96-12-A (3 June 1999) para. 14; Article 31 (1) states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".
[787] *Prosecutor v Furundzija*, (Appeals Chamber Judgement) IT-95-17/1-A (21 July 2000) para. 277.
[788] James Duffy and John O'Brien, 'When Interpretation Acts Require Interpretation: Purposive Statutory Interpretation and Criminal Liability in Queensland' (2017) 40 University of New South Wales Law Journal 3, p. 970.
[789] *Prosecutor v Tadic*, (Appeals Chamber Judgement) ICTY-94-1-A (15 July 1999) para. 166.
[790] *Prosecutor v Delalic et al.*, (Trial Chamber Judgement) IT-96-21-T (16 November 1998) para. 163.

> sources may cast light on the understanding of the legislators. The existence of the teleological interpretative principle is not, therefore, in doubt.[791]

Similarly, Nolte stated that the ICTY emphasises the object and purpose of a treaty not only to rely on the 'subsequent practice or legislative trends' but also to take 'subsequent developments into account.'[792] The *Celebici* Trial Chamber provided a guidance to interpret the provisions of the Statute and Rules following the 'objects of the Statute and the social and political considerations which gave rise to its creation.'[793] The teleological interpretation was emphasised because grave violations of international humanitarian law may appear in the future with 'new forms and permutations'. The *Celebici* Chamber stated that:

> The 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 the existing of international customary law. Thus, the utilisation of the literal, golden and mischief rules of interpretation repays the effort.[794]

Besides, Article 33(1) and 33 (2) of the Vienna Convention, the ICTR also follows Article 33 (4) of the Vienna Convention to interpret if there is any difference within the meaning of authentic texts. For example, in *Prosecutor v. Semanza*, the ICTR Trial Chamber was consistent with the *Tadic* conclusion in using the terms 'widespread' or 'systematic' as a disjunctive mode, suggested by the English version of the statute. The Chamber refrained from following 'widespread' and 'systematic' as a cumulative mode, suggested by the French version of the statute.[795] Previously, the Trial Chamber in the *Akayesu, Rutaganda* and *Musema* cases followed the English version of the statute and found evidence in the customary norms in determining murder as a crime against humanity. In contrast, the *Semanza* Trial Chamber did not find any customary norm to this mode of interpretation.[796]Also, the Chamber noted that the ICTY in the *Tadic* Judgement dealt with 'the limited practice' on this matter to conclude that 'widespread *or* systematic was an element of crimes against humanity in customary international law.'[797] Nonetheless, the *Semanza* Trial Chamber found the practice of the

[791] Nial Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20 Fordham International Law Journal, Issue 3, p. 666.
[792] Georg Nolte, *Treaties and Subsequent Practice* (Oxford University Press 2013) 292.
[793] *Prosecutor v Delalic et al* (Trial Chamber Judgement) IT-96-21-T (16 November 1998) para.170.
[794] Ibid., para.170.
[795] *Prosecutor v Semanza*, (Trial Chamber Judgement and Sentence) ICTR-97-20-T (15 May 2003) para. 328.
[796] Ibid.
[797] Ibid., para. 328. (emphasise given in the original)

previous cases as 'uniform' and followed the English text of Article 3 of the Statute as it is more consistent with customary international law.[798] The judges of the *Ad Hoc* Tribunals have applied the 'purposive' or 'teleological' interpretation in several cases. This interpretation is not applied subject to the condition of linguistic conflict or ambiguity.[799]

This section below explores the sources applied by the *Ad Hoc* Tribunals' to the identification of international crimes. The *Ad Hoc* Tribunals seek to use the law as they find it, not as they wish it to be.[800] Their jurisdiction was limited to the identification of existing laws, instead of determining whether a norm is 'valid or desirable'.[801] Konderla argued that 'the ICTY and the ICTR have expanded its role by being more liberal with the interpretation of the norms of customary nature.'[802] Despite criticism of the tribunal's approach, Robert Cryer and others stated that 'the Tribunal took considerable pains to determine what happened in the former Yugoslavia accurately.'[803]

The *Ad Hoc* Tribunals cited multiple sources as evidence to identify international crimes, which were either ascertained as custom or interpreted as custom. The *Vasiljevic* Trial Chamber mentioned two specific ways of identifying an act as criminal: first, through the criminalisation of the act by a large number of national jurisdictions. Second, by a treaty provision that provides for its criminal punishment and has come to represent customary international law.[804] This chapter analyses that none of the ways had been consistently followed in the works of the *Ad Hoc* Tribunals. The section below argues that the *Ad Hoc* Tribunals referred several sources to support the identification of custom following three approaches. These approaches are made relying on the teleological interpretation, i.e., object and purpose of the Statutes. The first part discusses the judicial decisions-based approach, taking into account national and international judicial decisions as evidence of customary international law. The second part highlights the human rights-based approach, interpreting common Article

[798] *Prosecutor v. Musema*, (Trial Chamber Judgement) ICTR-96-13-T (27 January 2000) para. 214; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment (6 December 1999) para. 79; *Prosecutor v Akayesu* (Trial Chamber Judgement) ICTR-96-4-T (2 September 1998) para. 588.; *Prosecutor v Semanza* (Trial Chamber Judgement and sentence) ICTR-97-20-T (15 May 2003) para. 335.
[799] Nial Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20 Fordham International Law Journal, Issue 3, p. 665.
[800] *Prosecutor v Vasiljevic* (Trial Chamber II) IT-98-32-T (29 November 2002) Footnote No- 586.
[801] Milan Kuhli & Klaus Gunther, 'Judicial Law making, Discourse Theory and the ICTY on Belligerent Reprisals' (2011) 12 German Law Journal 5, p. 1266.
[802] Joanna Konderla 'International Customary Law in the Jurisprudence of the ICTY and the ICTR' (2018) 8 Wroclaw Review of Law, Administration & Economics 2, p. 299.
[803] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th ed., Cambridge University Press 2019) p. 135.
[804] *Prosecutor v Vasiljevic*, (Trial Chamber II) IT-98-32-T (29 November 2002) para. 199.

3 and the Martens Clause. The third part explains the instrument-based approach, referring several instruments as evidence of customary international law.

4.3 Sources to Support the Identification of Customary International Law

PART I

4.3.1 Judicial Decisions-Based Approach: National and International Case Law

4.3.1.1 Case Law

The *Ad Hoc* Tribunals referred to several national and international judicial decisions as evidence to support the identification of customary international law. The Nuremberg and post-Nuremberg jurisprudence were used as guidance in determining the legal nature of international crimes. In general, the development of case law or judicial decisions of national courts influences the scope and extent of customary international criminal law. Bantekas stated that the application of judicial decisions has not been referred to as a source of international crimes under customary international law, but '[t]he decisions of domestic and particularly international tribunals may pave the way for a change of opinion of states on a particular matter …'.[805] Ericsson argued that 'the decisions may […] contribute to the emergence of a customary rule by influencing state practice.'[806] Judicial decisions or case law was not regarded as a source of the Statute of ICTY and ICTR. The ICTY stated that the application of national legislation and case law is accepted if the major legal systems adopt the same notion. The *Tadic* Appeals Chamber stated that:

> [n]ational 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. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion.[807]

[805] Ilias Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law' (2006) 6 International Criminal Law Review 1, p. 131.
[806] Maria Ericsson, *Defining Rape: Emerging Obligations for States under International Law?* (Martinus Nijhoff Publishers 2011) 25.
[807] *Prosecutor v Tadic*, (Appeals Chamber Judgement) ICTY-94-1-A (15 July 1999) para. 225.

Similarly, after a year of the *Tadic* Appeals Chamber decision, the ICTY in the *Kupreskic* Trial Chamber similarly stated that judicial decisions neither a binding precedent nor a distinct source of law in international criminal adjudication.[808] The use of national law was suggested to fill *lacunae* in the Statute or in customary international law. The Chamber pronounced to rely on national legislation and judicial decisions 'with a view to determining the emergence of a general principle of criminal law common to all major systems of the world.'[809] Furthermore, the ICTY in the *Kupreskic* case also appears to have taken in account Article 38 (1)(d) of the Statute of the ICJ. However, the Chamber applied judicial decisions as a 'subsidiary means for the determination of rules of law'.[810] The recent report of the ILC suggested judicial decisions as 'an aid' to the identification process of customary international law. Here, the term 'subsidiary means indicates the 'ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law, like treaties, customary international law or general principles of law.'[811] In contrast, Gallant's writing reflects judicial decisions as a very 'fundamental means' to determine rules of law.[812]

The judges of ICTY outlined the legal significance of national case law, stating that each case law does not carry the same evidential value. In this regard, the ICTY Trial Chamber in the *Kupreskic* case stated that 'precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio juris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law.'[813] The Chamber clarified stating that, judicial decisions of national courts under the provisions of the 1948 Genocide Convention or other international treaties are more important than the decisions given under national laws.[814] Judicial decisions that follow international law are regarded relevant to the development of customary international law.

The Trial Chamber expressed its concern, mentioning that it was not an easy task for the international lawmakers to find the evidence of custom from the diverse and often conflicting national traditions in criminal law.[815] The ICTY had to draw upon judicial decisions for two

[808] *Prosecutor v Kupreskic*, (Trial Chamber Judgement) ICTY-95-16-T (14 January 2000) para. 540.
[809] Ibid., para. 539.
[810] Ibid., para. 540.
[811] Report on the work of the sixty-eighth session (2016), (document A/71/10) Chapter V, Identification of customary international law, General Commentary, Conclusion 13 para. 1.
[812] K. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2005) 67.
[813] *Prosecutor v Kupreskic*, (Trial Chamber Judgement) ICTY-95-16-T (14 January 2000) para. 540.
[814] Ibid., para. 541.
[815] *Prosecutor v Kupreskic*, (Trial Chamber Judgement) ICTY-95-16-T (14 January 2000) para. 537.

reasons; first, both substantive and procedural criminal was at a very rudimentary stage. Second, after World War II, the case law has developed more than treaty provisions concerning international crimes.[816] Harmen van der Wilt supported the reference to national case law; he mentioned that 'international tribunals have resorted to domestic legislation and case law of national courts because recognition of conduct as an international crime through the establishment of universal jurisdiction and abolition of statutes of limitation reflects at least the *opinio juris* of states on the issue.'[817] However, this type of outcome may appear at times to reflect an 'activist' approach by the tribunals.[818] This chapter examines the evidence finding methods of the ICTY, reflecting on its use of case law.

The ICTY relied on several national case law as evidence of customary international law. The ICTY in the *Kupreskic* case stated that national courts that apply international law have greater weight than national courts that follow national legislation.[819] The application of international law is essential in distinguishing between international and ordinary crimes. The ICTY in the *Tadic* Jurisdiction Decision relied on the *Court of Cassation* in France, where the domestic court decided crimes against humanity was a subject of international order instead of a domestic matter.[820] The ICTY found the *Barbie Trial* was relevant in finding evidence of customary international law. The Trial of *Klaus Barbie* was held in 1987 in a French court. Nicholas Doman noted that by Law Number 64-1326, France incorporated the law of crimes against humanity- as defined by the Resolution of the United Nations of 13 February 1946[821]- into its domestic legislation on 26 December 1964.[822] He, citing the view of the *Cour d'appel* of Paris, stated that the law of France had incorporated relevant international law and noted that international law was superior to national law.[823] The *Tadic* Jurisdiction Decision specifically pointed out evidence of State practice from the case law while determining the scope of the grave breaches provisions, e.g., the Third Chamber of the Eastern Division of the Danish High

[816] Ibid., para. 537.
[817] Harmen van der Wilt, 'State Practice as Element of Customary International Law: A White Knight in International Criminal Law?' (2019) 20 International Criminal Law Review 5, p.18.
[818] Ibid., p. 4.
[819] *Prosecutor v Kupreskic*, (Trial Chamber Judgement) ICTY-95-16-T (14 January 2000) para. 541.
[820] *Prosecutor v Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para. 58.
[821] Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal, G.A. Res. 95(1), 1 U.N. GAOR Supp. (No. 2) at 188, U.N. Doc. A/64/Add. 1 (1947).
[822] Nicholas R Doman, 'Aftermath of Nuremberg: The Trial of Klaus Barbie' (1989) 60 University of Colorado Law Review 3, p. 456.
[823] Ibid., p. 461.

Court in the case of the *Prosecution v. Refik Saric*.[824] However, the ICTY refrained from analysing criteria such as the 'quality of the reasoning of each decision' and the 'reception of the decision by States and by other courts'. The ILC suggested these criteria as valuable guidance to the custom identification process.[825] The 'cumulative effect' of national case may also be useful to the formation of custom.[826] Judge Cassese suggested the importance of being prudent while familiarizing a principle from national criminal law to the international context.[827]

Along with national case law, the *Ad Hoc* Tribunals' decisions also referred to the Nuremberg and other trials following World War II to support the evolution of customary international criminal law. The *Stakic* Trial Chamber applied the case law of the Nuremberg, Tokyo, and other tribunals established under Allied Control Council Law No. 10 as the secondary source,[828] whereas the ICTY and ICTR's previous decisions are considered as the primary sources.[829] The ICTY seems very cautious while applying decisions from national and international tribunals. For example, the *Kupreskic* case stated that:

> [i]nternational criminal courts such as the International Tribunal must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing law. Moreover, they should apply a stricter level of scrutiny to national decisions than to international judgements, as the latter are at least based on the same corpus of law as that applied by international courts, whereas the former tend to apply national law, or primarily that law, or else interpret international rules through the prism of national legislation.[830]

Although the *Ad Hoc* Tribunals showed a distinction between national and international decisions, both were applied in the process of custom formation. However, the findings of the *Ad Hoc* Tribunals did not clarify whether judicial decisions are reflective of both State practice

[824] *Prosecutor v Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1(2 October 1995) para. 83.
[825] Report on the work of the sixty-eighth session (2016), (document A/71/10) Chapter V, Identification of customary international law, General Commentary, Conclusion 13, para. 3.
[826] Yudan Tan, 'The Identification of Customary Rules in International Criminal Law' (2018) 34 Utrecht Journal of International and European Law 2, pp. 92-110.
[827] *Prosecutor v Erdemovic*, (Separate and Dissenting Opinion of Judge Cassese) IT-96-22-A (7 October 1997) para. 2-5.
[828] *Prosecutor v Stakic*, (Trial Chamber Judgment) IT-97-24-T (31 July 2003) para. 414.
[829] Ibid.
[830] *Prosecutor v Kupreskic*, (Trial Chamber Judgement) ICTY-95-16-T (14 January 2000) para. 542.

and *opinio juris*.[831] An assessment based on State practice and *opinio juris* is significant to support a rule customary international law. The Second Report of the ILC stated that 'the value of these decisions varies considerably, and individual decisions may present a narrow, parochial outlook or rest on an inadequate use of sources.'[832] Akande considered that the rules of customary international law recognised through judicial decisions provide an 'off the shelf' assessment of the law as the beginning point of resolving future cases.[833] This view of Akande can be interpreted as if he indicates to the existence of *opinio juris*, not State practice.

4.3.1.2 International Case Law

The decisions of international courts and tribunals provide significant evidential value as to the identification of existing customary rules. The *Kupreskic Trial* found the Nuremberg, Tokyo and other national trials essential because these tribunals dealt with provisions which were 'either declaratory of existing law or which had been gradually transformed into customary international law.'[834] The *Ad Hoc* Tribunals applied case law from Nuremberg and other military trials to find relevant evidence of customary international law. The ICTY in the *Tadic* case stated that case law should be indicative of the emergence of a norm of customary international law on the matter in question.[835] Birgit Schlutter mentioned that 'interestingly, the particularities of international criminal law were to be found expressed best by the case of the IMT's for Nuremberg and Tokyo, rather than by international conventions.'[836] For example, the *Celebici* Appeals Chamber relied on *Pohl* case and *Roechling* case law to determine existence of the term 'duty to know' in customary international law.[837] The *Celebici* Appeals Chamber also referred to the *Yamashita* case, where the United States Military Commission emphasised 'widespread offences' and 'lack of effective control by the commander to discover and control the criminal acts'.[838] The *Hostage* case was referred to conclude that if a commander of occupied territory 'fails to require and obtain complete information', he is guilty of a dereliction of his duty. The *Tadic* Appeals Chamber largely relied

[831] Ilias Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law' (2006) 6 International Criminal Law Review 1, p.131.
[832] Second Report on identification of customary international law by Sir Michael Wood (22 May 2014) A/CN.4/672, para 41, pp. 21-25.
[833] Dapo Akande, 'Sources of International Criminal Law' in Antonio Cassese ed., *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 53.
[834] *Prosecutor v Kupreskic*, (Trial Chamber Judgement) ICTY-95-16-T (14 January 2000) para. 541.
[835] *Prosecutor v Tadic*, (Appeals Chamber Judgement) ICTY-94-1-A (15 July 1999) para 256.
[836] Birgit Schlutter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff Publishers 2010) 192.
[837] *Prosecutor v Delalic et al.*, (Appeals Chamber Judgement) IT-96-21-A (20 February 2001) para. 229.
[838] Ibid., para. 228.

on the case law of the *Ministries* case[839], *Justice* case[840], *Eichmann* case and *Finta* case to satisfy that 'purely personal motives' do not constitute crimes against humanity under customary international law.[841] To support the identification of Joint Criminal Enterprise (JCE) under customary international law, the *Dordevic Appeals* Chamber referred to the post-World War II jurisprudence.[842] However, Bantekas criticised such kind of development, stating that 'clearly the sole employment of WWII case law to formulate the concept of joint criminal enterprise in international humanitarian law is an undisguised attempt to render as a primary source […] because this fits with the judges' line of legal reasoning. The selectivity and the use of supplementary sources and their slow elevation to primary sources is worrying, if not frightening.'[843]

In other words, it seems complicated to find an exact barometer to identify international crimes in the 'slow elevation' process of custom development. Antonio Cassese stated that the 'ICL is still in its infancy, or at least adolescence: consequently, many of its rules still suffer from their loose content, contrary to the principle of specificity proper to criminal law.'[844] The Nuremberg-era trials is viewed as the nascent stage of international criminal law, which reached its adolescence during the *Ad Hoc* tribunals' period. No specific requirement to assess evidence of law from the judicial decision has been demonstrated. Finding the evidence of law has often been considered the most challenging task for any international lawmakers. It is even more challenging to find international crimes under customary international law. There is no widespread acceptance by states, no methodological criteria, no evidence, no means is embraced to determine *usus* and *opinio juris.*[845] Birgit stated that 'if international jurisprudence is used as evidence of a crime's customary nature, attention has to be paid to the particular circumstances in which the individual judgment was delivered.'[846] He also stated that the

[839] *Prosecutor v Tadic*, (Appeals Chamber Judgement) ICTY-94-1-A (15 July 1999) para. 264.
[840] Ibid.
[841] Ibid., p. 265.
[842] *Prosecutor v Dordevic*, (The Appeals Chamber Judgement) IT-05-87/1-A (27 January 2014) para. 43.
[843] Ilias Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law' (2006) 6 International Criminal Law Review 1, pp.129-133.
[844] Antonio Cassese, *International Criminal Law* (Oxford University Press 2008) 17.
[845] Ilias Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law' (2006) 6 International Criminal Law Review 1, p. 132.
[846] Birgit Schlutter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff Publishers 2010) 199.

Nuremberg Tribunals' cases may not always be comparable with the cases tried before the ICTY.[847]

Nevertheless, judges of the *Tadic* Appeals Chamber found both international and national law as an indicator of international custom. The application of 'judicial practice and possibly evidence of consistent state practice, including national legislation' is significant when demonstrating the independent exercise of customary law.[848] The Chamber stated that '[h]ad customary international law developed to restrict the scope of those provisions which are at the very origin of the customary process, uncontroverted evidence would be needed.'[849] The *Ad Hoc* Tribunals' investigation to use judicial decisions as evidence is cursory, with a little guidance on what context national courts incorporated international law. As per the guidance of ILC, particular caution has been suggested while using national courts' decisions as evidence of law. Generally, national courts incorporate international law 'only in a particular way and to a limited extent.'[850] Along with the national and international judicial decisions, the *Ad Hoc* Tribunals have considered international principles and international legal instruments as evidence of customary international law. In particular, the *Ad Hoc* Tribunals extensively relied on Common Article 3 and the Marten Clause as evidence of customary international law. This thesis considers the *Ad Hoc* Tribunals' approach as human rights-based approach to identify rules of customary international law.

PART II

4.3.2 Human-Rights Based Approach: Common Article 3 And the Martens Clause

4.3.2.1 Common Article 3

The *Ad Hoc* Tribunals interpret Common Article 3 to consider this provision as declaratory of customary international law. In this regard, the chapter discusses that the *Ad Hoc* Tribunals has adopted the human rights approach to support new norms of customary international law. Gandhi stated that 'Common article 3 of the Geneva Convention is co-terminus with certain

[847] Ibid.; See also, Joanna Konderla 'International Customary Law in the Jurisprudence of the ICTY and the ICTR' (2018) 8 Wroclaw Review of Law, Administration & Economics 2, p. 290.
[848] *Prosecutor v Tadic* (Appeals Chamber Judgement) ICTY-94-1-A (15 July 1999) para. 290.
[849] Ibid.
[850] Report on the work of the sixty-eighth session (2016), (document A/71/10) Chapter V, Identification of customary international law, General Commentary, Conclusion 13, para. 7.

human rights which are non-derogable in character, i.e., rights which are protected in all times-peace, war and national emergency.'[851] Common Article 3 plays a significant role in the existence of customary rules of international humanitarian law during internal armed conflicts. The *Tadic* Jurisdiction Decision stated that some treaty provisions and Common Article 3, which include internal conflicts, have evolved into customary international law.[852] In this regard, The *Tadic* Trial Chamber referred to the *Military and Paramilitary Activities in and Against Nicaragua case* and stated that Common Article 3 reflects 'elementary considerations of humanity'.[853] The ICJ in the *Nicaragua* case stated that:

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity.[854]

Although the ICJ's Advisory Opinion has been discussed to support the evidence of the law, the Opinion did not contain any discussion about the application of international humanitarian law in internal armed conflicts.[855] The ICTY ascertained no other case law to support the existence of relevant customary international law norms. One single case may question the presence of sufficient requisite elements of customary international law. The defence in the *Celebici* case also argued that the *Tadic* Appeals Chamber failed to find the status of Common Article 3 under customary international law.[856] It lacks proper analysis of State practice and *opinio juris*. The defence also argued that 'the findings of the ICJ on the customary status of common Article 3 and its applicability to both internal and international

[851] M. Gandhi, 'Common Article 3 of Geneva Conventions, 1949 in the Era of International Criminal Tribunals' (2001) 1 ISIL Yearbook of International Humanitarian and Refugee Law 11, pp. 207-218.
[852] *Prosecutor v Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para. 97; *Prosecutor v Kuprekic* (Trial Chamber Judgement) ICTY-95-16-T (14 January 2000) para. 534.
[853] *Prosecutor v Tadic*, (Trial Chamber Judgement) IT-94-1-T *bis*-R117 (11 November 1999) para. 609; *Nicaragua Case*, ICJ Reports 1986, 114. Later, it was added in the report of the UN Secretary-General on the Statute of the International Criminal Tribunal for the former Yugoslavia. Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), para. 48 n.9, UN Doc. S/25704 (1993), reprinted in 32 ILM 1163, 11191 (1993); See also, *Corfu Channel* case, ICJ Reports 1949, p. 22.
[854] *Corfu Channel Case*, *(United Kingdom v Albania),* ICJ Reports 1949, p. 22, para. 215.
[855] Ilias Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law' (2006) 6 International Criminal Law Review 1, p. 130.
[856] *Prosecutor v Delalic et al.*, (The Trial Chamber Judgement) IT-96-21-T (16 November 1998) para. 142.

conflicts are *dicta*.'[857] The *Celebici* Trial Chamber encountered this argument relying on the *Nicaragua* decision that was Common Article 3, as an expression of elementary considerations of humanity applicable to all international armed conflicts, regardless of the nature of the conflict.[858] The Chamber also stated that the ICRC found the application of Common Article 3 is rational as it consistent with the 'logic and spirit of the Geneva Conventions.'[859] It is considered as the 'minimum yardstick' of international humanitarian law rules and applies to international armed conflicts. It contains 'core of the rules applicable […] to conflicts' such as violence to life outrages upon personal dignity.[860] It 'functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal.'[861]

The application of Common Article 3 obtains customary status both from human rights law and humanitarian law perspectives. Both branches of international law concentrate on 'respect for human values and the dignity of the human person. Both bodies of law take as their starting point the concern for human dignity, which forms the basis of a list of fundamental minimum standards of humanity.'[862] The *Ad Hoc* Tribunals found the existence of several prohibitions as international crimes based on Common Article 3. This Article is the reflection of 'fundamental humanitarian principles underlying the four Geneva Conventions',[863] the object of which is to respect the dignity of the human person and become a part of customary law from the time of its adoption.[864] In fact, fundamental humanitarian principles were developed through centuries of warfare.[865] These principles contain significant value to the evolution of customary international law relating to Common Article 3. Thereby, as an 'expression to fundamental standards of humanity' it is applicable in all circumstances.[866] Schachter stated that condemnation statements are adequate to form custom if the conduct in question violates the basic concept of human dignity.[867] The *Tadic* Trial Chamber considered

[857] Ibid.
[858] Ibid.
[859] Ibid., para. 146.
[860] Ibid.
[861] *Prosecutor v Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para. 89; *Prosecutor v Kunarac* (Trial Chamber Judgement) ICTY -96-23-T or ICTY-96-23-T/1 (22 February 2001) para. para. 403.
[862] *Prosecutor v Delalic et al.*, (The Trial Chamber Judgement) IT-96-21-T (16 November 1998) para. 149.
[863] Ibid., para. 301.
[864] Ibid., para. 301.
[865] Ibid., para. 143
[866] Ibid., para. 145
[867] Oscar Schachter, 'International Law in Theory and Practice: General Course in Public International Law', (1982) 178 *Recueil des Cours* 9, p. 336.

the breach of '"elementary considerations of humanity" as the breach of which may be considered to be a "breach of a rule protecting important values" and which "must involve grave consequences for the victim".'[868]

This section discusses the available State practice and *opinio juris* to identify Common Article 3 in internal armed conflict. In this regard, the *Akayesu* Trial Chamber noted states' acknowledgement and incorporation of Common Article 3 in domestic penal codes.[869] The Appeals Chamber in the *Tadic* Jurisdiction Decision referred to the Spanish Civil War (1936-39), where no available State practice was found distinguishing between international and internal wars.[870] Following that war, the Great Britain protested against the bombing of Barcelona, which led to the adoption of a resolution by the Assembly of the League of Nations on 30 September 1938 concerning the Spanish conflict and the Sino-Japanese War.[871] These practices were reaffirmed by several contemporaneous resolutions by the Assembly of the League of Nations and reinforced in subsequent practice, such as in the conduct of the Democratic Republic of the Congo in its civil war. The statement of the Prime Minister of Congo, issued on 21 October 1964, admitted a similar commitment to the conduct of hostilities.[872] To underscore the importance of the statement as State practice, it was suggested that '[t]his statement must not be read as an offer or a promise to undertake obligations previously not binding; rather, it aimed at reaffirming the existence of such obligations and spelt out the notion that the Congolese Government would fully comply with them.'[873] The *Tadic* Jurisdiction Decision also included the Operational Code of Conduct for Nigerian Armed Forces, where the Federal troops were duty-bound to respect the rules of the Geneva Conventions as evidence of State practice.[874] Thus, the Chamber justified the evolution of general principles of customary international law relating to internal armed conflict.[875] Not only was the Chamber concerned with the state officials' adherence to the state's activities, but also it took into account the intended behaviour of the rebels in El Salvador in 1988.[876] The

[868] *Prosecutor v Tadic*, (Trial Chamber Judgement) IT-94-1-T (7 May 1997) para. 612.
[869] *Prosecutor v Akayesu*, (Trial Chamber Judgement) ICTR-96-4-T (2 September 1998) para. 608. The Chamber states that "the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3."
[870] *Prosecutor v Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para. 100.
[871] Ibid., para. 101.
[872] Ibid., para. 105.
[873] Ibid.
[874] Ibid., para. 106.
[875] Ibid.
[876] Ibid., para. 107.

Tadic Jurisdiction Decision also stated that the Security Council's unanimous adoption of the resolution concerning the situation of civil strife in Somalia reflects *opinio juris*. It condemns breach of humanitarian law in internal armed conflicts entailing individual criminal responsibility.[877] The international instruments which have been considered as contributory to the formation of customary international law in this regard are a) the action of the ICRC[878], b) two resolutions adopted by the United Nations General Assembly[879], c) certain declarations made by the Member States of the European Community, and d) the Additional Protocol II of 1977.[880] The influence of Common Article 3 is observed by Doswald-Beck in recognition of crimes against humanity as an international crime, in the conclusion of the 1948 Genocide Convention and in the regulation by a multilateral treaty of non-international armed conflicts for the first time in 1949.[881]

Common Article 3 also played a prominent role in deciding individual criminal responsibility in internal armed conflict. The defence in the *Celebici* case argued that the ICTY was unable to exercise jurisdiction over any matter that falls beyond the customary rules of international humanitarian law. The main point of defence argument was on the concept of individual criminal responsibility, as this concept was new, and no such development of this concept had been introduced since the adoption of the four Geneva Conventions in 1949.[882] However, the *Celebici* Trial Chamber, citing the *Tadic* Jurisdiction Decision, encountered no difficulties defining individual criminal responsibility in internal and international armed conflicts. The *Tadic* Jurisdiction Decision considered the principles and rules of humanitarian law as 'elementary considerations of humanity'.[883] The Decision also discussed the Nuremberg judgement, which stated that 'individual criminal responsibility is not barred by the absence of treaty provisions on the punishment of breaches.'[884] The *Tadic* Jurisdiction Decision noted that the 'many elements of international practice show that States intend to criminalise serious

[877] Ibid., para. 133; S.C. Res. 794 (3 December 1992); S.C. Res. 814 (26 March 1993).
[878] The ICRC states that the 'common sense would suggest that such rules, and the limits they impose on the way war is waged, should be equally applicable in international and non-international armed conflicts.'
[879] UN General Assembly, Respect of human rights in armed conflicts, 19 December 1968, A/RES/2444; UN General Assembly, Basic principles for the protection of civilian populations in armed conflicts, 9 December 1970, A/RES/2675.
[880] *Prosecutor v Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para. 108.
[881] Doswald-Beck, 'Implementation of International Humanitarian Law in Future Wars' (1999), 52 Naval War College Review 1, pp. 47-48.
[882] *Prosecutor v Delalic et al.*, (The Trial Chamber Judgement) IT-96-21-T (16 November 1998) para. 294.
[883] *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para.129.
[884] Ibid., para. 128.

breaches of customary rules and principles on internal conflicts.'[885] However, this decision did not explain what constitutes 'international practice' or whether it meets the requirements of customary international law. The Chamber drew reference to the prosecutions before Nigerian courts during the Nigerian Civil War.[886] It also includes references to a few national military manuals to justify breaches of Common Article 3 is punishable. The Chamber noted two resolutions[887] on Somalia, where Security Council unanimously condemned breaches of humanitarian law and held the authors of such breaches "individually responsible". These resolutions were considered reflective of *opinio juris*.[888] The *Akayesu* case mentioned both State practice and *opinio juris* for breaches of Common Article 3 also arise in consideration of individual criminal responsibility under customary international law.[889] Similarly, judge Abi-Saab noted that individual criminal responsibility for grave breaches provisions is 'a growing practice and *opinio juris* both of states and international organisations'.[890] The observation of judge Abi-Saab can be interpreted as if he emphasised one element of custom based on the practice of international organisations. It may cause difficulties if someone looks for *opinio juris* of states where the practice is growing, not settled. The legal obligation of states may not arise from 'growing practice'.

