The Rome Statute as Evidence of Customary International Law

Tan, Y.

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To my grandma Dazhen Zhang (张达珍)

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PROEFSCHRIFT

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Abbreviations

AATA	Administrative Appeals Tribunal of Australia
AC	Appeal Cases (the UK cases)
A Ch	Appeals Chamber
AI	Amnesty International
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
Am U Intl L Rev	American University International Law Review
Am U L Rev	American University Law Review
ARIEL	Austrian Review of International and European Law
art(s)	Article(s)
ASP	Assembly of States Parties
Australian J HR	Australian Journal of Human Rights
Australian Ybk Intl L	Australian Yearbook of International Law
British Ybk Intl L	British Yearbook of International Law
California L Rev	California Law Review
Canadian Ybk Intl L	Canadian Yearbook of International Law
Cardozo L Rev	Cardozo Law Review
Case W Res J Intl L	Case Western Reserve Journal of International Law
Chicago J Intl L	Chicago Journal of International Law
Chinese J Intl L	Chinese Journal of International Law
Cir	Circuit (the US cases)
CLB	Commonwealth Law Bulletin
CLF	Criminal Law Forum
CLR	Commonwealth Law Reports (Australia)
Columbia L Rev	Columbia Law Review
Cornell Intl LJ	Cornell International Law Journal
Crim Law & Philos	Criminal Law & Philosophy
CUP	Cambridge University Press
Dalhousie LJ	Dalhousie Law Journal
Denver J Intl L& P	Denver Journal of International Law and Policy
DePaul L Rev	DePaul Law Review
DLR	Dominion Law Reports
Doc	Document
Duke LJ	Duke Law Journal
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECtHR	European Court of Human Rights
ed(s)	editor(s)

edn	edition
EJCCLCJ	European Journal of Crime, Criminal Law and Criminal Justice
EJIL	European Journal of International Law
Emory Intl L Rev	Emory International Law Review
et al	Et alii (and others)
EWCA Crim	Court of Appeal Criminal Division (the UK)
F 3d	Federal Reporter, Third Series (the US Circuit Court of Appeals)
FC	Federal Court (Canada)
FCA	Federal Court of Appeal (Canada)
FCAFC	Federal Court of Australia-Full Court
Finnish Ybk Intl L	Finnish Yearbook of International Law
fn	Footnote
Fordham Intl LJ	Fordham International Law Journal
GA	General Assembly
GAOR	General Assembly Official Records
Georgetown LJ	Georgetown Law Journal
GSU L Rev	Georgia State University Law Review
Harvard Intl LJ	Harvard International Law Journal
Harvard J on Legis	Harvard Journal on Legislation
HMSO	Her Majesty's Stationery Office
Houston J Intl L	Houston Journal of International Law
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Rep	ICJ Report
ICLQ	International and Comparative Law Quarterly
ICLR	International Criminal Law Review
ICRC	International Committee of the Red Cross
ICT	International Crimes Tribunal(Bangladesh)
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILA	International Law Association
ILDC	International Law in Domestic Courts
ILM	International Legal Materials
ILR	International Law Reports
Intl J HR	International Journal of Human Rights
IOLR	International Organizations Law Review
IRRC	International Review of the Red Cross
Israel Ybk HR	Israel Yearbook on Human Rights
J Armed Conflict L	Journal of Armed Conflict Law
J Conflict & Security L	Journal of Conflict and Security Law
J Crim L & Criminology	Journal of Criminal Law and Criminology
Jewish Ybk Intl L	Jewish Yearbook of International Law

JICJ	Journal of International Criminal Justice
Leiden J Intl L	Leiden Journal of International Law
LJN	Landelijk Jurisprudentie Nummer (country case number) (the Netherlands)
LPICT	Law and Practice of International Courts and Tribunals
LQR	Law Quarterly Review
LRTWC	Law Reports of the Trials of the War Criminals
MJECL	Maastricht Journal of European and Comparative Law
Melbourne J Intl L	Melbourne Journal of International Law
Melbourne U L Rev	Melbourne University Law Review
Michigan J Intl L	Michigan Journal of International Law
Military L & L War Rev	Military Law and the Law of War Review
Military L Rev	Military Law Review
MPEPIL	Max Planck Encyclopedia of Public International Law
MPUNYB	Max Plank Yearbook of United National Law
Netherland Intl L Rev	Netherland International Law Review
No.	Number
Nordic J Intl L	Nordic Journal of International Law
OUP	Oxford University Press
p(p)	Page(s)
Pace Intl L Rev	Pace International Law Review
para(s)	Paragraph(s)
PTC	Pre-Trial Chamber
Recueil des cours	Recueil des cours de l'Académie du droit international de la Haye (Collected Courses of The Hague Academy of International Law)
Res	Resolution
SC	Security Council
SCSL	Special Court for Sierra Leone
SPSC	Special Panels for Serious Crimes
Stanford J Intl L	Stanford Journal of International Law
STL	Special Tribunal for Lebanon
Supp	Supplement
TC	Trial Chamber
Tilburg L Rev	Tilburg Law Review
TMWC	Trial of the Major War Criminals before the International Military Tribunals: Nuremberg
TWC	Trials of the War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10
U Pa L Rev	University of Pennsylvania Law Review
U.S.	United States Reports (United States Supreme Court)

UK	United Kingdom
UKHL (now SC)	United Kingdom House Lord (now Supreme Court)
UKTS	United Kingdom Treaty Series
UN	United Nations
UNTS	United Nations Treaty Series
UNWCC	United Nations War Crimes Commission
US	United States
USC	Unites States Code
USGPO	Unites States Government Printing Office
v	Versus (against)
Vand J Transnatl L	Vanderbilt Journal of Transnational Law
Virginia J Intl L	Virginia Journal of International Law
Vol(s)	Volume(s)
WLR	Weekly Law Reports (the UK)
YIHL	Yearbook of International Humanitarian Law
ZAGPPHC	South Africa North Gauteng High Court, Pretoria
ZASCA	South Africa Supreme Court of Appeal
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik (Journal for International Doctrine in Criminal Law)
§(§)	section(s)

Table of Contents

1 Introduction

The relationship between treaties and customary international law remains a highly debated topic in international law.[1] Treaties and customary international law may co-exist on the same subject matter.[2] The rules of the two sources may overlap or conflict with each other or may have identical content. The International Court of Justice (ICJ) in *Nicaragua* upheld that the two sources do not supplant with each other for their separate methods of application and interpretation.[3] As opposed to a treaty rule, a customary international rule is usually unwritten and less detailed. A treaty rule covering the same subject matter could be an important starting point in identifying the (possible) content of a customary international rule.[4] According to the ICJ, a multilateral treaty rule which is clearly articulated may play a role in 'recording and defining rules deriving from customary international

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1 See Richard R. Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965) 41 *British Ybk Intl L* 275; Richard R. Baxter, 'Treaties and Custom' (1970) 129 *Recueil des cours* 27; Michael Akehurst, 'Custom as a Source of International Law' (1976) 47 *British Ybk Intl L* 1, 42-52; Mark Villiger, *Customary International Law and Treaties: A Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Martinus Nijhoff 1985) 156-67; Oscar Schachter, 'Entangled Treaty and Custom' in Y. Dinstein and M. Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht: Nijhoff 1989) 732; Mark Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (Fully revised 2nd edn, The Hague/London: Kluwer 1997); Yoram Dinstein, 'The Interaction between Customary Law and Treaty' (2006) 322 *Recueil des cours* 243; Maurice Mendelson, 'The International Court of Justice and the Sources of International Law' in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (New York: CUP 2009) 72-79; Bingbing Jia, 'The Relations between Treaties and Custom' (2010) 9 *Chinese J Intl L* 81.

2 R. Jennings and A. Watts (eds), *Oppenheim's International Law*, Vol 1 (9th edn, London: Longmans 1996), §§ 24-32.

3 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v USA*), Merits, [1986] ICJ Rep 14 [*Military and Paramilitary Activities* Judgment], 93-96, paras 175-79.

4 Kennedy Gastorn, Secretary-General of the Asian-African Legal Consultative Organisation (AALCO), Address in regard to the theme 'Identification of Customary International Law: Legal and Policy Implications' on 2 November 2016 at the UN Trusteeship Council Chambers, 10. For discussions on the advantages and disadvantages of deriving the content of customary law from a treaty formulation, see Daniel Bethlehem, 'The Methodological Framework of the Study' in E. Wilmshurst and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (New York: CUP 2007) 1-14.

law'.[5] For example, in the *North Sea Continental Shelf* cases of the ICJ, States invoked a treaty rule as evidence of the existence of a customary rule binding upon all States.[6] The ICJ analysed whether a principle set out in article 6(2) of the 1958 Geneva Convention on the Continental Shelf had passed into customary international law.[7] International and national criminal tribunals have also contemplated similar issues of a customary rule paralleling a treaty rule with the same matter in the field of international criminal law.[8] This research studies the status of the 1998 Rome Statute of the International Criminal Court (Rome Statute)[9] as evidence of customary rules in international (criminal) law.

1.1 The role of customary international law in the International Criminal Court

Customary international law is either a source of international law[10] or an aid to interpreting written rules.[11] Parallel with the development of international criminal law since the middle of the 20th century,[12] customary international law also plays a significant role as a source or an interpretive aid in this field.[13]

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5 *Continental Shelf* (*Libyan Arab Jarnahiriya/Malta*), Judgment, [1985] ICJ Rep 13, 29-30, para 27 [*Libya-Malta Continental Shelf* Judgment]; Baxter, 'Multilateral Treaties as Evidence of Customary International Law', 275-300; *North Sea Continental Shelf* cases (*Germany v Denmark; Germany v Netherlands*), Judgment, [1969] ICJ Rep 3 [*North Sea Continental Shelf* cases], 39, 41, paras 63, 69; *Military and paramilitary Activities* Judgment, [1986] ICJ Rep 14, 97, para 183; Villiger, *Customary International Law and Treaties: A Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* 227, 238; 'Identification of Customary International Law', in 'Report of the International Law Commission', GAOR 71st Session Supp No 10, UN Doc A/71/10 (2016), para 62, Conclusion 11.1-11.2; 'Text of the draft conclusions on identification of customary international law', in 'Report of the International Law Commission', GAOR 73rd Session Supp No 10, UN Doc A/73/10 (2018), para 65, Conclusion 11.1-11.2.

6 *North Sea Continental Shelf* cases, 41, para 70.

7 ibid, 39, 41, paras 63, 71; Geneva Convention on the Continental Shelf, 29 April 1958, 10 June 1964, 499 UNTS 312.

8 *Prosecutor v Mucić et al* (Judgement) ICTY-96-21-T (16 November 1998) [*Delalić/Mucić et al* Trial Judgment], para 302. For a detailed analysis, see Baxter, 'Multilateral Treaties as Evidence of Customary International Law'; Baxter, 'Treaties and Custom', 58-61.

9 Rome Statute of the International Criminal Court, 17 July 1998, 1 July 2002, 2187 UNTS 90 (1998 Rome Statute).

10 Jennings and Watts (eds), *Oppenheim's International Law*, Vol 1, § 10, p 26 and fn 1; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford: OUP 2012) 23-27; Andrew Clapham, *Brierly's the Law of Nations* (7th edn, Oxford: OUP 2012) 57-63; Malcolm Shaw, *International Law* (8th edn, Cambridge: CUP 2017) 286-88; Hugh Thirlway, *The Sources of International Law* (Oxford: OUP 2014) 53-91; Statute of the International Court of Justice, 26 June 1945, 24 October 1945, 33 UNTS 993, art 38.

11 Jennings and Watts (eds), ibid; Thirlway, ibid.

12 Claus Kreß, 'International Criminal Law' in R. Wolfrum (ed) (2009) *MPEPIL*, paras 22-29.

13 *Furundžija* Appeals Chamber Judgment, paras 275-81.

Indeed, the idea of customary international law as a source of international criminal law has not been uncontested.[14] Rules derived from customary international law are quite vague. Its ambiguous and unwritten characteristics seem to be inconsistent with the principle of legality requiring specificity and certainty.[15] However, the difference between treaties and customary international law in legal certainty is a matter of degree. If the attribute of the ambiguity of customary international law were to deny its source status, treaties would also be excluded as a source in this field, which would be unacceptable. The principle of legality itself serves to restrict the interpretation of applicable rules, including customary international law, instead of excluding custom as a source of international criminal law.[16] Additionally, the UN Secretary-General's report, which was approved by the UN Security Council,[17] noted that the International Criminal Tribunal for the former Yugoslavia (ICTY) should only apply 'rules of international humanitarian law that are beyond any doubt part of customary law'.[18] The drafters of the ICTY Statute aimed to limit the ICTY's jurisdiction over crimes existent under customary international law so as to avoid violating the principle of legality.[19] In short, customary international law remains a source of interna-

14 For discussions, see Alain Pellet, 'Applicable Law' in A. Cassese *et al* (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP 2002) 1070-72; Beth van Schaack, '*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals' (2008) 97 *Georgetown LJ* 119, 138.

15 Kenneth S. Gallant, *The Principle of Legality in International and Comparative Law* (New York: CUP 2008) 352-78.

16 *The Prosecutor v Bosco Ntaganda* (Judgment 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', A Ch) ICC-01/04-02/06-1962 (15 June 2017), paras 1, 54-55; *Prosecutor v Milutinović et al* (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction: Joint Criminal Enterprise) ICTY-99-37-AR72 (21 May 2003) [*Milutinović et al* Appeals Chamber Decision on Jurisdiction 2003], paras 37-38; *Prosecutor v Mucić et al* (Judgement) ICTY-96-21-A (20 February 2001) [*Mucić et al* Appeals Chamber Judgment], para 173; *Nahimana et al v The Prosecutor* (Judgement, partly dissenting opinion of Judge Shahabuddeen) ICTR-99-52-A (28 November 2007), para 19; Mohamed Shahabuddeen, 'Does the Principle of Legality Stand in the Way of the Progressive Development of the Law?' (2004) 2 *JICJ* 1013, 1017; Robert Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (3rd edn, New York: CUP 2014) 17-19; Larissa van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Leiden: Martinus Nijhoff 2005) 213-14; Joseph Powderly, 'The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function: Reflections on Sources of Law and Interpretative Technique' in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford: OUP 2015) 444-98.

17 SC Res 827 (1993) on establishment of the ICTY and adoption of the Statute of the Tribunal, UN Doc S/RES/827 (1993), para 1.

18 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993), UN Doc S/25704 (1993), para 34.