Similar types of arguments were provided by the *Celebici* Trial Chamber when defence argued that 'the states adopting the four Geneva Conventions did not include Common Article 3 in the system of "grave breaches" established to enforce the Conventions' proscriptions.'[891] The *Celebici* Trial Chamber referred to the *Tadic* Jurisdiction Decision and observed the broader scope of Common Article 3 that meant to cover all serious violations of international humanitarian law and make the jurisdiction 'watertight'.[892] The Trial Chamber emphasised the 'intention' of the Security Council that wanted to include all serious violations of international humanitarian law within the jurisdiction of the ICTY.[893] The 'intention' of the Security Council may not be regarded as indicative of *opinio juris*, let alone State practice. The *Celebici* Trial

[885] Ibid., para. 130.
[886] Ibid., para. 130-31.
[887] UN Security Council, Security Council 794 [Somalia], 3 December 1992, S/RES/794 (1992) and UN Security Council, Security Council resolution 814 (1993) [Somalia], 26 March 1993, S/RES/814 (1993).
[888] *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1(2 October 1995) para. 130.
[889] *Prosecutor v Akayesu*, (Trial Chamber Judgement) ICTR-96-4-T (2 September 1998) para. 616.
[890] *Prosecutor v Tadic*, (Separate opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, In the Appeals Chamber) IT-94-1-AR72 (2 October 1995).
[891] *Prosecutor v Delalic et al.*, (The Trial Chamber Judgement) IT-96-21-T (16 November 1998) para. 294. [emphasis added].
[892] Ibid., para. 298.
[893] Ibid., para. 299. [Emphasise added in italic]

Chamber found that the development of Common Article 3 concerning serious violations of human rights was illustrative of the 'evolving' nature of customary international law.[894]

4.3.2.2 The Martens Clause

The reference to the 'principles of humanity' and 'dictates of public conscience' as stated in the Marten Clause is the basis to justify the scope and purpose customary international law application. Any imprecise, undefined or a new situation can resort to this Clause to identify customary international law.[895] The Martens Clause appeared as a part of international humanitarian law. The 1899 Hague Convention concerning the laws and customs of war on land contains this Clause. It states that:

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

There is no accepted definition of the Martens Clause.[896] Therefore, it receives a variety of interpretations. The ICJ declared in the *Legality of the Threat or Use of Nuclear Weapons* that the Martens Clause itself is a part of customary international law.[897] The ICJ Advisory Opinion did not provide any specific interpretation of this Clause. The foundation of the Clause relies on the 'laws of humanity and the requirements of the public conscience'. The *Ad Hoc* made an extensive reference to this Clause in several judgements. This Clause has been interpreted to define the customary rules of international humanitarian law. This chapter argues that this kind of interpretation adopts human rights approach to justify the existence of customary rules. Theodor Meron stated that this Clause symbolises the 'humanitarian and

[894] Ibid., para. 301.
[895] *Prosecutor v. Hadzihasanovic*, (Appeals Chamber Judgement) IT-01-47-AR72 (Separate and Partially Dissenting Opinion of Judge David Hunt Command Responsibility Appeal) 16 July 2003, para. 40.
[896] Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm.
[897] *Legality of the Threat or Use of Nuclear Weapons* (Advisory opinion), ICJ Reports 1996, p. 259, para. 84.

humanizing' strand of the laws of war.[898] It serves the primary objective of international criminal law, which is to protect the individual human being out of 'humanising' purpose.[899]

The Marten Clause or 'the laws of humanity and the requirements of the public conscience' are linked to the emergence of the customary rules of international crimes. It provides validity as to the foreseeability of a crime that has no written existence. Meron claimed that 'public conscience' can be reflected in two parts: public opinion and government opinion.[900] Both opinions are formed with the influence or aid of popular opinion to develop certain norms which are declaratory of custom.[901] Nauru argued in its submission before ICJ in the Advisory Opinion that the Martens Clause indicates 'legal communications in the name of dictates of public conscience'. It referred to a 'host of draft rules, declarations, resolutions, and other communications expressed by persons and institutions highly qualified to assess the laws of war although having no governmental affiliations.'[902] Weatherall indicated 'conscience' as 'juridical conscience of mankind', that 'depicts the incorporation of normative considerations, inherent in the general legal principle of human dignity, into positive law through *opinio juris sive necessitatis* as peremptory norms of *jus cogens.*'[903] In his view, 'judicial practice indicates a plurality of potential forms in which *opinio juris sive necessitatis* may be articulated pursuant to the emergence of peremptory norms.'[904] The underlying conditions of the Marten Clause reflect what people consider necessary as a law.

The Martens Clause reflects the necessity of having a law; in other words, it refers to *de lege ferenda,* not *de lege lata*. The essentiality of this clause is mentioned in the *Kupreskic* case. The *Kupreskic* Trial Chamber stated that 'this clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances, the scope and purport of the rule must be defined with reference to those principles and dictates.'[905] This case highlights the formation of a customary

[898] Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006) p. 5.
[899] Birgit Schlutter, 'Constitutionalisation at its best or at its worst? Lessons from the development of customary international criminal law' available at - https://esil-sedi.eu/wp-content/uploads/2018/04/Schleutter.pdf, p. 4
[900] Theodor Meron, 'The Marten Clause, Principle of Humanity, and Dictates of Public Conscience' (2000) 94 American Journal of International Law 78, p. 83.
[901] Ibid.
[902] Nauru, Written submission on the advisory opinion requested by the World Health Organization, p. 68.; RupertTicehurst,'TheMartensClauseandtheLawsofArmedConflict'https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm.
[903] Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge University Press 2015) 142
[904] Ibid., p. 143.
[905] *Prosecutor v Kupreskic*, (Trial Chamber Judgement) ICTY-95-16-T (14 January 2000) para. 525.

rule emphasising the existence of *opinio juris* or *opinio necessitatis* as manifested in the Martens Clause.[906] Judge Antonio Cassese also noted that the accommodated effects of the Martens Clause and *opinio juris* could turn into a custom and oblige the major military powers to follow it, regardless of whether they have ratified the Additional Protocol I.[907]

In contrast, some authors considered 'the Marten Clause has by now become one of the legal myths of international society and has been hailed as a significant turning point in the history of IHL.'[908] This Clause serve as 'fundamental guidance' to interpret rules of humanitarian law.[909] This is an indirect custom formation process, providing special importance to one element i.e., *opinio juris*.[910] Kuhli and Gunther considered *Ad Hoc* tribunals' work in this context as judicial law-making.[911] They added that the law-making process in this regard is not straightforward. Instead, the *Ad Hoc* Tribunals have shown a 'critical reflective attitude' by depending too much on the principles of humanity and public conscience.[912]

Besides the human-rights approach, the *Ad Hoc* Tribunals substantiated their findings of the customary nature of international crimes based on international instruments. The section that follows provides examples of a few international crimes where an instrument-based approach has been developed to identify customary international law. The Tribunals applied treaty provisions that were unquestionably binding on the parties at the time of the alleged offence and not in conflict with peremptory norms.[913] Although the *Ad Hoc* Tribunals applied general rules of interpretation to ensure treaty provisions are reflective of customary international law, the section below shows to what extent the *Ad Hoc* Tribunals analysed treaty provisions as evidence of State practice and *opinio juris*.

---

[906] Ibid., p. 531.
[907] Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 European Journal of International Law 1, p. 187.
[908] Paola Gaeta, Salvatore Zappala, Jorge E. Vinuales (eds), Cassese's International Law (Oxford University Press 2020) 370.
[909] Ibid.
[910] Ibid.
[911] Milan Kuhli & Klaus Gunther, 'Judicial Lawmaking, Discourse Theory and the ICTY on Belligerent Reprisals' (2011) 12 German Law Journal 5. p. 1274.
[912] Ibid., p. 1276.
[913] Andre Klip and Goran Sluiter, *Annotated Leading Cases of International Criminal Tribunals* (The International Criminal Tribunal for the Former Yugoslavia, Volume. 7) (Intersentia, Hart, Verlag Osterreich 1999) p.19; See also *Tadic* Jurisdiction Decision, para.143.

4.3.3 International Instruments as Evidence of Customary International Law: Instruments-Based Approach

Treaties and other international instruments have been primarily visited and interpreted by the *Ad Hoc* Tribunals in the making of international crimes. This section analyses whether the reference to the international instruments as an interpretative aid satisfies the classic definition of customary international law or not. The international instruments include instruments of international humanitarian law and international human rights law. Reference to international instruments includes, but is not limited to, provisions of international conventions, *travaux preparatoires*, draft codes, opinions expressed by members of the Security Council when voting on resolutions, and the views of the Secretary-General of the United Nations. The *Celebici* Trial Chamber stated not to ignore any of the instruments while interpretating the Tribunals' statute. In the Chamber's view 'the vast majority of members of the international community rely upon such sources in construing international instruments.'[914] The *Ad Hoc* Tribunals attempt to provide a purposive interpretation of the existing provisions of customary international law relying on sources mentioned above.

On some occasions, the *Ad Hoc* tribunals' judges seem too swift to identify norms of customary international law. For example, the Trial Chamber in the *Furundzija* case discusses the judges' efforts to crystalise customary international law with 'extra-conventional effect'.[915] This judgement provided no explanation how an 'extra-conventional effect' can be construed and how it would be a reflection of State practice and *opinio juris*. This section shows a broad union of all instruments, both international humanitarian law and international human rights law, to demonstrate the ascertainment of new customary norms, with no rigorous examination of the presence of both elements- state practice and *opinio juris*.

4.3.3.1 International Conventions and Resolutions

The *Ad Hoc* Tribunals widely interpreted treaty provisions to identify rules of customary international law on numerous occasions. As stated before in the first chapter, that treaty obligation is independent of customary obligation. It is generally expected that tribunals should analyse the materials cited and clarify whether it reflects state practice and *opinio juris*.

[914] *Prosecutor v Delalic et al.,* (The Trial Chamber Judgement) IT-96-21-T (16 November 1998) para.169.
[915] *Prosecutor v Furundzija*, (Trial Chamber II) IT-95-17/1-T (10 December 1998) para. 160. The Chamber stated that "An extra-conventional effect may however be produced to the extent that the definition at issue codifies or contributes to developing or crystallising customary international law."

However, the extensive analysis on the two-element approach seems missing in the work of the *Ad Hoc* Tribunals. For example, to define 'torture'- a crime under customary international law, the Trial Chamber in the *Furundzija* case referred to Common Article 3 of the Geneva Conventions 1949 and Article 4 of the Additional Protocol II. The Trial Chamber, citing a decision by the Constitutional Court of Colombia, stated that 'the Trial Chamber does not need to determine whether the Geneva Conventions and the Additional Protocols passed in customary law in their entirety [...] or whether, as seems more plausible, only the most important provisions of these treaties have acquired the status of general international law. In any case, the proposition is warranted that a general prohibition against torture has evolved in customary international law.'[916] It is not clear whether the word 'passed in' means creation or reflection of customary international law. As per the Special Rapporteur of ILC, treaty provisions 'may reflect' a rule of customary international law. The word 'may reflect' warns that 'treaties cannot create customary international law or conclusively attest to it.'[917] The rigorous examination lacks clarification on how the Geneva Conventions and Additional Protocols satisfy the two elements of customary international law. It requires to emphasise that the inherent nature of International humanitarian law conventions is not associated with criminal norms.

The Chamber also found this prohibition in the Lieber Code and Articles 4 and 46 of The Hague Conventions 1907, with the conjunctive influence of the Martens Clause.[918] This should be noted here that the Nuremberg Charter did not have any specific provision on the prohibition of torture. However, Article II (1) (c) of Allied Control Council Law No. 10 had a provision on the prohibition of torture as a crime against humanity. International Humanitarian Law does not provide any definition of torture. Article 1(1) of the Torture Convention 1984 contains the definition of 'Torture'.[919] The trajectories of customary international law, starting with the provisions of the treaty, are not specified, pointing out the two-element approach.

The *Furundzija* Trial Chamber appears to have relied on states' inaction to identify evidence of customary international law. It stated that 'no state ha[d] ever claimed that it was authorised to practice torture in time of armed conflict, nor ha[d] any state shown or manifested

[916] Ibid. para. 137.
[917] Report on the work of the sixty-eighth session (2016), (document A/71/10) Chapter V, Identification of customary international law, General Commentary, Conclusion 10, para. 3
[918] *Prosecutor v Furundzija*, (Trial Chamber II) IT-95-17/1-T (10 December 1998) para. 160.
[919] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, UNTS, vol. 1465, p. 85.

opposition to the implementation of treaty provisions against torture.'[920] Several other factors that ripe the prohibition of torture into customary law are, first, the ratification of the treaties, particularly the adoption of the Geneva Conventions by a large number of states. Second, the absence of the persistent objector rule claiming the practice of torture as legal. Third, the *Nicaragua* case' confirmation on Common Article 3 of the Geneva Convention, including torture among other prohibitions, as a settled principle under customary international law in both international and internal armed conflicts.[921] No doubt, this is a difficult task to find 'positive practice' of states as opposed to 'inaction' concerning a prohibitive rule. In this regard, the Special Rapporteur comment seems useful to identify the evidence of customary international law. He stated that '[c]ases involving such rules will most likely turn on evaluating whether the practice (being deliberate inaction) is accepted as law.'[922] This statement appears offering an investigation on case law as an additional criterion to consider 'inaction' as evidence of law. The *Furundzija* Trial Chamber also specified a few grounds of justification for the ascertainment of customary international law norms based on the definition laid down in the Torture Convention. The Chamber stated that:

> First of all, there is no gainsaying that the definition laid down in the Torture Convention, although deliberately limited to the Convention, must be regarded as authoritative, *inter alia*, because it spells out all the necessary elements implicit in international rules on the matter. Secondly, this definition, to a very large extent coincides with that contained in the United Nations Declaration on Torture of 9 December 1975, hereafter "Torture Declaration". It should be noted that this Declaration was adopted by the General Assembly by consensus. This fact shows that no member State of the United Nations had any objection to such definition. In other words, all the members of the United Nations concurred in and supported that definition. Thirdly, a substantially similar definition can be found in the Inter-American Convention. Fourthly, the same definition has been applied by the United Nations Special Rapporteur and is in line with the definition

[920] *Prosecutor v Furundzija*, (Trial Chamber II) IT-95-17/1-T (10 December 1998) para. 137.
[921] Ibid., para. 138.
[922] Report on the work of the sixty-eighth session (2016), (document A/71/10) Chapter V, Identification of customary international law, General Commentary, Conclusion 3, para. 4.

> suggested or acted upon by such international bodies as the European Court of Human Rights and Human Rights Committee.'[923]

In addition, the *Celebici* case referred to regional and international human rights law instruments to identify torture as international crime under customary international law. The Trial Chamber has shown the presence of several international human rights law instruments such as the Universal Declaration of Human Rights, including International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ("Torture Convention") and 1975 Declaration of the United Nations General Assembly.[924] The *Celebici* Trial Chamber also referred to a number of regional human rights treaties, including the European Convention on Human Rights, the American Convention on Human Rights, the Inter-American Convention to Prevent and Punish Torture, and the African Charter on Human and Peoples' Rights.[925] Based on the instruments mentioned, the Trial Chamber stated that the prohibition of torture was also a norm of customary law.[926] In 2012, the ICJ also affirmed that the prohibition of torture is grounded in a 'widespread international practice and on the *opinio juris* of States'.[927] However, the identification of torture as international crimes under customary international yet ask for other supporting evidence.

The *Celebici* Chamber also pointed out 'consensus' element to identify torture as an international crime. In this regard, the Chamber made a comparison among the Torture Convention 1984, the Declaration on Torture 1975 and the Inter-American Convention 1985.[928] The Chamber concluded that 'it may, therefore, be said that the definition of torture contained in the Torture Convention includes the definitions contained in both the Declaration on Torture and the Inter-American Convention and thus reflects a *consensus* which the Trial Chamber considers to be representative of customary international law.'[929] The Chamber has no discussion how 'consensus' among the international instruments reflects the existence and content of customary international law. This is also not clear whether this 'consensus' indicates

[923] *Prosecutor v Furundzija*, (Trial Chamber II) IT-95-17/1-T (10 December 1998) para. 160.
[924] *Prosecutor v Delalic at al.*, (The Trial Chamber Judgement) IT-96-21-T (16 November 1998) paras. 447, 452, 453.
[925] Ibid., para. 452.
[926] Ibid., para. 454.
[927] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),* ICJ Reports 2012, P. 457
[928] *Prosecutor v Delalic at al.*, (The Trial Chamber Judgement) IT-96-21-T (16 November 1998), paras. 456-458
[929] Ibid., para. 459. (emphasise added).

customary obligation or treaty obligation among the states. The *Nahimana* Appeals Chamber suggested that 'consensus' among States is significant to form customary international law.[930]

In contrast, the observation of *Kunarac* Appeals Chamber considered the conventional definition of torture as a part of customary international law as long as it implies state responsibility.[931] Treaty provisions impose obligation upon States, not on individual. The *Furundzija* Trial Chamber stated that 'State parties to the relevant treaties have been granted, and are obliged to exercise, jurisdiction to investigate, prosecute and punish offenders. Thus, in human rights law too, the prohibition of torture extends to and has a direct bearing on the criminal liability of individuals.'[932] The existence of individual responsibility arose from the international community's awareness of 'outlawing this heinous phenomenon'.[933] The *Furundzija* Trial Chamber' conclusion in this regard does not meet any consistent methodology of custom identification. International community's awareness may, at best, guide what should be law in future, not what is law.

The *Furundzija* Trial Chamber referred to similar kinds of instruments, as mentioned above, to define the prohibition of 'rape' under customary international law. 'Rape' in war time is expressly prohibited by treaty law. This provision seems to have received the evidence of 'acceptance as law' due to the repeated use of similar term in various treaties. For example, the presence of customary rules prohibiting 'rape' was identified tracing back to Article 44 of the Lieber Code, Article 46 of the Hague regulations annexed to Hague Convention IV, read in conjunction with Marten Clause, Article 27 of Geneva Convention of 1949, Article 76 (1) of the Additional Protocol I of 1977 and Article 4 (2) (e) of the Additional Protocol II of 1977.[934] Common Article 3 to the Geneva Conventions of 1949 and Article 4 of the Additional Protocol II were referred as the primary instruments to justify the prohibition of rape and serious sexual assaults under customary international law. These provisions are used as a guidance to justify 'rape as crimes against humanity' as well. The Chamber appears to have taken a very quick decision while asserting a norm under customary international law. For example, the guidance as to the constitution of 'other serious sexual assaults' as international crimes under customary international is ambiguous. The Chamber identified the existence of it from the implicit

[930] *Prosecutor v. Nahimana et al.*, (Appeals Chamber Judgement) ICTR -99-52-A (28 November 2007) (Partly Dissenting Opinion of Judge Meron) paras, 5-8.
[931] Prosecutor v *Kunarac et al.*, (Appeals Chamber Judgement) IT-96-23 & IT-96-23/1-A (12 June 2002) para. 146.
[932] *Prosecutor v Furundzija*, (Trial Chamber II) IT-95-17/1-T (10 December 1998) para.145.
[933] Ibid., para.146.
[934] Ibid., para.168, 165.

meaning of the provisions stated concerning the prohibition of 'rape'.[935] This decision shows an overreliance on international humanitarian law and international human rights law instruments to support the identification of the prohibition of rape and serious sexual assault under customary international law.[936]

Similarly, the *Kunarac* Trial Chamber explored various international human rights instruments and identified existing customary rules on 'slavery'. The Trial Chamber's reference to the object of various international human rights treaties was considered as significant to define 'slavery' as an international crime under customary international law. The Chamber mentioned about the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the Fundamental Freedoms of 1950, the American Convention on Human Rights of 1969, and the African Charter on Human and Peoples' Rights of 1981.[937] The Chamber also referred to the 1926 Slavery Convention, the International Labour Organisation's draft of the 1930 Draft Convention on Forced and Compulsory Labour, the Convention Concerning the Abolition of Forced labour 1957 (the Forced Labour Convention) drafted under the auspices of the ILO, which was intended to complement the Slavery Convention, the Supplementary Slavery Convention, and the Forced and Compulsory Labour Convention.[938] The Chamber also noted relevant provisions from Additional Protocol II and the 1949 Geneva Convention IV.[939] Notably, 'Article 4 ("Fundamental guarantees") of Additional Protocol II, as the Protocol "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949".[940] The Chamber over-emphasised on civil and political rights to identify 'slavery' as an international crime, while Bikundo argued that the reference to economic and social rights could have been more 'neutral' to keep pace with human rights law.[941] The *Nahimana* Trial judgement similarly followed the guidelines provided in the ICCPR and Convention on the Elimination of all Forms

[935] Ibid., para.165.
[936] Ibid., p.168.
[937] *Prosecutor v Kunarac et al.,* (Trial Chamber Judgement) ICTY -96-23-T or ICTY-96-23-T/1 (22 February 2001) para. 539.
[938] Ibid.
[939] *Prosecutor v Kunarac et al.,* (Trial Chamber Judgement) ICTY -96-23-T or ICTY-96-23-T/1 (22 February 2001) para. 528.
[940] Ibid., para. 529.
[941] Edwin Bikundo, 'Enslavement as a Crime against Humanity: Some Doctrinal, Historical, and Theoretical Considerations' in Kevin Jon Heller, Frederic Megret, Sarah MH Nouwen, Jens David Ohlin, Darryl Robinson (eds) *The Oxford Handbook* on *International Criminal law* (Oxford University Press 2020) 361.

of Racial Discrimination (CERD) to observe the interaction between incitement and hate speech.[942]

The *Kunarac* Trial Chamber did not provide any grounding argument as to how these written texts are sufficient to identify evidence of customary international law. The Special Rapporteur of the ILC stated that 'written text' is not enough to show evidence of customary international law. To consider treaties and resolutions of international organisations as evidence of custom, the significant part would be looking into the 'surrounding circumstances'.[943] Also, the Chamber did not mention how these treaties would impose individual criminal responsibility. It can be generally assumed that the abovementioned references to slavery reflect widespread acceptance by the international community. The widespread acceptance, no doubt, reflects the prohibition of slavery. However, this remains questionable whether sufficient State practice and *opinio juris* can be inferred to consider 'slavery' an international crime. States may have accepted this prohibition as a violation of human rights, not as an international crime. An analysis of States' conduct is significant to understand the views of states during ratification. The ILC's draft conclusions called for monitoring 'state conduct in relation to treaties' in order to find State practice.[944] There is no doubt that states are bound to prohibit slavery from the basic human rights perspective, Lenzerini stated the following reasons in this regard:

> a) first, all fundamental conventions pertaining to heinous violations of basic human rights oblige state parties to treat such violations as criminal offences under their domestic laws; although they are conventional provisions, they reflect an unequivocal state practice; b) in addition, it is not disputed that, after the adoption of the UN Charter, the matter of human rights has been progressively removed from the domestic jurisdiction of states; as a consequence, states are bound to guarantee basic human rights to their citizens, and so to protect them, inter alia, from private slavery and slavery-like practices; c) finally, the principle in point has been generally confirmed,

[942] *Prosecutor v. Nahimana et al*., (Trial Chamber Judgement) ICTR-99-52-T (3 December 2003) para.1074
[943] Report on the work of the sixty-seventh session (2015) (document A/70/10) Chapter VI, Identification of Customary International law, para. 67.
[944] Draft Conclusion 6, Identification of Customary International Law, A/CN.4/L.872, p. 2.

> for basic human rights, by several international and domestic judicial decisions.[945]

The *Kupreskic* Trial Chamber identified states' inaction as State practice to identify the prohibition on 'reprisals against civilians' in customary international law. Articles 57 and 58 of the Additional protocol I contain this provision. The *Kupreskic* Trial Chamber stated that 'such provisions […] are now part of customary international law not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any state, including those which have not ratified the Protocol.'[946] The reference to this prohibition is also found in Articles 51(6) of Additional Protocol I of 1977.[947] The ratification of Additional Protocol I by many states may stand as confirmation of acceptance of this principle. The customary presence of this crime also has been deduced from states' inaction or abstention. The ICTY Trial Chamber referred to evidence of practice from states' inaction from the use of reprisals in the last fifty years in various international and internal armed conflicts.[948] The ICTY in the *Martic* Review of the Indictment stated that this principle was substantially upheld by the ICRC in its Memorandum of 7 May 1983 and observed in the Iran-Iraq War.[949] However, states' inaction needs to be supported by states' knowledge. To consider inaction as an evidence of State practice, the significant part is to observe whether states possess the 'actual knowledge of the practice in question' or whether states are 'deemed to have had such knowledge'.[950]

Nevertheless, the ICTY's concern was whether the First Additional Protocol 1977 would be applied to the states who have not ratified it.[951] The Chamber admitted that there was no emerged body of State practice supporting the elements of custom. In this regard, the Chamber justified this principle under customary international law based on the Marten Clause. The *Kupreskic* Chamber stated that 'this is however an area where *opinio juris sive necessitatis* may play a much greater role than *usus*, as a result of the […] Martens Clause.'[952] In this regard, the presence of *opinio juris* is also confirmed by the adoption of a Resolution of the UN General

[945] Federico Lenzerini, 'Suppressing Slavery under Customary International Law' (2000) 10 Italian Yearbook of International Law 1, p. 157.
[946] *Prosecutor v Kupreskic et al.,* (Trial Chamber Judgement) ICTY-95-16-T (14 January 2000) para. 524.
[947] Ibid., para. 527.
[948] Ibid., para. 533.
[949] *Prosecutor v Martic*, Review of the Indictment Pursuant to Rule 61, No. IT-95-11-R61, (13 March 1996) para. 13.
[950] Report on the work of the sixty-seventh session (2015) (document A/70/10) Chapter VI, Identification of Customary International law, para. 66.
[951] *Prosecutor v Kupreskic et al.,* (Trial Chamber Judgement) ICTY-95-16-T (14 January 2000) para. 527
[952] Ibid., para. 527.

Assembly in 1970, which stated that 'civilian populations or individual members thereof, should not be the object of reprisals.'[953] The protection of civilians in time of armed conflict is a universally recognised principle. The *Kupreskic* Trial Chamber drew reference to the Resolution adopted by British Prime Minister Neville Chamberlain concerning the protection of civilian populations against bombing from the air. The Resolution stated that 'the intentional bombing of [the] civilian population is illegal.'[954] In international humanitarian law, special protection against attacks is given in Article 19 of the Fourth Geneva Convention.[955] The *Kupreskic* Trial Chamber pointed out that the international principle- reasonable care must be taken in attacking military objectives- was referred to by the United Kingdom in 1938 during the Spanish Civil War.[956] The *Tadic* Appeals Chamber also emphasised the General Assembly Resolutions that affirm certain rules of war regarding the 'protection of civilians and property applicable in both internal and international armed conflicts.'[957] The *Ad Hoc* tribunals have used resolutions in such a way as if it can create custom. Generally, resolutions neither form custom nor perform as 'conclusive evidence of their *existence and content*, however they may have value in providing evidence of existing or emerging law.'[958] In most of the cases, the *Ad Hoc* Tribunals provided mere reference to the resolution, without verifying the concerned states acknowledgment to the existence of customary international law. Hence, mere reference, without all due caution, is always unwarranted.

The ICTY in the *Galic* case identified several sources, including resolutions, to support 'the prohibition against terrorising the civilian population' as a rule of customary international law. The prosecution in the *Galic* case 'cited certain rules on aerial warfare prepared in the 1920s but not finalised, two UN resolutions from 1994 condemning atrocities in the former Yugoslavia, and the Spanish penal code from 1995.'[959] The *Galic* Trial Chamber noted a number of international instruments confirming 'terror against the civilian population as a war crime' under customary international law. The Trial Chamber referred to the use of 'systematic

[953] Ibid., para. 532.
[954] Ibid., para. 521; See also, Paul J. Goda S.J, 'The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War' (1966) 33 Military Law Review 93, p. 98
[955] Ibid., para. 523.
[956] Ibid., para. 524.
[957] *Prosecutor v Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) paras 110-112; See also, UN General Assembly, Respect of human rights in armed conflicts, 19 December 1968, A/RES/2444 and UN General Assembly, Basic principles for the protection of civilian populations in armed conflicts, 9 December 1970, A/RES/2675.
[958] Report on the work of the sixty-eighth session (2016), (Document A/71/10) Chapter V, Identification of customary international law, General Commentary, Conclusion 12, para. 1. (emphasise in original)
[959] *Prosecutor v Galic*, (Trial Chamber Judgment) IT-98-29-T (5 December 2003) para. 69.

terrorism' in the Report of the Commission on Responsibilities 1919 and the Australian War Crimes Act 1945.[960] The reference given in Article 33 of Geneva Convention IV and in Article 51 (2) of Additional Protocol I also used by the *Galic* Chamber in identifying the customary status of this rule.[961] The *Galic* Appeals Chamber also added some other provisions of international instruments such as Article 13 (2) of the Additional Protocol II, Article 6 of the Turku Declaration of Minimum Humanitarian Standards.[962] Reference to the prohibition of terror under customary international law can be found in the number of state parties to Additional Protocol I and II by 1992.[963] The Chamber also referred to 'official pronouncements of States and their military manuals' as an indication of the customary international law.[964] The military manuals are not automatic evidence of State practice unless it is 'public, at least to one other State.'[965]

Judge Meron referred to the Hague Convention 1907 to consider spreading terror among the civilian population is a part of customary international law.[966] He drew an analogy to identify evidence of custom, stating that 'if threats that no quarter will be given are crimes, then surely threats that a party will not respect other foundational principles of international law - such as the prohibition against targeting civilians - are also crimes. The terrorisation at issue here is exactly such a threat.'[967] On the other hand, Judge Schomburg, in his separate and partially dissenting opinion, submitted that it was impossible to assert that the crime of terror was beyond doubt a part of customary international law: It did not fulfil the fourth *Tadic* condition for jurisdiction under Article 3 of the Statute of the ICTY.[968] The fourth condition states that 'the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.'[969] Judge Schomburg

[960] Ibid., para.117-118.
[961] Ibid., para.119-120.
[962] *Prosecutor v Galic*, (Appeals Chamber Judgement) IT-98-29-A (30 November 2006) para. 88. '[a]cts or threats of violence the primary purpose of foreseeable effect of which is to spread terror among the population are prohibited'.
[963] Ibid., para. 89.
[964] Ibid., para. 89.
[965] Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullem Crimen Sine Lege* (Springer 2017) 184
[966] *Prosecutor v Galic*, (Appeals Chamber Judgement) IT-98-29-A (Separate opinion by Judge Theodor Meron) (30 November 2006) para. 2.
[967] Ibid., (Separate and partially dissenting opinion by Judge Theodor Meron) para. 2.
[968] Ibid., (Separate and partially dissenting opinion by Judge Schomburg) para. 4.
[969] *Prosecutor v Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para. 94.

expressed concern about whether the limited number of penalties imposed by states could be viewed as evidence of "extensive and virtually uniform" state practice on this matter.[970]

The *Galic* Appeals Chamber also discussed national legislation concerning 'the prohibition of terror against the civilian population', such as the Norwegian Military Penal Code of 1902, the 1962 Geneva Conventions Act of Ireland, the Criminal Codes of the Czech Republic and the Slovak Republic, the Penal Code of Cote d'Ivoire, the Penal Code of Ethiopia, the 1960 Criminal Code of the Republic of Yugoslavia and the superseding Article 142 (War Crimes Against the Civilian Population) in Chapter XVI (Criminal Offences Against Humanity and International Law) of the 1976 Criminal Code, all of which criminalise terror against the civilian population.[971] It concluded that 'those provisions not only amount to further evidence of the customary nature of terror against the civilian population as a crime but are also relevant to the assessment of the foreseeability and accessibility of that law to Galic.'[972] The Appeals Chamber noted that the conviction by the Split County Court in Croatia under Article 51 of the Additional Protocol I and Article 13 of the Additional Protocol II.[973] Judge Schomburg stated in his separate opinion that 'it is questionable whether a single judgement can be considered an example of state practice.'[974] However, the *Galic* Trial Chamber also referred to a conviction on this matter by the court-martial sitting in the Netherlands East Indies, the *Motomura et al. case*, in July 1947.[975] Unlike Judge Schomburg, Judge Shahabuddeen agreed with the view that terror, as charged, was a crime as a matter of customary international law. However, he was concerned with the comprehensive definition of terror under customary international law as neither the required State practice nor *opinio juris* was available on this particular issue.[976] The ICTY referred to both international instruments and judicial decisions to identify the use of terror against civilians as a crime under customary international law.

---

[970] *Prosecutor v Galic*, (Appeals Chamber Judgement) IT-98-29-A (30 November 2006) (Separate and partially dissenting opinion by Judge Schomburg) para. 10. Judge Schomburg stated that 'we must also consider the reference of a number of states which indicates a "continuing trend of nations criminalising terror as a method of warfare" with no relevance to the time when the indictment had taken place is insufficient to consider as an evidence of state practice.'

[971] Ibid., para. 94-95.

[972] Ibid., para. 95-96.

[973] Ibid., para. 97.; See also footnote number 306, *Prosecutor v Radulovic et al.*, Split Country Court, Case No. K-15/95

[974] Ibid., (Separate and partially dissenting opinion by Judge Schomburg) para. 1.

[975] *Prosecutor v Galic*, (Trial Chamber Judgment) IT-98-29-T (5 December 2003) paras. 114-115.

[976] *Prosecutor v Galic*, (Appeals Chamber Judgement) IT-98-29-A (30 November 2006), Separate Opinion of Judge Shahabuddeen, para. 3.

4.3.3.2 Other International Instruments

The *Furundzija* Trial Chamber specifically explained the legal significance of the 'International Law Commission's Draft Code of Crime Against the Peace and Security of Mankind'. The Chamber stated that 'the draft code is not binding as a matter of international law, but is an authoritative instrument, parts of which may constitute evidence of customary international law, shed light on customary rules which are of uncertain content or are in the process of formation, or, at the very least, be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world.'[977] It seems like the Chamber itself was in a dilemma to consider the 'Draft Code' as evidence of customary international law. However, it entails all possible uses of the 'Draft Code' so that it assists in forming or crystalising the evidence of customary international law. The ICTR, in the *Prosecutor v. Nahimana et al.*, Appeals Chamber referred to the 'Draft Code' to justify the absence of a rule under customary international law.[978] The ILC noted that mere reference does not portray any 'extensive analysis' to determine customary international law. [979] Judge David Hunt did not consider the ILC Draft Code as an evidence of State practice to identify rules of customary international law because members of the ILC are elected '*in their individual capacity* and not as representatives of their Governments.'[980] The *Kupreskic* Trial Chamber clearly stated the difference between the ILC Draft Code and Customary international law.[981]

Likewise, Kai Ambos almost provided a similar argument while observing whether the definition given in the UN Draft Comprehensive Terrorism Convention met the criteria of international crimes. He noted that the prohibition of terrorism or specific terrorist acts mentioned in numerous treaties enjoys widespread support from the international community as part of the international treaty regime but does not constitute customary law.[982] He further stated that the Draft Comprehensive Convention lacks 'international consensus' as there is ambiguity in between the law against terrorism and international humanitarian law. Most importantly, the unaddressed area is 'whether the acts of armed forces during armed conflicts

[977] *Prosecutor v Furundzija*, (Trial Chamber II) IT-95-17/1-T (10 December 1998) para. 227.
[978] *Prosecutor v. Nahimana et al.*, (Appeals Chamber Judgement) ICTR-99-52-A (28 November 2007) para. 50.
[979] First report on formation and evidence of customary international law, by Michael Wood, Special Rapporteur (Document A/CN. 4/663), (17 May 2013) para.72.
[980] *Prosecutor v. Hadzihasanovic*, (Appeals Chamber Judgement) IT-01-47-AR72 (Separate and Partially Dissenting Opinion of Judge David Hunt Command Responsibility Appeal) 16 July 2003, para.26.
[981] *Prosecutor v Kupreskic et al.*, (Trial Chamber Judgement) ICTY-95-16-T (14 January 2000), para. 591.
[982] Kai Ambos and Anina Timmermann, 'Terrorism and Customary International Law' in Ben Saul (ed.), *Research handbook on international law and terrorism* (Elgar 2014) 31.

can ever constitute terrorist offences.'[983] He found no general *opinio juris*, as the Draft Comprehensive Convention emphasises the territorial sovereignty and principle of non-intervention.[984]

The *Krstic* Trial Chamber also drew attention to the work of international organisations, including the Report of the International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind, the Sub-Commission of the UN Commission on Human Rights' reports on the Prevention of Discrimination and Protection of Minorities, and the draft text of the element of crimes completed by the Preparatory Commission for the International Criminal Court as evidence of 'acceptance as law'.[985] The work to the establishment of the International Criminal Court, particularly 'the finalised draft text of the elements of crimes completed by the Preparatory Commission for the International Criminal Court in July 2000', was given particular attention by this Chamber.[986] Despite the fact that this document was produced after the acts involved in the *Krstic* Trial, the Trial Chamber found 'the document is a useful key to the *opinio juris* of the State'.[987] The Chamber considered this evidence as acceptance as law (*opinio juris*) to assess the state of customary international law from the representation of the States, whether signatories of the Rome Statute or not, in the Preparatory Commission.[988] The *Delalic* Chamber also considered the Rome Statute as reflection of the *opinio juris* of state parties only,[989] whereas several provisions of the Rome Statute are not considered as part of customary international law. The *Kupreskic* Trial Chamber rejected to consider the Rome Statute's definition of 'persecution' because it does not 'consonant with customary international law.[990] Judge David Hunt stated the customary status of the Rome Statute. In his opinion, '[w]hereas many of the Statute's provisions may be taken as reflecting customary international law at the time it was adopted, it also creates new law or modifies existing law.'[991]

Alongside, the reference to the Nuremberg Charter, Control Council No. 10, Charter of the International Military Tribunal for the Far East of 1946, and the UNWCC was common in

[983] Ibid., p. 33.
[984] Ibid., p. 35.
[985] *Prosecutor v Krstic*, (Trial Chamber Judgement) IT-98-33-T (2 August 2001) para. 541.
[986] Ibid.
[987] Ibid.
[988] Ibid.
[989] *Prosecutor v Delalic et al.*, (The Trial Chamber Judgement) IT-96-21-T (16 November 1998) para. 196.
[990] *Prosecutor v Kupreskic et al.*, (Trial Chamber Judgement) ICTY-95-16-T (14 January 2000), para. 580.
[991] *Prosecutor v. Hadzihasanovic*, (Appeals Chamber Judgement) IT-01-47-AR72 (Separate and Partially Dissenting Opinion of Judge David Hunt Command Responsibility Appeal) 16 July 2003, para. 30.

the work of *Ad Hoc* Tribunals. For example, the *Kunarac* Trial Chamber noted that the concept of 'enslavement' as a crime against humanity referring to Article 6 (c) Nuremberg Charter, Article II of the Control Council No. 10 and Article 5(c) of the Charter of the International Military Tribunal for the Far East of 1946.[992] Similarly, the crime of extermination appeared for the first time in an American draft of the text for the Nuremberg Charter.[993] The *Vasiljevic* Trial Chamber referred to the representatives' discussion during the adoption of the Nuremberg Charter. The Chamber stated that 'extermination' was considered an independent criminal offence, not a mere device used for the commission of vast scale killings.[994] Article 6 (c) of the Nuremberg Charter included this category of crime as a crime against humanity. The Chamber also indicated the presence of this crime in the Tokyo Charter, Control Council Law No 10, and in the United Nations War Crime Commission as a 'mass murder'.[995] The provisions of Nuremberg or Tokyo Charter, no doubt, have particular usefulness because of its acceptance by the UN General Assembly as a 'codification of customary international law. In contrast, there are divisions of opinions among the scholars in terms of referring to Control Council No.10. Since Control Council Law No. 10 does not have the same status as the Nuremberg Charter, it is considered to play a less important role to the development of customary international law.[996] In contrast, Rauter did not find it feasible to draw a strict separation among the legal principles of the Nuremberg Era.[997] This is equally confusing to draw State practice and *opinio juris* from the work of UNWCC or from the American draft text. These documents, at least, do not reflect any evidence of State practice. The disparity between the *Ad Hoc* Tribunals' decisions shows the presence of inconsistent methodologies. In *Kayishema and Ruzindana case*, the Trial Chamber observed that 'a limited number of killings or even one single killing could qualify as extermination if it forms part of a mass killing event.'[998] However, the *Vasiljevic* Trial Chamber did not accept the *Kayishema and Ruzindana* Trial Chamber ruling on the point mentioned above. The *Vasiljevic* Trial Chamber stated that the

[992] *Prosecutor v Kunarac* (Trial Chamber Judgement) ICTY -96-23-T or ICTY-96-23-T/1 (22 February 2001) para. 527.
[993] Report of Robert H Jackson, United States Representative to the International Conference on Military Trials, London, 25 July 1945, p. 374. at- https://www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf.
[994] *Prosecutor v Mitar Vasiljevic*, (Trial Chamber Judgement) IT-98-32-T (29 November 2002) para. 217.
[995] Ibid. para. 220.
[996] Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal law*, (Oxford University Press 2011) 112.
[997] Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullem Crimen Sine Lege* (Springer 2017) 195.
[998] *Prosecutor v Kayishema and Ruzindana*, (Trial Chamber Judgement) ICTR-95-1-T (21 May 1999) para.147.

Kayishema and Ruzindana Trial Chamber 'omitted to provide any *state practice* in support of its ruling on that point, thereby very much weakening the value of its ruling as a precedent.'[999]

Generally, customary international law is evidenced by 'general practice accepted as law'.[1000] The elements of custom encompass 'State practice' and '*opinio juris'*, or a legal obligation to follow the practice. The above-explained three approaches show the inconsistent, yet significant, custom identification process undertaken by the *Ad Hoc* Tribunals. The Tribunals introduced a rapid custom identification process, which is termed as sudden or abrupt development of customary international criminal law. The *Tadic* Jurisdiction Decision hinted at such development, stating that the 'abrupt development of customary law is not unusual as, in the field of international human rights law, convention and custom have sometimes sprung up almost instantaneously, leading to almost overlapping developments in conventional and customary law.'[1001] Kuhli and Gunther noted this custom-finding approach as imprecise because it involves identifying something that is 'famously elusive and vague'.[1002] Arajarvi considered this abrupt attitude of the international courts and tribunals as 'self-fulfilling prophecy'.[1003] It is undoubtedly a complex process to find the required elements of customary international law according to Article 38 (1) (b) of the Statute of the International Court of Justice. The opinion of Damgaard sounds logical in this regard. He stated that 'international criminal law is still quite rudimentary, but its sources are frequently taken for granted, without any forethought been given as to what sources can be relied upon when considering issues arising in international criminal law.'[1004] Although legal positivists find these custom identification process as disturbing, Schabas appreciated the efforts of the judges. He noted in his writing that 'international criminal law owes much of its dynamism to this openness to judicial activism.'[1005]

---

[999] *Prosecutor v Vasiljevic*, (Trial Chamber Judgement) IT-98-32-T (29 November 2002) fn. 586. [Emphasise added]

[1000] Statute of the International Court of Justice, 3 Bevans 1179, 59 Stat 1031, TS 993.

[1001] *Prosecutor v Tadic*, (Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para. 115.

[1002] Milan Kuhli & Klaus Gunther, 'Judicial Law making, Discourse Theory and the ICTY on Belligerent Reprisals' (2011) 12 German Law Journal 5. p. 1266.

[1003] Noora Arajarvi, 'The Requisite Rigour in the Identification of Customary International Law' (2017) 19 International Community Law Review 1, page. 19. See also Noora Arajarvi, The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals, (Routledge 2014)150-151.

[1004] Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes* (Springer 2008) 28

[1005] William Schabas, 'Customary law or 'judge-made' law: Judicial creativity at the UN criminal tribunals' in *The Legal Regime of the International Criminal Court*, International Humanitarian Law Series, Volume 19 (Brill/Nijhoff 2009)100.

4.4 Does other Hybrid and International Criminal Tribunals Follow the Same Approach of Custom Identification?

The application of the two-element approach remains a challenge before the international criminal courts and tribunals. The *Ad Hoc* Tribunals inadequately provided evidence as to the evidence of state practice and *opinio juris*. Several case law of the ICTY and ICTR had the explicit reference of State practice and/or *opinio juris*.[1006] The *Ad Hoc* Tribunals carried out the groundwork concerning the identification of customary international law. Subsequently, other tribunals such as the Special Court of Sierra Leone (SCSL), Special Tribunal for Lebanon (STL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) applied the jurisprudence of the ICTY and ICTR. This chapter will briefly discuss the use of customary international law within the scope of these tribunals' jurisdiction.

As stated elsewhere in the thesis, both the International Law Commission and International Court of Justice affirm the presence of two elements to form customary international law. Crawford noted in the book that, as per the ICJ jurisprudence, State practice shows the presence of *opinio juris*.[1007] The Pre-Trial Chamber of the ECCC stated that 'a wealth of state practice does not usually carry with it a presumption that *opinio juris* exists.'[1008] Instead, practice must be followed with a belief of obligation.[1009] The Pre-Trial Chamber also relied on international instruments and international case law to the custom identification process.

[1006] *Prosecutor v. Hadzihasanovic*, (Appeals Chamber Judgement) IT-01-47-AR72 (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) 16 July 2003, para. 12, *Prosecutor v. Delalic* (Trial Chamber Judgement) IT-96-21-T (16 November 1998) para. 302, *Prosecutor v. Aleksovski* (Appeals Chamber Judgement) IT-95-14/1-A (24 March 2000) para. 23; *Prosecutor v. Tadic* (Appeals Chamber Judgement) IT-94-1-A (15 July 1999) para. 288.; *Prosecutor v. Naletilic and Martinovic* (Appeals Chamber Chamber) IT-98-34-A (3 May 2006) (Separate Opinion of Judge Schomburg) para.15; *Prosecutor v. Kordic and Cerkez* (Appeals Chamber Judgement) IT-95-14/2-A (17 December 2004) para. 66; *Prosecutor v Kunarac* et al. (Appeals Chamber judgement) (IT-96-23 & IT-96-23/1-A) (12 June 2002), para. 98; *Prosecutor v. Galic* (Appeals Chamber Judgement) IT-98-29-A (30 November 2006) paras. 86-98; *Rwamakuba v. Prosecutor* (Appeals Chamber Judgement) ICTR-98-44-AR 72.4 (Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide) (22 October 2004) para. 14; *Gacumbitsi v. Prosecutor* (Appeals Chamber Judgement) ICTR-2001-64-A (7 July 2006) para. 51; *Nahimana et al. v. Prosecutor* (Appeals Chamber Judgement) ICTR-99-52-A (28 November 2007) para. 5-8.; *Prosecutor v. Ntakirutimana and Ntakirutimana* (ICTR-96-17-A) (13 December 2004) paras. 518-519. See also Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullem Crimen Sine Lege* (Springer 2017) 128-131.

[1007] James Crawford, *Brownlie's Principles of Public International Law* (9th ed. Oxford University Press 2019) 24.

[1008] *Decision on the Appeals Against the Co-investigative Judge Order on Joint Criminal Enterprise (JCE)*, (PTC 38) 002/19-09-2007-ECCC/OCIJ (20 May 2010) para. 53.

[1009] Ibid.; The ECCC stated that "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".

In contrast, Judge Janet Nosworthy, in his separate opinion in the *Ayyash* case, seems to have emphasised the certain 'maturity' of practice rather than states' belief. In his view, 'it would be impossible to enter a state's 'mind' and ascertain the intention behind its behavior, and it would be unreasonable to require that *opinio juris* be proven exclusively through statements from states about their motivations.'[1010] His view is more consistent with the International Law Association Final Report, published in 2000, emphasising State practice.[1011]

The application of the two-element approach was common in the work of the SCSL. 'Custom' was considered as a source of applicable law in the SCSL.[1012] The Secretary-General's report also stated on the establishment of SCSL that 'international crimes enumerated in its Statute are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.'[1013] In *Prosecutor v. Norman,* the SCSL applied customary international law to justify 'child recruitment' as a crime under international law. To this end, the Court emphasised the presence of both elements of customary international law, borrowing the ICJ's concept that 'State practice, without *opinio juris*, is just habit.'[1014] The SCSL adopted the similar, but detailed, approach that the *Ad Hoc* Tribunals had undertaken to the formation of customary international law. The Court provided a timeframe for the development of customary international law. It was noted in the judgement that customary law begins to develop with the acceptance of key international instruments between 1990 and 1994. The Court also stated that 'customary law, as its name indicates, derives from custom. Custom takes time to develop. It is thus impossible and even contrary to the concept of customary law to determine a given event, day or date upon which it can be stated with certainty that a norm has crystalised.'[1015]

To show the crystallisation of customary international law, the Court listed states' national legislation concerning the prohibition of recruitment and voluntary enlistment of

[1010] *Prosecutor v Ayyash et al.*, (Trial Chamber Judgement) STL-11-01/T/TC ((Separate Opinion of Judge Janet Nosworthy) (18 August 2020) p. 39.
[1011] International Law Association, London Conference, Final Report of Commission on Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International law (2000). The ILA states that 'the most important, component of customary international law is State practice.'
[1012] Article 72 *bis*, Special Court for Sierra Leone Rules of Procedure and Evidence.
[1013] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para. 12.
[1014] Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), SCSL-2004-14-AR72 (E) (31 May 2004), p. 13, para. 17. See also Edward T. Swaine, 'Rational custom' (2002) 52 Duke Law Journal, pp. 567-568.
[1015] Ibid., p. 25, para. 50.

children.[1016] The Court considered national legislation as the best reflection of State practice. Several legal systems have criminalised the recruitment of children under 15 in their national legislation, and the vast majority of states proscribed it in their military law.[1017] Alongside, the Court duly made a distinction between treaty obligation and customary law obligation. It stated that the prohibition of child recruitment was not a mere treaty obligation; instead, it became a part of customary international law under Geneva Conventions and Additional Protocol II before 1996. The custom emerges in this case because 'many of the provisions of Additional Protocol II, including the fundamental guarantees, were widely accepted as customary international law by 1996.'[1018] The Court indicated the presence of a high number of states parties, such as 185 state parties of the Geneva Convention 1949, including Sierra Leone, to show widespread acceptance. The SCSL's identification of the rules of customary international law excessively relied on various international instruments. The Court hardly provided any supporting evidence as to the presence of two-element approach. Schabas considered this approach of the court as a 'gross exaggeration.'[1019]

The Instrument-Based Approach of the *Ad Hoc* Tribunals also reflects in the decisions of the SCSL. This approach was apparent in the Court's reference to Article 38 of the Convention on the Rights of the Child (CRC). Article 38 explicitly prohibited state parties to recruit any person 'who has not attained the age of fifteen years into their armed forces.'[1020] The Court stated that the CRC received 'the highest acceptance of all international conventions'. Thus, it provides compelling evidence that the norm on the prohibition on child recruitment became customary intentional law by 1996.[1021] Similarly, the universal acceptance of the practice was shown by referring to the 2001 Child Soldiers Global Report.[1022] The Court stated that this Report reflects the acceptance of the same view in different legal systems. The Rome Statute and proposals of representative States in 1998 were also referred to as evidence of State practice.[1023]

[1016] Ibid., p. 13, para. 18. See also Edward T. Swaine, 'Rational custom' (2002) 52 Duke Law Journal, pp. 567-568.
[1017] Ibid., p. 24, para. 47.
[1018] Ibid., p. 13, para. 18.
[1019] William Schabas, 'Customary law or 'judge-made' law: Judicial creativity at the UN criminal tribunals' in *The Legal Regime of the International Criminal Court*, International Humanitarian Law Series, Volume 19 (Brill/Nijhoff 2009) 91.
[1020] Convention on the Rights of the Child. United Nations, Treaty Series, vo. 1577, p. 3.
[1021] Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), SCSL-2004-14-AR72 (E) (31 May 2004), p. 13, para. 19.
[1022] Ibid., p. 23, para. 44.
[1023] Ibid., p. 23, para. 17.

In contrast, Judge Geoffrey Robertson did not agree to the formation of custom as mentioned by the majority. In his dissenting opinion, he emphasised the 'accretion of state practice' as the primary technique of finding international law, rather than Statutes passed by parliament.[1024] His view indicated that there is a difference between ordinary crimes and international crimes; otherwise, the 'global criminalisation of a particular conduct as evidence that such conduct can amount to the status of an international crime would, for example, provide for an act such as theft to qualify as an international crime.'[1025] The formation of custom is a process of evolution by which states recognise a norm as a rule after a certain amount of practice.[1026] In terms of 'number' of states, he stated that 'the number of states required depends on the amount of practice which conflicts with the rule and even a practice followed by a very small number of states can create a rule of customary law if there is no practice which conflicts with the rule.'[1027] He opposed using international instruments as evidence of custom because the Geneva Conventions and the CRC' prohibition on child recruitment do not criminalise such activity. Similarly, he stated that the Rome Statute does not reflect codification of custom; it just criminalises activities. [1028] Judge Robertson's view reflects more the classic formation of customary international law. In his opinion, the deduction of the evidence of customary international law from international instruments cannot form a rule of customary international law. Schabas noted the view of judge Robertson as one of the reasons which allows international criminal tribunals to use an 'immensely flexible technique' to develop law.[1029] The recent work of the International Law Commission, however, carefully incorporated national legislation as evidence of practice subject to their interpretation and application by domestic courts. The significant part is to observe whether the interpretation provided by the domestic court is compatible with international law.[1030] National legislation is considered a product of 'political choices', but it can be useful evidence of ''acceptance as

[1024] Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), SCSL-2004-14-AR72 (E) (31 May 2004) (Dissenting Opinion by Judge Robertson), para. 18.
[1025] Ibid.
[1026] Ibid., para. 19.
[1027] Ibid., para. 49.
[1028] Ibid., para. 75.
[1029] William Schabas, 'Customary law or 'judge-made' law: Judicial creativity at the UN criminal tribunals' in *The Legal Regime of the International Criminal Court*, International Humanitarian Law Series, Volume 19 (Brill/Nijhoff 2009) 78.
[1030] Report on the work of the sixty-eighth session (2016), (document A/71/10) Chapter V, Identification of customary international law, General Commentary, Conclusion 3, Para. 5.

law', especially where it is specified that it has been made compulsory under customary international law.'[1031]

In a very recent decision before the STL, Judge Janet Nosworthy recalled Judge Robertson's view and stated that 'the majority's assessment of the available sources had made a credible case for finding that customary international law on the matter had crystallised, while Judge Robertson seemed to place the threshold somewhat higher.'[1032] Nosworthy noted the presence of 'considerable variation' in the way international courts routinely determine customary law based on available information. He considered this 'level of variation is intrinsic in the exercise' of international courts and found this feature as 'inevitable' to the emergence of customary international law.[1033] In his opinion, 'applying the evidential standard of 'beyond reasonable doubt' when considering whether the existence of a rule of customary international law had been proven, would serve to adequately protect the rights of the accused in a criminal trial.'[1034] He does not seem to emphasise the classic definition of customary international law to identify the customary rules of international crimes.

The SCSL in the *Prosecutor v. Fofana and Kondewa* has taken an instrument-based approach to identify 'prohibition against pillage' under customary international law. In assessing this prohibition, the SCSL has taken the approach adopted by the ICTY. The analysis of State practice shows the presence of this rule tracing back to Article 44 of the Lieber Code 1863, Article 18 of the Laws and Customs of War 1874, Article 32 of the Laws of War on Land 1880, Article 28 and 47 of the Hague Regulations 1907, Article 33 (2) and 53 of the Geneva Convention 1949, Article 13 (1) of Additional Protocol II, and Article 13 of the ICRC Commentary. The Court found the finalised text of the Elements of Crimes completed by the Preparatory Commission for the International Criminal Court in July 2000 is a useful indication of the *opinio juris* of states.[1035] Similarly, this judgment mentioned the ICRC Compendium on Customary International Humanitarian Law, which surveyed state practice to conclude 'prohibition of pillage' in 2005.[1036] However, the Court in the *Fofana* case also assessed the terms 'extensive and uniform' to observe whether the prosecution's submission of three

[1031] Ibid.
[1032] *Prosecutor v Ayyash et al.*, (Trial Chamber Judgement) STL-11-01/T/TC ((Separate Opinion of Judge Janet Nosworthy), (18 August 2020) para. 46.
[1033] Ibid.
[1034] Ibid., para. 47.
[1035] *Prosecutor v Fofana*, (Appeals Chamber Judgment) SCSL-04-14-A, (28 May 2008) para. 403.
[1036] Ibid., para. 404.

military manuals represents uniform State practice.[1037] The Court stated that the military manuals of Australia, Canada and the United Kingdom did not show any uniform practice.[1038]

The Special Tribunal for Lebanon is known as the 'internationalised' court. The Resolution of the UN Security Council set it up out of an agreement between the UN and Lebanon government.[1039] This judgement portrays a complex presence of a two-element approach to the definition of terrorism in customary international law. The STL interlocutory decision has taken the help of international law to avoid 'unjust' or 'unreasonable' national law and to maintain the 'high standard of justice' specified in the Secretary-General's Report.[1040] The definition of terrorism under customary international law shows an extensive reliance on international instruments. The Tribunal referred to several treaties, UN Resolutions, and states' legislative and judicial practice, indicating customary rules on the crime of terrorism.[1041] The Tribunal also explored the common elements of the crime in the national judiciary from five states: Canada, Italy, Mexico, Argentina, and the USA.[1042] However, the Tribunal investigated only a small number of national cases (5 or 6 judgements), which may be considered a weakening point to forming a uniform and consistent State practice. The Tribunal found the punishment for the acts of terrorism in time of peace as a settled practice. It added that 'this practice is evidence of a belief of States that the punishment of terrorism responds to a social necessity (*opinio necessities*) and is hence rendered obligatory by the existence of a rule requiring it (*opinio juris*).'[1043] The Tribunal also referred to a unanimous resolution 1544 of UN Security Council adopted on 2004 as evidence of the law.[1044] In 2011, the Interlocutory Decision founded its opinion relying on 'a number of treaties, UN Resolutions and the legislative and judicial practice of States'. Nonetheless, in 2020, the Trial Chamber in the *Ayyash* case criticised the *Tadic* Appeals Chamber stating that 'the Appeals Chamber does not specify whether it regarded "pronouncements of States, military manuals and judicial decisions" as forms of State practice or *opinio juris*, or indeed as both, suggesting that it has

[1037] Ibid., para. 405.
[1038] Ibid., para. 406.
[1039] United Nations Security Council, S/RES/1757 (2007) 30 May 2007.
[1040] Kai Ambos, Judicial Creativity at the Special Tribunal for Lebanon, (2011) 24 Leiden Journal of International Law 655, p. 657.
[1041] Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I/AC/R 176bis (16 February 2011), para 85.
[1042] Ibid., para 86.
[1043] Ibid., para 102.
[1044] Ibid., para 102.

followed the approach of inferring *opinio juris* from state practice.'[1045] Although the jurisprudence of the ICTY and ICTR provided several ways of identifying rules of customary international law, the struggle to find custom continues before other international courts and tribunals. The discussion below shows the scope of customary international law before the International Criminal Court.

4.5 The Application of Custom by the International Criminal Court

Article 21 (1)(b) is a gateway for the International Criminal Court (ICC) to apply customary international law where appropriate. There is no express reference to customary international law in the Rome Statute. Instead, it is encompassed within the term 'principles and rules of international law.'[1046] The ICC in the *Lubanga* case noted that 'whilst relevant jurisprudence from the ad hoc tribunals may assist the chamber in its interpretation of the Statute, the chamber is bound, in the first place, to apply the Statute, the Elements of Crime and the Rules of Procedure and Evidence.'[1047] Cryer considered the drafters of the Rome Statute have created an 'unfortunate relationship' between Article 21 and the sources of international law given in Article 38 (1) of the Statute of the ICJ.[1048] He stated that the hierarchical status of sources given in Article 21 can 'distort' the definitions of international crimes. The following section shows the gradual transformation of customary international law through the practice of the ICC.

This application is significant to fulfil the lacuna in the Statute and other sources referred to in Article 21 (1)(a).[1049] Article 22 restricts the prosecution of any crime before the ICC, which is not defined by the Rome Statute.[1050] In 2012, the Pre-Trial Chamber in the *Ruto* case stated that the application of customary international law is limited. Nevertheless, in 2014, the Appeals Chamber in the *Lubanga* case read Article 21 together with the expression 'the

[1045] *Prosecutor v Ayyash et al.*, (Trial Chamber Judgement) STL-11-01/T/TC ((Separate Opinion of Judge Janet Nosworthy) (18 August 2020) p. 38.
[1046] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed., Oxford University Press, 2016) 514.
[1047] *Prosecutor v Lubanga*, (Trial Chamber III) ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (21 March 2016) para. 79.
[1048] Robert Cryer, 'Royalism and the King: Article 21 of the Rome Statute and Politics of Sources' (2009) 12 New Criminal Law Review: An International and Interdisciplinary Journal 3, p. 390.
[1049] *Prosecutor v Ruto et al*., (Pre-Trial Chamber II) ICC-01/09-01/11-373 (Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, Pre-Trial Chamber II) 23 January 2012, para 289.
[1050] Article 22, Rome Statute of the International Criminal Court, UNTS, Vol. 2187 (1998)

established framework of international law',[1051] providing a scope to recourse customary international law, irrespective of any lacuna exists, to ensure that an interpretation is consistent with international humanitarian law. The *Lubanga* case reflected a more comprehensive application of Article 21. Subsequently, in 2017, the Appeals Chamber in the *Ntaganda* case added a new criterion to the application of customary international law. The Chamber stated that 'if customary or conventional international law stipulates […] an additional element of […] crime, the Court cannot be precluded from applying it to ensure consistency of the provision with international humanitarian law.'[1052] The Court affirmed that the application of customary international law on this ground does not violate Article 22 of the Rome Statute. The ICC does not seem to have taken a rigorous approach of identifying State practice and *opinio juris*, while applying customary international law. It shows a very loose attachment with the application of customary international law at the beginning.

The previous decisions of the ICC appear as 'practice' to form customary international law in *Al Bashir* case. The Pre-Trial Chamber applied customary international law to determine that 'immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court.'[1053] The Chamber stated that international prosecutions against Heads of State have gained 'widespread recognition as accepted practice' from the increasing number of Heads of State prosecutions by international courts since 14 February 2002. The Chamber pointed out international prosecutions against Slobodan Milosevic, Charles Taylor, Muammar Gaddafi, Laurent Gbagbo.[1054] The Chamber also stated that the rejection of immunity for Heads of State by international courts since World War I bears the evidence of practice.[1055] Besides, 9 plus years of existence of the Rome Statute with the ratification of 120 states shows the international community's commitment to consider this principle as part of customary international law.[1056] According to this Chamber, the evidence of international practice concerns the commitment of the international community to the formation of customary international law. Generally, international courts and tribunals are

[1051] *Prosecutor v Lubanga*, (Appeals Chamber Judgment) ICC-01/04-01/06-3121-Red, (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his Conviction) 1 December 2014, para. 322.
[1052] *Prosecutor v Ntaganda*, (Appeals Chamber Judgment) ICC-01/04-02/06 OA5, (Judgement on the Appeal of Mr Ntaganda Against the "Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9)15 June 2017, para. 1.
[1053] *Prosecutor v Omar Al Bashir* (Pre-Trial Chamber I) ICC-02/05-01/09-139 (Decision on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) 12 December 2011, para. 36.
[1054] Ibid., para. 39.
[1055] Ibid., para 40-42.
[1056] Ibid., para 38.

responsible for the separate ascertainment of State practice and *opinio juris*. Compliance with the jurisprudence of customary international law is also essential to avoid fragmentation of international criminal law, in particular to a situation referred by the Security Council.[1057] In this situation, the ICC interpreted the jurisprudence of the *Ad Hoc* and other international courts and tribunals while interpretating rules of customary international law.