19 *Prosecutor v Tadić* (Interlocutory Appeal Decision on Jurisdiction) ICTY-94-1-AR72 (2 October 1995) [*Tadić* Appeals Chamber Decision on Jurisdiction], para 94.

tional criminal law.[20] Jurisprudence of international and national criminal tribunals also support that view.[21]

This study of the nature of the Rome Statute as evidence of customary international law could not have been done two decades ago. In 1998, a United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was held in Rome (Rome Conference).[22] After a month of negotiations at the Rome Conference, the Rome Statute was adopted with 120 States voting for, 21 States abstaining and 7 States voting against, and it entered into force on 1 July 2002.[23] By virtue of the Statute, the International Criminal Court (ICC) was established to deal with individual criminal responsibility for the most serious crimes of concern to the international community as a whole.[24]

It seems that customary international law is of less importance at the ICC after the adoption of the Rome Statute.[25] Pursuant to articles 21(1)(a) and (b) of the Statute, customary international law is not the primary but secondary source of applicable law for the ICC.[26] Significantly, article 22(1)

20 A. Cassese *et al* (eds), *Cassese's International Criminal Law* (3rd edn, Oxford: OUP 2013) 13-14; Alain Pellet, 'Applicable Law', 1072; Yudan Tan, 'The Identification of Customary Rules in International Criminal Law', (2018) 34 *Utrecht Journal of International and European Law* 92.

21 *Prosecutor v Blaškić* (Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) ICTY-95-14-AR108*bis* (29 October 1997), para 64; *Kajelijeli v Prosecutor* (Judgment) ICTR-98-44A-A (23 May 2005), para 209; *Chief Prosecutor v Delwar Hossain Sayeedi* (Judgment, International Crimes Tribunal-1) ICT-BD 01 of 2011 (28 February 2013), para 30(4); *Chief Prosecutor v Salauddin Quader Chowdhury* (Judgment, International Crimes Tribunal-1) ICT-BD 02 of 2011 (1 October 2013), para 36(4); *Prosecutor v Lino Beno* (Judgment, District Court of Dili) SPSC-4b/2003 (16 November 2004), paras 13-14; William A. Schabas, 'Customary Law or Judge-Made Law: Judicial Creativity at the UN Criminal Tribunals' in J. Doria *et al* (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (1930-2000) (Leiden: Martinus Nijhoff Publishers 2009) 75-101; Birgit Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia* (Leiden: Brill 2010).

22 'Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (15 June-17 July 1998), Rome, UN Doc A/CONF.183, 17 July 1998.

23 There were 185 UN member States in 1998. 'Summary record of the 9th Plenary Meetings of the Conference', UN Doc A/CONF.183/SR.9, 17 July 1998, para 10. Voting against see UN Doc A/CONF.183/SR.9, paras 17 (India), 28 (US), 33 (Israel), 40 (China); for further explanations, see 'Summary record of the 9th meeting [of the Sixth Committee]', UN Doc A/C.6/53/SR.9 (1998), paras 30-43 (China), 52-63 (US).

24 1998 Rome Statute, Preamble, arts 1 and 5(1).

25 Larissa van den Herik, 'The Decline of Customary International Law as a Source of International Criminal Law' in C. A. Bradley (ed), *Custom's Future: International Law in a Changing World* (New York: CUP 2016) 231, 239-41, 251-52.

26 1998 Rome Statute, art 21; Joseph Powderly, 'The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function: Reflections on Sources of Law and Interpretative Technique' in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (Leiden: Brill 2015) 453.

of the Statute reads: '[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court'. The reference to 'a crime within the jurisdiction of the Court' prevents the ICC from prosecuting crimes that are not defined in the Statute but merely based on customary law.[27] Article 22(1) implies that the ICC will not automatically apply existing rules and new developments in customary international law regarding crimes.[28] Aside from articles 21 and 22, article 25(2) reads: '[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.' Pre-Trial Chambers of the ICC once held that 'the question as to whether customary law admits or discards the "joint commission through another person" is not relevant for this Court', because 'the Rome Statute expressly provides for this specific mode of liability'.[29] The emphasis on 'in accordance with this Statute' also demonstrates that the ICC is prevented from employing a mode of liability that is recognised under customary law but that goes beyond the scope of the Statute.

Yet, the viewpoint that customary international law is merely a theoretical issue at the ICC is not persuasive.[30] Articles 11(2), 13(b) and 24(1) of the Rome Statute allow the ICC to try individuals for an offence committed after the entry into force of the Statute (1 July 2002), but prior to a State's ratification of it. According to the Rome Statute, the ICC may retroactively apply the Statute to exercise jurisdiction over situations in two contexts.[31] Firstly, article 12(3) of the Statute permits non-party States' acceptance of the ICC's jurisdiction by lodging a declaration with the Registrar.[32] For example, Ukraine has accepted the jurisdiction of the ICC over alleged crimes committed in its territory from November 2013 onwards through declarations

27 1998 Rome Statute, art 22(1) (*Nullum crimen sine lege*); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, Oxford: OUP 2016) 543.

28 Leila N. Sadat, 'Custom, Codification and Some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute' (1999) 49 *DePaul L Rev* 909, 910-12; Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: OUP 2001) 52.

29 *The Prosecutor v Katanga & Ngudjolo* (Decision on the confirmation of charges, PTC I) ICC-01/04-01/07-717 (30 September 2008) [*Katanga & Ngudjolo* Decision on Confirmation of Charges], paras 508; see also *Prosecutor v Ruto et al* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II) ICC-01/09-01/11-373 (23 January 2012) [*Ruto et al* Decision on Confirmation of Charges], para 289.

30 Powderly, 'The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function: Reflections on Sources of Law and Interpretative Technique', 453.

31 Antonio Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case' (2002) 13 *EJIL* 853, 875; Marko Milanović, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' (2011) 9 *JICJ* 25, 51-52; Marko Milanović, 'Aggression and Legality: Custom in Kampala' (2012) 10 *JICJ* 165.

32 For discussions of art 12(3) and the ICC's temporal jurisdiction to crimes, see Carsten Stahn, Mohamed M. El Zeidy and Hector Olásolo, 'The International Criminal Court's *ad hoc* Jurisdiction Revisited' (2005) 99 *AJIL* 421, 429-31.

in 2014 and 2015.[33] Secondly, article 13(b) of the Statute empowers the UN Security Council to refer a situation concerning a non-party State to the Rome Statute. The Situation in Darfur, Sudan referred to the ICC by the UN Security Council is a good example.[34] Due to the non-party States' acceptance and the Security Council's referral, the ICC may retroactively exercise jurisdiction over crimes committed by nationals of a non-party State in the territory of a non-party State. In the two circumstances, the ICC cannot 'retroactively' apply the Rome Statute to prosecute alleged crimes because these crimes were committed prior to the 'consent' of that non-party State. But how can the ICC retroactively exercise jurisdiction over these Situations without violating the rule prohibiting retroactive prosecution of crimes? As Bruce Broomhall wrote: '[t]he only legitimate basis for establishing the criminal responsibility of individuals [at the ICC] would presumably – in the absence of relevant national criminal prohibitions at the time of the alleged conduct – be that of customary international law.'[35] Therefore, in the two contexts, a good choice for the ICC is to establish whether these offences in the Statute are reflections of customary law at the material time. Other commentators share the view and argue for the necessity to study the status of the Rome Statute as evidence of customary international law.[36]

In addition, as noted above, the ICC can resort to customary international law as a secondary source to fill applicable gaps concerning modes of liabilities and defences.[37] Last, the ICC may also rely on customary inter-

33 'Declaration by Ukraine lodged under Article 12(3) of the Rome Statute' (9 April 2014); 'Declaration by Ukraine lodged under Article 12(3) of the Rome Statute' (8 September 2015).

34 SC Res 1593 (2005) on violations of international humanitarian law and human rights law in Darfur, Sudan, UN Doc S/RES/1593 (2005).

35 Bruce Broomhall, 'Article 22' in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Munich: Hart/Beck 2008) 720.

36 Gennady M. Danilenko, 'The Statute of the International Criminal Court and Third States' (2000) 21 *Michigan J Intl L* 445, 468; Leena Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 *EJIL* 543, 567; Leila N. Sadat and Jarrod M. Jolly, 'Seven Canons of ICC Interpretation: Making Sense of Article 25's Rorschach Blot' (2014) 27 *Leiden J Intl L* 755, 786; Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (New York: CUP 2014) 244-45, 257-58; Camilla Lind, 'Article 22' in M. Klamberg (ed), *The Commentary on the Law of the International Criminal Court* (Brussels: Torkel Opsahl Academic EPublisher 2017) 257; Fausto Pocar, 'Transformation of Customary Law Through ICC Practice' (2018) 112 *AJIL Unbound* 182, 184-85.

37 *The Prosecutor v Lubanga* (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, A Ch) ICC-01/04-01/06-772 (21 December 2006), para 34; Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 383-85; Margaret M. DeGuzman, 'Article 21' in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (3rd edn, Munich: Hart/Beck 2016) 939; Vladimir-Djuro Degan, 'On the Sources of International Criminal Law' (2005) 4 *Chinese J Intl L* 45, 52.

national law to clarify the content of unclearly written texts of the Rome Statute, in particular, if that treaty rule is a restatement of a customary rule.[38] As Claus Kreß held, the crimes and individual criminal responsibility under international criminal law *stricto sensu* ultimately must be rooted in customary international law.[39] The definitions of core international crimes included in the Rome Statute therefore should be interpreted strictly in order to achieve the goal of adherence to customary international law. In all of these circumstances, the ICC needs to consider the existence and the content of customary rules in international criminal law.[40] In a nutshell, customary international law continues to play a role within the framework of the ICC.

1.2 Aim, questions and scope of this research

This research aims to examine the nature of rules of the Rome Statute as evidence of customary international law. The central question of this research is whether and to what extent a rule of the Rome Statute was or is declaratory of a customary rule on the same subject matter. This work mainly addresses three sub-questions: (1) whether a provision of the Rome Statute reflected a pre-existing customary rule at the adoption of the Statute or crystallised itself into custom upon its inclusion in the Statute in 1998; (2) whether a provision of the Statute that was of a declaratory nature continues to be declaratory of a customary rule; and (3) whether a provision of the Statute that was not of a declaratory nature has subsequently become so. The first decisive date in this research is the year 1998, the time when the Rome Statute was adopted. The second is late June in 2018, when this research was completed.

It is debatable whether the Rome Statute is either a mirror of customary international law or creates new rules. In the drafting process of the Rome Statute, some State delegations explicitly addressed whether the aim of the Rome Statute was to codify or crystallise crimes under customary interna-

38 *The Prosecutor v Bosco Ntaganda* (Judgment 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', A Ch) ICC-01/04-02/06-1962 (15 June 2017), para 1; Dapo Akande, 'Sources of International Criminal Law' in A. Cassese (ed), *Oxford Companion on International Criminal Justice* (Oxford: OUP 2009) 50-51; Cassese *et al* (eds), *Cassese's International Criminal Law* 13-14; Powderly, 'The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function: Reflections on Sources of Law and Interpretative Technique', 478; Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 228-30; Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 335; 'Report of the International Law Commission', GAOR 61st Session Supp No 10, UN Doc A/61/10 (2006), para 251.

39 Kreß, 'International Criminal Law', para 12. Also see *Prosecutor v Galić* (Judgement) ICTY-98-29-T (5 December 2003) [*Galić* Trial Judgment], Separate and Partially Dissenting Opinion of Judge Rafael Nieto-Navia, paras 108-113 and fn 389.

40 *The Prosecutor v Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, PTC I) ICC-02/05-01/09-3 (4 March 2009) [*First Warrant of Arrest* Decision for *Al Bashir*], para 126.

tional law rather than to create new crimes.[41] Some delegations considered that the task was to transpose the accumulated body of customary law into a treaty text.[42] The Preparatory Committee on the establishment of an international criminal court, established by the UN General Assembly,[43] also upheld this opinion so as to attract wide acceptance.[44] States at the Rome Conference relied on custom to argue for or against the inclusion or exclusion of specific underlying offences in the Statute, for instance, war crimes committed in non-international armed conflict.[45] A Chilean court openly stated that '[t]he Rome Statute became the expression of existing international law at the time of its creation'.[46] The Federal Court of Australia also noted:

> […] the Rome Statute was drawn up to provide for the crimes it defined and purported to define those crimes as crimes that had crystallised into crimes in international law as at the date of the Statute, notwithstanding that the Statute was to come into force, and the ICC was to be established, at a later date.[47]

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41 Hans-Ulrich Scupin, 'History of International Law, 1815 to World War I' in R. Wolfrum (ed) (2011) *MPEPIL*, para 36; 'Second Informal Inter-Sessional Workshop for experts from Member States of the Atlantic Alliance with regard to the issue of War Crimes', UD/A/AC-249/1997/WG-1/IP, UK; 'Summary Records of the Plenary meetings', UN Doc A/CONF.183/SR.2, para 44 (Japan) about war crimes; UN Doc A/CONF.183/SR.5; UN Doc A/CONF.183/SR.9, para 38 (China) about war crimes and crimes against humanity; 'Summary record of the 11th meeting [of the Sixth Committee]', UN Doc A/C.6/52/SR.11(1997), para 96 (China) about war crimes.

42 Scupin, 'History of International Law, 1815 to World War I'; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: OUP 2012) 107; UN Doc A/CONF.183/SR.3, para 21 (Czech Republic); UN Doc A/CONF.183/SR.3, para 4 (Singapore).

43 'Establishment of an international criminal court', GA Res 50/46 (1995), UN Doc A/RES/50/46.

44 'Summary of the Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996', UN Doc A/AC.249/1 (1996), para 38; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', GAOR 51st Session Supp No 22, UN Doc A/51/22 (1996), Vol I, para 78.

45 Philippe Kirsch and John T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 *AJIL* 2, 6; Phillippe Kirsch and Darryl Robinson, 'Reaching Agreement at the Rome Conference' in A. Cassese *et al* (eds), *The Rome Statute of the International Criminal Court: Commentary* (Oxford: OUP 2002) 79-80. Some delegations argued that only weapons prohibited under customary international law could be included, see UN Doc A/CONF.183/C.1/SR.4, paras 52-53 (US); UN Doc A/CONF.183/C.1/SR.5, paras 28 (France), 77 (Israel); UN Doc A/CONF.183/C.1/SR.26, para 55 (Korea); UN Doc A/CONF.183/C.1/SR.5, para 87 (India); UN Doc A/CONF.183/C.1/SR.27, para 33 (Israel), 43 (Bosnia and Herzegovina).

46 *Víctor Raúl Pinto v Tomás Rojas* (Supreme Court, Chile) 3125-04, ILDC 1093 (CL 2007), para 29.

47 *SRYYY v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs), [2005] FCAFC 42, para 75, confirmed in *SZCWP v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs), [2006] FCAFC 9, para 107. For a slightly different view, see *SRNN v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs), [2000] AATA 983, para 63; *AXOIB v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs), [2002] AATA 365, para 32.

Different views exist.[48] Some States argued that the list of offences should consider the development of law, in particular, the law of weapons.[49] The Indian delegation, however, commented that the Rome Conference 'is an institution-setting conference and not one meant to progressively develop and codify substantive parts of international law'.[50] The employment of chemical and bacteriological weapons as a war crime was generally supported at the Conference, but the use of them was not listed as a war crime due to disagreements on the use of nuclear weapons.[51] Article 10 of the Statute provides that '[n]othing in this Part [about jurisdiction, admissibility and applicable law] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'. This provision indicates that the crimes outlined in the Statute are not exhaustive restatements of the entire corpus of international criminal law.[52]

The International Law Commission (ILC) and States rarely determine whether a treaty is a restatement (the transformation of a pre-existing customary rule into written form) or is a progressive development (the drafting of newly written rules) of customary law. The ILC, established by the UN General Assembly to promote the codification of international law and its progressive development,[53] usually refrains from categorising clearly or exclusively that treaty provisions are either a codification or a progressive development of international law.[54] The Commission never clarified to what extent the Draft text for the Establishment of an International Criminal Court (the ILC 1994 Draft)[55] was a codification or progressive development of international criminal law. In addition, the 2000 *Crimes against Humanity*

48 'Summary record of the 14th meeting [of the Sixth Committee]', UN Doc A/C.6/52/SR.14 (1997), para 52 (Georgia).

49 UN Doc A/CONF.183/C.1/SR.27, para 4 (Algeria); UN Doc A/CONF.183/C.1/SR.28, para 25 (Namibia); UN Doc A/CONF.183/SR.5, para 62 (New Zealand).

50 UN Doc A/CONF.183/SR.4, para 52 (India).

51 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 277-82.

52 *Situation in the Republic of Kenya* (Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya") ICC-01/09-19-Corr (31 March 2010), para 32; Timothy McCormack and Sue Robertson, 'Jurisdictional Aspects of the Rome Statute for the New Industrial Criminal Court' (1999) 23 *Melbourne U L Rev* 635, 653; Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 266-67; Otto Triffterer and Alexander Heinze, 'Article 10' in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 645-49; Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 335-36, suggesting that article 10 was limited to war crimes.

53 Statute of the International Law Commission, as amended by GA Res 36/39 (1981), arts 1(1) and 15; 'Establishment of an International Law Commission', GA Res 174 (II) (1947), UN Doc A/RES/174 (II).

54 'Report of the International Law Commission', UN Doc A/51/10 (1996), Vol II, pp 84, 86-87, paras 147 (a), 156-59.

55 'Report of the International Law Commission', UN Doc A/49/10 (1994), pp 20-73.

and War Crimes Act of Canada stipulates that '[f]or greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date'.[56] The Philippines also stated that 'basic tenets of the Court [ICC] were consistent with customary international law'.[57] Fourteen member States of the Caribbean Community have repeatedly held that some 'provisions of the Rome Statute' had attained 'the status of or represent customary international law'.[58] The US legal adviser remarked at the 2010 Kampala Review Conference that '[u]nlike genocide, war crimes, and crimes against humanity – which plainly violated customary international law when the Rome Statute was adopted – as yet, no authoritative definition of aggression exists under customary international law'.[59] The ILC and States did not clarify to what extent provisions of the Statute are codifications of customary law which existed before 17 July 1998, or are crystallisations of emerging customary law through the adoption of the Statute.

Commentators argued that the result of the Rome Statute with 'uneasy technical solutions, awkward formulations, [and] difficult compromises' was aimed to attract as much ratification as possible.[60] Roy Lee, executive secretary to the Preparatory Committee and the Rome Conference, stated that 'the definition of crimes contained in the Statute reflects existing practices

56 Canada, Crimes Against Humanity and War Crimes Act 2000, art 6(4); *Sapkota v Canada* (Minister of Citizenship and Immigration), [2013] FC 790, para 28.

57 'Summary record of the 12th meeting [of the Sixth Committee]', UN Doc A/C.6/55/SR.12 (2000), para 20 (Philippines).

58 UN Doc A/C.6/52/SR.11 (1997), para 46 (Trinidad and Tobago, speaking on behalf of the 14 member States of the Caribbean Community); GAOR 67th session, 31st plenary meeting, UN Doc A/67/PV.31 (6 November 2012), and in GAOR 70th session, 48th plenary meeting, UN Doc A/70/PV.48 (5 November 2015), Statement of Trinidad and Tobago on behalf of 14 member States of the Caribbean Community. See also Switzerland, 'Report by the Federal Council on Private Security and Military Companies' (Report to the Parliament in response to the Stähelin Postulate 04. 3267 of 1 June 2004, Private Security Companies), 2 December 2005, 5.5.2.1: 'The crimes against international law named in the Rome Statute of the International Criminal Court reflect customary international law, as is broadly recognised'.

59 Harold H. Koh, Legal Adviser, US Department of State, 'Statement at the Review Conference of the International Criminal Court' (Kampala, Uganda, 4 June 2010).

60 'Summary record of the 9th meeting [of the Sixth Committee]', UN Doc A/C.6/55/SR.9 (2000), para 4 (Mr Kirsch, Chairman of the Preparatory Commission for the International Criminal Court); Philippe Kirsch, 'Customary International Humanitarian Law, its Enforcement, and the Role of the International Criminal Court' in L. Maybee and B. Chakka (eds), *Custom as a Source of International Humanitarian Law: Proceedings of the Conference to Mark the Publication of the ICRC Study 'Customary International Humanitarian Law'* (Geneva: ICRC 2006) 79-80; Leila N. Sadat, 'Custom, Codification and Some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute' (1999) 49 *De Paul L Rev* 910.

and affirms current developments in international law'.[61] Theodor Meron asserted that:

> Articles 6 to 8 […] will take a life of their own as an authoritative and largely customary statement of international humanitarian and criminal law […]. […] [T]he Statute is largely reflective of customary law. Largely, but not completely.[62]

Provisions of the Rome Statute to some degree are clearly codifications of customary law,[63] for example, the definition of genocide under article 6. At the same time, as noted by William Schabas, the Statute also progressively develops international criminal law, for instance, its article 8 includes a new rule concerning enlisting children soldiers under the age of 15 years as a war crime.[64] The majority of the Special Court for Sierra Leone (SCSL),[65] however, disagreed with this view. In its opinion, enlisting children soldiers as a war crime was recognised in custom before November 1996.[66] Whether a provision of the Rome Statute was a reflection of a pre-existing customary rule or was a crystallisation of an emerging customary rule at the 1998 Rome Conference is still controversial.[67]

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61 Roy S. Lee, 'The Rome Conference and Its Contributions to International Law' in R.S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* (The Hague: Kluwer Law International 1999) 1, 38. See also Philippe Kirsch, 'The Development of the Rome Statute' in R.S. Lee (ed), ibid, 458, arguing that '[t]he definition of crimes is broadly based on existing international law'.

62 Theodor Meron, 'Crimes under the Jurisdiction of the International Criminal Court' in H. Von Hebel *et al* (eds), *Reflection on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague: TMC Asser 1999) 48.

63 Leila N. Sadat and Richard Carden, 'The New International Criminal Court: An Uneasy Revolution' (1999) 88 *Georgetown LJ* 381, 423; Philippe Kirsch, 'Foreword' in K. Dörmann (ed), *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (New York: CUP 2003) xiii; Hans-Peter Kaul, 'Ten Years International Criminal Court', at the Experts' Discussion '10 years International Criminal Court and the Role of the United States in International Justice', Berlin, 2 October 2012.

64 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 221; Herman von Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court' in R.S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* 104, 126; *Gacumbitsi v The Prosecutor* (Judgement) ICTR-01-64-A (7 July 2006) [*Gacumbitsi* Appeals Chamber Judgment], paras 49-52; *The Prosecutor v Seromba* (Judgement) ICTR-01-66-A (12 March 2008) [*Seromba* Appeals Chamber Judgment], Dissenting Opinion of Judge Liu, paras 9-10, 15.

65 Statute of the Special Court for Sierra Leone (Statute of the SCSL), annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002), 2178 UNTS 137, art 1.

66 *Prosecutor v Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), A Ch) SCSL-2004-14-AR72 (E) (31 May 2004), para 51.

67 UN Doc A/CONF.183/SR.2, paras 40-8 (Japan); UN Doc A/CONF.183/C.1/SR.3, paras 89, 91 (UK), 109 (Slovenia); UN Doc A/CONF.183/C.1/SR.4, paras 2-3 (Canada), 24-5 (Israel); UN Doc A/CONF.183/C.1/SR.26, paras 40 (Switzerland), 51 (Brazil), 95-7 (US); UN Doc A/CONF.183/SR.9, para 38 (China).

As Mark Villiger wrote: 'customary law is dynamic and the customary rule underlying a treaty text may change; the treaty rule may generate new customary law'.[68] The Rome Statute reserves the possibility of a treaty rule developing into custom after its adoption. In Part II, article 10 implies the possible impact of the Rome Statute on the 'existing or developing rules of international law' as an aid to interpreting other treaties.[69] Other international tribunals also referred to the Statute to interpret and clarify the definition of crimes.[70] Commentators have argued that the provisions of the Rome Statute and their interpretations will 'influence the evolution of international law' and subsequent State practice.[71] It remains unclear whether treaty rules that were of a declaratory nature continue to be declaratory of customary law and whether newly drafted rules of the Rome Statute have passed into the corpus of customary international law.[72]

A number of studies have examined and commented on rules of the Rome Statute and the practice of the ICC.[73] Several books have explored issues of crimes, individual criminal responsibility, and defences (including procedural defences as well as substantive grounds excluding crimi-

68 Villiger, *Customary International Law and Treaties: A Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* 227, 238; Baxter, 'Multilateral Treaties as Evidence of Customary International Law', 275-300; *North Sea Continental Shelf* cases, 41, para 71; *Libya-Malta Continental Shelf* Judgment, 29-30, para 27; *Military and Paramilitary Activities* Judgment, 95, para 177; UN Doc A/73/10 (2018), para 65, Conclusion 11; UN Doc A/71/10 (2016), para 62, Conclusion 11.

69 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 335-36.

70 For a detailed analysis, see ibid, 336.

71 Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court', 571 with further reference in fn 183; Triffterer and Heinze, 'Article 10', 654.

72 Bassiouni, *Introduction to International Criminal Law* 144. Articles 38 and 43 of the 1969 Vienna Convention recognised that a treaty could pass into customary international law.

73 R.S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results*; Cassese *et al* (eds), *The Rome Statute of the International Criminal Court: A Commentary*; C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Brill 2009); Triffterer and Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*; Schabas, *The International Criminal Court: A Commentary on the Rome Statute*; M. Klamberg (ed), *The Commentary on the Law of the International Criminal Court* (Brussels: Torkel Opsahl Academic EPublisher 2017).

nal responsibility).[74] At the same time, a considerable amount of research has been carried out on customary international law, in particular on the nature of customary international law.[75] The ILC in 2018 adopted a set of 16 draft conclusions guiding the identification of customary international law.[76] Some recent works observing customary international law have either assessed the approach on how to identify a rule of customary international law[77] or analysed specific issues, in particular, the role of non-State actors

74 For crimes, see Eve La Haye, *War Crimes in Internal Armed Conflicts* (New York: CUP 2008); William A. Schabas, *Genocide in International Law, The Crime of Crimes* (2nd edn, New York: CUP 2009); M. Cherif Bassiouni, *Crimes Against Humanity* (New York: CUP 2011); L. N. Sadat (ed), *Forging a Convention for Crimes against Humanity* (New York: CUP 2011); Carrie McDougall, *The Crime of Aggression Under the Rome Statute of the International Criminal Court* (New York: CUP 2013); C. Kreß and S. Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge: CUP 2017); Robert Dubler and Matthew Kalyk, *Crimes against Humanity in the 21st Century: Law, Practice, and Threats to International Peace and Security* (Leiden/Boston: Brill|Nijhoff 2018). For modes of liability, see Gideon Boas, James Bischoff and Natalie Reid, *International Criminal Law Practitioner Library*: *Vol 1, Forms of Responsibility in International Criminal Law* (New York: CUP 2007); Guénaël Mettraux, *The Law of Command Responsibility* (Oxford: OUP 2009); Héctor Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart Publishing 2009); Chantal Meloni, *Command Responsibility in International Criminal Law* (The Hague: TMC Asser Press 2010); Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: OUP 2012); Lachezar D. Yanev, *Theories of Co-perpetration in International Criminal Law* (Leiden: Brill|Nijhoff 2018). For defences, see Yoram Dinstein, *The Defence of 'Obedience of Superior Orders' in International Law* (Oxford: OUP 2012); Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Leiden: Brill 2015).

75 For a bibliography on customary international law, see 'Fifth report on identification of customary international law', by Michael Wood, Special Rapporteur, Addendum, UN Doc A/CN.4/717/Add.1 (2018). For recent books, see Maurice Mendelson, 'The Formation of Customary International Law' (1998) 272 *Recueil des cours* 155; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: CUP 1999); Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (Aldershot etc: Ashgate|Dartmouth 2001); Amanda Perreau-Saussine and James B. Murphy (eds), *The Nature of Customary Law* (New York: CUP 2009); Brian Lepard, *Customary International Law: A New Theory with Practical Applications* (New York: CUP 2010); David Bederman, *Custom as a Source of Law* (Cambridge: CUP 2010) 171; Yilkal Hassabe, *International Custom as a Source of International Criminal Law: In Light of the Principle of Legality the Status of International Custom to Create* (Saarbrücken: VDM 2011); Michael Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (New York: CUP 2013); Huge Thirlway, *The Sources of International Law* (Oxford: OUP 2014) 53-91; Hiroshi Taki, *State Recognition and Opinio Juris in Customary International Law* (Tokyo: Chuo University Press 2016); Bradley (ed), *Custom's Future: International Law in a Changing World;* B. Lepard (ed), *Reexamining Customary International Law* (New York: CUP 2016).

76 'Report of the International Law Commission', GAOR 73rd Session Supp No 10, UN Doc A/73/10 (2018), paras 58, 60, 65.

77 Bradley (ed), *Custom's Future: International Law in a Changing World*; Lepard (ed), *Reexamining Customary International Law*; Larrisa van den Herik, 'Using Custom to Reconceptualize Crimes Against Humanity' in S. Darcy and J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: OUP 2010) 80-105.

in the formation of customary international law.[78] Theodor Meron and the International Committee of the Red Cross (ICRC) have dealt with substantive aspects of customary law in the field of international human rights law and international humanitarian law.[79] Recent literature on international criminal law has drawn attention to the approaches to developing, interpreting or identifying customary rules in international criminal tribunals.[80]

The majority of these efforts, however, have not fully accommodated the interaction between substantive provisions of the Rome Statute and customary international law. Apart from a few writings analysing a rule of the Statute as a reflection of or departure from a pre-existing customary rule,[81] there has been little research dealing with rules of the Statute as evidence of parallel customary rules and as evidence of the progressive development of custom. Leena Grover's work concluded that the crimes in articles 6-8 and 8*bis* of the Statute are 'in general' codifications of custom.[82] Her research focused on the role of custom as an aid to interpreting 'crimes' especially 'codified' in the Rome Statute; therefore, the question is unanswered as to whether a specific element of crimes or other substantive provisions of the Statute codified custom or generated new custom. A recent work, '*Crimes against Humanity in the 21st Century*',[83] focuses on a particular category of international crimes, thus, leaving the issues of liabilities and defences untouched in this regard.

The task of this research, therefore, is to examine whether and to what extent a rule of the Rome Statute was or is declaratory of a customary rule on the same subject matter. For clarity of argument, the research topic requires

78 L. Lijnzaad (ed), *Judge and International Custom* (Leiden: Brill 2016); Niels Blokker, 'International Organisations and Customary International Law' (2017) 14 *IOLR* 1; Gregory Fox, Kristen Boon, and Isaac Jenkins, 'The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law' 2017 (67) *Am U L Rev* 649.