The Pre-Trial Chamber in the *Ruto* case mentioned the applicability of the jurisprudence of other international criminal tribunals when they are indicative of 'a principle or rule of international law',[1058] or at least, a 'persuasive authority'. On many occasions, the ICC applies this jurisprudence as an interpretative aid to address undefined areas of law in the Rome Statute. In the case of *Katanga and Ngudjolo*, the Pre-Trial Chamber referred to the *Kunarac*[1059] case *Aleksovaski*[1060] case to define the core elements of a war crime under Article 8 (2)(b)(xxi) relying on 'humiliation, degradation, or violation of the person's dignity'.[1061] A similar approach was invoked by the Pre-Trial to interpret the terms 'widespread' and 'systematic'.[1062] Relying on *Akayesu* Trial Chamber, the Pre-Trial Chamber in this case, confirmed the alternative use of the terms 'widespread' and 'systematic'.[1063] In contrast, the Trial Chamber in the *Al Mahdi* case refused to apply the ICTY jurisprudence to interpret the word 'attack'. The chamber stated that 'the jurisprudence of the ICTY is of limited guidance given that, in contrast to the Statute, its applicable law does not govern 'attacks' against cultural objects but rather punishes their 'destruction or wilful damage'.'[1064] Schabas stated the ICTY had confirmed the 'customary nature of war crimes involving the direction of attacks against civilian objects.'[1065] In his view, the ICTY jurisprudence might have provided a basis for prosecution of the acts perpetrated by Al Mahdi in Timbuktu if any of the Rome Statute provisions are found to be dealing with non-international armed conflict.[1066]

[1057] Hitomi Takemura, 'Inconvenient Truth About the identification of Customary International Law in International Criminal Law' (2020) 62 Japanese Yearbook of International Law 312, p. 327.
[1058] *Prosecutor v Ruto et al*., (Pre-Trial Chamber II) ICC-01/09-01/11-373, (Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute) 23 January 2012, para. 289.
[1059] *Prosecutor v Kunarac*, (Trial Chamber Judgment) IT-96-23 & 23-1 (22 February 2001) para. 501.
[1060] *Prosecutor v Aleksovski*, (Trial Chamber Judgment) IT-95-14/1-T (25 June 1999) para. 56.
[1061] *Prosecutor v Katanga and Ngudjolo Chui*, (Pre-Trial Chamber I) ICC-01/04-01/07-717 (Public Redacted Version of Decision on the Confirmation of Charges) 30 September 2008, para. 369.
[1062] *Prosecutor v Katanga and Ngudjolo Chui*, (Pre-Trial Chamber I) ICC-01/04-01/07-717 (Public Redacted Version of Decision on the Confirmation of Charges) 30 September 2008, para. 412.
[1063] Ibid.; See also, *Prosecutor v. Akayesu*, (Trial Chamber Judgment) ICTR-96-4-T (2 September 1998) para. 579.
[1064] *Prosecutor v Ahmad Al Faqi Al Mahdi*, (Trial Chamber VIII) ICC-01/12-01/15 (27 September 2016) para. 16
[1065] William Schabas, 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit' (2017) 49 Case Western Reserve Journal of International Law 1, p. 79.
[1066] Ibid., p. 90.

The inevitability of the application of customary international law is also drawn from the cases appearing before the ICC under Article 12 of the Rome Statute. The necessity of applying customary international law arises in two recent cases due to *lacuna* in the provisions of the Rome Statute. In the *Situation in the State of Palestine*, the Pre-Trial Chamber called for Article 21 (1)(b) to determine the criteria for 'statehood' under general international law. The Chamber made it clear that Article 12 (2)(a) 'conduct in question' does not contain the criteria for 'statehood' under general international law.[1067] Similarly, in the *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, the Pre-Trial Chamber identified the two-element of customary international law, State practice and *opinio juris*, to interpret the meaning of the words 'on the territory of which the conduct occurred' under Article 12 (2)(a). In this regard, Article 21 (1)(b) has been applied to read the concept of territorial jurisdiction under customary international law. The Pre-Trial Chamber carried out a 'brief' survey on 24 states' national legislation to identify State practice concerning the objective and subjective territoriality principle under customary international law.[1068] The Chamber assumed the presence of *opinio juris* from the State practice of the reviewed states.[1069] However, the question remains unattended whether the survey on 24 states is sufficiently widespread in this regard. In the *Lotus* case before the International Court of Justice, Judge M. Altamira, in his dissenting opinion, mentioned that 'the municipal legislation of different nations is not capable of making an international custom; however, it may touch upon legal questions which may have an impact on foreign legal systems and thus may impinge into the area of international law without declaring themselves a concrete ground of international customs.'[1070]

Although there is no mention of customary international law in the Rome Statute, the judges and prosecutors of the ICC will invoke the application of it and continue to seek for various modes of interpretation. For example, in the recent ICC draft policy on cultural heritage, the Office of the Prosecutor (OTP) relied on the practice developed by the ICTY to

[1067] *Situation in the State of Palestine*, (Pre-Trial Chamber I) ICC-01/18, (Decision on the Prosecution request pursuant to Article 19 (3) for a Ruling on the Court's territorial Jurisdiction in Palestine) 5 February 2021, para. 106.
[1068] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, (Pre-Trial Chamber III) ICC-01/19 (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Pre-Trial Chamber III) para. 56 'Objective Territoriality: Australia, Argentina, China, Czech Republic, Colombia, Egypt, Estonia, Finland, Georgia, Germany, Mexico, New Zealand, Poland, Romania, Serbia, Switzerland, Tajikistan, Thailand; Subjective Territoriality: Armenia, Azerbaijan, Georgia, Kazakhastan, Lithunia.
[1069] Ibid., para. 57.
[1070] *S.S Lotus (France v Turkey),* (1927) PCIJ Series A, No. 10 (Dissenting Opinion by M. Altamira) p. 284.

observe article 8 (2)(b)(ix) and 8(2)(e)(iv) under customary international law.[1071] Referring to the document '*Protection of Cultural Property: Military Manual*', the OTP appears to emphasise the 'qualitative considerations' instead of 'quantitative considerations' to identify customary rules relating to the prohibition of attacks on cultural heritage.[1072] The document finds the 'the preservation of the cultural heritage is of great importance for all peoples of the world',[1073] while the ICTY did not consider 'the cultural property be of 'great importance' for such attacks to be unlawful.'[1074] The OTP considered this *Military Manual* as reflective of customary international law. The OTP also added national and international instruments such as the 1907 Hague Regulations, the 1954 Hague Convention, the 1977 Additional Protocols and in countless statements by states, international organizations and international judicial organs.

The identification of customary international law with respect to finding international crimes may remain a centre of critic due to their intrinsic nature of emergence, which is very, sometimes, abrupt or sudden in this rapidly changing world. Besides, the *Ad Hoc* tribunals' inconsistent methodologies of identifying customary international law will always have an impact on future tribunals. The section follows analyses to observe whether the *Ad Hoc* Tribunals' methodologies may satisfy the two-element approach of customary international law.

[1071] ICC Draft Policy on Cultural Heritage, (22 March 2021) Para. 43.; Prosecutor v. Strugar (Trial Chamber Judgment) IT-01-42-T (31 January 2005) paras. 298-330, *Prosecutor v Jokic*, (Sentencing Judgement) IT-01-42/1-S (18 March 2004) para. 46.
[1072] ICC Draft Policy on Cultural Heritage, (22 March 2021) Para 48.
[1073] Roger O' Keefe et al., *Protection of Cultural Property: Military Manual* (Paris and San Remo: UNESCO and International Institute of Humanitarian Law, 2016' p. 34, para. 114; 'the measure of incidental damage to be caused to cultural property is a question not just of cubic metres but also, crucially, of the cultural value of the object, building or site […] Since elements of this cultural heritage are very often irreplaceable, only the promise of very considerable concrete and direct military advantage, in many cases overwhelming, will in practice be enough.'
[1074] ICC Draft Policy on Cultural Heritage, (22 March 2021), para. 43.

4.6 Evaluation of State Practice and *Opinio Juris*

Finding the sources of international crimes in customary international law by collecting and assessing State practice is difficult. The diverse nature of State practice includes 'acts, statutes, judicial decisions, official statements, and regulations, among others.'[1075] Beck stated that the International Tribunal's practice originates from 'official sources i.e. those attributable to the state and not denied by it.'[1076] The *Tadic* Jurisdiction Decision's reference to 'official pronouncements of States' appears to indicate the concept of State practice.[1077] However, it does not show any association of this pronouncement with international law. The traditional concept of customary international law is substantially 'empirical' where State practice and views play a central role in encompassing international order.[1078] The ICRC's Study on Customary International Humanitarian Law has also faced challenges. Beck mentioned in his paper that the Steering Committee discussed the possibility of collecting information from the actual behaviour of troops to ascertain State practice. However, the ICRC study did not find it feasible; rather, it focused on the available public documents.[1079] The practice studied by the ICRC included 'physical actions and verbal acts such as military manuals, legislation and statements made in the context of international fora.'[1080] The study of the ICRC did not deviate from the view that *opinio juris* may also appear in some cases where state behaviour is ambiguous or unclear.[1081] In contrast, according to Wilt, 'state practice is only evidence of an *opinio juris* but not a separate requirement for the creation of customary law.'[1082]

The chapter argues that the *Ad Hoc* Tribunals' custom identification process primarily based on international instruments fails to adequately show how State practice emerges from international instruments. The main concentration of the teleological interpretation is to find State practice and *opinio juris* from the use of international practice. Now the question is does international practice always represent State practice? In the *Nottebohm case*, the ICJ stated that 'international practice provides many examples of acts performed by states in the exercise

[1075] Ryan M Scoville, 'Finding Customary International Law' (2016) 101 Iowa Law Review 1893, p.1 896.
[1076] Louise Doswald Beck, 'Developments in Customary International Humanitarian Law (2005) 15 Swiss Rev Int'l & Eur L 471, p. 474.
[1077] *Prosecutor v Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para. 99.
[1078] Ryan M Scoville, 'Finding Customary International Law' (2016) 101 Iowa L Rev 1893, p. 1896.
[1079] Louise Doswald Beck, 'Developments in Customary International Humanitarian Law' (2005) 15 Swiss Review of International & European Law 471, p. 474.
[1080] Ibid., p. 474.
[1081] Ibid., p. 476.
[1082] Harmen van der Wilt, State Practice as Element of Customary International Law: A White Knight in International Criminal Law? (2019) 20 International Criminal Law Review 5, p. 1-21.

of their domestic jurisdiction which do not necessarily or automatically have an international effect, which are not necessarily or automatically binding on other states or which are binding on them only subject to certain conditions…'[1083] No doubt, international practice arises from the participation of states in international platforms, but do not always reflect State practice as evidence of law. For example, the participation of states in the General Assembly of the United Nations does not always indicate evidence of State practice and *opinio juris.*

The chapter finds that the *Ad Hoc* Tribunals did not distinguish between the practice of the international organisations and practice of States. The *Tadic* Jurisdiction Decision referred to the contribution of the International Committee of the Red Cross (ICRC) regarding the emergence of customary rules in internal armed conflict. The Appeals Chamber stated that 'the practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought, therefore, to be regarded as an element of actual *international practice*; this is an element that has been conspicuously instrumental in the emergence or crystallisation of customary rules.'[1084] The ICTY could have explained how international practice of some international organisations when accompanied by *opinio juris* may give rise to rules of customary international law. The Conclusion of the ILC stated that 'international organisations are not States. They are entities established and empowered by States […] to carry out certain functions, and to that end have international legal personality, that is, they have their own rights and obligations under international law.'[1085] Referring to the ICTY's reliance on the ICRC, Arajarvi noted that 'the Court paves the way for custom formation beyond state-dominated law creation.'[1086] She drew a subtle line showing how the international practice is not the same as State practice. Treves has clarified that 'practice is what the subjects of international law do and say, what they want (or consent to), and what they believe. Such practice may in some cases be attributable to states taken singularly and in other cases to states taken in groups.'[1087]

[1083] *Nottebohm Case*, ICJ Reports 1955, pp. 20-21.
[1084] *Prosecutor v Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para. 109. [emphasise added)
[1085] Draft Conclusions on Identification of Customary International Law Commission, 2018, A/73/10, p. 126.
[1086] Noora Arajarvi, 'From State-Centricism to Where? The Formation of (Customary) International Law and Non-State Actors' p. 17. Available at- https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599679; DB Hollis, 'Why State Consent Still Matters- Non-State Actors, Treaties, and the Changing Sources of International Law' (2005) 23 Berkeley Journal of International Law 138.
[1087] Tullio Treves, *Customary International Law' in Max Planck Encyclopaedia of Public International Law* (Oxford University Press, 2012) 5-6

This chapter further observes that the emergence of international crimes under customary international law is 'international practice centric', which prominently indicates the presence of *opinio juris*. The identification of the international practice-based customary international law fulfils the desire of the international community. For example, the ICJ finds *opinio juris* in UN General Assembly Resolutions that constitute authoritative expressions of the position of the international community as a whole.[1088] The *Tadic* Appeals Chamber suggested that the text of the ICC Statute 'may be taken to express the legal position i.e., *opinio juris* of those states that adopted the Statute, at the time it was adopted.'[1089] In fact, the existence of *opinio juris* can be inferred from 'official statements of state representatives, decisions of high courts and, depending on its content and voting, UN (General Assembly) resolutions.'[1090] Agnieszka Szpak suggested that the strong reliance on *opinio juris* as 'reasonable and justified' in the situation where international humanitarian law applies.[1091]

Moreover, the human rights approach adopted by the *Ad Hoc* tribunals justifies the presence of *opinio juris* for customary international law. Judge Meron described the influence of international human rights law in the international courts and tribunals' work, emphasising the role of *opinio juris* towards the custom formation.[1092] He also stated the presence of the human rights approach to the definition of international humanitarian law.[1093] Schlutter described the 'constitutionalist approach', based on the idea of the 'universality of international human rights law' or 'fundamental humanitarian values' enshrined in the Martens Clause.[1094] However, sometimes, the reference to the Martens Clause and *opinio juris* is problematic and cumbersome. Cassese posited a different view to Schlutter regarding reliance on the Martens Clause as a source of international law. He argued that 'it may be used either as an interpretative tool or as a means of enhancing the *usus* and *opinio juris* of particular aspects of humanitarian

---

[1088] Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge University Press, 2015) 143; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) Judgement, ICJ Reports 198, p.14, para 188.
[1089] *Prosecutor v Tadic*, (Appeals Chamber Judgement) ICTY-94-1-A (15 July 1999*)*.para 223.
[1090] Kai Ambos and Anina Timmermann, 'Terrorism and Customary International Law' in Ben Saul (ed.) *Research Handbook on International Law and Terrorism*, (Elgar 2014) 20.
[1091] Agnieszka Szpak, 'Legacy of the Ad hoc International Criminal Tribunals in Implementing International Humanitarian Law' (2013) 4 Mediterranean Journal of Social Sciences 9, p. 529.
[1092] Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006) 3. He stated that '*Opinio Juris* has proven influential in the form of verbal statements by governmental representatives to international organisations, the content of resolutions, declarations and other normative instruments adopted by such organisations, and in the consent of States to such instruments.'
[1093] Ibid., 4.
[1094] Birgint Schlutter, 'Constitutionalisation at its best or at its worst? Lessons from the development of customary international criminal law' available at http://esil-sedi.eu/wp-content/uploads/2018/04/Schleutter.pdf

law in favour of further protection from the calamities of armed conflict.'[1095] Georges Abi-Saab suggested applying the Martens Clause to cover all matters that are not already covered under specific provisions.[1096] Meron said 'the rhetorical and ethical language of the clause has compensated for its somewhat vague and indeterminate legal content and exerts a strong pull towards normativity.'[1097] Greenwood noted it as too unrealistic to apply the concept 'the public conscience' as the foundation for a separate rule of law.[1098]

However, the Martens Clause - as a substitute consideration of humanity- has gathered criticism for being 'unduly extensive'.[1099] Judge Shahabuddeen found that the 'principles of humanity' and the 'dictates of public conscience' can be a distinct source of international law: 'since "established custom" alone would suffice to identify a rule of customary international law, a cumulative reading is not probable.'[1100] The Martens Clause enhances the position of *opinio juris,* allowing custom to emerge through the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent.[1101] Concerning *opinio juris*, it should be noted that '[i]n the area of international humanitarian law, where many rules require abstention from certain conduct, omissions pose a particular problem in the assessment of *opinio juris* because it has to be proved that the abstention is not a coincidence but based on a legitimate expectation.'[1102] Fan noted that the *Kupreskic* judgement over-relied on the *opinio juris sive necessitatis* for crystallising the prohibition on 'reprisals against civilians in combat

[1095] Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 European Journal of International Law 1, p. 187.
[1096] Georges Abi-Saab, *The Specificities of Humanitarian Law, in: Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour Jean Pictet*, in Christophe Swinarski (ed.) (Martinus Nijhoff Publishers, 1984) 265, 274.
[1097] Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006) 5; see also, Theodor Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law' (1996), 90 American Journal of International Law 238, p. 239. 'decision's focus on statements than the actual practice resembled the approach in human rights law where *opinio juris* is emphasised to compensate for the paucity of supporting practice
[1098] Christopher Greenwood, 'Historical Development and Legal Basis' in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford University Press 1995) 28.
[1099] Christopher Greenwood, Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, in Horst Fischer, Claus Kreb and Sascha Rolf Luder eds. *International and National prosecution of Crimes under International Law: Current Developments* (Arno Spitz, 2001) pp. 539, 556; Theodor Meron, The Humanization of Humanitarian Law, (2000) 94 American Journal of International Law 239, p. 250.
[1100] *Legality of the Threat or Use of Nuclear Weapons (Advisory opinion)*, ICJ Reports 1996 (Dissenting opinion of Judge Shahabuddeen) p. 406.
[1101] *Prosecutor v Kupreskic*, *(*(Trial Chamber Judgement) ICTY-95-16-T (14 January 2000) para. 527; see also Achilles Skordas, 'Hegemonic Custom?' in Michael Byers and Georg Nolte (eds) *United States Hegemony and the Foundations of International Law* (Cambridge University Press 2003).
[1102] Jean-Marie Hanckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law,* (International Committee of the Red Cross and Cambridge University Press 2005) xli. See also *Galic* Appeals Chamber (Separate opinion by Judge Schomburg) para. 19.

zones' as customary international law.[1103] Cassese stated that the reason for emphasizing *opinio juris* lies in the difficulties of recounting the actual behaviour of the troops in the field.[1104] Any matter involves armed conflict requires 'an international decision maker's primary reliance on normative words rather than on a combination of words and consistent deeds.'[1105] The *opinio-juris* finding of the *Kupreskic* case reflects Birgit's 'core-right approach' of custom identification.[1106] This chapter does not support the 'core-right approach' because this approach relies heavily on 'valued-driven' *opinio juris* and totally negates the presence of State practice

Nonetheless, the identification of customary international law is a 'breakthrough'[1107] yet raises several complexities. The section below describes a possibility of whether the *Ad Hoc* Tribunals' work reflects the modern concept of customary international law or remains uncertain and questionable.

4.5 Reflection of the Modern Concept of Customary International Law: A Questionable Development?

The emergence of the customary rules of international crimes seems to have gone beyond the regular form of custom formation. It revolves around international human rights law and international humanitarian law.[1108] Stephan suggested various approaches to the interpretation of customary international law, discouraging the 'monolithic construct' of custom.[1109] The 'monolithic' construction of custom does not concentrate on the rigorous examination of State practice. In this regard, Stephan stated that:

[1103] Mary D Fan, 'Custom, General Principles and the Great Architect Cassese' (2012) 10 Journal of International Criminal Justice 1063, p. 1073.
[1104] *Prosecutor v Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para. 99.
[1105] Frederic L. Kirgis 'Custom on a Sliding Scale' (1987) 81 American Journal of International Law 146, p. 148.
[1106] Birgit Schlutter, *Developments in Customary International Law - Theory and Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff Publishers 2010) 220.
[1107] Ryan M Scoville, 'Finding Customary International Law' (2016) 101 Iowa Law Review 1893, p. 1946; See also, Fausto Pocar, 'International Criminal Justice and the Unifying Role of Customary Law'' (2016) 21 Uniform Law Review 171, p. 173.

[1108] Micaela Frulli, 'The Contribution of International Criminal Tribunals to the Development of International Law: The Prominence of *opinio juris* and the Moralisation of Customary Law' (2015) 14 The Law and Practice of International Courts and Tribunals 1, p. 89.
[1109] Paul B Stephan, 'Disaggregating Customary International Law' (2010) 21 Duke Journal of Comparative and International Law 1, p. 192.

> [t]his move (monolithic construct) allows international lawyers to assert that a set of uniform rules governs the making, application and unmaking of CIL. The monolithic move results not from a careful assessment of actual state practice, but rather from a tendency toward abstraction and generality, fueled largely by a concern about the underlying legitimacy of international law as such. But in a world where acceptance of the contribution of international law to social ordering is widespread and manifest, instrumental concerns replace existential anxiety.[1110]

Bantekas observed that there is yet to be any particular behaviour that paves the way to form customary international law by *Ad Hoc* tribunals. He mentioned that the *Ad Hoc* Tribunals have heavily relied on the 'Nuremberg judgement and the decisions of the subsequent tribunals, and a handful of judgements during the Cold War, as well as 20-30 treaties and considerable soft law, such as the Draft Code of Crimes.'[1111] He stated that 'the whole exercise of identifying general customary law has become immensely complex, and correspondingly uncertain; and in so many areas it is not just a question but also a policy-choice.'[1112] The *Ad Hoc* tribunals followed the deductive process associated with the modern concept of customary international law.[1113] Reflection on *opinio juris* is prominent in the deductive method of custom formation, focusing on a psychological element as a first indicator of the existence of a rule. As per the modern concept, Roberts stated that custom deduces evidence from a general statement of rules, instead of states' actual conduct. The development of custom in this process is instant or quick because 'it is deduced from multilateral treaties and declarations by international fora such as the General Assembly, which can declare existing customs, crystalize emerging customs, and general new customs…'[1114]

[1110] Ibid, p. 192.
[1111] Ilias Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law' (2006) 6 International Criminal Law Review 1, pp.131-132.
[1112] Robert Y. Jennings, *What is International Law and How Do We Tell It When We See It?: Nulla Poena Sine Lege in English Criminal Law* (Kluwer 1983) 11; Also available in the Book Review of *Customary International Humanitarian Law* (International Committee of the Red Cross and Cambridge University Press 2005, edited by Jean-Marie Hanckaerts and Louise Doswald-Beck) published in Leiden Journal of International Law, 21 (2008), pp. 255-288.
[1113] Maria Ericsson, *Defining Rape: Emerging Obligations for States under International Law?* (Martinus Nijhoff Publishers 2011) p. 20. She stated that 'a deductive process, focusing primarily on *opinio juris* in the form of texts and statements, for example, UN General Assembly declarations or treaties, rather than on practice. Thus, modern custom is able to develop more rapidly since it can be deduced from various statements and documents in the international fora.'
[1114] AE Roberts, 'Traditional and Modern Approaches to Customary International Law. A reconciliation' (2001) 95 American Journal of International Law 4, pp. 758-59.

In contrast, the traditional view suggests that *opinio juris* does not have a separate existence, 'the two elements of custom being the two pillars of the inductive approach.'[1115] On various occasions, the international crimes tribunals appear to have refrained from applying the traditional approach to customary international law. The ICTY in the *Tadic* case signifies the custom identification process based on what a State says than what it does.[1116] The *Ad Hoc* Tribunals have attempted to locate State practice, instead of investigating states' actual behaviour, in international organisations. In fact, one may argue that the decisions of the *Ad Hoc* Tribunals function as 'persuasive evidence' to substantiate the existence of customary international law. The process of custom formation is not automatic; rather, it 'requires someone to study, analyse and rationalize that evidence, and to elucidate the resulting rule of law.'[1117] International criminal courts and tribunals are given the duty to study and find custom to mould or develop the customary rules of international crimes. However, the complex nature of their work leads to investigate whether the sources of international crimes are considered as 'unperfected'.

4.4.1 'Unperfected' Source?

The *Vasiljevic* Trial Chamber found an act is criminal under customary international law either because 'a vast number of national jurisdictions have criminalised it or a treaty provision which provides for its criminal punishment has come to represent customary international law.'[1118] The Trial Chamber also seemed satisfied to accept acts as a criminal if those acts are 'criminal according to general principles of law recognised by the community of nations.'[1119] Jain explained that international criminal tribunals and commentators are inclined to use 'general principles' to fulfil the gap due to the absences of treaties and customary international law.[1120] However, the ICTY has not maintained any consistent manner during the use of general principles as a tool to circumvent this lacuna. Jain stated that it 'demonstrates a worrying propensity to pick and choose municipal systems for their deprivation, with little attention to questions of selection, depth of analysis, and the appropriateness of transposition.'[1121]

[1115] A.E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', (2001) 95 American Journal of International Law 4, p. 758.
[1116] *Prosecutor v Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-I (2 October 1995) para. 99.
[1117] Judge Abdulqawi Ahmed Yusuf, 'Fifth Antonio Cassese Lecture: The Role of International Lawyers between Theory and Practice' (2017) 15 Journal of International Criminal Justice 3, p. 604.
[1118] *Prosecutor v Vasiljevic* (Trial Chamber II) IT-98-32-T (29 November 2002) para. 199.
[1119] Ibid.
[1120] Neha Jain, 'Comparative International Law at the ICTY: The General Principles Experiment' (2015) 109 American Journal of International Law 486, p. 495.
[1121] Ibid., p. 495-96.

General principles of law as a source of international law are the expression of national legal systems and other 'unperfected' sources that do not satisfy the criteria of other sources listed under Article 38 of the ICJ statute.[1122] Bassiouni stated that rules of customary international law may reflect general principles of law when those rules are formed on the basis of *opinio juris*. However, Petersen stated that general principles of law are 'value-related', and therefore, the recognition of them as precedent would be nothing more than a futile source.[1123]. From the view of Jain and Petersen, it is apparent that it would be a futile process if someone tries to identify source of international crimes in the general principles of law.

4.6 Conclusion

This chapter has analysed the unusual custom formation process, observing less stringent emphasise on State practice. The assessment and collection of several national and international instruments do not satisfy the two-element approach of customary international law. The main criterion of identification is that the norm needs to be pre-supposedly existent. Generally, the creation of customary international law is seen 'as an evolving process. At first, some states initiated the first practice, and with evolving generality, uniformity and duration that state practice was gradually joined by *opinio juris.*'[1124] Mere observation of State practice may not offer validity to that norm.[1125]

The chapter admits the central use of *opinio juris* to the formation of customary international law. It argues that *opinio juris*, in this regard, is the reflection of the necessity of the international community. Generally, international judicial decisions, General Assembly resolutions, and provisions of treaties have normative value, and thus indicate the necessity of the international community. Recalling the ICJ decision, the chapter argues that the General Assembly resolutions have normative value. It can 'provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.'[1126] From the analysis of the *Ad Hoc* Tribunals' approach to identifying and applying customary international law, this chapter

[1122] M. Cherif Bassiouni, 'A Functional Approach to 'General Principles of International Law' (1990) 11 Michigan Journal of International Law 3, p. 768.
[1123] Niels Petersen, 'Customary Law without Custom- Rules, Principles, and the Role of State Practice in International Norm Creation' (2007) 23 *American University International Law Review* 275, p. 286-289.
[1124] Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullem Crimen Sine Lege* (Springer 2017) 96
[1125] Milan Kuhli & Klaus Gunther, Judicial Lawmaking, Discourse Theory and the ICTY on Belligerent Reprisals, (2011) 12 German Law Journal 5. p. 1275.
[1126] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, para. 70.

argues that *opinio juris* is the governing rule followed by State practice. Frulli mentioned that, given the situation of Yugoslavia and Rwanda, 'one may propound the view that […] there was indeed an acceleration in the formation and diffusion of a solid *opinio juris* (but not yet state practice) that prompted - at the very least - the criminalisation under international law of the serious violations of international humanitarian law in internal armed conflicts.'[1127] Unlike Frulli, the chapter does not suggest the total departure from State practice. This chapter argues that the broad application of international law norms and instruments reflects the presence of *opinio juris* at the beginning point based on the international practice. The work of the *Ad Hoc* Tribunals did not reflect the two-element approach; instead, they applied an 'inconsistent eclectic approach'[1128] to justify their customary international law claim.

[1127] Micaela Frulli, 'The Contribution of International Criminal Tribunals to the Development of International Law: The Prominence of *opinio juris* and the Moralisation of Customary Law' (2015) 14 The Law and Practice of International Courts and Tribunals 1, p. 86-87.
[1128] William Thomas Worster, 'The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches' (2014) 45 Georgetown Journal of International Law 445, pp. 520-521.

CHAPTER 5. THE EXPANSIVE INTERPRETATION TO THE CUSTOMARY RULES OF GENOCIDE: ROLE OF THE ICJ, *AD HOC* CRIMINAL TRIBUNALS AND INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR

5.0 Introduction

The Convention on the Prevention and Punishment of the Crime of Genocide 1948 (hereinafter the Genocide Convention) defines 'genocide' as an international crime. The Genocide Convention is undeniably a part of customary international law. The chapter consists of two parts- in the first part, it briefly discusses how genocide becomes a part of customary international law. It also shows whether there is any presence of State practice and *opinio juris* in the process of custom formation. In the second part, the chapter discusses two significant constituent elements of the crime of genocide under customary international law. In this regard, the chapter examines the decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) (hereinafter *Ad Hoc* Tribunals). Two constituent elements are first, 'intent' of genocide, and second, the concept of 'protected groups'. The chapter explores whether the *Ad Hoc* Criminal Tribunals' interpretation of the constituent elements of genocide fulfils the classic definition of customary international law, satisfying the criteria of State practice and *opinio juris*. It finds that the *Ad Hoc* Tribunal's prevailing view suggests the purpose-based approach to interpret 'intent' requirement as special or specific intent. On the other hand, the *Ad Hoc* Tribunals adopted both objective and subjective test to understand the nature of the 'group' as a protected one. The chapter discusses the interpretation of both elements in light of the approaches mentioned. It concludes that the purpose-based approach in terms of 'intent' and the objective test in terms of the 'concept of protected groups' are more in line with customary international law.

PART I

5.1 Genocide as an International Crime

This section provides an historical overview of the concept of genocide as international crime. The historical overview provides a scope to revisit the development of the concept of genocide. The Convention on the Prevention and Punishment of the Crime of Genocide 1948

(hereinafter Genocide Convention 1948) defines 'genocide' as an international crime. The Genocide Convention 1948 is considered to be one of the first post-war human rights treaties completed through the effort of the United Nations General Assembly. The UN General Assembly does not act as a legislative body and thus cannot pass laws. Nevertheless, the Tribunal in the *Justice* case found that the power vested in the General Assembly to be significant for determining the crime of genocide.[1129] General Assembly Resolution[1130] reflected as 'a moral force created by the consensus of a world-wide assembly'.[1131] On 13 November 1946, at its forty-seventh plenary meeting held on 9 November 1946, the General Assembly referred a draft resolution on the crime of genocide to the Sixth Committee for their consideration and to report on the possibility of declaring genocide an 'international crime'.[1132] The draft resolution was debated in three sessions of the Sixth Committee. The Summary Record of Meetings on Legal Questions shows the gravity of this crime, reflecting its customary character.

On 22 November 1946, Ernesto Dihigo, the Cuban ambassador, ascertained the customary nature of the crime of genocide stating that 'genocide is not a new crime; it was committed in ancient times and occurred again before and during the last world war, in the very centre of Europe.'[1133] At the same meeting, Sir Hartley Shawcross from the United Kingdom recalled a proposal raised at the fifth International Conference for the Unification of Criminal Law in 1933 to demonstrate the early presence of the crime of genocide.[1134] Riad Bey believed that 'just as wars of aggression had been condemned as violating the principles of the rights of man, so genocide should be condemned as a violation of the same principles.'[1135] He also stated that the crime of genocide must have been considered as serious offence against the

[1129] *The Justice Case*, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume 3, p. 983.
[1130] UN General Assembly, The Crime of Genocide, 11 December 1946, A/RES/96.
[1131] Fortieth Meeting of the Sixth Committee, 2 October 1947 (documents A/C. 6/SR.40) as printed in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Preparatoires*, Volume. 1(Martinus Nijhoff Publishers 2008) 393.
[1132] Letter From the President of the General Assembly to the Chairman of the Sixth Committee on 13 November 1946 (documents A/C. 6/64).
[1133] Twenty-Second Meeting of the Sixth Committee, 22 November 1946 (documents A/C. 6/84).
As printed in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Preparatoires,* Volume. 1 (Martinus Nijhoff Publishers 2008) 8.
[1134] Ibid. p. 9.
[1135] Twenty-Third Meeting of the Sixth Committee, 28 November 1946 (documents A/C. 6/91) as printed in. Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Preparatoires,* Volume. 1 (Martinus Nijhoff Publishers 2008) 91.

principle of justice and respect for human dignity.[1136] In contrast, Mr Gajardo from Chile preferred the definition of the crime as a 'crime against peoples rather than as a crime under international law, thus avoiding all confusion resulting from the fact that genocide could be committed within the frontiers of a country and would thus be a national crime.'[1137] In the Thirty-Ninth Meeting of the Sixth Committee, Sir Hartley Shawcross made his viewpoint clear stating that genocide was already a crime under international law and had already been adhered to by the International Military Tribunal at Nurnberg.[1138] Nonetheless, the United Kingdom did not support the idea that 'genocide was a crime against humanity'.[1139] In contrast, France proposed to equalise 'genocide as a crime against humanity' as the Nuremberg Tribunal proscribed both crimes.[1140] Mr Ordonneau from France emphasised Nuremberg's precedent and referred to the Nuremberg Tribunals' decisions for similar offences.[1141] The Venezuelan proposal indicated that Nazism and fascism were not the origins of this crime; instead, there was always existence of such crimes.[1142] The Venezuelan draft had no reference to the Nuremberg Precedent. Mr Azkoul from Lebanon also opposed the Nuremberg Tribunal reference as there was no conviction on genocide.[1143] By contrast, Mr Yepes from Colombia emphasised the importance of defining genocide under international law because of the earlier connection found in the Nuremberg Tribunal decisions.[1144] Mr Liu from China considered this

[1136] Ibid., p. 91.