79 Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (New York: Clarendon Press 1989); JM. Henckaerts and L. Doswald-beck (eds), *Customary International Humanitarian Law*, Vols I and II (New York: CUP 2005).

80 Schlütter, *Developments in Customary International Law*; Jean d'Aspremont, 'An Autonomous Regime of Identification of Customary International Humanitarian Law: Do Not Say What You Do or Do Not Do What You Say?' in R. van Steenberghe (eds), *Droit International Humanitaire: un Régime Spécial de Droit International?* (Brussels: Bruylant 2013); Noora Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (New York: Routledge 2014); Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* (Cham: Springer International Publishing AG 2017).

81 For a comparison between customary law and the Rome Statute, see Cassese *et al* (eds), *Cassese's International Criminal Law*, about genocide and crimes against humanity. Michael Bothe, 'War Crimes' in A. Cassese *et al* (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP 2002); Carrie McDougall, *The Crime of Aggression Under the Rome Statute of the International Criminal Court* (New York: CUP 2013) 137-55; Pilar V. Sainz-Pardo, 'Is Child Recruitment as a War Crime Part of Customary International Law?' (2008) *12 Intl J H R* 555; Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *JICJ* 315-32.

82 Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 220-344.

83 Dubler and Kalyk, *Crimes against Humanity in the 21st Century*, chapters 9-10.

qualifications. Firstly, this research does not aim to examine the Rome Statute as a whole but concentrates on selected provisions.[84] Definitions of crimes in articles 6-8 and 8*bis*, liabilities in articles 25, 28 and 30, as well as defences in articles 27, 29, 31-33 are firmly related to customary international law.[85] It is true that a proper method to determine the nature of the Statute, as evidence of customary international law, is to look into all these articles with more than 90 sub-paragraphs thoroughly. This research focuses on selected representative provisions of crimes, modes of liability and defences. The provisions chosen are articles 8(2)(c) and (e) for war crimes in non-international armed conflict, article 7 regarding crimes against humanity, article 25(3)(a) concerning 'indirect co-perpetration' liability, and article 27(2) concerning personal immunity. These provisions were either disputable when the Rome Statute was adopted or have been significant in the ICC's present practice.[86] Appraising other substantive provisions is the next logical step but was outside the time frame of this research.

Secondly, a provision on a matter that was included in the Rome Statute is the starting point. Therefore, customary international rules on subjects that are not covered by the Statute go beyond the scope of this research.[87] This research concerns general customary international law, and it does not examine regional customary international law. This research does not discuss such questions as the source of general principles of criminal law and the application of customary law by national criminal courts. The terms

84 Determination of the nature of a specific treaty provision does not depend on the nature of the treaty, except that the treaty as a whole is declaratory of custom. The Rome Statute as a whole is impossible to be a codification of existing international law. Many provisions in the Statute are not relevant to customary international law. Part I of the Statute about the establishment of the Court, such as the seat of the ICC in The Hague, is not relevant to customary law. Part IV concerning the composition and administration of the ICC, Parts V-VI as well as Part VIII regarding the proceedings before the ICC share the same feature of irrelevance. Parts IX and X relate to the 'international cooperation and judicial assistance' and the 'enforcement of sentences'. Parts XI-XIII pertain to the Assembly of States Parties (ASP), financing issue and the final clauses of the Statute. The content of these parts are not relevant to customary international law. Provisions of these Parts go beyond the focus of this research. Articles in Parts II-III and Part VII might be the place to analyse whether a treaty rule is evidence of custom.

85 In Part II, article 5 lists the crimes in the jurisdiction of the ICC, while articles 11-19 pertain to issues of jurisdiction and admissibility. Article 20 under the title of *'ne bis in idem'* (not twice in the same [thing]) is a procedural issue and article 21 regulates the applicable law for the Court. In Part III, articles 22-24 are linked to the principle of legality, which is a limitation for interpretation of crimes. Article 26 excludes the jurisdiction over persons under eighteen. These rules in Parts II and III are also not within the realm of this research on customary law. Rules in Part VII about penalties have less evidential value of a customary rule because article 80 under the title of 'non-prejudice to national application of penalties and national law' stipulates a disclaimer.

86 For further clarification of the importance of these provisions, see each chapter.

87 Vienna Convention on the Law of Treaties, 23 May 1969, 27 January 1980, 1155 UNTS 331, Preamble, 'the rules of customary international law will continue to govern questions not regulated by the provisions' of treaties.

'custom', 'customary law' and 'customary international law' are used interchangeably in this research.[88]

1.3 Methodology and terminology of this research

This section outlines the methodological framework for this research, which is analysed in detail in Chapter 2. Four steps have to be followed to decide whether a treaty rule was or is declaratory of customary law.

The first step is to show that a rule/practice on a subject is found in a treaty rule. This step relates to the reading of the Rome Statute. This study generally applies the principles of interpretation embedded in articles 31-33 of the Vienna Convention on the Law of Treaties,[89] which are confirmed by the ICC.[90] In addition, article 21(3) of the Rome Statute, requiring the interpretation be consistent with 'internationally recognised human rights', is taken into account.[91] According to Leena Grover, article 21(3) is a 'background' interpretive principle, which is applicable to interpreting crimes and other parts of the Rome Statute.[92] Furthermore, in interpreting core crimes in the jurisdiction of the ICC, article 22(2) of the Statute requires faithful compliance with the principle of strict construction.[93] The principle of legality is the 'guiding interpretive principle' for the interpretation of crimes.[94]

The second step is to confirm whether a treaty rule articulates itself as declaratory of pre-existing customary law.[95] An affirmative answer to this question illustrates a preliminary but not decisive conclusion about the status of a customary rule. For this purpose, this research looks into the text of the treaty rule and the preamble of the treaty, the structure and context of the treaty rule, as well as the *travaux préparatoires* (preparatory works) of that treaty rule. If there is no claim in the treaty or its preparatory works, this does not exclude the conclusion that the treaty rule is declaratory of custom.[96]

88 A. Perreau-Saussine and J. B. Murphy (eds), *The Nature of Customary Law* (New York: CUP 2009), clarifying the meaning of custom, common law and customary international law.

89 Vienna Convention on the Law of Treaties.

90 See *Prosecutor v Lubanga* (Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, A Ch) ICC-01/04-168 (13 July 2006), paras 33-42; *Prosecutor v Lubanga* (Decision on the Practices of Witness Familiarisation and Witness Proofing, PTC I) ICC-01/04-01/06-679 (8 November 2006), para 8; *Lubanga* Decision on Confirmation of Charges, para 283; *Kenya* Authorisation Decision 2010 (Dissenting Opinion by Judge Hans-Peter Kaul), paras 33-35.

91 1998 Rome Statute, art 21(3).

92 Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 122-23.

93 1998 Rome Statute, art 22(2).

94 Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 102-33.

95 *North Sea Continental Shelf* cases, 41, paras 63, 71; *Military and Paramilitary Activities* Judgment, 95, para 177; UN Doc A/73/10 (2018), para 65, Conclusion 11.

96 Dinstein, 'The Interaction between Customary Law and Treaty'.

The third step is to prove the existence or non-existence of a customary rule. This step pertains to the method of ascertaining the status of a customary rule. In the identification of customary international rules, there is little possibility that an academic theory can perfectly deal with every controversial issue.[97] From a legal positivist perspective, subjective and objective elements, i.e., State practice and *opinio juris*, constitute the elements of customary law.[98] Thus, the classic approach to identifying the state of a customary rule is to seek sufficient evidence of the two distinctive elements (the two-element approach).[99] Sir Michael Wood, Special Rapporteur for the ILC's topic 'Identification of Customary International Law',[100] noted that the two-element approach, namely evidence of State practice ('a general practice') and *opinio juris* ('accepted as law') is an accepted guideline for the identification of customary law.[101] In the field of international criminal law, an identification approach that departs from the two-element approach has not been reached.[102] This research also employs the two-element identification approach.

In this research, practice refers to physical behaviour and verbal acts (statements) between or among States. The practice also includes actions of international organisations. Opinio juris refers to the unilateral acceptance of what practice reflects customary law. Given the prohibitive feature of substantive rules in international criminal law and the scarcity of hard evidence of national prosecution, this research sets out a flexible formula of the two-element identification approach, focusing more on opinio juris. Scholars and the recent ILC work both support a flexible application of the two-element

97 Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* 87-116.

98 For an elaboration on the naturalism and positivism understandings of customary law as well as debates about customary law as a source of international law, see ibid, 87-92.

99 UN Doc A/CN.4/682; Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law* 33; The American Law Institute, 'Restatement of the Law of Foreign Relations Law of the United States' (Third), 1986, para 102, Comment b; Stephen Donaghue, 'Normative Habits, Genuine Beliefs and Evolving Law: Nicaragua and the Theory of Customary International Law' (1995) 16 *Australian Ybk Intl L* 327; Oscar Schachter, 'International Law in Theory and Practice: General Course in Public International Law' (1982) 178 *Recueil des cours* 32*; North Sea Continental Shelf* cases, 43-44, paras 74, 77; *Jurisdictional Immunities of the State* (*Germany v Italy*: *Greece Intervening*), Judgment, [2012] ICJ Rep 99 [*Jurisdictional Immunities of the State* Judgment], 122, para 55.

100 'Report of the International Law Commission', GAOR 67th Session Supp No 10, UN Doc A/67/10 (2012), para 157.

101 UN Doc A/73/10 (2018), para 65, Conclusion 2; UN Doc A/71/10 (2016), para 62; 'Report of the International Law Commission', GAOR 70th Session Supp No 10, UN Doc A/70/10 (2015), para 74.

102 Michael Wood, 'Foreword' in B. Lepard (ed), *Reexamining Customary International Law*; Schlütter, *Developments in Customary International Law*; Arajärvi, *The Changing Nature of Customary International Law*.

approach in a particular context.[103] Chapter 2 further observes the identification method, and the forms and evidence of the two elements in detail.

The fourth and last step is to demonstrate that a treaty rule was or is evidence of the status of customary law. This step concerns how to illustrate the relationship between custom and treaty rules. This research employs the notion of 'declaratory' in a general sense to illustrate the relationship between custom and provisions of the Rome Statute, regardless of whether a provision had a law-declaratory feature at the time of its adoption. In this research, a treaty rule 'was declaratory' of custom if it incorporated a pre-existing customary rule during the process of its formation, or crystallised an emerging customary rule when the treaty was adopted. Accordingly, an historical overview of the development of a 'rule' or practice before 1998 is required. In this research, the phrase 'is declaratory' is employed to illustrate the nature of a treaty rule as a reflection of custom at present. This phrase covers two circumstances. On the one hand, if a treaty rule that was declaratory continues to be a reflection of a given customary rule to date, such a treaty rule 'is declaratory' of custom. On the other hand, if a treaty rule that was not declaratory in nature, but its substantial content has progressively passed into the corpus of current customary law at the time of assessment, this treaty rule 'is declaratory' of custom.

1.4 Structure of this research

This research consists of seven chapters. The importance of customary law, the aim of the research, the questions raised as well as the research's general methodology and merits are set out in the present introduction. Before analysing substantive provisions of the Rome Statute, Chapter 2 outlines the methodological framework of this research in more detail: (1) the interpretation of the Rome Statute; (2) the method to ascertain the existence of a customary rule; (3) the role of treaty law in the identification of custom and the term used to clarify the relationship between treaty and custom; and (4) preconditions for a provision of the Rome Statute to be declaratory of custom.

Chapter 3 examines the relationship between article 8 of the Rome Statute and customary law concerning war crimes in non-international armed conflict. This Chapter briefly revisits the historical development of war crimes and analyses the negotiations on article 8 of the Rome Statute and

103 Frederic Kirgis, 'Custom on a Sliding Scale' (1987) 81 *AJIL* 146; Anthea E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *AJIL* 757, 764; Jan Wouters and Cedric Ryngaert, 'Impact on the Process of the Formation of Customary International Law' in M. T. Kamminga and M. Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford: OUP 2009) 111-12; Robert Kolb, 'Selected Problems in the Theory of Customary International Law' (2003) 50 *Netherlands Intl L Rev* 119, 128; 'Second report on Identification of Customary International Law to the Sixty-sixth Session of the ILC', by Michael Wood, Special Rapporteur, UN Doc A/CN.4/672 (2014), para 3.

then examines the practice of prosecuting war crimes in non-international armed conflict after the adoption of the Rome Statute. The main conclusion of Chapter 3 is that war crimes for violations of Common Article 3 of the 1949 Geneva Conventions in non-international armed conflict were codified in article 8(2)(c) of the Rome Statute. However, war crimes for other serious violations in non-international armed conflict were crystallised in article 8(2)(e) at the Rome Conference. Articles 8(2)(c) and (e) of the Rome Statute in general were and are declaratory of custom concerning war crimes in non-international armed conflict.

Chapter 4 focuses on the relationship between article 7 of the Rome Statute and customary law concerning crimes against humanity. Since World War II, there have been several formulations of crimes against humanity in international instruments. Chapter 4 argues that multiple definitions do not affect the customary state of crimes against humanity in general but indicate different understandings of elements of the crimes. The contextual requirements and some underlying prohibited acts of crimes against humanity remain controversial. This Chapter critically analyses two contextual elements concerning the issue of the removal of a nexus with an armed conflict and the issue of policy requirement. The armed conflict nexus requirement was a substantive element for the notion of crimes against humanity in the Nuremberg Charter. Later on, as a departure from pre-existing customary law, the link to the armed conflict requirement disassociated itself within the notion of crimes against humanity. It remains unclear when this nexus disappeared under customary law before the adoption of the Statute of the International Criminal Tribunal for Rwanda (ICTR).[104] By excluding the armed conflict nexus, article 7 codified or, at the very least, crystallised this development of crimes against humanity under customary law. Chapter 4 concludes that article 7(1) of the Statute was and is declaratory of custom on the nexus issue. In addition, 'the policy to commit such an attack' is deemed a legal requirement before the ICC. After the *Kunarac et al* Appeals Chamber judgment of the ICTY, policy was considered an evidentiary factor to establish an attack in the jurisprudence of the ICTY and the ICTR. Chapter 4 concludes that article 7(2)(a) was and is declaratory of custom with regard to the policy element for the crimes against humanity.