[1137] Twenty-Fourth Meeting of the Sixth Committee, 29 November 1946 (documents A/C. 6/96).
As printed in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Preparatoires,* Volume. 1 (Martinus Nijhoff Publishers 2008) 18.

[1138] Thirty-Ninth Meeting of the Sixth Committee, 29 September 1947 (documents A/C. 6/SR.34) as printed in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Preparatoires,* Volume 1 (Martinus Nijhoff Publishers 2008) 389.

[1139] Matthew Lippman, 'The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide' (1985) 3 Boston University International Law Journal 1, p. 28; see also, 6 U.N. ESCOR (160th mtg) p. 322 (1948).

[1140] Ibid.; see also Ad Hoc Committee on Genocide Report to the Economic and Social Council on the Meetings of the Committee Held at Lake Success, New York, from 5 April to 10 May 1948, 7 U.N. ESCOR Supp. (No. 6) at 1, U.N. Doc. E/794 (1948) [hereinafter cited as the Ad Hoc Committee Report].

[1141] *Ad Hoc* Committee on Genocide Summary Record of the Twenty-Third Meeting, 27 April 1948. (documents E/AC. 25/SR.23) as printed in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Preparatoires,* Volume 1 (Martinus Nijhoff Publishers 2008) 972.

[1142] Matthew Lippman, 'The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide' (1985) 3 Boston University International Law Journal 1, p. 38; see also 3 U.N. GAOR C.6, (109the mtg.) at 489, Mr. Perez Porozo (Venezuela).

[1143] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Preparatoires,* Volume.1 (Martinus Nijhoff Publishers 2008) 972.

[1144] Twenty-Third Meeting of the Sixth Committee, 28 November 1946 (documents A/C. 6/91) as printed in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Preparatoires*, Volume.1 (Martinus Nijhoff Publishers 2008) 13.

crime an offence against fundamental principles of morality.[1145] After debates throughout meetings, the debate in the Sixth Committee inferred that 'there was unanimous agreement that the General Assembly should affirm that genocide is a crime under international law.'[1146]

The debate shows that the heinousness of this crime has a long-standing presence in human history. The identification of the crime of genocide by the Sixth Committee reflects the customary nature of the crime of genocide, demonstrating its existence in ancient times. The codification reflects 'morality' 'human dignity' or the existence of other kinds of humanness as evidence of acceptance as law (*opinio juris*). This debate also shows the intention of the states at the drafting process to codify 'genocide' as an international crime based on such considerations. The affirmation was apparent from the debate that this crime exists not only in the proceedings of the Nuremberg Tribunals but also in the principles of justice and respect for human dignity. The presence of the term 'genocide' in the Nuremberg Tribunal adds enormous legal importance to understand its inherent existence as an international crime.

5.2 The Prohibition of Genocide under Customary International law

The prohibition of genocide has been recognised since the adoption of General Assembly Resolution in 1946.[1147] This section describes customary nature of the term 'genocide', showing its presence even before the Convention was adopted. In this regard, the discussion refers to some early references to the term 'genocide'. It also shows that genocide is crime for the denial of the moral law and thus always exists in international law, more specifically in customary international law.

5.2.1 Early References to the Term 'Genocide'

The word 'genocide' was first coined by Raphael Lamkin, a Polish lawyer. He used the term to indicate the outright extermination of Jews and Gypsies and denote a 'coordinated plan of different actions' by Nazi Germany.[1148] Lemkin showed in his book that the concept of this

[1145]Twenty-Fourth Meeting of the Sixth Committee, 29 November 1946 (documents A/C. 6/96) as printed in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Preparatoires,* Volume. 1 (Martinus Nijhoff Publishers 2008) 22.
[1146] Report of the Sixth Committee, The Crime of Genocide, 1946, Annex 63 (documents A/231) as printed in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Preparatoires,* Volume. 1 (Martinus Nijhoff Publishers 2008) 31.
[1147] UN General Assembly, The Crime of Genocide, 11 December 1946, A/RES/96.
[1148] Raphael Lemkin, *Axis Rule In Occupied Europe: Laws Of Occupation - Analysis Of Government Proposals For Redress* (Washington, D.C.: Carnegie Endowment for International Peace, 1944) 79-95.

crime had existed since the beginning of the human race. In a report to an international conference held in Madrid, Raphael Lemkin first proposed the making of a multilateral convention proposing 'the extermination of human groups' an international crime, paralleling slavery, piracy and other universally recognised "offences against the law of nations".[1149] In 1933, he called the crime 'Acts of Barbarity', which became 'genocide' after ten years in 1943.[1150] However, the prosecution's opening statement in *The RuSha* case *and The Pohl* case stated that 'as early as October 1933 it was rejected in its initial form presented by the author at the international conference for the simplification of criminal law in Madrid. Lemkin himself concludes from this that the charge of "genocide" as a crime is not possible, because an international convention does not exist.'[1151] Justice Robert H. Jackson recalled the rejection of this crime in 1933. He mentioned in his opening address that 'as long ago as 1933, Professor Lemkin proposed the recognition of genocide as a crime under international law. Had his proposal been adopted, Sir Cecil Hurst and his United Nations War Crimes Commission would not now be so hard put to determine the guilt of Nazi oppressors.'[1152] From the discussion above, Madrid's international conference was of particular importance in mentioning the initial presence of the crime of genocide.

The Nuremberg and other trials presented the earliest events of the concept of 'genocide' in the international criminal prosecution. The fourth chapter of the thesis noted the significance of the decisions of Nuremberg and other trials as evidence of law. There were no charges on the crime of genocide in the Nuremberg and other trials. However, the crime was referred to in several indictments. For example, the prosecutor, Mr Ferencz, mentioned this crime in his opening statement at the Trial of Einsatzgruppen. He emphasised the importance of exploring every aspect of Nazi doctrine that linked to the development of the crime of genocide. He stated that Nazi programs were initiated to exterminate the Jews. The crime of genocide derived from the Nazi ideology of 'blood and race' which was carried out by Hitler and his platoons in the occupied territories.[1153] Also, the opening statement also referred to the

[1149] Raphael Lemkin, 'Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations'; Available at: http://www.preventgenocide.org/lemkin/madrid1933-english.htm.
[1150] Ibid.
[1151] *The RuSha Case and the Pohl Case*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume. V. p. 5.
[1152] Robert H. Jackson's Opening Address for the United States of America by Hon. Robert H. Jackson at the Trial of War Criminals at Nuernberg, (The Washington Post, 1946) 56.
[1153] *The Einsatzgruppen Case* and *RuSha Case*, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume IV, p. 32.

'methodical executions of long-range plans to destroy ethnic, national, political, and religious groups which stood condemned in the Nazi mind.'[1154]

The *Justice* case made a direct reference to the crime of genocide, stating that '[t]he prime illustration of a crime against humanity under Control Law No.10, which by reason of its magnitude and its international repercussions has been recognised as a violation of common international law, we cite "genocide", which will shortly receive our full consideration.'[1155] The term 'genocide' was also used in the *Ministries* case when charging defendants with war crimes and crimes against humanity for offences committed against the civilian population.[1156] The *Ministries* case also stated that the Third Reich had embarked on a systematic programme of genocide, aiming to destroy 'nations and ethnic groups'. The Third Reich sought to strengthen the German nation and the alleged 'Aryan' race by imposing Nazi characteristics on selected individuals and exterminating 'undesirable racial elements'.[1157] Through speeches, articles, news releases and other publications, the defendant incited the persecution of ethnic groups on the grounds of their being 'political and racial undesirables.'[1158] In the *Goring* case, Sir Hartley Shawcross, the British prosecutor, also used the term 'genocide', stating that 'genocide was not restricted to the extermination of the Jewish people or of the gypsies. It was applied in different forms in Yugoslavia to the non-German inhabitants of Alsace-Lorraine, and the people of the Low Countries and Norway.'[1159] Given the fact that there were no charges, the reference to this crime adds evidential value to the determination of crime under customary international law. This section below shows the factors involved to ascertain the elements of customary international law.

5.2.2 'Genocide' is a Crime Contrary to Moral Law and the Principles of Humanity: Impact of Custom

This section discusses the initial evolution of this crime under customary international law following factors such as 'moral law' or 'principles of humanity'. The General Assembly observed that 'genocide is almost as old as the world. Ancient, modern and contemporary history all furnish numerous examples of it. But German Nazism rendered it tragically real by

[1154] *The Einsatzgruppen Case* and *RuSha Case*, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume IV, p. 30.
[1155] *The Justice Case*, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume 3, p. 983.
[1156] The *Ministries Case,* U.S. Military Tribunal Nuremberg (April 11-13, 1949) 14 TWC 308, p. 44.
[1157] Ibid.
[1158] Ibid.
[1159] *France et al. v Göring (Hermann) et al.,* 17 IMT 61 (June 25, 1946) p. 497.

organising the systematic and large-scale destruction of various racial or national groups.'[1160] The General Assembly seems to have observed the presence of this crime as foreseeable at all times in history. However, no precise enumeration as to its sources was provided by this resolution. This crime was, rather, discussed as one of the first human rights items within the committee.[1161] The strong association of this crime with losses of humanity, human dignity and international peace and security is also observed in the First Draft Resolution, it stated that:

> Whereas throughout history and especially in recent times many instances have occurred when national, racial, ethnical or religious groups have been destroyed, entirely or in part; and such crimes of genocide not only shook the conscience of mankind, but also resulted in great losses to humanity in the form of cultural and other contributions represented by these human groups; Whereas genocide is a denial of the right to existence of entire human groups in the same way as homicide is the denial of the right to live for individual human beings and that such denial of the right to existence is contrary to the spirit and aims of the United Nations;...[1162]

In 1951, the International Court of Justice (ICJ) in an *Advisory Opinion on the Reservations on the United Nations Convention on the Prevention and Prohibition of the Crime of Genocide* ascertained the customary characteristics of genocide, focusing on the origins of the Genocide Convention. The ICJ also reflected the same attributes of this crime. The ICJ stated that:

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General Assembly, December

[1160] United Nations General Assembly Resolution 96 (1), Fifty-Fifth Plenary Meeting Held on 11 December 1946, note by the Secretary-General as printed in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Preparatoires*, Volume.1 (Martinus Nijhoff Publishers 2008).) 34.
[1161] Two Hundred and Eighteenth Meeting, 26 August 1948 (documents E/Sr.218) as printed in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Preparatoires*, Vol.1, 1219 (2008).
[1162] Draft resolution relating to the crime of genocide proposed by the delegation Cuba, India and Panama, 2 November 1946 (documents A/BUR./50).

> 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognised by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required in order to liberate mankind from such an odious scourge.[1163]

From the statement above, it is apparent that the ICJ deduced the customary character of the crime of genocide from the origins of the Genocide Convention and considered this crime as contradictory to the moral law. The ICJ further emphasised the objects of the Genocide Convention which had adopted the crime of genocide 'for a purely humanitarian and civilizing purpose.'[1164] Referring to the decision of the ICJ, Birgit stated that 'the court employed an entirely different approach to the attribution of customary status to the prohibition of genocide than it had done with customary norms in its previous judgements. This methodology was heavily influenced by the nature and character of the prohibition of genocide.'[1165] He also stated that the ICJ, in this case, did not apply the 'two-element approach', rather found the customary character of a rule from some underlying principles such as moral law or the most elementary principles of morality.[1166] Overall, genocide is considered one of the most serious crimes under international law due to its tragic consequences for humanity and the fact that it endangers international peace and security.[1167] Some considerations of humanity constitute the basic object and purpose of the Genocide Convention. In 2015, the ICJ has recalled what has been noted by the Court in 1951 and 2007 concerning the objects of the Convention.[1168] The ICJ has

[1163] *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, ICJ Reports 1951, p. 23.
[1164] Ibid.; The ICJ stated that 'the objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object, on the one hand, is to safeguard the very existence of certain human groups and, on the other, to confirm and endorse the most elementary principles of morality. In such a convention, the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison de'etre* of the convention.'
[1165] Birgit Schlutter, *Developments in Customary International Law - Theory and Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff Publishers 2010) 144.
[1166] Ibid., 145.
[1167] Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996. This report appears in the Yearbook of the International Law Commission, 1996, vol. II, Part Two.
[1168] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, ICJ Reports 2015, p. 47.

not deviated what has been pronounced in the previous judgement, rather it reiterated the Preamble to the Genocide Convention[1169]

The discussion shows that the Genocide Convention as a part of customary international law is persuaded more by the human rights norms. The basis of the Convention lies in the 'moral and humanitarian principles.'[1170] This Convention is considered as 'the first human rights instrument adopted by the United Nations.'[1171] Draper stated that 'the Genocide Convention went beyond traditional humanitarian law by extending its scope beyond situations of war.'[1172] In 2015, the ICJ also noted that 'the Convention and international humanitarian law are two distinct bodies of rules, pursuing different aims. The Convention seeks to prevent and punish genocide as a crime under international law (Preamble), "whether committed in time of peace or in time of war" (Art. I), whereas international humanitarian law governs the conduct of hostilities in an armed conflict and pursues the aim of protecting diverse categories of persons and objects.'[1173] Undeniably, the principles enshrined in the Convention are recognised by 'civilised nations' and provide a 'universal character' in condemnation of genocide. The Convention 'belongs to the growing corpus of international criminal law.'[1174]

The Genocide Convention is one of the widely ratified international instruments. As of now,152 states have ratified the Genocide Convention.[1175] The ICJ in the Advisory Opinion stated that 'it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate.'[1176] This intention can also be understood from the representatives' proposal during the Sixth Committee meetings. For example, Sir Hartley Shawcross (United Kingdom) and Mr Chagla (India) proposed that members call upon their

[1169] Ibid., p. 65.
[1170] *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, ICJ Reports 1951, p. 24
[1171] John P. Pace, The United Nations Commission on Human Rights: A Very Great Enterprise (Oxford University press 2020) 23.
[1172] G.I.A.D. Draper, The Development of International Humanitarian Law, in *Int'l Dimensions of Humanitarian Law* (UNESCO 1988) 80.
[1173] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, ICJ Reports 2015, p. 69.
[1174] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* ICJ Reports 2007 (Separate Opinion of Judge Tomka) P. 293
[1175] https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en
[1176] *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, ICJ Reports 1951, p. 24.

governments to recognise this crime in national legislation.[1177] Even though the prohibition of genocide had received widespread acceptance, there were no convictions on genocide until the *Akayesu* case in 1998 before the ICTR. Until the establishment of the two *Ad Hoc* Tribunals, '*Eichmann* remained the only significant judicial application of the Genocide Convention until the late 1990s.'[1178] In the *Eichmann* case, both the Israeli District Court in the *Eichmann* case observed 'genocide - corresponding to a "crime against the Jewish People"'.[1179] The *Eichmann* was the first case that defined the crime of genocide.[1180] However, the constituent elements of the crime of genocide were first discussed during the *Ad Hoc* tribunals' trials. Some scholars find the definition of genocide in Article II of the Genocide Convention unclear because it provides a 'vague concept of genocide followed by examples of acts deemed to be illustrative of the crime'.[1181] The section that follows illuminates the *Ad Hoc* Tribunals' contribution to developing the constituent elements of genocide under customary international law. It discusses the instruments and methods adopted by the *Ad Hoc* Tribunals to satisfy customary international law as a source of the crime of genocide.

PART II

5.3 Customary Rules of Genocide: An Expansive Interpretation by the *Ad Hoc* Criminal Tribunals

The unique, coherent and single concept to define the constituent elements of the crime of genocide is absent. The absence of singular notion allows the judges of the *Ad Hoc* Criminal Tribunals to rely on international documents that contain even the slightest mention of the elements of the crime of genocide. The *Ad Hoc* tribunals' expansive interpretation often fails to meet the criteria of State practice and *opinio juris*. In most cases, the references to international instruments appear as evidence of law or *opinio juris*. The view of Andrew T. Guzman is essential here; he pointed out that '[a] focus on *opinio juris* is appealing to those

[1177] Twenty-Second Meeting of The Sixth Committee Held On 22 November 1946 (Documents A/C. 6/84) as printed in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Preparatoires*, Vol.1, 10 (2008).

[1178] William Schabas, 'The Contribution of the Eichmann Trial to International Law' (2013) 26 Leiden Journal of International Law 3, p. 671.

[1179] *EichmannCase,* para.10.at- https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Appeals_Judgement_29-5-1962.pdf

[1180] William Schabas, 'The Contribution of the Eichmann Trial to International Law' (2013) 26 Leiden Journal of International Law 3, p. 671.

[1181] Lori Lyman Bruun, 'Beyond the 1948 Convention - Emerging Principles of Genocide in Customary International Law' (1993) 17 Maryland Journal of International Law 193, p. 197.

who want to expand the set of norms that are considered CIL.'[1182] Given the fact that genocide is recognised as an international crime under customary international law, the *Ad Hoc* Tribunals' excavation on the individual requirements of crime has particular usefulness.[1183] Karnavas stated that 'the Chambers of the *ad hoc* Tribunals are interpreting the Genocide Convention in a broad and contradictory fashion and are diluting the essence of the crime when they apply the statutory modes of liability to the crime of genocide.'[1184] The section that follows specifically concentrates on the sources accepted as evidence of law by the *Ad Hoc* Tribunals. It examined the sources in light of the two elements of customary international law.

5.3.1 Source and Method of Interpretation

As stated in Chapter four of the thesis, the jurisdiction of the ICTY was limited to violations of international humanitarian law, which are part of customary international law. Anything beyond customary international law would be considered as 'unauthorised'.[1185] This means that any treaty provision outside the scope of customary international law would not be relevant. Article 4 (2) of the ICTY Statute includes the same provisions of the Genocide Convention. Birgit Schlutter stated that 'there can be absolutely no doubt that the prohibitions of genocide as contained in Article 4 (2) of the ICTY Statute, which recites the provisions of the Genocide Convention 'word for word', fell under customary international law'.[1186] Quigley cited two separate bodies of law on genocide, one under the Genocide Convention and the other under customary international law. He stated that '[t]here may, on certain points, be a difference between genocide as defined in customary law and in the Genocide Convention. Customary law, moreover, evolves more readily than treaty norms. Customary law potentially introduces another dynamic factor in the definition of genocide.'[1187] The treaty obligation and customary law obligation should be treated separately and distinctively where that obligation

[1182] Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008) 195.
[1183] Birgit Schlutter, *Developments in Customary International Law - Theory and Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff Publishers 2010) 213.
[1184] Michael G. Karnavas, 'Moving Target in Conflict with the Principle of Legality' in Dr Paul Behrens and Ralph Henham (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Routledge 2016) 98.
[1185] Mohamed Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal* (Oxford University Press 2012) 52.
[1186] Birgit Schlutter, *Developments in Customary International Law - Theory and Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff Publishers 2010) 213; See also *Jelisic* Trial Chamber para. 60.
[1187] John Quigley, *The Genocide Convention - An International Law Analysis* (Routledge 2006) 80.

remains both in treaty and customary law.[1188] No doubt, the Genocide Convention 1948 incurs customary obligation as it is declaratory of customary international law. However, the chapter argues that the individual assessment of the *Ad Hoc* Tribunals' expansive interpretation on genocide requires states' engagement in the practice as acceptance of law (*opinio juris*). The section below shows the Tribunals' endeavour to identify the rules of customary international law.

In terms of using sources and methodologies, the work of the *Ad Hoc* Tribunals seems quite sparse. The reference to national and international instruments does not follow any specific methodology to identify the customary international law. David L. Nersessian noted that the *Ad Hoc* Tribunals relied on several commentaries and instruments, national or international, to determine the customary characteristics of the crime of genocide.[1189] The methodology he mentioned is 'interpretative methodology' to analyse the Statute of the ICTY.[1190] As mentioned in the fourth chapter of the thesis, the *Ad Hoc* Tribunals invoked the general rules of treaty interpretation to interpret the Statute of the ICTY and ICTR. The ICTY in the *Krstic* Trial Chamber applied Article 31 and 32 of the Vienna Convention on the Law of Treaties.[1191] As per the Vienna Convention, treaty interpretation should follow 'the ordinary meaning of the terms in their context and in light of the treaty's object and purpose.'[1192] Where the ordinary meaning is not clear, interpreters can refer to the 'preparatory work of the treaty or the circumstances of its conclusions.'[1193] The *Galic* Appeals Chamber considered the *travaux preparatoires* of the Genocide Convention as a supplementary means of interpretation.[1194] The *Tadic* Appeals Chamber already stated that the supplementary means of interpretation is applied when the text of a treaty or other international norm-creating instruments is ambiguous or obscure.[1195]

The *Ad Hoc* Tribunals maintained a nexus between interpretative methods and customary international law to avoid the violation of *nullum crimen sine lege*. John Quigley

[1188] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, ICJ Reports 2015, p. 48.
[1189] David L. Nersessian, 'The Contours of Genocide Intent: Troubling Jurisprudence from the International Criminal Tribunals' (2002) 37 Texas International Law Journal 2, p. 240.
[1190] Ibid., p. 240.
[1191] *Prosecutor v Krstic*, (Trial Chamber Judgement) IT-98-33-T (2 August 2001) para. 541.

[1192] Article 31 (1), Vienna Convention on the Law of Treaties, UNTS, Vol. 1155, p. 331.
[1193] Article 31 (1) and 32, Vienna Convention on the Law of Treaties, UNTS, Vol. 1155, p. 331.
[1194] *Prosecutor v Galic*, (Appeals Chamber Judgement) IT-98-29-A (30 November 2006) para. 103.
[1195] *Prosecutor v Tadic*, (Appeals Chamber Judgement) ICTY-94-1-A (15 July 1999) para. 303.

particularly stated that the *Krstic* Trial Chamber interpreted Article 4 of the Statute of the ICTY on the basis of customary international law, instead of strictly following the Genocide Convention.[1196] Referring to the approach adopted by the *Krstic* Trial Chamber, Quigley noted that 'if one were to conceive the project as simply to interpret Article II, one would probably take the same sources into account, either as instances of implementation of the relevant article of the Genocide Convention, or as instances of customary norms covering the same subject matter.'[1197] He acknowledged the approach of the *Krstic* Trial Chamber because the difference between the treaty and custom is more 'theoretical than real'.[1198] Although customary law was not direct source of the Statutes of the ICTY and ICTR, any interpretation that deviated from customary international law could lead to the violation of the principle of legality.

The *Ad Hoc* Tribunals referred several sources to identify the evidence of customary international law. The *Krstic* Trial Chamber considered the Genocide Convention and its object and purpose as one of the primary sources to determine the customary rules of genocide.[1199] The *Jelisic* Trial Chamber relied on judicial interpretations of treaties or conventions. The Chamber stated that the 'judicial interpretations of a treaty can evidence subsequent practice.'[1200] The Chamber reiterated case law from the previous decisions such as *Akayesu* and *Kayishema*. It also referred to national courts' findings (such as the *Eichmann* case) to show the constitution of 'subsequent practice grounded on the Convention.'[1201] Similarly, the *Krstic* Trial Chamber also looked for the guidance given in national legislation and practice, such as judicial interpretations and decisions.[1202] References to two or three case law may not satisfy the requirement of 'sufficiently widespread' State practice. Nersessian argument is relevant here, he stated that the 'case law on genocide from the tribunals is not truly subsequent practice grounded on the Genocide Convention because it derives from the interpretation of an analogous statutory provision, rather than the Convention itself.'[1203] Hence, judicial decisions

[1196] John Quigley, *The Genocide Convention - An International Law Analysis* (Routledge 2006) 80
[1197] Ibid., p. 82.; Quigley states that 'All the sources to which the *Krstic* trial chamber refers might legitimately be used to construe Article II of the Genocide Convention, without referring to any different or broader concept of genocide that may exist in customary international law.'
[1198] John Quigley, *The Genocide Convention - An International Law Analysis* (Routledge 2006) 82.
[1199] *Prosecutor v Krstic*, (Trial Chamber Judgement) IT-98-33-T (2 August 2001) para. 541.
[1200] *Prosecutor v Jelisic*, (Trial Chamber Judgement) IT-95-10-T (14 December 1999) para. 61.
[1201] Ibid., para. 61.
[1202] *Prosecutor v Krstic*, (Trial Chamber Judgement) IT-98-33-T (2 August 2001) para. 541.
[1203] David L. Nersessian, 'The Contours of Genocide Intent: Troubling Jurisprudence from the International Criminal Tribunals' (2002) 37 Texas International Law Journal 2, p. 274.

may not be accepted as solid evidence of State practice. Nonetheless, the legal significance of the *Ad Hoc* Tribunals' decisions in determining international crimes cannot be undermined.

As stated above, the *Ad Hoc* Tribunals were aware that no interpretation could be given in violation of the principle of *nullum crimen sine lege*. The ICTR in the *Prosecutor v Kayishema* case stated that the interpretation should be in compliance with the principle of legality so that it does not get detrimental to the accused.[1204] Mr. Eric Ostberg, the Prosecutor of the ICTY in the *Karadzic and Mladic* case, stated in his opening statement that 'in the interests of international justice, genocide should not be diluted or belittled by too broad an interpretation' and that a strict interpretation is needed to 'justify the appellation of genocide as the 'ultimate crime.''[1205] The *Akayesu* Trial Chamber also maintained the specificity while interpreting Article 2 (2)(a) of the Statute of ICTR. For example, the French version of Article 2 (2) (a) of the Statute of the ICTR refers to '*meurtre'* while the English version uses 'killing'. The word '*meurtre'* has a precise meaning and stands for murder with intention; the English version is more general, covering both intentional and unintentional homicides. Given the presumption of innocence of the accused, the *Akayesu* Trial Chamber relied on the French version and Article 311 of the Penal Code of Rwanda.[1206] To resolve the confusion between the English and French texts, the *Akayesu* Trial Chamber noted how the material aspect of the offence depends on the death of the victims.[1207] Nersessian found the *Akayesu* Chambers' explanation of 'genocidal intent' limited.[1208] Referring to the drafting record of the Convention, he stated that the term "killing" should take priority over "*meurtre*".[1209]

The section that follows emphasises the two constituent elements of genocide: first, the 'intent' element, and second, the 'groups' element. The presence of 'intent', in particular, is significant in justifying genocide as a category of crime distinct from crimes against

[1204] *Prosecutor v Kayishema*, (Decision on the Motion of the Prosecutor to Sever, to Join in a Superseding Indictment and to Amend the Superseding Indictment, (27 March 1997) para. 3; Michael G. Karnavas, 'Moving Target in Conflict with the Principle of Legality' in Dr Paul Behrens, Professor Ralph Henham (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Routledge 2016) 100.

[1205] *Prosecutor v Karadzic and Mladic*, Case No. IT-95-18-I (Transcript of Hearing, Opening Statement of Eric Ostberg, Prosecutor of the ICTY) p. 25.

[1206] *Prosecutor v Akayesu*, (Trial Chamber Judgement) ICTR-96-4-T (2 September 1998) para. 500-501. Article 311 of the Penal Code of Rwanda states that 'Homicide committed with intent to cause death shall be treated as murder'.

[1207] Ibid., para. 501.

[1208] David L. Nersessian, 'The Contours of Genocide Intent: Troubling Jurisprudence from the International Criminal Tribunals' (2002) 37 Texas International Law Journal 2, p. 271.

[1209] Ibid., p. 273.

humanity.[1210] The ICJ has noted that 'the specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution…'[1211] The following part of the discussion highlights the interpretation provided by the *Ad Hoc* Criminal Tribunals' to the term 'intent' and 'group'. In this regard, it discusses whether the customary law was applied by the *Ad Hoc* Tribunals as interpretative aid to the constituent elements of the crime of genocide. In other words, it ascertains to what extent it can be assumed that the *Ad Hoc* Tribunals' interpretation meets the classic theory of customary international law. The term 'intent' has received several interpretations in different tribunals in different contexts. Dojcinovic stated that 'descriptions of various forms of intent as *mens rea* in legal publications, international case law and jurisprudence, however, represent a relatively diverse combination of national and international approaches to this core concept in criminal law.'[1212]

5.3.2 Defining 'Intent' as a Matter of Customary International Law

The mental element of the crime 'genocidal intent' was discussed for the first time during the trials of the ICTY and ICTR. The existence of the crime of genocide has two separate mental elements: one is 'general intent' and the other one is 'intent to destroy'.[1213] 'General intent' relates to the offence's objective element, whereas 'intent to destroy' forms an 'additional subjective requirement that complements the general intent and goes beyond the objective elements of the offence definition.'[1214] The *Ad Hoc* Tribunals referred to several sources and interpreted 'intent to destroy' requirement based on 'purpose-based approach'. The view is regarded as the traditional view due to its prevailing acceptance in the *Ad Hoc* Tribunals' case law. This section ascertains whether the purpose-based approach reflects the notion of customary international law satisfying its requirements or this approach has lost its credentials to the subsequently developed 'knowledge-based approach'.

[1210] Katherine Goldsmith, 'The issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach' (2010) 5 Genocide Studies and Prevention: An International Journal 3, p. 241.

[1211] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v Serbia and Montenegro*), ICJ Reports 2007, p. 82. See also *Kupreskic Trial Chamber,* para. 636.

[1212] Predrag Dojcinovic (ed.), *Propaganda and International Criminal Law: From Cognition to Criminality*, (Routledge 2019) 3.

[1213] Kai Ambos, 'What does 'intent to destroy' in genocide mean?' (2009) 91 International Review of the Red Cross 876, p. 835.

[1214] Ibid, p. 835.

For the first time, the term 'intent' was given expression at the drafting history of the Genocide Convention, regardless of whether the destructive act is small or big or whether there is any institutional plan or policy. It can also be traced back to the *Ad Hoc* Committee on Genocide set up by virtue of the Economic and Social Council resolution dated 3 March 1948.[1215] The *Ad Hoc* Committee observed that 'genocide is involved even if the authors of the act intended to destroy only part of the group, for example, if they sought to reduce it by a third or a quarter of the number of its members.'[1216] However, the term 'intent' was not included in Article 1 (II) of the Draft Convention for the Prevention and Punishment of Genocide. It states that 'Genocide is understood to mean criminal acts against any one of the groups of human beings […] with the purpose of destroying them in whole or in part, or of preventing their preservation or development.'[1217] Eventually, the text of the Genocide Convention included the term 'intent' in the definition of genocide. Until the *Akayesu* case, the exact time when the concept of 'intent to destroy' began to be understood as 'special' or 'specific' could not be clearly identified. The section below shows the *Ad Hoc* Tribunals' interpretation to the existence of 'intent' as 'special' or 'specific'. It also attempts to define whether the interpretation has been carried out in accordance with customary international law or not.

5.3.2.1 Purpose-Based Approach and Customary International Law

The application of the purpose-based approach identified the concept of 'intent' from several sources. For example, the *Akayesu* Trial Chamber showed the requirement of 'special intent' from the Roman continental legal systems. The Chamber referred to the *travaux preparatoires* of the Genocide Convention.[1218] The *Akayesu* Trial Chamber stated that, according to the Roman -continental legal systems, special intent is required 'as a constituent element of certain offences and demands that the perpetrator have the *clear intent* to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterised by a psychological relationship between the physical result and the mental state of the perpetrator.'[1219] However, Kress stated that the reference to

[1215] Ad Hoc Committee on Genocide, Draft Report Submitted by Mr. Azkoul, Rapporteur, E/AC. 25/ W.1/Add.3, (30 April 1948).
[1216] Ibid.
[1217] Committee on the Progressive Development of International Law and its Codification, Draft Convention for the prevention and punishment of genocide (prepared by the Secretariat) A/AC.10/42 (6 June 1947).
[1218] *Prosecutor v Akayesu*, (Trial Chamber Judgement) ICTR-96-4-T (2 September 1998) para. 519.
[1219] Ibid., para. 518. see also *Kayishema* (ICTR-95-I-T) Trial Chamber II (21 May 1999), para. 91. (emphasise added)

the 'Roman-continental legal systems' lacks a clear 'comparative criminal law argument'.[1220] He also pointed out that 'if reference to "Roman-continental legal systems" in *Akayesu* was meant to include, for example, the criminal legal systems of Germany, Austria and Switzerland, it was inaccurate. None of the three systems is there a distinction precisely mirroring the French one between *dol general* and *dol special.*'[1221] In contrast, common law terminology classifies crime with 'specific intent' instead of 'special intent'. Customary international law mainly reflects common law, but no simplistic or clear definition of 'specific intent' is provided by the common law.[1222]

The *Akayesu* Trial Chamber also noted the observation by the representative of Brazil during the *travaux preparatoires* of the Genocide Convention, where 'genocide is characterised by the factor of *particular intent* to destroy a group. In the absence of that factor, whatever the degree of the atrocity of an act and however similar it might be to the acts described in the convention, that act could still not be called genocide'[1223] The 'clear intent to cause the damage' was the main key element in the *Akayesu* Trial Chamber.[1224] The findings of the *Akayesu* case was followed in the subsequent ICTR cases, such as in the case of *Prosecutor* v. *Georges Rutaganda*[1225], *Prosecutor v. Ignace Bagilishema*[1226] and *Prosecutor v. Alfred Musema*.[1227] The *Jelisic* Appeals Chamber also applied the findings of the *Akayesu* case. The Chamber rejected the prosecution's argument that an accused has the required *mens rea* for genocide if he 'consciously desired' the destruction of the group.[1228] Following the *Akayesu* case, the *Jelisic* Appeals Chamber stated that the 'specific intent requires that the perpetrator […] seeks to achieve the destruction of a group.'[1229] The term 'specific intent' also includes perpetrator's personal motive of gaining an economic benefit or political advantage.[1230] The

[1220] Claus Kress, 'The Darfur Report and Genocide Intent' (2005) 3 Journal of International Criminal Justice 3, p. 567
[1221] Ibid. 8
[1222] Ibid., p. 569.
[1223] *Prosecutor v Akayesu*, (Trial Chamber Judgement) ICTR-96-4-T (2 September 1998) para. 519.
[1224] Ibid., para. 520. 'with regard to the crime of genocide, the offender is culpable only when he has committed one of the offences charged under Article 2 (2) of the Statute with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.'
[1225] *Prosecutor v Rutaganda*, (Trial Chamber Judgement) ICTR-96-3-T, Judgment (6 December 1999) para. 61.
[1226] *Prosecutor v Bagilishema,* (Trial Chamber I) ICTR 95-1A (7 June 2001) para. 62.
[1227] *Prosecutor v Musema,* (Trial Chamber Judgement) ICTR-96-13-T (27 January 2000) para. 164.
[1228] *Prosecutor v Jelisic*, (Appeals Chamber Judgment) IT-95-10-A (5 July 2001) para. 42.
[1229] Ibid., para. 46.
[1230] Ibid., para. 49 & 51. See also *Prosecutor v Tadic*, (Appeals Chamber Judgement) ICTY-94-1-A (15 July 1999) para. 269.

Appeals Chamber also provided interchangeable use of the term 'intent'. The Chamber stated that:

> Article 4, paragraphs (2) and (3) of the Statute largely reflect Articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide. As has been seen, Article 4 (2) of the Statute defines genocide to mean any of certain "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The Statute itself defines the intent required: the intent to accomplish certain specified types of destruction. This intent has been referred to as, for example, special intent, specific intent, *dolus specialis*, particular intent and genocidal intent. [1231]

However, the interchangeable use of the term has been criticised by some authors. Schabas stated that the *Jelisic* case dealt with *dolus specialis* to determine the threshold of *mens rea* essential for the crime of genocide.[1232] He found that the interchangeable use of *dolus specialis*, either as 'special intent' or 'specific intent', maybe a source of confusion because the *dolus specialis* concept 'is particular to a few civil law systems and cannot sweepingly be equated with the notions of 'special' or 'specific intent' in common law systems.'[1233] He discouraged importing the meaning of the concept from national criminal law systems.[1234] Similarly, the prosecution in the *Jelisic* Appeals Chamber submitted that 'the Trial Chamber erred in law by limiting its application of Article 4 of the Statute of the ICTY to […] only cases that meet a civil law *dolus specilis* standard.'[1235] The prosecution also argued that the concept of *dolus specialis* could not be presumed to have a fixed meaning even within the diverse groups of civil law systems.[1236]

The use of international instruments was also noticeable in the *Krstic* Trial Chamber. The Chamber defined the term 'intent' following the drafting history of the Genocide Convention. The Chamber referred to the preparatory works of the Genocide Convention where

---

[1231] *Prosecutor v Jelisic*, (Appeals Chamber Judgment) IT-95-10-A (5 July 2001) para 45.; *Prosecutor v. Musema* (Trial Chamber Judgement) ICTR-96-13-T (27 January 2000) paras. 164-167.; *Prosecutor v. Akayesu* (Trial Chamber Judgement) ICTR-96-4-T (2 September 1998) para. 498. The International Law Commission refers to specific intent (A/51/10), p. 87.

[1232] William A. Schabas, 'The *Jelisic* Case and the *Mens Rea* of the Crime of Genocide' (2001) 14 Leiden Journal of International Law123, p. 128. See also, *Prosecutor v. Alfred Musema,* (Trial Chamber Judgement) ICTR-96-13-T (27 January 2000) paras. 164-167.

[1233] Ibid., p. 129.

[1234] Ibid.

[1235] *Prosecutor v Jelisic*, (Appeals Chamber Judgment) IT-95-10-A (5 July 2001) para. 42.

[1236] Ibid., para. 42.

the drafters envisioned 'genocide as an enterprise whose goal and objective […] is to destroy a human group'.[1237] The Chamber mentioned that the International Law Commission has upheld the view of the preparatory work and stated that 'a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a *particular state of mind* or a *specific intent* with respect to the overall consequence of the prohibited act.'[1238] The Trial Chamber drew attention to domestic laws, including Article 211-1 of the French Criminal Code, 'to distinguish genocide by the existence of a plan to destroy a group.'[1239] However, the Chamber did not accept the view of legal commentators who considered 'genocide embraces those acts whose foreseeable or probable consequences is the total or partial destruction of the group without any necessity of showing that destruction was the goal of the act.'[1240] The chamber regarded the commentator's view as ambiguous to reflect the status of customary international law.[1241] The Chamber stated that:

> [w]hether this interpretation can be viewed as reflecting the status of customary international law at the time of the acts involved here is not clear. For the purpose of this case, the Chamber will therefore adhere to the characterisation of genocide which encompass only acts with the *goal* of destroying all or part of a group.[1242]

The *Krstic* Trial Chamber focused was on the 'goal', 'objective', 'particular state of mind or specific intent' to the destruction of all and part of a group. In the *Krstic* Trial Chamber, the ICTY was adhered 'to the characterisation of genocide which encompass only acts committed with the *goal* of destroying all or part of a group.'[1243] In the *Krstic* case, the prosecution submitted a broad interpretation of 'intent to destroy', specifying the 'conscious

[1237] *Prosecutor v Krstic*, (Trial Chamber Judgement) IT-98-33-T (2 August 2001) para. 571.
[1238] Ibid.; See also *Prosecutor v Kayishema and Ruzindana* (Trial Chamber Judgement) ICTR-95-1-T (21 May 1999) para. 103. See also, ILC Draft Code, p.88; 'The ILC indicated that 'general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or specific intent with respect to the overall consequence of the prohibited act.'
[1239] *Prosecutor v Krstic*, (Trial Chamber Judgement) IT-98-33-T (2 August 2001) para. 571.
[1240] Ibid., para. 572.
[1241] Ibid., para. 571.
[1242] Ibid.
[1243] Ibid.

desire' of the accused.[1244] However, the *Krstic* Trial Chamber relied on the purpose-based approach based on the accused's goal or desire as found in several international instruments. The 'purpose-based' or 'goal-oriented' approach was also followed in the *Blagojevic* and *Bradjanin* decisions.[1245] In 2007, the ICJ also followed this approach in the case of *Bosnia and Herzegovina v. Serbia and Montenegro*.[1246] The Court stated that 'special and specific intent has been considered as an 'extreme form of wilful and deliberate acts designed to destroy a group or part of a group.'[1247]

However, this concept has been criticised by some authors as having no foundation in the Genocide Convention. Ambos stated that 'the traditional interpretation of the intent to destroy requirement in genocide as purpose-based will stems from too narrow a reading of the concept of intent, equating it with the volitional element of intent.'[1248] Greenawalt argued that the 'historical and literal' interpretation of the Genocide Convention does not support pure 'volitional or purpose-based approach'.[1249] He combined two elements of the term 'intent' from the plain reading of the Genocide Convention: first, 'selection of group members on the basis of their group identity' and second, 'knowledge regarding the destructive consequences of one's actions for the survival of the group.'[1250] Similarly, Aydin stated that "'general intent" comes into question when the perpetrator knows that his conduct is socially harmful and dangerous, and when he desires that harmful and dangerous intent.'[1251] Kress also stated that the idea of *dol general* denotes the 'perpetrator's consciousness to act in contravention of a rule of criminal law' and the idea of *dol special* indicates the 'occurrence of a specific result'.[1252] He found the knowledge-based approach relevant to the proper construction of genocidal intent.[1253] In his view, the *Krstic* Trial Chamber lacks exhaustive interpretation of

[1244] Ibid., para. 569.
[1245] *Prosecutor v Blagojevic and Jokic*, (Trial Judgement) IT-02-60-T (17 January 2005) para. 656.
[1246] *Case concerning the application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* ICJ Reports 2007, para. 188.
[1247] Ibid.
[1248] Kai Ambos, 'What does 'intent to destroy' in genocide mean?' (2009) 91 International Review of the Red Cross 876, p. 885.
[1249] Alexander K. A Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge Based Interpretation' (1999) 99 Columbia Law Review Association 8. p. 2289.
[1250] Ibid.
[1251] Devrim Aydin, 'The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts' (2014) 78 Journal of Criminal Law 423, p. 432.
[1252] Claus Kress, The Darfur Report and Genocide Intent, (2005) 3 Journal of International Criminal Justice 3, p. 568
[1253] Ibid., p. 575.

the *travaux preparatoires*. He considered the *Krstic* Trial interpretation as 'cursory' to the determination of customary international law and stated that:

> The way the customary law argument has been used in the *Krstic* case is open to a methodological challenge. It is readily conceded that general or customary international law should guide the delineation of the borderlines of international criminalization, even where the formal source of the crime in question is an international treaty such as the Genocide or the ICC Statute.[1254]

Similarly, the Report of the UN International Commission on Darfur ('Darfur Report') finds 'the knowledge-based definition of individual genocidal intent as a form of *dol special* because such knowledge would refer specifically to the occurrence of the destructive result and not just to the illegality of the conduct.'[1255] Specific intent indicates knowledge of the perpetrator about his conduct.[1256]

However, this chapter finds that the process of custom formation reflects more to the purpose-based approach due to its repetitive use in the subsequent case law. This kind of development, in some cases, reflect *lex ferenda*, instead of *lex lata.*[1257] However, Noora Arajarvi also highlighted the future normative validity of the decisions. She stated that:

> The past misinterpretation of a rule - identifying and applying a norm as CIL when in fact there is not sufficient practice is and/or *opinio juris*- does not necessarily taint its future normative validity, if it is accepted and followed by States (and other entities). In other words, even if the rule was not customary at the initial point, the subsequent practice overrides the initial faulty interpretation as the norm gains wider usage in practice.[1258]

[1254] Ibid., p. 570. Kress stated that Greenawalt analysis "had clearly evinced the (unsurprising) result that the drafters of the Genocide Convention had not formed a clear and unanimous view on our intricate question of interpretation."
[1255] Ibid., p. 575.
[1256] M. Cherif Bassiouni and P. Manikas, *The law of the international criminal tribunal for the Yugoslavia* (Transnational publishers, 1996) 527.
[1257] Noora Arajarvi, The Requisite Rigour in the Identification of Customary International Law' (2017) 19 International Community Law Review 1, p. 18
[1258] Noora Arajarvi, 'The Role of the International Criminal Judge in the Formation of Customary International Law' (2015)1 European Journal of Legal Studies 2. p. 19.

5.3.3 Defining the 'Protected Groups' under Customary International Law

This section ascertains whether the *Ad Hoc* Tribunals interpretation of the concept of 'Group' followed the requirements of customary international law or not. At the very early stage of development, the concept of the 'protected groups' was not limited to the four groups as stated in the Genocide Convention. The United Nations General Assembly resolution 96 (1) defined Genocide as 'a denial of the right of existence of entire human groups.'[1259] The UN Secretariat emphasised that 'the victim of the crime of Genocide is a human group. It is not a greater or smaller number of individuals who are affected for a particular reason but a group as such.'[1260] However, the Genocide Convention does not seek to protect the right to life of entire human groups; rather, its application is limited to national, ethnic, racial or religious groups. The *Krstic* Trial Chamber stated that 'this characteristic makes genocide an exceptionally grave crime and distinguishes it from other serious crimes.'[1261] The Convention's definition is also regarded as 'ambiguous, providing only a vague concept of genocide.[1262] The definition of protected groups has always been complex due to intricacies associated with the nature and character of such groups. The *Rutaganda* Trial Chamber stated that 'the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context.'[1263]

In fact, the list of protected groups given in the Genocide Convention has always been a subject of criticism due to its narrowness.[1264] No detailed explanation as to the nature and characteristics of the protected groups is neither provided in the Convention nor elsewhere.[1265] The *Krstic* Trial Chamber stated that 'the preparatory work on the Convention and the work conducted by international bodies in relation to the protection of minorities partially overlap and are on occasion synonymous.'[1266] For example, the *Krstic* Trial Chamber noted that 'European instruments' on human rights apply the term 'national minorities', whereas

[1259] UN General Assembly, *The Crime of Genocide,* A/RES/ 96 (I), U.N. Doc. A/64/Add.1 (11 December 1946).
[1260] 'Relation Between the Convention on Genocide on the One Hand and the Formulation of the Nuremberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other, Note by the Secretariat', Chapter 1, no. 1.
[1261] *Prosecutor v Krstic*, (Trial Chamber Judgement) IT-98-33-T (2 August 2001) para. 553.
[1262]Lori Lyman Bruun, 'Beyond the 1948 Convention, Emerging Principles of Genocide in Customary International Law' (1993) 17 Maryland Journal of International Law 193, p. 197.
[1263] *Prosecutor v Rutaganda,* Case No. ICTR-96-3-T, Judgment (6 December 1999) para. 56
[1264] William A. Schabas, Genocide in International law (Cambridge University Press, 2009) 117.
[1265] *Prosecutor v Krstic*, (Trial Chamber Judgement) IT-98-33-T (2 August 2001) para. 555.
[1266] Ibid.

'universal instruments' generally refer to 'ethnic, religious or linguistic minorities'. Both expressions aim to achieve the same goals.[1267] Bettwy stated that, in most cases, the list of protected groups given in the Genocide Convention received acceptance both at the national and international level.[1268] Nonetheless, he admitted that 'international case law and state practice, for example, have in several instances challenged the exclusiveness of the Genocide Convention's list.'[1269] The national laws of different nations does not follow the list of groups stated in the Genocide Convention. The national law of some countries added '*political groups and other* groups' in the definition of genocide.[1270]

Narrow or strict definition of the 'protected groups' restricts its wider application as it may go beyond the scope of the Genocide Convention and customary international law. In the *Vasiliauskas v. Lithuania* case, the applicant argued that the Lithuanian courts' wide interpretation of the 'protected groups' lacks foundation in public international law. The ECtHR found 'no sufficiently strong basis for finding that customary international law as it stood in 1953 included "political groups" among those falling within the definition of genocide' because 'the scope of the codified definition of genocide remained narrower in the 1948 Convention and was retained in all subsequent international law instruments.'[1271] Unlike the *Ad Hoc* Tribunals, the ECtHR did not attempt to find customary international law based on few national legislation or drawing references of moral principles. The ECtHR refrained from making quick decisions to the ascertainment of customary international law. Werle asserted the same noting that the extended group is neither protected by international treaties nor by customary international law.[1272]

In contrast, the Statute of the ICTY and ICTR did not have to suffer any such kind of complexity as both Statutes had exactly included the definition of genocide as it is stated in the Genocide Convention. The interpretation provided by the *Ad Hoc* Tribunals, to some extent,

---

[1267] Ibid.
[1268] David Shea Bettwy, 'The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding under Customary International Law' (2011) 2 Notre Dame Journal of International and Comparative Law 1, p. 167.
[1269] Ibid., p.167; See also, page no: 172-73 'the copy-and-pasting of the four protected groups of the Genocide Convention into domestic code does not necessarily demonstrate recognition of having to limit the enumeration to those groups under a rule of law.' In his view, *opinio juris* stands for the 'recognition that a rule of law or legal obligation is involved'
[1270] Article 3 (2) (c), The International Crimes (Tribunals) Act, 1973, Act No. XIX of 1973 (20 July 1973), added 'Political Groups'; Article 281, Penal Code of the Empire of Ethiopia of 1956 added 'Social Groups'.
[1271] *Vasiliauskas v. Lithuania* (European Court of Human Rights Grand Chamber Judgement) Application no. 35343/05 (20 October 2015) para. 18.
[1272] Gerhard Werle, *Principles of International Criminal Law* (2nd ed. T.M.C. Asser Press 2009) 263.

reflects the customary international law. However, Herik stated that the *Ad Hoc* Tribunals 'may interpret the definition in accordance with customary international law as long as they respect the limits of the statutory definition.'[1273] The questions of interpretation should not deal with whether other groups can be included in the protected groups of genocide. Instead, the interpretation should clarify 'how the enumeration of the four classes of groups should be understood, and how to establish whether a certain individual belonged to one of these defined groups.'[1274] The *Ad Hoc* Tribunals were concerned with providing interpretation to the nature of 'protected groups' on the basis of customary international law. In 2005, the Report of the UN International Commission on Darfur emphasised to apply the principle of interpretation in such a way so that it provides the 'maximum legal effects' to the rules on genocide. The Report stated that the 'international rules on genocide use a broad and loose terminology when indicating various groups against which one can engage in acts of genocide, including references to notions that may overlap (for instance, "national" and "ethnical"). This terminology is criticised for referring to notions such as 'race', which are now universally regarded as outmoded or even fallacious.'[1275]

To this end, the *Ad Hoc* Tribunals provided interpretation based on the subjective and objective approaches to identify nature of the 'protected groups'. The chapter determines to what extent the interpretation complies with the status of customary international law.

5.3.3.1 Objective and Subjective Approach: Impact of Customary International Law

The *Ad Hoc* Tribunals adopted both subjective and objective approaches to define the customary character of protected groups. Klip and Sluiter stated that the protected groups were assessed by the *Ad Hoc* Tribunals on a 'case-by-case basis by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators.'[1276] The identification of the protected groups through an objective test depends on the social and historical context, whereas the subjective test relies on the perpetrators' perceptions.

[1273] L. J. Van Den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Martinus Nijhoff Publishers 2005) 127.
[1274] Ibid.
[1275] International Commission of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the UN Secretary-General, pursuant to SC Res. 1564, 18 September 2004, Annex to letter dated 31 January 2005 from the UN Secretary-General addressed to the President of the Security Council, S/2005/60, 1 February 2005, para. 494.
[1276] Andre Klip and Goran Sluiter, *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia, Volume 12* (Intersentia, Hart, Verlag Osterreich 2007) 650.

The *Akayesu* Trial Chamber provided the objective interpretation reflecting the definition of genocide stated in the Genocide Convention.[1277] The *Akayesu* Trial Chamber found it important to 'respect the intention of the drafters of the Genocide Convention, which according to the *travaux preparatoires*, was patently to ensure the protection of any stable and permanent group.'[1278] The reference to the *travaux preparatoires* of the Genocide Convention also reflects the objective approach of interpretation. The Chamber stated that:

> It appears that the crime of genocide was allegedly perceived as targeting only 'stable' groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.[1279]

The *Akayesu* Trial Chamber also highlighted the 'intention' of the drafters of the Genocide Convention, covering the protection of any group which is 'stable and permanent'.[1280] Although the *Akayesu* Trial Chamber emphasises on the 'intention and object' of the Convention, the Chamber fails to draw the clear intention of the drafters of the Genocide Convention to consider the protected groups as exhaustive.[1281] The *Krstic* Trial Chamber pointed out complications to rely on the objective approach. The Chamber stated that:

> The preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the second word [sic] war, as "national minorities", rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of

[1277] *Prosecutor v Akayesu*, (Trial Chamber Judgement) ICTR-96-4-T (2 September 1998) para. 511.
[1278] Ibid.
[1279] Ibid.
[1280] Ibid., para. 516.
[1281] David Shea Bettwy, 'The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding under Customary International Law' (2011) 2 Notre Dame Journal of International and Comparative Law 1, p. 181.

> scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention.[1282]

However, the requirement 'permanent and stable' was followed by the ICTR in all subsequent judgements, either following the subjective or objective approaches.[1283] For example, the *Rutaganda* Trial Chamber not only reflects on the subjective approach but also focuses on the *travaux preparatoires* of the Genocide Convention to refer the protected groups as 'stable and permanent'.[1284] Similarly, the *Kayishema and Ruzindana* Trial Chamber applied a broad and mixed approach of identifying ethnic group based on both subjective and objective approach. It stated that:

> [a]n ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others). A racial group is based on hereditary physical traits often identified with geography. A religious group includes denomination or mode of worship or a group sharing common beliefs.[1285]

In contrast, the ICTY in the *Jelisic* case only followed the subjective approach.[1286] The subjective approach also prevailed in the *Tolimir* Case in 2012 by the ICTY.[1287] This approach appears significant in the work of the UN Commission experts.[1288] It also prevails in the *Ndindebahizi* judgement, where the perpetrators perceived the victims' identity.[1289] Verdirame stated that the *Ad Hoc* Criminal Tribunals seem to have applied the subjective approach more than the objective approach to define the characteristics of the protected groups.[1290] The subjective approach suggests defining groups based on the perception of 'the perpetrator in

[1282] *Prosecutor v Krstic*, (Trial Chamber Judgement) IT-98-33-T (2 August 2001) para. 556.
[1283] L. J. Van Den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Martinus Nijhoff Publishers 2005) 132.
[1284] *Prosecutor v Rutaganda*, (Trial Chamber judgement) ICTR-96-3-T, Judgment (6 December 1999) para. 57.
[1285] *Prosecutor v Kayishema and Ruzindana*, (Trial Chamber Judgement) ICTR-95-1-T (21 May 1999), para. 98.
[1286] *Prosecutor v Jelisic*, (Appeals Chamber Judgment) IT-95-10-A (5 July 2001) para. 70.
[1287] *Prosecutor v Tolimir,* (Trial Chamber Judgement) IT-05-88/2-T (12 December 2012) p. 735.
[1288] Letter Dated 9 December 1994 From the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1994/1405 (9 December 1994) para. 159. The document states that "to recognise that there exists discrimination on racial or ethnic grounds, it is not necessary to presume or posit the existence of race or ethnicity itself as a scientific objective fact."
[1289] *Prosecutor v Ndindabahizi* (Trial Chamber Judgement) ICTR-2001-71-I (15 July 2004) para. 486.
[1290] Guglielmo Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad hoc Tribunals' (2000) 49 International & Comparative Law Quarterly 3, p. 592.

determining whether a protected group was targeted as such.'[1291] Verdirame explained that 'the perceptions of the victims and of the alleged perpetrators' fall into the 'social construct' approach.[1292] The perpetrator perceived the 'Tutsi' as a distinct group, although objectively, there are not many differences between the groups- Hutu and Tutsi.[1293] The application of the subjective approach by the *Ad Hoc* Tribunals was useful to decide 'Tutsi' as the protected group. Herik stated that 'if a perpetrator kills many people believing that they are a protected group, while in fact they are not, this does not constitute genocide under the objective approach, whereas it does according to the purely subjective approach based on the perception of the perpetrator.'[1294] However, reliance on perpetrator's perception can be considered as the downside of the subjective approach.[1295] The subjective approach has no specific earlier references to the Genocide Convention or other international instruments. Nevertheless, this approach has been subsequently followed in the case law of the ICTY and ICTR. The *Jelisic* subjective approach could have been applied to consider the Khmer Rouge targeted members of a "tainted national group' as the protected groups within the meaning of the Genocide Convention.[1296] The subjective approach more reflects Arajarvi's 'judge-made custom'. Referring to ICJ's *North Sea Continental Shelf* case, she stated that a custom can be formed not from 'explicit external facts but from the judge'.[1297] The interpretative role of the judiciary or the method of judicial 'gap-filling' is, always, accepted.[1298] Under the teleological approach, it is significant to ascertain that courts are providing effect to the intention of the drafters. If an

[1291] David Shea Bettwy, 'The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding under Customary International Law' (2011) 2 Notre Dame Journal of International and Comparative Law 1, p. 190.
[1292] Guglielmo Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals' (2000) 49 International & Comparatively Law Quarterly 3, p. 592; See also, Guglielmo Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals'in Mark Lattimer (ed.) *Genocide and Human Rights* (Routledge 2007).
[1293] David Shea Bettwy, 'The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding under Customary International Law' (2011) 2 Notre Dame Journal of International and Comparative Law 1, p. 190.
[1294] L. J. Van Den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Martinus Nijhoff Publishers 2005) 134.
[1295] Ibid.
[1296] Tatiana E Sainati, 'Toward a Comparative Approach to the Crime of Genocide' (2012) 62 Duke Law Journal 1, p. 201.; See also 002, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, para. 207 (Extraordinary Chambers in the Cts. Of Cambodia Sept. 15, 2010).
[1297] Noora Arajarvi, 'The Role of the International Criminal Judge in the Formation of Customary International Law' (2007)1 European Journal of Legal Studies 2, p, 17.
[1298] *Prosecutor v Delalic et al.*, (Trial Chamber Judgement) IT-96-21-T (16 November 1998) para. 165.

interpretation does not reflect the intention of the drafters, it may carry a risk to be considered an 'abuse of the legislative function of the judiciary.'[1299]

Notwithstanding, the subjective approach has been found as innovative in the Darfur Report. Schabas stated that the work of the Darfur Commission has legal significance; however, 'the enigmatic definition of genocide in the 1948 Convention has eluded consensus, and continues to challenge those who interpret it, be they scholars, activists, or members of international tribunals and commissions.'[1300] The Report noted that the Rwanda's genocide in 1994 showed the limitations of current international rules on Genocide, which compelled the judges of ICTR to embrace 'an innovative interpretation' in defining the protected groups.[1301] Despite the diverse views due to the hybrid formulation of identifying groups based both on objective connotations and subjective perceptions, the Darfur Report relies on the subjective test.[1302] The Report suggested that the subjective approach supplements, develops or at least elaborates the standards mentioned in the Genocide Convention and the corresponding customary rules on genocide.[1303] The Darfur Report stated that:

> What matters from a legal point of view is the fact that the interpretative expansion of one of the elements of the notion of genocide (the concept of protected group) by the two International Criminal Tribunals is in line with the object and scope of the rules on genocide (to protect from deliberate annihilation essentially stable and permanent human groups, which can be differentiated on one of the grounds contemplated by the Convention and the corresponding customary rules).[1304]

[1299] Ibid.; see also fn-211, *Magor & St. Mellons RDC v. Newport Corporation* [1952] AC 189, 191. Viscount Simonds, speaking in the House of Lords disapproved of the judicial function of filing in the gaps of an enactment. He described it as a naked usurpation of the legislative function under the thin disguise of interpretation. In his view, '[i]f a gap is disclosed the remedy lies in an amending Act.'

[1300] William A. Schabas, 'Genocide, Crime against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide' (2006) 27 Cardozo Law Review 1703, p. 1707.

[1301] International Commission of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the UN Secretary-General, pursuant to SC Res. 1564, 18 September 2004, Annex to letter dated 31 January 2005 from the UN Secretary-General addressed to the President of the Security Council, S/2005/60, 1 February 2005, para. 498.

[1302] Ibid., paras. 508-512 'objectively the victims and the attackers did not appear to constitute distinct ethnic groups, but nevertheless they were considered to be a protected group, given that the victims of the attack were perceived to be part of the 'African' group, while the attackers, the so-called Janjaweed, were perceived by the victims as belonging to the 'Arab' group.'

[1303] Ibid., para. 500.

[1304] Ibid., para. 501.

Determining the nature or characteristics of the 'protected groups' was complicated because neither the Genocide Convention nor customary international law provides any uniform definition in this regard. However, the interpretation provided by the *Ad Hoc* Tribunals corresponds to the customary characteristics of the crime of genocide. The Darfur Report stated that:

> This expansive interpretation does not substantially depart from the text of the Genocide Convention and the corresponding customary rules, because it too hinges on four categories of groups which, however, are no longer identified only by their objective connotations but also on the basis of the subjective perceptions of members of groups. Finally, and perhaps more importantly, *this broad interpretation has not been challenged by States*. It may therefore be safely held that that interpretation and expansion has become part and parcel of international customary law.[1305]

In other words, it seems from the Darfur Report that the broad interpretation of the group has received acceptance by states as 'it has not been challenged by States'. Based on the Darfur Commission's statement, one may assume that the broad interpretation satisfies the role of States' acquiescence in forming customary international law. Wolfke stated that the acquiescence of States plays a central role in ascertaining a 'certain factual uniformity in international relations.'[1306] According to Byres, 'acquiescence often signifies ambivalence or even apathy to the rule in question rather than a conscious support for the rule on the part of the acquiescing state.'[1307] It is a difficult to understand a state's motivation from its acquiescence. Mere acquiescence cannot contribute to the development of customary international law.

Despite the fact that the expansive interpretation includes both approaches, objective and subjective, the chapter argues that the subjective test does not correspond to the customary rules. The subjective test neither draws any references from national law nor from international instruments. In contrast, the *Ad Hoc* Tribunals' objective approach indicates reference from international documents such as Genocide Convention or the *travaux preparatoires*. Although there was no State practice available, the international instruments, particularly *travaux preparatoires*, may be suggestive of *opinio juris* to satisfy the nature of 'protected groups' under customary international law. The treaty's preparatory work can be resorted when the

[1305] Ibid. (emphasis added)
[1306] Karol Wolfke, *Custom in Present International Law (*Kluwer Academic Publishers 1993) 164.
[1307] Michael Byers, *Custom, Power and the Power of Rules* (Cambridge University Press 1999) 106

treaty itself is silent.[1308] The underlying significance is to understand the drafter's intention to codify the existing rule of customary international law. However, there may have always risk applying this approach as there is no solid foundation under customary international law. Bettwy found it unsafe, particularly to 'the addition of new protected groups'.[1309] He also stated that 'since courts would have to challenge the object and purpose of the Convention to implement such a formulation, supporting state practice is unlikely to reach a level sufficient to create a new rule of customary law.'[1310] Nonetheless, he also identified the manifestation of *opinio juris* from the *Ad Hoc* Tribunals' 'cleverly' interpretation of the Genocide Convention.[1311]

5.4 Conclusion

The discussion above shows that the classic concept of custom plays a narrow role in the determination of substantive elements of genocide. The *Ad Hoc* Tribunals referred, *inter alia*, to international instruments and applied principles of interpretation to satisfy the requirements of customary international law for the crime of genocide. Criticising the work of the *Ad Hoc* Tribunals, Karnavas stated that:

> Under the guise and protection of international criminal prosecution, the *ad hoc* Tribunals seem to be stretching the crime of genocide beyond its intended limit. This cursory look at the incongruent genocide decisions and the tortuous reasoning of the various Chambers suggests that application of the Genocide Convention is in both a state of flux and a state of confusion, leading to unforeseeable and inconsistent results.[1312]

The chapter shows that the interpretative independence of the *Ad Hoc* Tribunals to observe the existence of customary international law. If previous methodologies of the *Ad Hoc* Tribunals are followed as a guideline, then one can easily state that the 'objective approach' of justifying 'intent' and the 'purpose-based approach' of defining 'groups' satisfy existence of customary international law. The above-mentioned international instruments were considered to have

[1308] Report on the work of the sixty-eighth session (2016), (document A/71/10) Chapter V, Identification of customary international law, General Commentary, Conclusion 11 (5)
[1309] David Shea Bettwy, 'The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding under Customary International Law' (2011) 2 Notre Dame Journal of International and Comparative Law 1, p. 183.
[1310] Ibid.
[1311] Ibid.
[1312] Michael G. Karnavas, 'Moving Target in Conflict with the Principle of Legality' in Paul Behrens and Ralph Henham (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects.* (Routledge 2016) p. 110.

evidential value to identify the existence of customary international law. No discrete ascertainment as to the evidence of State practice and *opinio juris* has been carried out by the tribunals. Akhavan stated that 'the emphasis on State practice may equally undermine the conception of genocide's inherent criminality as an unimpeachable axiom that does not require normative embellishment'.[1313] However, one may suggest that the *Ad Hoc* Tribunals have chosen an inconsistent and conservative construction, which is suggestive of judge-made custom. Arguably, one may also consider the *Ad Hoc* Tribunals have produced new law instead of finding it. Wolfgang Friedmann stated that 'the focal problem of the international courts is that the borderlines between the interpretation of existing law and the making of new laws are inevitably fluid'.[1314]

[1313] Payam Akhavan, 'The Crime of Genocide in ICTR Jurisprudence' (2005) 3 Journal of International Criminal Justice 4, p. 991.
[1314] Wolfgang Friedmann, 'The North Sea Continental Shelf Cases: A Critique' (1970) 64 American Journal of International Law 2, pp. 229-240.