Chapter 5 discusses the relationship between article 25(3)(a) of the Rome Statute and customary law concerning indirect co-perpetration. The notion of indirect co-perpetration defined by the ICC aims to impute liability to an individual at the leadership level, regardless of whether the crimes committed are within the scope of the common plan among the accused. However, an examination of the text and the drafting history of article 25(3)(a) indicates that article 25(3)(a) does not contain a form of indirect co-perpetration. Since this rule does not deal with indirect co-perpetration, it seems that it is not necessary to examine the relationship between article 25(3)(a) and

104 SC Res 955 (1994) on establishment of the ICTR and adoption of the Statute of the Tribunal, UN Doc S/RES/955 (1994).

custom on the issue of indirect co-perpetration. Nevertheless, assuming it is well accepted that indirect co-perpetration liability is embedded in article 25(3)(a), it is required to examine its customary status to date. Chapter 5 observes the necessity of attributing liability to individuals at the leadership level, post-World War II practice, the jurisprudence of other international criminal tribunals as well as implementation legislation to assess the customary status of indirect co-perpetration liability. Chapter 5 concludes that apart from the case law of the ICC and a few cases of the ICTY, there is little evidence of the acceptance of indirect co-perpetration as a customary rule. Indirect co-perpetration has not been sufficiently supported by practice and *opinio juris* to constitute a customary rule to date. Therefore, even assuming this provision covers indirect co-perpetration liability, article 25(3)(a) neither was nor is declaratory of a customary rule about indirect co-perpetration.

Chapter 6 discusses the relationship between article 27(2) of the Rome Statute and customary international law. Article 27(2) provides that international immunities and special procedural rules cannot bar the exercise of jurisdiction by the ICC. After analysing the text and the structure of the Statute, as well as the preparatory works of article 27(2), Chapter 6 argues that article 27(2) does not derogate from the pre-existing traditional customary law respecting personal immunity. After examining international jurisprudence, national cases as well as the attitude of the UN Security Council and the work of the ILC, Chapter 6 concludes that article 27(2) neither was declaratory nor is declaratory of a modified customary rule.

In closing, Chapter 7 highlights the general conclusions of this research.

1.5 Merits and limits of this research

After the adoption of the Rome Statute, customary international law remains an essential source in the field of international criminal law. This study of the nature of the Rome Statute as evidence of custom is of substantial practical significance. The analysis of the interrelation between treaty provisions and custom is relevant to the task of interpretation and application of law within and outside the ICC.

As illustrated above, customary law continues to play a role at the ICC. The questions of the validity and applicability of a provision of the Rome Statute and its customary status have emerged in the *Al Bashir* case of the Darfur Situation, which was referred by the UN Security Council to the ICC.[105]

105 *The Prosecutor v Al Bashir* (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, PTC I) ICC-02/05-01/09-139-Corr (13 December 2011) [*Al Bashir Malawi* Cooperation Decision 2011]; *The Prosecutor v Al Bashir* (Decision Pursuant to Article 87 (7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, PTC I) ICC-02/05-01/09-140-tENG (13 December 2011) [*Al Bashir Chad* Cooperation Decision 2011].

If Al Bashir were present in the ICC, further issues would arise as to whether the crimes he is charged with and the liability attributed to him were recognised under customary law.[106] These issues may also occur in potential cases of the Côte d'Ivoire, Georgia, Libya, Palestine, and Ukraine Situations.[107]

On the other hand, similar questions about the applicability of the Rome Statute and the validity of customary law may also arise outside the framework of the ICC. Firstly, as of July 2018, 123 States are parties to the Rome Statute,[108] and another 31 countries have signed but not ratified it.[109] Russia, Sudan, Israel and the US have declared the will no longer sign the treaty. More than 60 States are not parties to the Rome Statute.[110] States are not bound by a rule of a treaty to which they have not explicitly consented.[111] Their non-party State status to the Rome Statute, however, does not mean that international crimes committed by their nationals in their territory would be subject to impunity. Aside from their respective national law, customary law plays a vital role at the national level, directly or indirectly, depending on their national legal systems. Some national courts of non-party States, for example, the US Supreme Court, have declared that customary international law is judicially applicable.[112] If rules of the Rome Statute concerning an offence, a mode of liability, or a defence are generally recognised under customary law, these rules will apply to crimes committed everywhere, irrespective of whether the crimes were committed by citizens

106 *First Warrant of Arrest* Decision for *Al Bashir*, para 223.

107 *Situation in the Republic of Côte d'Ivoire* (Decision on the 'Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010', PTC III) ICC-02/11-36 (22 February 2012), paras 36-37; *Situation in Georgia* (Decision on the Prosecutor's request for authorization of an investigation, PTC I) ICC-01/15-12 (27 January 2016); 'Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan', GA Res 67/120 (2013), UN Doc A/RES/67/120.

108 Burundi and Philippines submitted their official withdrawal notifications to the UN Secretary-General. Burundi's withdrawal became effective on 27 October 2017, and the Philippines' withdrawal will be effective on 17 March 2019, see C.N.805.2016.TREATIES-XVIII.10 and C.N.138.2018.TREATIES-XVIII.10. In 2016, South Africa and Gambia also submitted their withdrawal notifications to the Secretary-General, but later they rescinded their notifications of withdrawal, see C.N.786.2016.TREATIES-XVIII.10, C.N.62.2017.TREATIES-XVIII.10, C.N.862.2016.TREATIES-XVIII.10 and C.N.121.2017.TREATIES-XVIII.10. Out of the 123 parties, 33 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States.

109 Depository of Status of Treaties, TREATIES-XVIII.10.

110 The US, Russian Federation and China have actively participated in the 1998 Rome Conference. The US and Russia both signed but expressly rejected to ratify the Statute. China, Syria, Yemen, South Sudan, Pakistan, India, Iraq, Somalia, Libya, and Egypt are neither States Parties to the Statute nor have they expressed the intention to ratify the treaty in the future.

111 Robert Cryer, 'The ICC and its Relationship to Non-States Parties' in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Brill | Nijhoff 2009) 261-62.

112 The *Paquete Habana*, 175 U.S. 677 (1900).

of States that have not ratified a treaty.[113] In interpreting and applying law, as well as filling gaps of law, the findings of this research might be of relevance in courts of these non-party States.

Secondly, debates about the customary status of the provisions of the Rome Statute might arise in national courts of States (including non-party States and States Parties) in analysing issues concerning civil compensation and the exclusion of refugee protection for committing international crimes, as well as with regard to exercising universal jurisdiction to prosecute international crimes. Indeed, the concept and requirements of universal jurisdiction are controversial,[114] and that States rarely exercise universal jurisdiction for political pressure or the lack of resources and evidence.[115] Nevertheless, Australia, Belgium, Canada, France, Finland, Germany, Norway, Spain, Sweden, Switzerland, the Netherlands and the UK are active in prosecuting international crimes based on universal jurisdiction.[116] Many States Parties to the Rome Statute have incorporated or transformed the crimes falling within the ICC's jurisdiction into their national laws. Some States can rely on customary law, directly or indirectly, to prosecute international crimes.[117]

113 Von Hebel and Robinson, 'Crimes within the Jurisdiction of the Court', 79, 122.

114 Theodor Meron, 'Is International Law Moving towards Criminalization?' (1998) 9 *EJIL* 18-31.

115 Schimmelpenninck van der Oije and Steven Freeland, 'Universal Jurisdiction in the Netherlands-the right approach but the wrong case? *Bouterse* and the '*December Murders*"' (2001) 7 *Australian J HR* 89; André Klip, 'Universal Jurisdiction: Regional Report for Europe' (2008) 79 *RIDP* 173; Noora Arajärvi, 'Looking Back from Nowhere: Is There a Future for Universal Jurisdiction over International Crimes?' (2011) 16 *Tilburg L Rev* 5-29.

116 See ICRC, 'Table of National Case Law on International Crimes and Universal Jurisdiction', in *Report of the Third Universal Meeting of National Committees on International Humanitarian Law*, 'Preventing and Repressing International Crimes: Towards an "Integrated" Approach Based on Domestic Practice', Vol II, Annexes, prepared by Anne-Marie La Rosa (2014) 123-32; Amnesty International, 'Universal Jurisdiction: Belgian prosecutors can investigate crimes under international law committed abroad', 1 February 2003, IOR 53/001/2003; International Federation for Human Rights, 'Universal Jurisdiction Developments: January 2006-May 2009', 2 June 2009; Trial, ECCHR, FIDH, 'Make Way for Justice: Universal Jurisdiction Annual Review 2015', April 2015; Trial, ECCHR, FIDH, FIBGAR, 'Make Way for Justice #2: Universal Jurisdiction Annual Review 2016', February 2016; FIDH, ECCHR, REDRESS, FIBGAR, 'Make Way for Justice #3: Universal Jurisdiction Annual Review 2017', March 2017; Human Rights Watch, 'Report on "These are the Crimes we are Fleeing" Justice for Syria in Swedish and German Courts and Annex', 3 October 2017.

117 Canada, Crimes Against Humanity and War Crimes Act 2000, art 4; Denmark, Military Penal Code 2005, art 36(1); Finland, Penal Code 1889, as amended 2012, § 15; Georgia, Constitutional Law 1995, art 6(2); Hungary, Fundamental Law 2011, art XXVIII (5); Kenya, International Crimes Act 2008, art 6(1); Mongolia, Constitutional Law 1992, art 10; Mongolia, Criminal Code 2002, art 2(1); Samoa, International Criminal Court Act 2007, § 7; Serbia, Criminal Code 2006, art 10 (3); South Africa, The Implementation of the Rome Statute of the International Criminal Court Act 2002, § 2; Switzerland, Criminal Code 1937, amended 2017, art 264(j); Tajikistan, Criminal Code 1998, art 1 (2); Timor-Leste, Constitutional Law 2002, § 9(1).

Findings of this research might be helpful for national courts when they try to analyse issues about customary law as well as the applicability of the Rome Statute as a reflection of customary law in these circumstances.

Thirdly, when the law applies to prosecuting crimes committed before the law was adopted or approved (*ex post facto* law), an observation on the customary status of a rule as promulgated in the Rome Statute before and after its adoption is valuable.[118] In fact, after the commission of international crimes, special tribunals were designed to prosecute international crimes, for example, the Extraordinary Chambers in the Courts of Cambodia (ECCC)[119] and the SCSL, as well as the Special Panels for Serious Crimes (SPSC) in East Timor. The applicable law for the 2015 Kosovo Specialist Chambers and Specialist Prosecutor's Office includes customary international law that was in force in Kosovo from January 1998 to December 2000.[120] It is undesirable but possible that similar international or national tribunals would be established in the future. In these post-ICC tribunals, customary law continues to play a role.[121] In this regard, findings of this research about the existence of a customary rule at the material time are of importance.[122]

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118 *Vasiliauskas v Lithuania* (Judgment, Grand Chamber) ECtHR Application No. 35343/05 (10 October 2015), Dissenting opinion of Judge Ziemele, paras 1-10, Dissenting opinion of Judge Power-Forde; UN Doc A/CONF.183/C.1/SR.3, para 100; *Streletz, Kessler and Krenz v Germany* (Merits, Concurring Opinion of Judge Loucaides) ECtHR Application No. 34044/96, 35532/97 and 44801/98(22 March 2001); UN Doc S/25704 (1993), para 34; *The Prosecutor v Rutaganda* (Judgement and Sentence) ICTR-96-3-T (6 December 1999) [*Rutaganda* Trial Judgment and Sentence], para 86.

119 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (Law on the Establishment of the ECCC), in Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003, 2329 UNTS 117, amended on 27 October 2004, art 1.

120 Kosovo, Law on Specialist Chambers and Specialist Prosecutor's Office 2015, arts 3(2)(d), 3(3), 12-14.

121 For example, *Prosecutor v Anastacio Martins and Domingos Gonçalves* (Judgment, District Court of Dili) SPSC-11/2001 (13 November 2003), p 10; *Prosecutor v Marcelino Soares* (Judgment, District Court of Dili) SPSC-11/2003 (11 December 2003), paras 16-17; *Prosecutor v Domingos Metan* (Judgment, District Court of Dili) SPSC-4c/2003(16 November 2004), paras 12-14; *Prosecutor v Lino Beno* (Judgment, District Court of Dili) SPSC-4b/2003(16 November 2004), paras 12-14; *Prosecutor v Agostinho Cloe et al* (Judgment, District Court of Dili) SPSC-4/2003 (16 November 2004), paras 13-14; *Prosecutor v Anton Lelan Sufa* (Judgment, District Court of Dili) SPSC-4a/2003 (25 November 2004), paras 24-25; *Prosecutor v Alarico Mesquita et al* (Judgment, District Court of Dili) SPSC-10/2003 (6 December 2004), paras 62-68, concerning the crimes against humanity under customary law.

122 *Prosecutor v Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) SCSL-2004-14-AR72 (E) (31 May 2004), para 17; *Co-Prosecutors v Ieng Sary* (Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order) 002/19-09-2007-ECCC/OCIJ (PTC 145 &146) (15 February 2011), para 144.

With regard to the limits of the study, there are mainly three. Firstly, this research does not examine all international crimes, liabilities and defences in the Rome Statute. It does not provide a survey of all underlying acts as well as all contextual elements of war crimes and crimes against humanity. The findings in this research about two selected crimes are of restricted value as to the issues of other underlying acts and other contextual elements. Secondly, there were certain barriers to collecting all the evidence required to assess whether a customary rule exists, including the availability of the evidence, and certain language barriers involved in its collection. The 1943 United Nations War Crimes Commission selectively reported on Post-World War II trials by Australian, British, Canadian, French, German, Norwegian, Polish, and the US tribunals.[123] Conclusive findings, however, cannot be directly drawn from these under-reported records because many of the records of these trials are brief summaries of arguments and findings, leaving their relevance uncertain for the customary identification. The judgments of post-World War II trials conducted in mainland China are also far from well-substantiated. Lastly, even with all available and accessible resources, identifying the state of a customary rule is not a task free from subjectivity. The assessment deals with evidence of objective and subjective aspects of States. This study cannot be value-free in the interpretation and explanation of evidence to reach conclusions.

Despite these limits, this research seeks to substantiate whether certain provisions of the Rome Statute possess a customary status, as this is relevant in situations where non-party States to the Statute become involved in proceedings before the ICC. In addition, this research hopes to provide practising international criminal lawyers with novel arguments and materials which can be used to assess whether a customary rule exists or whether the Rome Statute is applicable to specific issues. Lastly, this research will hopefully provide a perspective to understand part of the corpus of customary law applicable in the field of international criminal law which could be of value to legal practitioners of States.

123 *Law Reports of Trial of War Criminals*: *Selected and Prepared by the United Nations War Crimes Commission* (London: HMSO 1947-1949).

2 Methodological Framework of This Research

2.1 Introductory remarks

As mentioned in Chapter 1, Chapter 2 outlines the methodological framework adopted in this research in detail. For this purpose, section 2.2 first sets out the guidelines for interpreting a provision of the Rome Statute and other treaty rules. Section 2.3 endeavours to set up the method for the identification of customary rules. Section 2.4 clarifies the terms employed to qualify the relationship between a treaty rule and custom. The means of identifying the preliminary declaratory nature of a treaty rule is also analysed in this section because it is a layer of analysis of this research. Finally, section 2.5 briefly examines whether obstacles exist for the study of the declaratory nature of the Rome Statute provisions as evidence of custom.

2.2 Interpreting provisions of the Rome Statute

The relationship between treaties and custom remains a highly debated topic in international law.[1] Treaty rules concerning crimes, liabilities and defences may be broader or narrower than customary law by removing a contextual requirement or including more underlying offences,[2] or adding

1 Baxter, 'Multilateral Treaties as Evidence of Customary International Law'; Baxter, 'Treaties and Custom'; Michael Akehurst, 'Custom as a Source of International Law' (1976) 47 *British Ybk Intl L* 1, 42-52; Villiger, *Customary International Law and Treaties: A Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* 156-67; Mark Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources*; Dinstein, 'The Interaction between Customary Law and Treaty'.