CONCLUDING REMARKS

Customary international law is nothing but a tool for the development of international crimes to bargain with the principle of legality. The identification of customary international law by the international criminal courts and tribunals has been criticised for not being supported by the two-element approach. Defining customary international law with the intertwined presence of State practice and *opinio juris* appeared as the most complex task. The judges of international criminal courts and tribunals were not oblivious to this fact. However, their openness to address the situation embraced diverse national and international instruments to identify rules of customary international law. The thesis admits that the diverse sources were unpersuasively used and established a parochial connection between the existence of international crimes and customary international law. The specific allocation of sources indicating the existence of State practice and *opinio juris* was missing. It seems that the judges of the international criminal courts attempted to resolve unprecedented problems with a pragmatic solution relying on the random collection of sources. While the identification of existence and content of a rule of customary international law is fraught with challenges for having no exact formulations, the international courts and tribunal seemingly attempted to certify it with the claim of customary international law.

Although the fallacies in international courts and tribunals' custom identification methods are apparent, it seems inappropriate to reject it all. The thesis does not deny the total existence of both requisite elements of customary international law in the development of international crimes. The thesis finds that *opinio juris* appears first as *lex ferenda* and plays the role of a custom saviour in the custom development process. This proposition recalled the Third Report of the International Law Commission, which stated that 'it is possible that an acceptance that something ought to be the law (nascent *opinio juris*) may develop first, and then give rise to practice that embodies it so as to produce a rule of customary international law.'[1315] Although this statement offers customary international law from 'nascent *opinio juris*' once it is embodied with State practice, the thesis finds no strict necessity of such embodiment when it deals with international crimes. However, State practice is always essential to signify the status of customary international law.

[1315] Third report on identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/682, para.16, p. 7.

The effort to develop international crimes under customary international law is highly discursive. Unlike the concept of 'Grotian Moment'[1316], the thesis rather observes the development of international crimes founded on a strong impulse i.e., the *necessity* of the international community. This necessity invigorates international organisations, courts and tribunals alike to find the prohibited rules as evidence of law or *opinio juris*. This nascent *opinio juris* appears in the international practice in different forms and in different means. The thesis has analysed the appearance of *opinio juris* from the perspective of natural law. It also discussed the existence of it in international legal norms and instruments based on teleological interpretation. The thesis considers it an ironic attempt to identify State practice from the 'object and purpose' of statutes based on teleological interpretation.

There is no doubt that rules of customary international law can be the object of interpretation[1317] to ensure the precise application of the rule. Merkouris referred to this method as the 'deductive approach'. The view of Judge Tanaka affirmed the importance of the teleological interpretation. He stated that 'customary law, being vague and containing gaps compared with written law, requires precision and completion about its content. This task, by its nature being interpretative, would be incumbent upon the Court. The method of logical and teleological interpretation can be applied in the case of customary law as in the case of written law.'[1318] The ILC did not seem to deviate from this approach; rather, it affirmed the possibility of applying the 'deductive approach' as an aid. The deductive approach does not ascertain evidence from the 'empirical' research of State practice and *opinio juris*.[1319] This approach finds rules of customary international from two categories: first, when 'possible rules of customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice as law' and second when these rules 'form part of an indivisible regime'.[1320]

Even if one accepts that the *Ad Hoc* Tribunals' method of applying the teleological interpretation is mostly a deductive approach, it raises questions whether the rules that had been interpreted were reflective of general practice as law or formed a part of an indivisible

[1316] Michael P. Scharf, 'Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change' 43 Cornell International Law Journal 3, p. 467.
[1317] Panos Merkouris, 'Interpretating the Customary Rules on Interpretation' (2017) 19 International Community Law Review 126, p. 142.
[1318] *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* ICJ Reports 1969 (Dissenting Opinion of Judge Tanaka) p. 181.
[1319] Draft Conclusions on Identification of Customary International Law Commission, 2018, A/73/10, p. 126.
[1320] Draft Conclusions on Identification of Customary International Law Commission, 2018, A/73/10, p. 126.

regime. As discussed in the first chapter, Judge Ammoun in his separate opinion in the *North Sea Continental Shelf* case, discouraged the deduction of proof of the formation of custom from statements in the text of a convention, unless it reflects customary international law, because it will go against the spirit and letter of Article 38 (1) of the Statute of the ICJ. [1321] The thesis finds that the teleological interpretation, at best, can reflect the embryonic nature of *opinio juris*.

The evolution of customary international law without any rigorous examination of two requisite elements is not unusual. For example, the PCIJ in the *Gulf of Maine* case posited 'a limited set of norms for ensuring the coexistence and vital cooperation of the members of the international community.'[1322] Similarly, the principles of *Uti possidetis*[1323] and *elementary considerations of humanity*[1324] were recognised by the ICJ as a foundation of customary international law. The adoption of a disperse method or no method at all to identify customary rules of international crimes is not considered unusual by scholars. Stahn stated that the evolution of international criminal law 'relied on creativity and idealism to escape from the narrow confines of a state-centric system of international law.'[1325] He found that the underlying foundation of international criminal law lies in 'promise, moral ambition and faith,'[1326] while the thesis emphasises the 'necessity' of the international community. This nascent *opinio juris* or legal obligation of States arises, not from actual practice, but from the necessity of the international community to end impunity. Nonetheless, States can show their actual practice through subsequent activities or by accepting the jurisprudence of the tribunals, who identified rules of customary international law.[1327] Recalling the decision of the ICJ in the *Nicaragua* case[1328], the thesis proposes that the evidence of *opinio juris* always leave the opportunity to be later supported by the 'established and substantial' practice of the States.

Therefore, the development of customary international law is much more international practice oriented. Expressions of nascent *opinio juris* do not show how States regulate the

[1321] *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* ICJ Reports 1969, p. 104.
[1322] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.),* ICJ Reports 1984, p. 246, para. 111
[1323] *Frontier Dispute (Burkina Faso v. Mali),* ICJ Reports 1986 para. 20.
[1324] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v U.S.),* ICJ Reports 1986, paras. 215, 218.
[1325] Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 412
[1326] Ibid.
[1327] A.M. Slaughter and S.R. Ratner, 'The Method is the Message', (1999) 93 American Journal of International Law 2, p. 411.
[1328] *Nicaragua Case* (*Nicaragua v United States of America*), ICJ Reports 1986, p. 96.

emergence, interpretation, and evolution of legal norms.[1329] Instead, it narrates what law should be in future. This formulation of customary international law, at best, can reveal the *opinio juris-based* custom. In this process, State practice performs a supportive or secondary role.

Undoubtedly, the consistent methodology to the identification of international crimes under the shade of customary international law, following its classic concept, is elusive. The international courts and tribunals should have applied a more nuanced engagement with the States prosecuting international crimes. Takemura stated that the evolution of customary international law, although static, may not be free from 'States' value judgements and the policy considerations'.[1330] In his opinion, the convenient use of customary international law gives rise to 'inconvenient truths about customary international law.'

It may also be argued that the expressions of *opinio juris* may suffer uncertainties if not associated with State practice. Several scholars affirm the position of the ILC and ICJ, according to which one approach to custom identification cannot form a customary norm. Positivists may find the dominant presence of *opinio juris-based* custom as a weak process of custom formation. This kind of reliance to observe the source of custom may squash or flatten the custom formation process. Therefore, it would be of no surprise if one argues that the customary rules of international crimes suffer from an identity crisis.

[1329] Michael N. Schmitt and Sean Watts, 'The Decline of International Humanitarian Law *Opinio Juris* and the Law of Cyber Warfare' (2015) 50 Texas International Law Journal 2, p.193

[1330] Hitomi Takemura, 'Inconvenient Truth About the identification of Customary International Law in International Criminal Law' (2020) 62 Japanese Yearbook of International Law, p. 333-334.

BIBLIOGRAPHY

Abbreviations

CERD	**Committee on the Elimination of Racial Discrimination**
LOC	**Library of Congress**
FO	**Foreign Office**
IMT	**International Military Tribunal**
IMTFE	**International Military Tribunal for the Far East**
ICTY	**International Criminal Tribunal for the former Yugoslavia**
ICTR	**International Criminal Tribunal for Rwanda**
ICC	**International Criminal Court**
SCSL	**Special Court for Sierra Leone**
STL	**Special Tribunal for Lebanon**
ECCC	**Extraordinary Chambers in the Courts of Cambodia**
ECHR	**European Convention on Human Rights**
ILC	**International Law Commission**
IHL	**International Humanitarian Law**
ICL	**International Criminal Law**
ILA	**International Law Association**
CIL	**Customary International Law**
ICRC	**International Committee of the Red Cross**
ICCPR	**International Covenant on Civil and Political Rights**

LNTS	**League of Nations Treaty Series**
TNA	**The National Archives**
UNTS	**United Nations Treaty Series**
UNWCC	**United Nations War Crimes Commission**
USNA	**United States National Archives**

Unpublished Sources

National Archives (Kew Gardens, London)

Cabinet Papers (CAB 23, 24, 28, 29)

Treasury Solicitors (TS 3, 26)

Foreign Office (FO 371, 608)

Frank L. Polk Papers

British Library Archives (Kings Cross, London)

Political (External) department Collection: Reference IOR/L/PS/12/4518, Coll 44/38(3), Reference IOR/L/PS/12/4521, Coll 44/38(5)

External Affairs Records, File No 4060-C-40C.

Published Sources

1. *Paper Relating to the Foreign Relations of the United States* 1919, Paris Peace Conference, Washington, DC: US Government Printing Office, 1942-1947.
2. United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationary Office 1948.
3. *Nazi Conspiracy and Aggression: Opinion and Judgement, Office of United States, Chief of Counsel For Prosecution of Axis Criminality*, 1947, Washington, DC: United States Government Printing Office.
4. *Report of Robert H. Jackson to the United States Representative to the International Conference on Military Trials*, (Department of State Publication 3080: International Organisation and Conference Series II, Europe and British Commonwealth 1 1949).

5. Letter of Raphael Lemkin published in *Executive Sessions of the U.S Senate Foreign Relations Committee* (1976) Historical Series 781-805.
6. Instrument of Appointment of the Board of Inquiry appointed on the third day of September 1945 under the National Securities (Inquiries) Regulations (being Statutory Rules 1941, No. 35, as amended by Statutory Rules 1941, Nos. 74 and 114 and Statutory Rules 1942, No. 273.
7. United Nations War Crimes Commission "Material for the Preparation of a Definition of 'Crimes against Humanity'", compiled by Egon Schwelb, III/33, 22 March 1946, (https://www.legal-tools.org/doc/c52df5/
8. Bohuslav Ecer, "Scope of the Retributive action of the United Nations according to their official Declarations-The Problem of War Crimes in connection with the Second World War" UNWCC III/4 (a), 27 April 1944.
9. The Problem of "War Crimes" in connection with the second World War, Explanatory and Additional Note by Dr Ecer to his Report (Doc. III/4), Committee III, III/4 (a), 12 May 1944, p. 4. Available at https://www.legal-tools.org/doc/6335bd/pdf
10. France, Great Britain and Russia Joint Declaration, (Telegram sent to Embassy Constantinople on May 29, 1915) 867.4016/67.
11. The Royal Warrant dated 14th June 1945, Army Order 81/45, 0160/2498.
12. Punishment of War Criminals' HL Deb 07 October 1942 vol. 124 cc 555-94

Books

1. Abi-Saab, Georges, 'The Specificities of Humanitarian Law' in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour Jean Pictet*, edited by Christophe Swinarski (Martinus Nijhoff Publication, 1984).
2. Abtahi, Hirad and Webb, Phillippa, *The Genocide Convention: The Travaux Preparatoires,* (Martinus Nijhoff Publishers, 2008).
3. Akande, Dapo, Sources of International Criminal Law in Antonio Cassese (eds.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009).
4. Akehurst, Michael, *Modern Introduction to International Law* (Seventh Revised Edition, Routledge, 1997).
5. Amato, Anthony D., *The Concept of Custom in International Law* (Cornell University Press, 1971).

6. Amato, Anthony D., *The concept of custom in international law* (Cornell University Press, 1971).
7. Ambos, Kai and Timmermann, Anina, 'Terrorism and Customary International Law' in Ben Saul (ed.), *Research handbook on international law and terrorism* (Elgar, 2014).
8. Ambos, Kai, *Treatise on International Criminal Law: Volume 1* (Oxford University Press, 2013).
9. Arajarvi, Noora, *The Changing Nature of Customary International Law: Methods of Interpreting Concept of Customs in International Criminal Tribunals* (Routledge, 2014).
10. Bassiouni, Cherif M., and Manikas, P., *The law of the international criminal tribunal for the Yugoslavia* (Transnational Publishers, 1996).
11. Bassiouni, Cherif M., *International Criminal Law, Sources, Subjects, And Contents* (Martinus Nijhoff Publishers, 2008).
12. Bassouni, Cherif M., *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, 2011).
13. Bikundo, Edwin, 'Enslavement as a Crime against Humanity: Some Doctrinal, Historical, and Theoretical Considerations' in Kevin Jon Heller, Frederic Megret, Sarah MH Nouwen, Jens David Ohlin, Darryl Robinson (eds.), *The Oxford Handbook* on *International Criminal law* (Oxford University Press, 2020).
14. Brownlie, Ian, *Principles of Public International Law* (Fifth Edition, Clarendon Press, 1998) .
15. Bryant, Michael, *A World History of War Crimes: From Antiquity to the Present* (Bloomsbury Publishing, 2016)
16. Byers, Michael, *Custom, Power and the Power of Rules* (Cambridge University Press, 1999).
17. Cassese, Antonio, *Cassese's International Criminal Law* (Second Edition, Oxford University Press, 2008).
18. Cheng, Bin, ed., *On the Nature and Sources of International Law, in International Law, in International Law, Teaching, and Practice 201* (London: Stevens, 1982).
19. Cheng, Zhaoqi, *A History of War Crimes Trials in Post 1945 Asia-Pacific* (Shanghai Jiao Tong University Press, 2017).
20. Chigara, Ben, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (Ashgate/Dartmouth, 2001).

21. Chitty, Joseph, ed., *The Law of Nations; or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* from the French of Monsieur De Vattel (T and J.W Johnson and Co. Law Booksellers, 1853).
22. Claud, Mullins, *The Leipzeig trials; an account of the war criminals' trials and a study of German mentality* (London: H.F. & G. Witherby, 1921).
23. Cryer, Robert, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Fourth Edition, Cambridge University Press, 2019).
24. d'Aspremont, Jean, *Formalism and the Source of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press, 2011).
25. Darcy, Shane, *Collective Responsibility and Accountability under International law* (Transnational Publishers, 2007).
26. DeGuzman, Margaret M., 'Crimes Against Humanity' in William A. Schabas and Nadia Bernaz (eds.), *Handbook of International Criminal law* (Routledge, 2011).
27. Dinstein, Yoram and Tabory, Mala, (eds.), *War Crimes in International Law* (Maritnus Nijhoff, 1996).
28. Dixon, Martin, *Textbook on International Law* (Seventh Edition, Oxford University Press, 2013).
29. Dojcinovic, Predrag, *Propaganda and International Criminal Law: From Cognition to Criminality* (Routledge 2019).
30. Draper, G.I.A.D, The Development of International Humanitarian Law, in *Int'l Dimensions of Humanitarian Law* (UNESCO, 1988).
31. Ericsson, Maria., *Defining Rape: Emerging Obligations for States under International Law?* (Nijhoff, 2011).
32. Ferencz, Benjamin, *Nuremberg: A Prosecutor's Perspective*, reprinted in War Crimes: The Legacy of Nuremberg (Belinda Cooper ed., 1999).
33. Gaeta, Paola., *A Commentary on The UN Convention on Genocide* (Oxford University Press, 2009).
34. Gallant, Kenneth S., *The Principles of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2009).
35. Garner, James Wilford, *Recent Developments in International Law*, Tagore Law Lectures, 1922 (Calcutta: University of Calcutta; London and New York: Longmans, Green and Company, 1925).
36. Glueck, Sheldon, *The Nuremberg Trial and Aggressive War* (New York: Alfred A. Knopf, 1946).

37. Glueck, Sheldon, *War Criminals: Their Prosecution and Punishment* (New York: Alfred A. Knopf, 1944).
38. Goldsmith, Jack L. and Posner Eric A., *The limits of International law* (Oxford University Press, 2005).
39. Greenwood, Christopher, 'Historical Development and Legal Basis' in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, 1995).
40. Greenwood, Christopher, Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, in Horst Fischer, Claus Kreb and Sascha Rolf Luder (eds.) *International and National prosecution of Crimes under International Law: Current Developments* (Arno Spitz, 2001).
41. Greenwood, Christopher, *Essay on War in International Law* (Cameron May Ltd, 2006).
42. Gross, Leo, *International Law in the Twentieth Century* (Ardent Media, 1969).
43. Guzman, Andrew T., *How International Law Works: A Rational Choice Theory* (Oxford University Press, 2008).
44. Hanckaerts, Jean-Marie, and Doswald-Beck, Louise, (eds.), *Customary International Humanitarian Law* (International Committee of the Red Cross and Cambridge University Press, 2005).
45. Herik, Van Den L. J., *The Contribution of the Rwanda Tribunal to the Development of International Law* (Martinus Nijhoff Publishers, 2005).
46. Higgins, A. Pearce, *The Hague Peace Conference and other International Conference Concerning the Laws and Usages of War: Text of Conventions with Commentaries* (Cambridge University Press, 1909).
47. Holland, Thomas Erskine., *The Laws of War on Land* (The Clarendon Press, 1908).
48. Humphrey, Waldock 'The Universal Declaration of Human Rights: Its History, Impact and Juridical Character', in *Human Rights: Thirty Years after the Universal Declaration* (B. Ramcharan ed., 1979).
49. Jennings, Robert Y., 'The Identification of International Law', in B. Cheng (ed.), *International Law: Teaching and Practice* (London: Stevens, 1982).
50. Jennings, Robert Y., *What is International Law and How Do We Tell It When We See It?: Nulla Poena Sine Lege in English Criminal Law* (Kluwer, 1983).

51. Karnavas, Michael G., 'Moving Target in Conflict with the Principle of Legality' in Paul Behrens and Ralph Henham (eds.), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Routledge, 2016).
52. Klip, Andre and Sluiter, Goran, *Annotated Leading Cases of International Criminal Tribunals* (The International Criminal Tribunal for the Former Yugoslavia, Volume I) (Intersentia, Hart, Verlag Osterreich, 1999).
53. Koskenniemi, Martti, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 1989).
54. Kyriakopoulos, George D., 'Formation of International Custom and the Role of Non-State Actors' in Ph. Pazartzis & M. Gavouneli (eds.), *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (Bloomsbury, 2016).
55. Lemkin, Raphael, *Axis Rule In Occupied Europe: Laws Of Occupation - Analysis Of Government-Proposals For Redress* (Washington, D.C.: Carnegie Endowment for International Peace, 1944).
56. Maogoto, Jackson Nyamuya, 'The 1919 Paris Peace Conference and the Allied Commission: Challenging Sovereignty Through Supranational Criminal Jurisdiction' in Morten Bergamo, Cheah Wui Ling and Yi Ping (eds.)*, Historical Origin of International Criminal Law*: Volume I (Torkel Opsahl Academic EPublisher, 2014).
57. McDonald, Gabrielle, *Substantive and Procedural Aspects of International Criminal Law* (BRILL, 2000).
58. McDougall, Carrie, *The Crime of Aggression under the Rome Statute if the International Criminal Court* (Cambridge University Press, 2013).
59. Meron, Theodor, *The Humanization of International Law* (Martinus Nijhoff Publishers, 2006).
60. Murphy, James Bernard, *The Philosophy of Positive Law: Foundations of Jurisprudence* (Oxford University Press, 2005).
61. Nilsson, Johan, 'Crimes Against Humanity', in A. Cassese (ed.), *Oxford Companion to International Criminal Justice* (Oxford University Press, 2009).
62. Nolte, George, *Treaties and Subsequent Practice* (Oxford University Press, 2013).
63. O'Connell, Mary Ellen, 'Historical Development and Legal Basis', Michael Bothe (ed.), *The Handbook of International Humanitarian Law* (Third Edition, Oxford University Press, 2013).
64. Pace, John P., *The United Nations Commission on Human Rights: A Very Great Enterprise* (Oxford University Press, 2020).

65. Paola Gaeta, Salvatore Zappala, Jorge E. Vinuales (eds.), *Cassese's International Law* (Oxford University Press, 2020).
66. Payelle, Georges, *German Atrocities in France; A Translation of the Official Report of the French Commission* (Londres, Impr. United Newspapers, Ltd., 1915).
67. Plesch, Dan, *America, Hitler and the UN: How the Allies Won World War II and Forged a Peace* (Bloomsbury, 2010).
68. Quigley, John, *The Genocide Convention- An International Law Analysis* (Routledge, 2006).
69. Quinn, Patrick J. *The Conning of America: The Great War and American Popular Literature* (Amsterdam-Atlanta, GA, 2001).
70. Raimondo, Fabián O., *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff Publishers, 2008).
71. Roberts, Adam and Guelff, Richard, *Documents on the Laws of War (*Third Edition, Oxford University Press, 2000).
72. Roberts, Adam, *Documents of the Laws of War* (Oxford University Press, 1982).
73. Saul, Ben and Akande, Dapo, *The Oxford Guide to International Humanitarian Law* (Oxford University Press, 2020).
74. Schabas, William A., *Genocide in International law* (Cambridge University Press, 2009).
75. Schabas, William A., *International courts and tribunals* (Edward Elgar Publishing Limited, 2014)
76. Schabas, William A., *The International Criminal Court: A Commentary on the Rome Statute* (Second Edition, Oxford University Press, 2016).
77. Schabas, William A., *The Trial of the Kaiser* (Oxford University Press, 2018).
78. Schabas, William A., *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press, 2012).
79. Schabas, William A.,'Customary law or 'judge-made' law: Judicial creativity at the UN criminal tribunals' in *The Legal Regime of the International Criminal Court*, International Humanitarian Law Series, Volume 19 (Nijhoff, 2009).
80. Schachter, Oscar, 'New Custom: Power, Opinio Juris and Contrary Practice', in J. Makarczyk (ed.), *Essays in Honour of Krzysztof Skubiszewski, Theory of International Law at the Threshold of the 21th Century* (The Hague, Kluwer Law International, 1996).

81. Schindler, D., and Toman, J., *The Laws of Armed Conflicts* (Martinus Nihjoff Publisher, 1988).
82. Schlutter, Birgit, *Developments In Customary International Law-Theory And Practice Of The International Court Of Justice And The International Ad Hoc Criminal Tribunals For Rwanda And Yugoslavia* (Martinus Nijhoff Publishers, 2010).
83. Sellers, Kristen, *Crimes against Peace and International Law* (Cambridge University Press, 2013).
84. Shahabuddeen, Mohamed, *International Criminal Justice At The Yugoslav Tribunal: A Judge's Recollection* (Oxford University Press, 2012).
85. Skordas, Achilles 'Hegemonic Custom?' in Michael Byers and Georg Nolte (eds.), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003).
86. Smith, Bradley F., *The American Road To Nuremberg: The Documentary Record 1944-1945* (Hoover Institution Press, 1982).
87. Smith, Rhona K.M., *Texts and Materials on International Human Rights* (Forth Edition, Routledge, 2020).
88. Solis, Gary D., *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010).
89. Stahn, Carsten, *A Critical Introduction to International Criminal Law* (Cambridge University Press, 2018)
90. Stoop, Dominique Francois De, *An Outline of International Law* (Calwell, ACT: ASPG, 2019).
91. Treves, Tullio, 'Customary International Law' in *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, 2012).
92. Weatherall, Thomas, *Jus Cogens: International Law and Social Contract* (Cambridge University Press, 2015).
93. Werle, Gerhard, *Principles of International Criminal Law* (Second Edition, T.M.C. Asser Press, 2009).
94. Willis, James F., *Prologue to Nuremberg - The Politics and Diplomacy of Punishing War Criminals of the First World War* (Greenwood Press, 1982).
95. Willmore, John Selden, *The Great Crime and Its Moral* (Hodder and Stoughton, 1917).
96. Wolfke, Karol, *Custom in Present International Law* (Second Revised Edition, Springer, 1993).

Other Books

97. *Report of the Committee on Alleged German Outrages* (London: Printed under the authority of his Majesty's Stationery Office by Hayman, Christy and Lilly Ltd., 1915).
98. *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, MN: American Law Institute, 1987).
99. The Proceedings of the Hague Peace Conference, Translation of the Official Texts prepared in the Division of International Law of the Carnegie Endowment for International Peace under the supervision of James Brown Scott (Volume I, Oxford University Press, 1920).
100. The Proceedings of the Hague Peace Conference, Translation of the Official Texts prepared in the Division of International Law of the Carnegie Endowment for International Peace under the supervision of James Brown Scott (Volume III, Oxford University Press, 1921).

Articles

1. Acquaviva, Guido, 'At the Origins of Crimes Against Humanity: Clues to a Proper Understanding of the *Nullum Crimen* Principle in the Nuremberg Judgement' (2011) 9 Journal of International Criminal Justice 4.
2. Akhavan, Payam, 'The Crime of Genocide in ICTR Jurisprudence' (2005) 3 Journal of International Criminal Justice 991.
3. Ambos, Kai, 'What does 'intent to destroy' in genocide mean?' (2009) 91 International Review of the Red Cross 876.
4. Ambos, Kai, Judicial Creativity at the Special Tribunal for Lebanon, (2011) 24 Leiden Journal of International Law 655.
5. Arajarvi, Noora, 'From State-Centricism to Where? The Formation of (Customary) International Law and Non-State Actors' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599679.
6. Arajarvi, Noora, 'The Role of the International Criminal Judge in the Formation of Customary International Law' (2007) 1 European Journal of Legal Studies 2.
7. Arajarvi, Noora, The Requisite Rigour in the Identification of Customary International Law' (2017) 19 International Community Law Review 1.

8. Aydin, Devrim, 'The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts' (2014) 78 Journal of Criminal Law 423.
9. Baker, Roozbeh (Rudy) B., 'Customary International Law in the 21st Century: Old Challenges and New Debate' (2010) 21 European Journal of International Law 1.
10. Baker, Roozbeh (Rudy) B., 'Customary International Law: A Reconceptualization' (2016) 41 Brooklyn Journal International Law 2.
11. Bantekas, Ilias, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law' (2006) 6 International Criminal Law Review 1.
12. Bassiouni, M. Cherif, 'Crimes Against Humanity': The Need for a Specialized Convention' (1994) 31 Columbia Journal of Transnational Law 3.
13. Bassiouni, M. Cherif., 'A Functional Approach to General Principles of International Law' (1990) 11 Michigan Journal of International Law 3.
14. Baxter, Richard, Multilateral Treaties as Evidence of Customary International Law, (1965-1966) 41 British Yearbook of International Law 275.
15. Bettwy, David Shea, 'The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding under Customary International Law' (2011) 2 Notre Dame Journal of International and Comparative Law 1.
16. Bodansky, Daniel M., 'The Concept of Customary International Law' (1995) 16 Michigan Journal of International Law 667.
17. Bring, Ove, 'Regulating Conventional Weapons in the Future. Humanitarian Law or Arms Control', (1987) 24 Journal of Peace Research 3.
18. Bruun, Lori Lyman, 'Beyond the 1948 Convention - Emerging Principles of Genocide in Customary International Law' (1993) 17 Maryland Journal of International Law 193.
19. Bufalini, Alessandro, 'The Principle of Legality and the Role of Customary International Law in the Interpretation of the ICC Statute' (2015) 14 The Law and Practice of International Courts and Tribunals 2.
20. Cassese, Antonio, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 European Journal of International Law 1.
21. Cave, Lord, 'War Crimes and their Punishment' (1923) 8 Transactions of the Grotious Society XXI.
22. Chimni, B. S., 'Customary International Law: A Third World Perspective' (2018) 112 American Journal of International Law 1.
23. Chinen, Mark A., 'Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner' (2001) 23 Michigan Journal of International Law 143.

24. Cryer, Robert, 'Royalism and the King: Article 21 of the Rome Statute and Politics of Sources' (2009) 12 New Criminal Law Review: An International and Interdisciplinary Journal 3.
25. Distefano, Giovanni, 'The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law' (2006) 19 Leiden Journal of International Law 1041.
26. Doman, Nicholas R, 'Aftermath of Nuremberg: The Trial of Klaus Barbie' (1989) 60 University of Colorado Law Review 3.
27. Doswald-Beck, Louise, 'Implementation of International Humanitarian Law in Future Wars' (1999), 52 Naval War College Review. 1.
28. Dowdeswell, Tracey Leigh, The Brussels Peace Conference of 1874 and the Modern Laws of Belligerent Qualification, (2017) 54 Osgoode Hall Law Journal 3.
29. Elias, Olufemi, 'The Nature of the Subjective Element in Customary International Law' (1995) 44 International and Comparative Law Quarterly 3.
30. Euteneier, Gregory T., 'Towards a Corporate 'Law of Nations' Multinational Enterprises' Contributions to Customary International Law (2007) 82 Tulane Law Review 757.
31. Fan, Mary D., 'Custom, General Principles and the Great Architect Cassese' (2012) 10 Journal of International Criminal Justice 1063.
32. Federico, Lenzerini, 'Suppressing Slavery under Customary International Law' (2000) 10 Italian Yearbook of International Law 1.
33. Fennelly, Nial, 'Legal Interpretation at the European Court of Justice' (1996) 20 Fordham International Law Journal 3.
34. Finch, George A., 'Review of The Nuremberg Trial and Aggressive War by Sheldon Glueck' (New York: Alfred A. Knopf, 1946) 41 American Journal of International Law 1.
35. Friedmann, Wolfgang, 'The North Sea Continental Shelf Cases: A Critique' (1970) 64 American Journal of International Law 2.
36. Frulli, Micaela, 'The Contribution of International Criminal Tribunals to the Development of International Law: The Prominence of *opinio juris* and the Moralisation of Customary Law' (2015) 14 The Law and Practice of International Courts and Tribunals 1.
37. Gaeta, Paola, 'On What Conditions Can a State be Held Responsible for Genocide' (2007) 18 European Journal of International Law 4.