2 'Report of the Secretary-General Pursuant to Paragraph 5 of the Security Council Resolution 955 (1994)' (13 February 1995), UN Doc S/1995/134, para 12.

a new restrictive element[3] or excluding underlying acts.[4] In this study, the text of the Rome Statute is the starting point for determining its provisions as declaratory of customary law. The first step is to construe the meaning of selected provisions of the Statute.[5] For this purpose, this section mainly aims to set out the guidelines in interpreting the provisions of the Rome Statute.

Article 22 of the Rome Statute is the first guidance for interpretation. Article 22 explicitly stipulates the principle of legality. The fundamental principle of legality requires that prosecution and punishment be based on clear provisions of international law at the time the crime was committed.[6] The strict principle of legality contains four derivatives: specificity and certainty; non-retroactivity (*lex praevia*); the ban on analogy (*lex stricta*); and favouring the accused (*in dubio pro reo*).[7] The rule of specificity and certainty requires the definition of crimes to be sufficiently clear and precise. The rule of non-retroactivity prohibits prosecuting an individual for acts committed before the conduct was criminalised. The first two sub-rules are provided in article 22(1) and article 24 (non-retroactivity *ratione personae*). The rule of the ban on analogy as well as the rule of favouring the accused is enshrined in article 22(2) of the Statute. It provides:

> The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

Article 22(2) of the Statute requires faithful compliance with the principle of strict construction in interpreting the definition of a core crime in the ICC's jurisdiction.[8] An interpretation of a core crime should be in favour of the accused, when in doubt. Despite the reference to 'the definition of a crime', there is support for the view that strict construction applies to the interpreta-

3 *Tadić* Appeals Chamber Decision on Jurisdiction, paras 139-40; *The Prosecutor v Akayesu* (Judgement) ICTR-96-4-A (1 June 2001), paras 465; *The Prosecutor v Muvunyi* (Judgement and Sentence) ICTR-00-55A-T (12 September 2006), para 514.

4 *Prosecutor v Oríć* (Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg) ICTY-03-68-A (3 July 2008), para 20; *Prosecutor v Hadžihasanović et al* (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) ICTY-01-47-AR72 (16 July 2003), Partial Dissenting Opinion of Judge Shahabuddeen, Separate and Partially Dissenting Opinion of Judge David Hunt; *Vasiliauskas v Lithuania* (Judgment, Grand Chamber) ECtHR Application No. 35343/05 (10 October 2015), Dissenting Opinion of Judge Ziemele, paras 1-10, Dissenting Opinion of Judge Power-Forde; UN Doc A/CONF.183/C.1/SR.3, para 100.

5 Baxter, 'Multilateral Treaties as Evidence of Customary International Law', 290.

6 J. Henckaerts and L. Doswald-beck (eds), *Customary International Humanitarian Law*, Vol I (New York: CUP 2005), Rule 101. For an analysis of this principle at the ICC, see Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 186-218.

7 Cassese *et al* (eds), *Cassese's International Criminal Law* 27-36.

8 For a recent analysis of this provision, see Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 546-48.

tion of modes of liability and defences.[9] And, the principle of legality overrides a teleological interpretative method by referring to the purpose of the Rome Statute to end impunity.[10]

Article 21(3) of the Statute also requires the interpretation be consistent with 'internationally recognised human rights'.[11] Leena Grover argued that this article is a 'background' interpretive principle, which is applicable in interpreting crimes and other parts of the Rome Statute.[12] This article does not aim to expand the scope of crimes to a maximum protection of victims.[13] All these interpretative limitations should be kept in mind in interpreting provisions of the Rome Statute concerning crimes, liabilities, and defences.[14]

In addition to the two interpretive principles mentioned above, this research also follows the principles of interpretation embedded in articles 31-33 of the 1969 Vienna Convention. The ICC in its jurisprudence accepted the applicability of these principles of interpretation.[15] We first have to study and analyse the terms, in accordance with article 31 of the Vienna Convention, to identify the meaning of the text in a treaty provision. A textual reading of the words and its context, as well as the object and purpose of the pro-

9 ibid, 547; *Ngudjolo* Trial Judgment (Concurring Opinion of Judge Christine Van den Wyngaert), para 18, fn 28; *Milutinović et al* Appeals Chamber Decision on Jurisdiction 2003, para 37.

10 Paul Robinson, 'Legality and Discretion in the Distribution of Criminal Sanctions' (1988) 25 *Harvard J on Legis* 393, 426-27; Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 167-69, 184; Caroline Davidson, 'How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Criminal Court' (2017) 91 *St. John's Law Review* 37, 92-95; William A. Schabas, 'Strict Construction and the Rome Statute' in S. Dewulf (ed), *La (CVDW): Liber Amicorum Chris Van den Wyngaert* (Antwerp: Maklu 2018) 423-38; *Ngudjolo* Trial Judgment (Concurring Opinion of Judge Christine Van den Wyngaert), para 18; *The Prosecutor v Bemba* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", Separate opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison) ICC-01/05-01/08-3636-Anx2 (8 June 2018) para 5. *Contra The Prosecutor v Ruto & Sang* (Decision on Defence Applications for Judgments of Acquittal, Reasons of Judge Eboe-Osuji, TC V(A)) ICC-01/09-01/11-2027-Red-Corr (5 April 2016) [*Ruto & Sang* Acquittal Decision 2016], para 437.

11 1998 Rome Statute, art 21(3).

12 Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 122-23.

13 ibid, 122.

14 For seven cannons of ICC interpretation, see Leila N. Sadat and Jarrod M. Jolly, 'Seven Canons of ICC Interpretation: Making Sense of Article 25's Rorschach Blot' (2014) 27 *Leiden J Intl L* 755.

15 See *Prosecutor v Lubanga* (Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, A Ch) ICC-01/04-168 (13 July 2006), paras 33-42; *Prosecutor v Lubanga* (Decision on the Practices of Witness Familiarisation and Witness Proofing, PTC I) ICC-01/04-01/06-679 (8 November 2006), para 8; *The Prosecutor v Lubanga* (Decision on the Confirmation of Charges, PTC I) ICC-01/04-01/06-803-tEN (29 January 2007) [*Lubanga* Decision on Confirmation of Charges], para 283; *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, PTC II) ICC-01/09-19-Corr (31 March 2010) [*Kenya* Authorisation Decision 2010], paras 33-35.

vision, are examined. A special meaning can also be given if the parties so intended. Second, by virtue of article 32 of the Convention, the preparatory works and the circumstances are considered as supplementary means either to determine the meaning of the terms if the meaning is still ambiguous or manifestly unreasonable after the application of article 31 or to confirm the meaning as interpreted under article 31.[16] Third, article 33 stresses the equally authentic effect of the text in different languages. These principles of interpretation apply to understanding the provisions of the Rome Statute as well as other treaty rules.

The portrayal of the work on the Rome Statute illustrated here provides the framework for the analysis of the preparatory works. The drafting history of the Rome Statute is mainly divided into four stages.[17] Firstly, the ILC, established by the UN General Assembly to promote the codification of international law and its progressive development,[18] resumed the work it had begun in 1949 on the issue of establishing an international criminal court or an international criminal trial mechanism.[19] In 1994, the ILC prepared a draft text for the Establishment of an International Criminal Court (the ILC 1994 Draft).[20] Secondly, an *Ad Hoc* Committee on the establishment of an international criminal court, established by the General Assembly,[21] reviewed issues arising out of the ILC 1994 Draft and prepared the text of a convention for an international criminal court.[22] Thirdly, relying on the work of the *Ad Hoc* Committee, the Preparatory Committee on the establishment of an international criminal court, also established by the General Assembly,[23] prepared its Draft Statute of an international criminal court and transmitted it to the Rome Conference for discussion.[24] Fourthly, at the 1998

16 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, 174, para 94.

17 M. Cherif Bassiouni and William A. Schabas (eds), *The Legislative History of the International Criminal Court*, Vol 2 (2nd Revised and Expanded edn, Leiden: Brill |Nijhoff 2016) 3-5.

18 Statute of the International Law Commission, arts 1(1) and 15; UN Doc A/RES/174 (II) (1947).

19 'International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking of Narcotic Drugs Across National Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction over Such Crimes', GA Res 44/39 (1989), UN Doc A/RES/44/39, para 1; 'Report of the International Law Commission', GAOR 4th Session Supp No 10, UN Doc A/CN.4/13 and Corr.1-3 (1949), paras 32-34.

20 UN Doc A/49/10 (1994), pp 20-73.

21 'Establishment of an international criminal court', GA Res 49/53 (1994), UN Doc A/RES/49/53.

22 'Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court', GAOR 50th Session Supp No 22, UN Doc A/50/22 (1995).

23 'Establishment of an international criminal court', GA Res 50/46 (1995), UN Doc A/RES/50/46.

24 'Reports and other Documents (United Nations publication)', UN Doc A/CONF.183/2/Add.1; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court'(14 April 1998), UN Doc A/CONF.183/2, 13-82.

Rome Conference, the Committee of the Whole with a series of working groups considered the Draft Statute prepared by the Preparatory Committee. The Drafting Committee of the Rome Conference was entrusted with coordinating and refining the drafting of all texts, formulating drafts, as well as giving advice on drafting. Delegations at the Plenary Meeting gave several statements at the beginning of the conference and finally voted for the adoption of the package of the Rome Statute prepared by the Committee of the Whole on 17 July 1998.

Lastly, the interpretation of substantive provisions of the Rome Statute interacts with the interpretation of provisions of international humanitarian law and international human rights law, as many rules of international criminal law derive from prohibitions in the two regimes.[25] Darryl Robinson notes that it is required to bear different interpretive assumptions and fundamental principles in mind among the three branches of international law.[26] International criminal law mainly focuses on the responsibilities of individuals (individuals shall refrain from certain conducts), while international humanitarian law and international human rights law concern the obligations of collective entities (parties to the conflicts or States shall refrain or engage in certain acts to protect the benefits of individuals). Furthermore, international criminal law addresses a narrow scope of serious crimes, while the other two branches of law focus on a system to promote the protection of identified beneficiaries. Moreover, due to the severity of punishment, international criminal law contains several restraining principles, such as the principle of legality as illustrated above.[27]

These differences among the three regimes should be kept in mind. Also, these differences indicate that construction of a rule in international criminal law may be inconsistent with the purposes of the other two regimes. In light of the diversification and expansion of international law, there are some discussions about substantive, institutional and methodological fragmentation of international law.[28] The ILC recommended four techniques of interpretation in order to address the fragmentation of international law. These techniques are to: (1) view international law as a legal system so that each norm relates to others; (2) determine the precise relationship between them either as normative fulfilment or conflicts; (3) apply the general rules of treaty interpretation reflected in articles 31-33 of the 1969 Vienna Convention;

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25 *Katanga & Ngudjolo* Decision on Confirmation of Charges, para 448.

26 Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden J Intl L* 925.

27 ibid; Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 126-27.

28 Mads Andenas and Eirik Bjorge, 'Introduction' in M. Andenas and E. Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge: CUP 2015) 4-11; 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, UN Doc A/CN.4/L.682 and Corr.1-3 (2006), para 192.

and (4) interpret in accordance with the principle of harmonisation.[29] These techniques are also guidelines for the systematic interpretation of the Rome Statute as well as other treaty provisions.

2.3 Methodology: the two-element approach to identifying customary rules

The determination of whether a treaty rule was or is declaratory of custom cannot be undertaken without identifying the state of a customary rule. The main challenge of this research concerns the methodology to ascertain the existence of customary law. This section aims to set out the approach to identifying customary rules in international (criminal) law.

When we ask how to identify customary rules, we refer to a method to ascertain the existence of a customary rule rather than the substance of that rule. In other words, the former deals with the process of identifying whether a customary rule has been formed, while the latter concerns the content of a customary rule.[30] This section first briefly reviews the peculiarities of international criminal law and outlines a flexible two-element approach for the identification of a customary rule. Then, this section assesses the requirements of the two elements, the forms of their evidence as well as other indicators.

2.3.1 A flexible formula for identifying the existence of a customary rule

The two-element approach is a well-accepted general method for the identification of customary law. According to article 38(1)(b) of the ICJ Statute, custom derives from a 'general practice, accepted as law'.[31] Hence, in determining how a certain practice becomes a new customary rule, the prevailing view is the presence of two elements, namely, a subjective element (*opinio juris* or *opinio juris sive necessitatis*) and an objective element (State practice).[32]

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29 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.702 (2006), para 14.

30 Maurice Mendelson, 'The Formation of Customary International Law' (1998) 272 *Recueil des cours* 155, 284; Herbert L.A. Hart, *The Concept of Law* (Oxford: OUP 1994); Christian Tams, 'Meta-Custom and the Court: A Study in Judicial Law-making' (2015) 14 *LPICT* 51.

31 Statute of the International Court of Justice, 26 June 1945, 24 October 1945, 33 UNTS 993. For interpretations of this paragraph, see Jennings and Watts (eds), *Oppenheim's International Law*, Vol 1, § 10, p 26, arguing that the 'substance of custom is to be found in the practice of States'.

32 Tullio Treves, 'Customary International Law' in R. Wolfrum (ed) (2006) *MPEPIL*, paras 7-8. For discussions of other theories, see Schlütter, *Developments in Customary International Law* 1-68; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* 87-92.

Accordingly, the classic approach to identifying the existence of a customary rule is to seek sufficient evidence of these two elements; this is known as the two-element approach. This approach is widely accepted and acknowledged by a large number of international scholars and international bodies.[33] The International Law Commission (ILC) in its recent work also supported the two-element approach. In 2012, the ILC included the topic 'Formation and Evidence of Customary International Law' on its agenda and appointed Sir Michael Wood as Special Rapporteur for this topic.[34] The title of this topic was later changed to 'Identification of Customary International Law'. Michael Wood submitted five reports with proposed conclusions to the ILC.[35] Besides the use of the term 'a general practice' instead of 'State practice', he also proposed the two-element approach. In 2018, the ILC adopted a set of 16 draft conclusions on 'Identification of Customary International Law'.[36] Its conclusion 2 under the title of 'two constituent elements' reads that '[t]o determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)'.[37]

Proposals for a different identification approach exist as to customary rules of international criminal law. Recent researchers observed that customary law remains the object of numerous controversies.[38] There existed different views with regard to the theories of custom-formation and the method of custom-identification.[39] Considering the high moral character of certain rules deriving from value-oriented norms, Theodor Meron proposed a 'core right' theory in the formation of customary law in international humani-

33 Stephen Donaghue, 'Normative Habits, Genuine Beliefs and Evolving Law: Nicaragua and the Theory of Customary International Law' (1995) 16 *Australian Ybk Intl L* 327; Oscar Schachter, 'International Law in Theory and Practice: General Course in Public International Law' (1982) 178 *Recueil des cours* 32; *North Sea Continental Shelf* cases, 43-44, paras 74, 77; *Jurisdictional Immunities of the State* Judgment, 122, para 55; Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol I: Rules, 33; The American Law Institute, 'Restatement of the Law of Foreign Relations Law of the United States' (Third), 1986, para 102, Comment b.

34 'Summary record of the 3132nd meeting of the 64th session', UN Doc A/CN.4/SR.3132 (2012), p 16; UN Doc A/67/10 (2012), para 167.

35 See the Note, the first, second, third, fourth, and fifth reports to the ILC, by Michael Wood, Special Rapporteur, UN Doc A/CN.4/653 (2012), UN Doc A/CN.4/663 (2013), UN Doc A/CN.4/672 (2014), UN Doc A/CN.4/682 (2015), UN Doc A/CN.4/695 and Add.1 (2016), UN Doc A/CN.4/717 (2018).

36 UN Doc A/73/10 (2018), paras 58, 60, 65; 'Text of the draft conclusions as adopted by the Drafting Committee on second reading', UN Doc A/CN.4/L.908 (2018); 'Text of the draft conclusions on identification of customary international law adopted by the Commission', in UN Doc A/71/10 (2016), paras 57, 59, 62-63.

37 UN Doc A/73/10 (2018), para 65, Conclusion 2.

38 Bradley (ed), *Custom's Future: International Law in a Changing World*; Lepard (ed), *Reexamining Customary International Law*.

39 Roberto Ago, 'Legal Science and International Law' (1956) 90 *Recueil des cours* 85.

tarian law and international human rights law.[40] In his view, the content of customary law can be inferred from the 'core values' of the international community.[41] His idea is similar to that of Christian Tomuschat, who suggested that the content of customary rules in the two fields of international law can be inferred 'from the basic values cherished by the international community'.[42] Although Tomuschat adopted the deductive method for custom-formation, his view did not deviate from the two-element approach in the custom-identification.[43] In contrast to Tomuschat's position on the method of custom-identification, Meron's 'core right' theory indicates that evidence of one element, *opinio juris* alone, is sufficient in the two fields.[44] He wrote that '[i]t is, of course, to be expected that those rights which are most crucial to the protection of human dignity and of universally accepted values of humanity, and whose violation triggers broad condemnation by the international community, will require a lesser amount of confirmatory evidence'.[45] As Birgit Schlütter observed, some authors in international criminal law, for example, Fausto Pocar and Antonio Cassese, support this 'core right' theory if the rules belong to the 'canon of norms which can be held to represent the "core values" of the international community'.[46]

In the identification of customary law, international criminal law presents some peculiarities when compared to other branches of international law. Its objects are individuals and it is a regime inspired by both civil and common law criminal systems.[47] Hard evidence of national practice is also not readily available in this field.[48] One reason is that international criminal law introduces a multitude of punishable acts.[49] Simply put, the customary

40 Theodor Meron, 'International Law in the Age of Human Rights' (2003) 301 *Recueil des cours* 9, 378, 384-86; see also Schlütter, *Developments in Customary International Law* 42 and fn 211.

41 Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of A New Century' (1999) 281 *Recueil des cours* 9, 334; Meron, 'International Law in the Age of Human Rights', 377-78, noting that 'custom is particularly influenced by public opinion and thus by the principal values of the international community'.

42 Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of A New Century', 334. For other scholars' ideas of different categories of customary law, see Schlütter, *Developments in Customary International Law* 37-38.

43 Christian Tomuschat, 'Obligations arising for states without or against their will' (1993) 241 *Recueil des cours* 195, 291.

44 See Schlütter, *Developments in Customary International Law* 42-43; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (New York: Clarendon Press 1989) 9, 94.

45 Meron, ibid, 94.

46 Schlütter, *Developments in Customary International Law* 44.

47 Yeghishe Kirakosyan, 'Finding Custom: The ICJ and the International Criminal Courts and Tribunals Compared' in C. Stahn and L. Van den Herik (eds), *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff 2012) 149-61.

48 For discussions, see Tan, 'The Identification of Customary Rules in International Criminal Law'.

49 Kirakosyan, 'Finding Custom: The ICJ and the International Criminal Courts and Tribunals Compared', 149-61.

status of a rule criminalising underlying acts contemplates no obligation on States but on individuals, who are prohibited from and responsible for committing international crimes. States affected and third States rarely prosecute underlying acts of international crimes, for various political or legal reasons, for example, because of the lack of evidence or sources, or the lack of motivation, or scarcity of support in national law. Another significant reason is that those accused of international crimes are generally tried by international criminal tribunals, rather than national courts. Therefore, the record of national investigation and prosecution of international crimes is not very substantial. Compared to evidence of *opinio juris*, evidence of State practice is more rarely obtainable.

Nevertheless, it would be going too far to adopt this one-element 'core right' theory, since it leaves much room for powerful States to manipulate the law.[50] The deductive method embedded in the 'core right' theory might also conflict with the strict principle of legality prohibiting analogy.[51] Given these features mentioned above, the two UN *ad hoc* tribunals for the former Yugoslavia and Rwanda, in their statements, have not departed from the two-element approach.[52] Commentators have also concluded that in theory a different method, deviating from the two-element approach, has not been found to identify customary rules of international criminal law.[53] A Pre-Trial Chamber of the ICC in a recent decision confirms the two-element approach.[54] In short, the classic two-element approach remains applicable to the identification of customary rules of international criminal law.[55]

A lack of evidence of instances of investigation and prosecution by States, however, does not mean that a customary rule cannot be formed and identified based on sufficient *opinio juris*, although it may affect the enforcement and the development of international criminal law gradually and negatively.[56] Torture as a crime against humanity is a good example. States throughout the world have tolerated or sometimes even authorised torture.

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50 For more discussions, see Schlütter, *Developments in Customary International Law*

51 Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 *JICJ* 835.

52 William A. Schabas, 'Customary Law or "Judge-Made" Law: Judicial Creativity at the UN Criminal Tribunals' in J. Doria *et al* (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (*1930-2000*) (Leiden: Martinus Nijhoff Publishers 2009) 75-101; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* 127-70, 234.

53 Michael Wood, 'Foreword' in B. Lepard (ed), *Reexamining Customary International Law*; Schlütter, *Developments in Customary International Law*; Arajärvi, *The Changing Nature of Customary International Law*.

54 *Al Bashir Malawi* Cooperation Decision 2011, paras 39-42.

55 Tan, 'The Identification of Customary Rules in International Criminal Law'.

56 For data emerges from the post-World War II conflicts, see M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (New York: CUP 2011) 650.

But torture is generally recognised as an international crime under customary law.[57] In addition, as the ICJ held, '[i]f a State acts in a way *prima facie* inconsistent with a recognised rule, but defends its conduct by appealing to exception or justifications within the rule itself […] the significance of that attitude is to confirm rather than to weaken the rule'.[58]

This study sets out a flexible formula of the two-element identification approach focusing more on *opinio juris*. Wood in his second report to the ILC mentioned that the two elements might sometimes be 'closely entangled' and evidence of each element may be given different weight depending on the 'contexts'.[59] Other legal writers have accepted a flexible application of the two-element approach.[60] For instance, Frederic Kirgis wrote that the identification of a customary rule should be analysed on a case-by-case basis depending on different rules and acts.[61] According to his idea of a sliding scale, more attention should be paid to evidence of *opinio juris* than State practice for a moral-oriented rule, such as the prohibition of the use of nuclear weapons.[62] Also, Anthea Roberts distinguished facilitative rules from moral rules in customary international law. In her view, the former tends to regulate the coexistence of States without taking into account the content of the rules, while the latter are rules with moral content. State practice is becoming less important for the latter rules.[63] The regime of international criminal law shares the value-oriented characteristic. Max Sørensen even provided a practical suggestion that 'in cases where a consistent practice can be proven, a certain presumption may arise in favour of the existence of *opinio juris*; so that the burden lies on the opposing party to […] refute the existence of a customary rule of law'.[64] The converse of the 'refutable pre-

57 1998 Rome Statute, art 7; *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*), Judgment, [2012] ICJ Rep 422 [*Obligation to Prosecute or Extradite* Judgment], 457, para 99.

58 *Military and Paramilitary Activities* Judgment, 98, para 186.

59 'Second report on Identification of Customary International Law to the Sixty-sixth Session of the ILC', by Michael Wood, Special Rapporteur, UN Doc A/CN.4/672 (2014), para 3; Robert Kolb, 'Selected Problems in the Theory of Customary International Law' (2003) 50 *Netherlands Intl L Rev* 119, 128.

60 Kolb, ibid, 128; Michael Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (New York: CUP 2013) 139-56.

61 Frederic Kirgis, 'Custom on a Sliding Scale' (1987) 81 *AJIL* 146

62 ibid, 149; Anthea E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *AJIL* 757, 764; Jan Wouters and Cedric Ryngaert, 'Impact on the Process of the Formation of Customary International Law' in M. Kamminga and M. Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford: OUP 2009) 111-12; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 [*Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion], 253, 256, paras 64, 75; *Prosecutor v Kupreškić et al* (Judgement) ICTY-95-16-T (14 January 2000) [*Kuprešić et al* Trial Judgment], para 527.

63 Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 764.

64 Humphrey Waldock, 'General Course on Public International Law' (1962) 106 *Recueil des cours* 41, 49.

sumed acceptance' idea is also true in the context of international crimes. In other words, if a general acceptance of a rule (*opinio juris*) can be proven, less practice is presumed sufficient. It is the burden on the opposing party to refute the existence of a customary rule. In this study, *opinio juris*, as opposed to practice (in particular, physical acts) of State, is raised to a higher rank.[65] Once there is enough confirmatory *opinio juris* for a rule, less practice is sufficient for the identification of a customary rule.

In conclusion, this study adopts a flexible formula of the two-element approach in the identification of customary rules. More attention is paid to States' statements or recognition as opposed to their physical acts.

2.3.2 The two elements

Issues about the two elements are controversial. This subsection does not aim to deal with all matters about the two elements but to highlight their requirements and forms of evidence anchoring this research.

2.3.2.1 Practice and opinio juris: quantity and quality

Requiring a practice observed by every State is not feasible and has never been a requirement for the identification of customary law.[66] The relevant practice 'must be general', which means that 'it must be sufficiently widespread and representative, as well as consistent'.[67] Michael Akehurst noted that 'the number of States taking part in the practice is more important than the number of acts of which the practice is composed'.[68] Also, as correctly noted by Brian Lepard, the precise degree of consensus among States is unclear to establish a customary rule: a simple majority or supermajority.[69]

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65 Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 *EJIL* 187, 188-89.

66 R. Jennings and A. Watts (eds), *Oppenheim's International Law*, Vol 1 (9th edn, London: Longmans 1996) § 10, p 29; *Furundžija* Appeals Chamber Judgment, para 281; the ICJ Statute, art 38(1)(b); Karol Wolfke, *Custom in Present International Law* (Dordrecht: Springer 1993) 87.

67 UN Doc A/73/10 (2018), para 65, Conclusion 8.1; UN Doc A/71/10 (2016), para 62, Conclusion 8.1; art 38(1)(b) of the ICJ Statute; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, [2001] ICJ Rep 40 [*Maritime Delimitation and Territorial* (*Qatar v Bahrain*)], 101-02, para 205, 'uniform and widespread State practice'.

68 Akehurst, 'Custom as a Source of International Law', 16, 18-19, arguing that 'where other things are equal, a very small number of acts, involving very few States and of very limited duration, is sufficient to create a rule of customary law, provided that there is no conflicting practice.'

69 ibid, 16-18; for 'considerable majority', 'overwhelming majority', 'large majority' requirements of practice, see Brian Lepard, *Customary International Law: A New Theory with Practical Applications* (New York: CUP 2010) 26 and fn 85, 151-52.

The 2005 ICRC *Study on Customary International Humanitarian Law* (2005 ICRC *Study*) even showed that practice of a few States is sufficient to create a customary rule, as long as these States play a great role in the formation of a rule.[70]

The definitions of *opinio juris* are also quite controversial among international scholars.[71] Lepard proposed a new notion of *opinio juris*: '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 state conduct'.[72] The idea of the desirability of what practice should be law might be covered by the phrase *opinio necessitatis*. This definition, however, is not compatible with the principle of legality in international criminal law. In this research, *opinio juris* still refers to the acceptance of a practice that reflects international law. Unlike State practice with general requirements, no criterion exists to identifying the quantity and quality of *opinio juris* of States for the formation of customary law.[73]

It is presumed that all States are potentially affected by international law. In fact, not every State has the opportunity or capacity to participate in a practice, to do or to say; even so, not every State is interested in a specific practice. Some States may lack the motivation to engage in or to address their legal views for different reasons.[74] The quality of practice and *opinio juris* may be different among States for a specific rule.[75] The ICJ proposed a test of 'States whose interests are specially affected'.[76] This position has been

70 For comments on the approach to customary law in the ICRC *Study*, see E. Wilmshurst and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (New York: CUP 2007) 3-49. For a slightly different view, see *North Sea Continental Shelf* cases, 43, para 73.

71 For discussions about the meaning of *opinio juris*, see Lepard, *Customary International Law: A New Theory with Practical Applications* 20-29, 112, 118-21, '*belief* that this practice is rendered obligatory by the existence of a rule of law requiring it', '*shared understanding* which enable States to distinguish between legally relevant and legally irrelevant State practice', 'an *express*, or most often presumed, *acceptance* of the practice as law by all interested states', 'belief of other states that the acting state has a legal obligation', 'consent of States', 'a state must believe that if it breaches a rule the states toward which it owes the duty may inquire into its conduct', '*articulation* of a legal rule before or concurrently with state action'.

72 ibid, 121.

73 For criticism of customary law, see J. Patrick Kelly, 'The Twilight of Customary International Law' (2000) 40 *Virginia J Intl L* 449, 518-19.

74 See comments by Government, Information submitted by Botswana to the 66th Session of the ILC (2014).

75 'Report of the International Law Commission', GAOR 69th Session Supp No 10, UN Doc A/69/10 (2014), para 181; Baxter, 'Treaties and Custom', 66; Villiger, *Customary International Law and Treaties* 30-33. For further debate and references, see Lepard, *Customary International Law: A New Theory with Practical Applications* 27-28, 153-54; Jonathan Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1986) 56 *British Ybk Intl L* 1, 19 arguing for 'a weighted majority'.