38. Gandhi, M., ‘Common Article 3 of Geneva Conventions, 1949 in the Era of International Criminal Tribunals’ (2001) 1 ISIL Year Book of International Humanitarian and Refugee Law 11.
39. Garibian, Sévane, ‘Declaration to the 1920 Treaty of Sèvres: Back to an International Criminal Law in Progress’ (2010) 1 Armenian Review 2.
40. Garner, James W., ‘Punishment of Offenders Against the Laws and Customs of War’ (Jan-Apr 1920) 14 American Journal of International Law 1/2.
41. Goda, Paul J., S.J., ‘The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War’ (1966) 33 Military Law Review 93.
42. Goldsmith, Jack L., and Posner, Eric A., ‘A Theory of Customary International Law’ (1999) 66 University of Chicago Law Review 1113.
43. Goldsmith, Katherine, ‘The issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach’ (2010) 5 Genocide Studies and Prevention 241.
44. Greenawalt, Alexander K. A., ‘Rethinking Genocidal Intent: The Case for a Knowledge Based Interpretation’ (1999) 99 Columbia Law Review Association 8.
45. Guzman, Andrew T, ‘Saving Customary International Law’ (2005) 27 Michigan Journal of International Law 1.
46. Hammer, Leonard M., ‘Reconsidering the Israeli Courts’ Application of Customary International Law in the Human Rights Context’ (1998-1999) 5 ILSA Journal of International & Comparative law 23.
47. Henkin, Louis, ‘Human Rights and ‘State Sovereignty’’, (1995) 25 Georgia Journal of International and Comparative Law 31.
48. Henry, Etienne, ‘Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law (with special reference to the jus contra bellum regime)’ 18 Melbourne Journal of International Law 2.
49. Hollis, D. B., ‘Why State Consent Still Matters- Non-State Actors, Treaties, and the Changing Sources of International Law’ (2005) 23 Berkeley Journal of International Law 138.
50. Hynning, Clifford J., ‘Sources of International Law’ (1956) 34 Chicago-Kent Law Review 2.
51. Jackson, Robert H., ‘Atrocities and War Crimes: Report from Robert H. Jackson to the President’ (1945) 12 Department of State Bulletin V.
52. Jackson, Robert H., ‘The Rule of Law among Nations’ 19 Temple Law Quarterly 3.

53. Jain, Neha, ‘Comparative International Law at the ICTY: The General Principles Experiment’ (2015) 109 American Journal of International Law 486.
54. Jalloh, Charles Chernor, ‘What makes a Crime against Humanity a Crime against Humanity’ (2013) 28 American University International Law Review 2.
55. Jarvis, Michelle, and Tieger, Alan, ‘Applying the Genocide Convention at the ICTY-The Influence of Paradigms Past’ (2016) 14 Journal of International Criminal Justice 857.
56. Jia, Bing Bing, ‘The Relations Between Treaties and Custom’ (2010) 9 Chinese Journal of International Law 81.
57. Kammerhofer, Jorg, ‘Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems’ (2004) 15 European Journal of International Law 3.
58. Kelly, Patrick, ‘The Twilight of Customary International Law’ (2000) 40 Virginia Journal of International Law 449.
59. Kelson, Hans, ‘The Rule Against Ex Post Facto Law and the Prosecution of the Axis War Criminals’ (1945) 2 The Judge Advocate Journal 3.
60. Kirgis, Frederic L., ‘Custom on a Sliding Scale’ (1987) 81 American Journal of International Law 1.
61. Kirsch, Philippe, ‘Applying the Principles of Nuremberg in the International Criminal Court’ (2007) 6 Washington University Global Studies Law Review 501.
62. Kochavi, Arieh J., ‘The Moscow Declaration, the Kharkov Trial, and the Question of a Policy on Major War Criminals in the Second World War' (1991) 76 History 248.
63. Konderla, Joanna, ‘International Customary Law in the Jurisprudence of the ICTY and the ICTR’ (2018) 8 Wroclaw Review of Law, Administration & Economics 2.
64. Korff, S. A., ‘An introduction to the history of international law’, (1924) 18 American Journal of International Law 2.
65. Koskenniemi, Martti, ‘Hersch Lauterpacht and the Development of International Criminal Law’ (2004) 2 Journal of International Criminal Justice 3.
66. Kress, Claus, The Darfur Report and Genocide Intent, (2005) 3 Journal of International Criminal Justice 3.
67. Kuhli, Milan, and Gunther, Klaus, ‘Judicial Lawmaking, Discourse Theory and the ICTY on Belligerent Reprisals’ (2011) 12 German Law Journal 5.
68. Lafontaine, Fannie, ‘Canada’s Crime Against Humanity and War Crimes Act on Trial: An Analysis of the *Munyaneza* Case’ (2010) 8 J International Criminal Justice 1.

69. Larson, Zeb, 'The Sullivan Principles: South Africa, Apartheid, and Globalization' (2020) 44 Diplomatic History 3.
70. Lauterpacht, Hersch, 'Draft Nuremberg Speeches' (2012) 1 Cambridge Journal of International and Comparative Law 1.
71. Lauterpacht, Hersch, 'The Law of Nations and the Punishments of War Crimes' (1944) 21 British Yearbook of International Law 58.
72. Lepard, Brian D., 'The Necessity of the *Opinio Juris* in the Formation of Customary International law' available at https://law.duke.edu/cicl/pdf/opiniojuris/panel_2-lepard.
73. Levy, Albert G. D., 'The Law and Procedure of War Crimes Trials' (Dec. 1943) 6 American Political Science Review 37.
74. Lippman, Matthew, 'The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide' (1985) 3 Boston University International Law Journal 1.
75. Lumb, R. D., 'Individual Responsibility for Aggressive War: The Crime Against Peace' (1956) 3 The University of Queensland Law Journal 333.
76. Manner, George, 'The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War' (Jul. 1943), 37 American Journal of International Law, 3.
77. Marcus, Joshua, 'Intent to Destroy' (2012) 3 Undergraduate Transitional justice Review 1.
78. Maridakis, Georges S., 'An Ancient Precedent to Nuremberg' (2006) 4 Journal of International Criminal Justice 4.
79. Matas, David, Prosecuting Crimes Against Humanity: The Lessons of World War I, (1989) 13 Fordham International Law Journal 1.
80. McKinnon, Harold R., 'Natural and Positive Law' (1948) 23 Notre Dame Law review, Issue. 2.
81. Meltzer, Bernard D., 'Robert H. Jackson: Nuremberg's Architect and Advocate' (2004) 68 Albany Law Review 55.
82. Mendelson, Maurice H., 'The Formation of Customary International Law' (1998) 272 Recueil Des Cours 155.
83. Menon, P.K., 'Primary, Subsidiary and other Possible Source of International Law' (1989) 1 Sri Lanka Journal of International Law 113.
84. Merkouris, Panos, 'Interpretating the Customary Rules on Interpretation' (2017) 19 International Community Law Review 126.

85. Meron, Theodor, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', (1996) 90 American Journal of International Law 239.
86. Meron, Thodor, 'The Marten Clause, Principle of Humanity, and Dictates of Public Conscience' (2000) 94 American Journal of International Law 78.
87. Nersessian, David L., 'The Contours of Genocide Intent: Troubling Jurisprudence from the International Criminal Tribunals' (2002) 37 Texas International Law Journal 2.
88. Olwig, Kenneth R., 'The Landscape of 'Customary' Law versus that of 'Natural' Law' (2005) 1 Landscape Research 3.
89. Orakhelashvili, Alexander, *Natural Law and Customary Law* (Max Planck Institute of International Law 2008) available at https://www.zaoerv.de/68_2008/68_2008_1_a_69_110.pdf.
90. Petersen, Niels, 'Customary Law without Custom- Rules, Principles, and the Role of State Practice in International Norm Creation, (2008) 23 American University International Law Review 275.
91. Plesch, Dan, Sacouto, Susana, and Lasco, Chante, 'The Relevance of the United Nations War Crimes Commission to the Prosecution of Sexual and Gender Based Crimes Today' (2014) 25 Criminal Law Forum 349.
92. Pocar, Fausto, 'International Criminal Justice and the Unifying Role of Customary Law' (2016) 21 Uniform Law Review (2-3).
93. Pollock, Frederick, 'The Sources of International Law' (1902) 2 Columbia Law Review 8.
94. Ratner, Steven R., 'The Genocide Convention After Fifty Years: Contemporary Strategies for Combating a Crime Against Humanity' (1998) 92 American Society of International Law 1.
95. Regan, F. and Nerone, F., 'The Legality of Nuremberg' (1965) 4 Duquesne University Law Review 146.
96. Roberts, A. E., 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 American Journal of International Law 757.
97. Rogers, A. P. V., 'War Crimes Trials under the Royal Warrant. British Practice 1945-49' (1990) 39 International and Comparative Law Quarterly 4.
98. Ryan, Allan A., 'Nuremberg's contributions to international law (Sharpening the Cutting Edge of International Human Rights Law: Unresolved Issues of War Crimes Tribunals)' (2007) 30 Boston College International and Comparative Law Review 1.

99. Sainati, Tatiana E., 'Toward a Comparative Approach to the Crime of Genocide' (2012) 62 Duke Law Journal 1.
100. Sartori, Giovanni, 'Concept misinformation in comparative politics' (1970) 64 American Political Science Review 1033.
101. Schabas, William A., 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit' (2017) 49 Case Western Reserve Journal of International Law 1.
102. Schabas, William A., 'Origins of the Genocide Convention: From Nuremberg to Paris' (2007-2008) 40 Case Western Reserve Journal of International Law, Issue 1.
103. Schabas, William A., 'The Contribution of the Eichmann Trial to International Law' (2013) 26 Leiden Journal of International Law 678.
104. Schabas, William A., 'The *Jelisic* Case and the *Mens Rea* of the Crime of Genocide' (2001) 14 Leiden Journal of International Law LJIL 123.
105. Schabas, William A., Carsten Stahn, Joseph Powderly, Dan Plesch and Shanti Sattler, The United Nations War Crimes Commission and the Origins of International Criminal Justice (2014) 25 Criminal Law Forum 1-7.
106. Schabas, William A., Genocide, 'Crime against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide' (2006) 27 Cardozo Law Review 1707.
107. Schachter, Oscar, 'International Law in Theory and Practice: General Course in Public International Law', (1982) 178 *Recueil des Cours* 9.
108. Scharf, Michael P., 'Accelerated Formation of Customary International Law' (2014) 20 ILSA Journal of International and Comparative Law 305.
109. Scharf, Michael P., 'Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change' 43 Cornell International Law Journal 3.
110. Scheffer, David, 'Nuremberg Trials' (2008) 39 Studies in Transnational l Legal Policy 155.
111. Schlutter, Birgint, 'Constitutionalisation at its best or at its worst? Lessons from the development of customary international criminal law' available at http://esil-sedi.eu/wp-content/uploads/2018/04/Schleutter.pdf.
112. Schmitt, Michael N., and Watts, Sean, 'The Decline of International Humanitarian Law *Opinio Juris* and the Law of Cyber Warfare' (2015) 50 Texas International Law Journal 2.
113. Schuyler, Robert Livingston, 'The British War Cabinet' (1918) 33 Political Science Quarterly 3.

114. Schwarzenberger, Georg, ‘The Inductive Approach to International Law’ 60 Harvard Law Review 4.
115. Schwarzenberger, Georg, 'Judgement of Nuremberg' (1947) 21 Tulane Law Review 329.
116. Scoville, Ryan M, ‘Finding Customary International Law’ (2016) 101 Iowa Law Review 1893.
117. Simma, Bruno, and Alston, Philip, ‘The Sources of Human Rights Law: Custom, Jus Cogens, and General principles’ (1989) 12 Australian Yearbook of International Law 82.
118. Slaughter, A. M., and Ratner, S. R., ‘The Method is the Message’, (1999) 93 American Journal of International Law 2.
119. Stephan, Paul B., ‘Disaggregating Customary International Law’ (2010) 21 Duke Journal of Comparative & International Law 1.
120. Stephen, Schwebel, ‘The Effect of Resolutions of the UN General Assembly on Customary International Law’ (1979) 73 Proceedings of the Annual Meeting (American Society of International Law) 301.
121. Szpak, Agnieszka, ‘Legacy of the Ad hoc International Criminal Tribunals in Implementing International Humanitarian Law’ (2013) 4 Mediterranean Journal of Social Sciences 9.
122. Takemura, Hitomi, ‘Inconvenient Truth About the identification of Customary International Law in International Criminal Law’ (2020) 62 Japanese Yearbook of International Law 312.
123. Tan, Yudan, ‘The Identification of Customary Rules in International Criminal Law’ (2018) 34 Utrecht Journal of International and European Law 2.
124. Taylor, Telford, ‘The Nuremberg Trials’ (1955) 55 Columbia Law Review 4.
125. Ticehurst, Rupert, ‘The Martens Clause and the Laws of Armed Conflict’ available at https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm.
126. Tomka, Peter, ‘Custom and the International Court of Justice’ (2013) 12 The Law and Practice of International Courts and Tribunals 195.
127. Tomuschat, Christian, ‘The Legacy of Nuremberg’ (2006) 4 The Journal of International Criminal Justice 4.
128. Trimble, Phillip R., ‘A Revisionist View of Customary International Law’ (1986) 33 UCLA Law Review 665.

129. Turns, David, ‘The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law’ (2003) 2 Chinese Journal of International Law 1.
130. Turns, David, ‘The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law’ (2003) 2 Chinese Journal of International Law 1.
131. Verdirame, Guglielmo, ‘The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals’ (2000) 49 International & Comparatively Law Quarterly 3.
132. Waldock, Humphrey, ‘Human Rights in Contemporary International Law and the Significance of the European Convention’ (1965) 11 International and Comparative Law Quarterly Supplementary Publications No. 1.
133. Weisburd, A. Mark, ‘The International Court of Justice and the Concept of State Practice’ 31 University of Pennsylvania Journal of International law 2.
134. Wilt, Harmen van der, ‘State Practice as Element of Customary International Law: A White Knight in International Criminal Law?’ (2019) 20 International Criminal Law Review 5.
135. Worster, William Thomas, ‘The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches’ (2014) 45 Geo J Int’l L 445.
136. Wright, Lord, ‘War Crimes under International Law’ (1946) 62 The Law Quarterly Review 40.
137. Wright, Quincy, ‘The Law of the Nuremberg Trial’ (1947) 41 American Journal of International Law 39.
138. Wright, Quincy, ‘The Outlawry of War’ (1925) 19 American Journal of International Law 1.
139. Yusuf, Abdulqawi Ahmed, J., ‘Fifth Antonio Cassese Lecture: The Role of International Lawyers between Theory and Practice’ (2017) 15 Journal of International Criminal Justice 3.

Other journals

140. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, (Jan-Apr. 1920) 14 American Journal of International Law.

141. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, (1920) 14 American Journal of International Law.
142. German War Trials: Judgement in Case of Commander Karl Neumann, (1922) 16 American Journal of International Law 4 (Oct. 1922).
143. German War Trials: Judgement in Case of Lieutenant Dithmar and Boldt, (1922) 16 American Journal of International Law 4 (Oct. 1922).
144. German War Trials: Judgement in the Case of Emil Muller, The American Journal of International Law, (1922) 16 American Journal of International Law 4 (Oct. 1922).
145. German War Trials: Judgement in the Case of Karl Heynen, The American Journal of International Law, (1922) 16 American Journal of International Law 4 (Oct. 1922).
146. Judgement of the International Military Tribunal Against Major Nazi War Criminals and Criminal Organisations, (1947) 20 Temple Law Quarterly 168.
147. Justice Jackson's Final Report to the President Concerning the Nuremberg War Crimes Trial, (1947) 20 Temp. Law Quarterly 338.
148. Report of the 6 June 1945, by Justice Robert H. Jackson, (1945) reprinted in 39 American Journal of International law.

Case law

ICJ cases

1. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010.
2. *Anglo-Norwegian Fisheries Case (UK v. Norway)*, I.C.J. Reports 1951.
3. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* I.C.J. Reports 2015.
4. *Asylum Case (Columbia v. Peru)*, I.C.J. Reports 1950.
5. *Barcelona Traction Case (Belgium v. Spain)*, I.C.J. Reports 1970.
6. *Case concerning the application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* I.C.J. Reports 2007.
7. *Continental Shelf Case (Libyan Arab Jamahiriya/Malta),* I.C.J Reports 1985.
8. *Corfu Channel Case (United Kingdom v. Albania)*, I.C.J Reports 1949.

9. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States)*, I.C.J. Reports 1984.
10. *Fisheries Jurisdiction Case (United Kingdom v. Iceland),* I.C.J. Reports 1974.
11. Frontier Dispute (Burkina Faso v. Mali), I.C.J. Reports 1986.
12. *Legality of the Threat of Use of Nuclear Weapon, Advisory Opinion*, I.C.J. Reports 1996.
13. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States),* I.C.J. Reports 1986.
14. *North Sea Continental Shelf Case (Germany v. Denmark; Germany v. Netherlands)*, I.C.J. Reports 1969.
15. *Nottebohm Case (Liechtenstein v. Guatemala)*, I.C.J Reports 1955.
16. *Question relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, I.C.J. Reports 2012.
17. *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, I.C.J. Reports 1951.
18. *S.S Lotus (France v. Turkey)*, P.C.I.J. Series A, No. 10 (1927).
19. *The Right of Passage case (Portugal v. India) (Dissenting Opinion of Judge Chagla),* I.C.J. Reports 1957.

ECHR cases

20. *Groppera Radio AG and Others v Switzerland* (1990) ECHR App no. 10890/84.
21. *Kokkinakis v Greece* (1993) ECHR App no. 14307/88.
22. *Kononov v Latvia* (2010) ECHR App no. 36376/04.
23. *Vasiliauskas v Lithunia* (2015) ECHR App no. 35343/05.

ICTY AND ICTR cases

24. *Prosecutor v. Aleksovski* (Trial Chamber Judgment) IT-95-14/1-T (25 June 1999).
25. *Prosecutor v. Aleksovski* (Appeals Chamber Judgement) IT-95-14/1-A (24 March 2000).
26. *Prosecutor v. Alfred Musema* (Trial Chamber Judgement) ICTR-96-13-T (27 January 2000).
27. *Prosecutor v. Anto Furundzija* (Trial Chamber II) IT-95-17/1-T (10 December 1998).
28. *Prosecutor v. Bagilishema* (Trial Chamber I) ICTR-95-1-A (7 June 2001).

29. *Prosecutor v. Balskic* (Appeals Chamber Judgement) IT-95-14-A (29 July 2004).
30. *Prosecutor v. Clement Kayishema and Obed Ruzindana* (Trial Chamber Judgement) ICTR-95-1-T (21 May 1999).
31. *Prosecutor v. Dragan Nikolic (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence)* (Trial Chamber Judgement) IT-94-2-R61(20 October 1995).
32. *Prosecutor v. Emmanuel Ndindabahizi* (Trial Chamber Judgement) ICTR-2001-71-I (15 July 2004).
33. *Prosecutor v. Erdemovic* Case (Separate and Dissenting Opinion of Judge Cassese) IT-96-22-A (7 October 1997).
34. *Prosecutor v. Goran Jelisic* (Appeals Chamber Judgment) IT-95-10-A (5 July 2001).
35. *Prosecutor v. Goran Jelisic* (Trial Chamber Judgement) IT-95-10-T (14 December 1999) para. 61.
36. *Prosecutor v. Jean Kambanda* (Trial Chamber Judgement) ICTR 97-23-S (4 September 1998).
37. *Prosecutor v. Jean-Paul Akayesu* (Trial Chamber Judgement) ICTR-96-4-T (2 September 1998).
38. *Prosecutor v. Jokic* (Sentencing Judgement) IT-01-42/1-S (18 March 2004).
39. *Prosecutor v. Kordic et al.* (Appeal Judgement) IT-95-14/2-A (17 December 2004).
40. P*rosecutor v. Kunarac et al.* (Appeals Chamber Judgement) IT-96-23&23/1-A (12 June 2002).
41. P*rosecutor v. Kunarac et al.* (Trial Chamber Judgement) IT-96-23&23/1-A (22 February 2001).
42. *Prosecutor v. Kupreskic* (Trial Chamber Judgement) IT-95-16-T (14 January 2000).
43. *Prosecutor v. Kvocka et al. (Decision on Preliminary Motions Filed by Mlado Radic, and Miroslav Kvocka Challenging Jurisdiction)* IT-98-30/1 (1 April 1999).
44. *Prosecutor v. Laurent Semanza* (Trial Chamber Judgement) ICTR-97-20-T (15 May 2003).
45. *Prosecutor v. Martic (Review of the Indictment Pursuant to Rule 61)* IT-95-11-R61 (13 March 1996).
46. *Prosecutor v. Martic* (Trial Chamber Judgement) IT-95-11-I (8 March 1996).
47. *Prosecutor v. Milos Stupar et al*. (First Instance Verdict) X-KR-05/24 (29 July 2008).

48. *Prosecutor v. Milutinovic et al. (Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-perpetration)* IT-05-87-PT (22 March 2006).
49. *Prosecutor v. Milutinovic et al. (Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise)* IT-99-37-AR72 (21 May 2003).
50. *Prosecutor v. Mitar Vasiljevic* (Trial Chamber II) IT-98-32-T (29 November 2002).
51. *Prosecutor v. Nahimana et al.* (Appeals Chamber Judgement) ICTR -99-52-A (28 November 2007).
52. *Prosecutor v. Nahimana et al.* (Trial Chamber Judgement I) ICTR-99-52-T (3 December 2003).
53. *Prosecutor v. Nsengiyumva* (Appeals Chamber Judgement) ICTR-96-12-A (3 June 1999).
54. *Prosecutor v. Radislav Krstic* (Trial Chamber Judgement) IT-98-33-T (2 August 2001).
55. *Prosecutor v. Radovan Karadzic and Prosecutor v. Ratco Mladic (Consideration of the Indictment within the framework of Rule 61 of the Rules of Procedure and Evidence)* (Trial Chamber I) IT-95-5-R61 & IT-95-18-R61 (12 October 2009).
56. *Prosecutor v. Rutaganda* (Trial Chamber Judgement) ICTR-96-3-T (6 December 1999).
57. *Prosecutor v. Sikirica* (Trial Chamber Initial Indictment) IT-95-8-I (21 July 1995).
58. *Prosecutor v. Stakic* (Trial Chamber Judgment) IT-97-24-T (31 July 2003).
59. *Prosecutor v. Stanislav Galic* (Appeals Chamber Judgement) IT-98-29-A (30 November 2006).
60. *Prosecutor v. Stanislav Galic* (Trial Chamber Judgment) IT-98-29-T (5 December 2003).
61. *Prosecutor v. Strugar* (Trial Chamber Judgment) IT-01-42-T (31 January 2005).
62. *Prosecutor v. Tadic* (Appeals Chamber Judgement) ICTY-94-1-A (15 July 1999).
63. *Prosecutor v. Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995).
64. *Prosecutor v. Vidoje Blagojevic and Dragan Jokic* (Trial Chamber Judgement) IT-02-60-T (17 January 2005).
65. *Prosecutor v. Vlastimir Dordevic* (The Appeals Chamber Judgement) IT-05-87/1-A (27 January 2014).
66. *Prosecutor v. Tolimir* (Trial Chamber Judgement) IT-05-88/2-T (12 December 2012).

International Military Tribunal Nuremberg cases

67. Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, "Blue Series" (1947-1948), Volumes I – XXII.

Other International Military Tribunals cases

68. The *Doctor's Trial,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume XII.
69. *The Einsatzgruppen Case* and *RuSha Case*, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume IV.
70. *The Flick Case,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume VI.
71. *The Justice* Case, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume VI.
72. *The Medical Case,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume I.
73. The *Milch Case,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume II.
74. *The Ministries Case,* Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume XII.
75. The *Peleus Trial*, British Military Court for the Trial of War Criminals held at the War Crimes Court, Hamburg under Control Council Law No. 10.
76. *The RuSha Case and the Pohl Case*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume V.

Other International Criminal Tribunals cases

77. *Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, SCSL-2004-14-AR72 (E) (31 May 2004)
78. *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/I (16 February 2011).

79. *Decision on the Appeals Against the Co-investigative Judge Order on Joint Criminal Enterprise (JCE*), (PTC 38) 002/19-09-2007-ECCC/OCIJ (20 May 2010).
80. *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/I/AC/R (16 February 2011).
81. *Prosecutor v. Ayyash et al.* (Trial Chamber Judgement) STL-11-01/T/TC (Separate Opinion of Judge Janet Nosworthy) (18 August 2020).
82. *Prosecutor v. Omar Al Bashir* (Pre-Trial Chamber I) ICC-02/05-01/09-139 (Decision on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) (12 December 2011).
83. *Prosecutor v. Ruto et al*. (Pre-Trial Chamber II) ICC-01/09-01/11-373 (Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, Pre-Trial Chamber II) (23 January 2012).
84. *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Trial Chamber VIII) ICC-01/12-01/15 (27 September 2016).
85. *Prosecutor v. Katanga and Ngudjolo Chui*, (Pre-Trial Chamber I) ICC-01/04-01/07-717 (Public Redacted Version of Decision on the Confirmation of Charges) (30 September 2008).
86. *Prosecutor v. Lubanga* (Trial Chamber III) ICC-01/04-01/06 (Judgment Pursuant to Article 74 of the Statute) (21 March 2016).
87. *Prosecutor v. Ntaganda* (Appeals Chamber Judgment) ICC-01/04-02/06 OA5, (Judgement on the Appeal of Mr Ntaganda Against the "Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9) (15 June 2017).
88. *Prosecutor v. Fofana* (Appeals Chamber Judgment) SCSL-04-14-A (28 May 2008).
89. *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, (Pre-Trial Chamber III) ICC-01/19 (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Pre-Trial Chamber III) (4 July 2019).
90. *Situation in the State of Palestine* (Pre-Trial Chamber I) ICC-01/18, (Decision on the Prosecution request pursuant to Article 19 (3) for a Ruling on the Court's territorial Jurisdiction in Palestine) (5 February 2021).
91. Case No. 002/19-09-2007-ECCC-OCIJ (15 September 2010).

National Case Law

92. *Attorney General of the Govt of Israel v. Eichmann* (District Court of Jerusalem) [1961] 45 *Pesakim Mehoziim* 3; Reported in English: [1968] 36 ILR 5.
93. *Eichmann v. Attorney General of the Govt of Israel* (Court of Criminal Appeal) [1968] *Piske Din* 2033; Reported in English: [1968] 36 ILR 277.
94. *Prosecutor v. R. Radulovic et al.* (Split Country Court) [1997] K-15/95.
95. *R v. Jones* [2006] U.K.H.L. 16.
96. *Regina v. Finta* [1994] 1 S.C.R.701.
97. *The Paquete Havana* [1900] 175 US 677.
98. *West Rand Central Gold Mining Company, Limited v. The King* [1905] 2 KB 391.

International Instruments

1. Agreement between the United Nations and the Government of Sierra Leone of the Establishment of a Special Court of Sierra Leone, U.N.T.S. 138, 2002
2. Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement), U.N.T.S. 284, 1945.
3. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.T.S. 1465, 1984.
4. Convention on the Prevention and Punishment of the Crime of Genocide, U.N.T.S. 78, 1948.
5. Convention on the Rights of the Child, U.N.T.S. 1577, 1989.
6. Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, 1949.
7. Hague Convention (II) on Laws and Customs of War on Land, T.S. 403, 1899.
8. Hague Convention (IV) Laws and Customs of War on Land, T.S. 539, 1907.
9. Hague Convention (IX) on Bombardment by Naval Forces in Time of War, T.S. 542, 1907.
10. International Covenant on Civil and Political Rights, U.N.T.S. 999, 1966.

11. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 U.N.T.S. 3, 1977.
12. Protocol for the Prohibition of the Use in War of Asphyxiating Poisonous or Other Gases, and of Bacteriological Methods of Warfare, L.N.T.S. 2138, 1925.
13. Statute of the International Court of Justice, T.S. No. 995, 1945.
14. Statute of the International Criminal Tribunal for Rwanda, 33 I.L.M. 1598, 1994.
15. Statute of the International Criminal Tribunal for the former Yugoslavia, 32 I.L.M. 1192, 1993.
16. The Charter of the International Military Tribunal of the Far East, 1946.
17. The Treaty of Lausanne, U.K.T.S. 16, 1923.
18. Treaty of Sevres, U.K.T.S. 11, 1920.
19. Treaty of Versailles, U.K.T.S. 4, 1919.
20. Vienna Convention on the Law of Treaties, U.N.T.S. 1155, 1969.
21. International Criminal Court Draft Policy on Cultural Heritage, 22 March 2021 available at https://www.icc-cpi.int/itemsDocuments/2021-03-22-otp-draft-policy-cultural-heritage-eng.pdf.

UN Resolutions

1. UN General Assembly, Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, 11 December 1946, A/RES/95.
2. UN General Assembly, Basic principles for the protection of civilian populations in armed conflicts, 9 December 1970, A/RES/2675.
3. UN General Assembly, Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, 21 November 1947, A/RES/177.
4. UN General Assembly, Respect of human rights in armed conflicts, 19 December 1968, A/RES/2444.
5. UN General Assembly, The Crime of Genocide, 11 December 1946, A/RES/96.
6. UN Security Council, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915.

7. UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 [Contains text of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991], 3 May 1993, S/25704.
8. UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 [Contains text of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991], 3 May 1993, S/25704.
9. UN Security Council, Security Council 794 [Somalia], 3 December 1992, S/RES/794.
10. UN Security Council, Security Council resolution 132 [on women and peace and security], 31 October 2000, S/RES/1325.
11. UN Security Council, Security Council resolution 1564 [on Darfur, Sudan], 18 September 2004, S/RES/1564.
12. UN Security Council, Security Council resolution 1593 [on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan], 31 March 2005, S/RES/1593.
13. UN Security Council, Security Council resolution 1757 [on the establishment of a Special Tribunal for Lebanon], 30 May 2007, S/RES/1757.
14. UN Security Council, Security Council resolution 814 [Somalia], 26 March 1993, S/RES/814.
15. UN Security Council, Security Council resolution 955 [Establishment of the International Criminal Tribunal for Rwanda], 8 November 1994 (as last amended on 13 October 2006), S/RES/955.

Other UN Documents

16. *Ad Hoc* Committee on Genocide, Summary Record of the Twenty-Third Meeting, E/AC. 25/SR.23 (27 April 1948).
17. *Ad Hoc* Committee on Genocide, Draft Report Submitted by Mr. Azkoul, Rapporteur, E/AC. 25/ W.1/Add.3 (30 April 1948).
18. Draft resolution relating to the crime of genocide proposed by the delegation Cuba, India and Panama, Doc. A/BUR./50 (2 November 1946).

19. Fortieth Meeting, Doc. A/C. 6/SR.40) (2 October 1947).
20. Letter from the President of the General Assembly to the Chairman of the Sixth Committee, Doc. A/C. 6/64 (13 November 1946).
21. Thirty-Ninth Meeting, Doc. A/C. 6/SR.34 (29 September 1947).
22. Twenty-Fourth Meeting of the Sixth Committee, Doc. A/C. 6/96 (29 November 1946).
23. Twenty-Second Meeting of the Sixth Committee, Doc. A/C. 6/84 (22 November 1946).
24. Twenty-Third Meeting of the Sixth Committee, Doc. A/C. 6/91 (28 November 1946).

Reports of International Law Commission

25. Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on Its Forty-eighth Session, A/51/10.
26. Draft Conclusions on Identification of Customary International Law with Commentaries, A/73/10.
27. First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur, A/CN.4/663.
28. Formation and evidence of customary international law, Note by Michael Wood, Special Rapporteur, A/CN.4/653.
29. Final Report by the Committee on Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, International Law Association, London Conference (2000).
30. Report of the International Law Commission on the work of its sixty-third session, A/66/10.
31. Report of the International Law Commission on the work of its sixty-eighth session, A/71/10.
32. Report of the International Law Commission on the work of its sixty-seventh session, A/70/10.
33. Report of the International Law Commission on the work of its sixty-sixth session, A/69/10).
34. Second report on identification of customary international law, by Sir Michael Wood, Special Rapporteur, A/CN.4/672.
35. Third report on identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/682.

Newspaper articles

1. ‘Allies to Punish Turks who Murder - Notify Porte That Government Heads Must Answer for Armenian Massacre’, *New York Times* (24 May 1915).
2. ‘Antagonists Face to Face’, *The Manchester Guardian* (8 May 1919)
3. ‘Atomic Bombing of Nagasaki told by Flight Member; Aftermath of Atomic Bomb: A City Laid Waste by World’s Most Destructive Force’, *New York Times Magazine* (9 September 1945).

National Legislation and Case Law

1. The Penal Code of the Empire of Ethiopia, 1957. No. 158 of 1957.
2. The International Crimes (Tribunals) Act, 1973, Act No. XIX of 1973.