76 *North Sea Continental Shelf* cases, 43, para 74.

criticised for its inconsistency with the principle of equality of States.[77] Sørensen and Alfred Verdross proposed a better test to cover 'all those States who have the opportunity to engage in practice', including practice in the UN framework and based on treaties.[78] It is worth noting that the 'specially affected States' or the 'most engaged States' tests do not mean that sufficient consistent practice of these States with their *opinio juris* would lead to the formation of a new customary rule.[79] The most engaged States test is by no means a constitutive element of customary law, instead it provides a way to qualify relevant evidence of State practice.[80]

This study admits that all States are relevant to the issue of international crimes, but relative weight is given to the practice and *opinio juris* of the most engaged States. Firstly, all participating States had the opportunity to discuss and vote at the Rome Conference, despite their lack of capacity or motivation. The most engaged States include those who actively participated in the drafting of the Rome Statute, in the debates of the UN organs and in the ICC's Assembly of States Parties (ASP) meetings, as well as the States who were involved in the specific practice of a specific rule.[81] Secondly, these States most engaged in a particular rule should be analysed on a case-by-case basis. For instance, as for war crimes in non-international armed conflict, States involved in non-international armed conflict in some areas, such as Rwanda, the former Yugoslavia and the DRC would be more affected States than other States. States affected may be less reluctant to prosecute international crimes at the national level for political reasons; their submissions and calls for intervention by international tribunals indicate their acknowledgement of war crimes. Thirdly, practice of States in the exercise of universal jurisdiction over international crimes is significant evidence for the identification of custom. These States are also deemed most engaged States.

2.3.2.2 Practice: forms of evidence

According to the ILC's 2016 and 2018 draft conclusions on the 'Identification of Customary International Law', the form of evidence of practice includes but is not limited to:

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77 A. Cassese and J. Weiler (eds), *Change and Stability in International Law-Making* (Berlin: Walter de Gruyter 1988) 2; Villiger, *Customary International Law and Treaties* 30-33; Jennings and Watts (eds), *Oppenheim's International Law*, Vol 1, § 10, p 29, arguing for 'States directly concerned'.

78 See Villiger, *Customary International Law and Treaties* 32.

79 *North Sea Continental Shelf* cases, 42-43, paras 73-74. For an analysis of this test, see Kevin J. Heller, 'Specially-Affected States and the Formation of Custom' (2018) 112 *AJIL* 191.

80 But see 'Identification of customary international law: Comments and observations received from Governments' (14 February 2018), UN Doc A/CN.4/716 (2018), pp 31 (China), 32 (Israel), 33 (Netherlands), 35 (US).

81 An exhaustive examination can be done with a group of researchers with translated documents of different languages, including English, Chinese, Arabic, Russia, Spanish, French, Germany, Greek, Danish and some other languages. In this doctoral dissertation, the author focuses on available and accessible resources to reach her conclusions.

diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts;[82] and decisions of national courts.[83]

The ILC in its draft conclusions adopted the view of verbal acts as State practice.[84] In fact, a statement as evidence of practice is an academic debate.[85] Anthony D'Amato distinguished statements as evidence of *opinio juris* and action as evidence of State practice.[86] By contrast, Akehurst argued that any behaviour or abstract statements of a State may constitute evidence of State practice, including 'any instance of State behaviour – including acts, omissions, statements, silence, treaty ratifications, negotiation positions reflected in preparatory works and votes of resolutions and declarations'.[87] Akehurst qualified verbal acts of a State by requiring acts of 'organs' that 'are competent to make treaties in the nature of the State'.[88] Also, Tullio Treves noted that the expression of views concerning whether a rule of customary law exists might be in the form of acts and real expressions of belief.[89] He argued that governmental statements in the national framework (for instance, declarations in Parliament) and international contexts (for example, notes, protests or claims, or reactions to other States' claims) are manifestations of practice.[90]

This study first qualifies a State's (written and verbal) statements that have an impact outside its territory as relevant evidence of State practice. The idea of verbal acts is important for States that have no capacity, or are unable to act perfectly, but they contribute to the formation of custom through their verbal acts. Bilateral or multilateral statements count as verbal acts if they are justified elsewhere and are not contradicted by what States do.[91] Positions of representatives of States in international organisations and

82 Arajärvi, *The Changing Nature of Customary International Law*; Noora Arajärvi, 'Looking Back from Nowhere: Is There a Future for Universal Jurisdiction over International Crimes?' (2011) 16 *Tilburg L Rev* 5, 16-17 and fn 65.

83 UN Doc A/73/10 (2018), para 65, Conclusion 6.2 ; UN Doc A/71/10 (2016), para 62, Conclusion 6.2. See also Brownlie, *Principles of Public International Law* 6-7.

84 UN Doc A/73/10 (2018), para 65, Conclusion 4.1, 4.3, 6.1; UN Doc A/71/10 (2016), paras 62-63, Conclusion 4.3, Conclusion 6.1 and its commentary (2).

85 Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: CUP 1999)133-36; André da Rocha Ferreira, Cristieli Carvalho, Fernanda Graeff Machry and Pedro Barreto Vianna Rigon, 'Formation and Evidence of Customary Law' (2013)1 *UFRGSMUN* 182, 188.

86 Anthony D'Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press 1971) 73-102.

87 Akehurst, 'Custom as a Source of International Law', 2, 10, 53.

88 ibid, 8.

89 Treves, 'Customary International Law', para 9.

90 ibid, para 26.

91 *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, para 186.

conferences form part of State practice individually or collectively.[92] States' positions in drafting a treaty, their voting and accession to a treaty, namely, the Rome Statute in this research, are valuable verbal acts.[93] Debates, statements and voting of States in the UN General Assembly,[94] and comments of representatives in the Sixth Committee, as well as their attitude towards specific provisions in other international fora are also part of their verbal acts. These verbal acts addressed in connection with particular and concrete cases are given much weight for the identification of custom.[95]

Secondly, the practice of the executive, legislative and judicial organs of a State is deemed State practice.[96] National laws and cases are not *per se* sources of international law because most of them do not deal with international law issues.[97] They also rarely deal with the issue of whether a customary international rule exists.[98] However, as Lassa Oppenheim noted, national cases, in 'cumulative effect', may afford evidence for the identification of customary law.[99] National laws and cases addressing international law issues are relevant.[100] In the case of practices varies among executive, legislative and judicial branches of a State, Sienhe Yee commented that:

> If a 'variation' appears in the practice of different organs at the same highest level of a State, such a 'variation' is *usually* also a false one because *usually* the executive branch has the charge of managing international affairs and it is the practice of this branch that counts in the formation of international law. […] [I]t is important for a decision-maker in the identification process to identify the conduct of the organ (whether executive, legislative or judicial) of a particular State that speaks finally for a particular State internationally and give effect to that conduct only.[101]

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92 *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*), Judgment, [1970] ICJ Rep 3, Separate Opinion of Judge Ammoun, 302-03, para 11.

93 *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion.

94 ibid, 99-100, paras 188-89; Treves, 'Customary International Law', paras 47-49, arguing treaty as a manifestation of practice of States taking in groups.

95 Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the International of Sources* 19; Treves, 'Customary International Law', paras 44-46, arguing certain resolutions of the UN organs as a manifestation of practice of States taking in groups.

96 UN Doc A/73/10 (2018), para 65, Conclusion 5. See also UN Doc A/71/10 (2016), para 62, Conclusion 5; ILA, *Formation of General Customary International Law* 728, § 9.

97 *Prosecution v Abílio Soares* (Judgment, Indonesian *Ad Hoc* Human Rights Court for East Timor, Central Jakarta District Court) 01/PID.HAM/AD. Hoc/2002/ph.JKT.PST (14 August 2002) 70.

98 Jennings and Watts (eds), *Oppenheim's International Law*, Vol 1, § 13, p 41.

99 ibid, § 13, pp 41-42 and fn 6, 8, giving examples of collections of municipal decisions dealing with matters of international law. See also Memorandum by the Secretariat, UN Doc A/CN.4/691 (2016), paras 40-49; UN Doc A/73/10 (2018), para 65, Conclusion 13.2; UN Doc A/71/10 (2016), para 62, Conclusion 13.2; *Prosecutor v Đorđević* (Judgement) ICTY-05-87/1-A (27 January 2014) [*Đorđević* Appeals Chamber Judgment], para 44.

100 Claude Emanuelli, 'Comments on the ICRC Study on Customary International Humanitarian Law' (2007) 44 *Canadian Ybk Intl L* 437, 445.

101 Sienho Yee, 'Report on the ILC Project on "Identification of Customary International Law"' (2015) 14 *Chinese J Intl L* 375, para 44.

By contrast, the ILC work provides that 'the weight to be given to that practice may, depending on the circumstances, be reduced'.[102] In general, foreign ministries with greater expertise address self-seeking and abstract statements, and courts with impartiality deal with specific issues. A better view is that 'differences between the practice followed by different organs of a State tend to disappear in time, as the views of one organ prevail over the views of others'. Before the disappearance of conflicting practice, the practice of a State is inconsistent and is less capable of contributing to the formation of international law.[103] In this research, almost all national laws and cases are drawn from the ICC's 'National Implementing Legislation Database (NILD)',[104] the ICRC's 'Customary IHL Database',[105] the Asser Institute's 'International Crimes Database (ICD)',[106] and collections of the 'Legal Tools Database'.[107]

Thirdly, in this study, practice is not limited to practice of States but also includes practice of international organisations acting as independent entities.[108] Practice of international organisations in their own right, in particular the UN organs, should be considered in the identification of custom. The ILC supports that, 'in certain cases', general practice also includes practice of international organisations for the formation of customary law.[109] The International Law Association (ILA) has also proposed that 'the practice of intergovernmental organisations in their own right is a form of "State

102 UN Doc A/73/10 (2018), para 65, Conclusion 7.2. See also Michael Wood, 'The present position within the ILC on the topic "Identification of customary international law": in partial response to Sienho Yee's Report on the ILC Project on "Identification of Customary International Law"' (2016) 15 *Chinese J Intl L* 3.

103 Akehurst, 'Custom as a Source of International Law', 21-22.

104 ICC, National Implementing Legislation Database, available at: https://iccdb.hrlc.net/data/[accessed 30 December 2017].

105 ICRC, Customary IHL Database, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/home [accessed 30 December 2017].

106 Asser Institute, International Crimes Database (ICD), available at: http://www.internationalcrimesdatabase.org/[accessed 30 December 2017].

107 Legal Tools Database, available at: https://www.legal-tools.org [accessed 30 December 2017] 'Text in these tools or in the Legal Tools Database does not necessarily represent views of the ICC, any of its Organs or any participant in proceedings before the ICC or any of the ICC States Parties.' The Case Matrix as a software platform is a service of the ICC Legal Tools Project.

108 'Identification of customary international law, Statement of the Chair of the Drafting Committee', by Mr Charles C. Jalloh, 25 May 2018, p 3; Jed Odermatt, 'The Development of Customary International Law by International Organisations' (2017) 66 *ICLQ* 491; Treves, 'Customary International Law', paras 50-52. For discussions of whether resolutions of international organisations can generate law for States as opposed to institutional law, see Maurice Mendelson, 'The International Court of Justice and the Sources of International Law' in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge: CUP 2009) 85-88.

109 UN Doc A/73/10 (2018), para 65, Conclusions 4.1-4.2; UN Doc A/71/10 (2016), para 62, Conclusions 4.1-4.2; Michael Wood, 'International Organisations and Customary International Law' (2015) 48 *Vand J Transnatl L* 609. For an analysis of this Report, see Niels Blokker, 'International Organisations and Customary International Law' (2017) 14 *IOLR* 1.

practice"'.[110] Alternatively, Treves employs the phrase 'international practice' rather than 'State practice' to illustrate what international organisations do and say.[111] The ICJ has referred to 'international practice' to show that the prohibition of torture is part of customary law.[112] Commentators have argued that the UN Security Council played a significant role 'in generating evidence of custom related to non-international armed conflicts'.[113] Resolutions of the General Assembly are also rich sources of evidence of the development of customary law.[114]

Indeed, the traditional position is left behind that only States are subject to international law.[115] Individuals are also directly bound by international criminal law. The practice of international organisations as an autonomous actor as opposed to States, such as the UN Security Council, its General Assembly, as well as its Secretary-General, are involved in the creation of a customary rule.[116] In addition to UN organs, jurisprudence of international and internationalised tribunals manifests the practice of international judicial organs. Jurisprudence of international criminal tribunals is not evidence of States practice for its attribute in nature[117] and the tribunals' jurisdictional limitations,[118] but it is a subsidiary means, from which the content of a

110 ILA, *Formation of General Customary International Law* 730, § 11. But see Yee, 'Report on the ILC Project on "Identification of Customary International Law"', para 42, only State conduct in relation to an international question can be counted as practice.

111 Treves, 'Customary International Law', paras 10, 50-52, 77, 80.

112 *Obligation to Prosecute or Extradite* Judgment, 457, paras 99-100.

113 Gregory Fox, Kristen Boon and Isaac Jenkins, 'The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law' (2017) 67 *Am U L R* 649.

114 Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford: OUP 1963) 5; UN Doc A/73/10 (2018), para 65, Conclusion 12; UN Doc A/71/10 (2016), para 62, Conclusion 12. *Contra* Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* 51-53, arguing that voting in favour of a resolution of the General Assembly may be purely a political showoff; Jennings and Watts (eds), *Oppenheim's International Law*, Vol 1, § 16, p 49, claiming that 'most resolutions are expressions of an essentially political view, although in certain cases they have been held to express an opinio juris'.

115 Anne Peters, *Beyond Human Rights*: *The Legal Status of the Individual in International Law* (Oxford: OUP 2016); Christopher Greenwood, 'Sovereignty: A View from the International Bench' in R. Rawlings *et al* (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford: OUP 2013) 255; Jennings and Watts (eds), *Oppenheim's International Law*, Vol 1, § 16, pp 45-50.

116 Jennings and Watts (eds), ibid, Vol 1, § 16, pp 48-49; ILA, *Formation of General Customary International Law* 731, 751, §§ 12, 19; UN Doc A/67/10 (2012), p 8; UN Doc A/71/10 (2016), para 62, Conclusions 4.2; UN Doc A/73/10 (2018), para 65, Conclusion 4.2; Akehurst, 'Custom as a Source of International Law', 11. For discussions on the role of international organisation practice, see Lepard, *Customary International Law: A New Theory with Practical Applications* 41-42.

117 ILA, *Formation of General Customary International Law* 729, § 10.

118 *The Prosecutor v Kayishema & Ruzindana* (Judgement) ICTR-95-1-T (21 May 1999) [*Kayishema & Ruzindana* Trial Judgment], para 138.

customary rule can be identified.[119] Decisions of international bodies, such as the IMT and IMTFE, the ICTY, the ICTR and the ICC, as well as other international and internationalised tribunals, constitute persuasive evidence in ascertaining the state of customary rules.[120] Principles and rules identified by pre/post-ICC tribunals and the ICC are useful to determine the existence and the content of a customary rule.[121] It should be noted that findings in these decisions are not conclusive evidence for the existence of customary law because custom is not static and may evolve after the delivery date of a decision.[122] In the two UN *ad hoc* tribunals, decisions of the Appeals Chamber would be given more weight than the findings of its Trial Chambers, in particular, the latter was subsequently overturned on appeal.[123]

2.3.2.3 Opinio juris: forms of evidence

According to the ILC, the form of evidence of *opinio juris* includes but is not limited to

> […] public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference. […] [F]ailure to react over time to a practice may serve as evidence of acceptance as law.[124]

At first glance, forms of evidence of the two elements overlap in the ILC's draft conclusions.[125] For instance, diplomatic correspondence, decisions of national courts and conduct in connection with resolutions are forms of evidence of both practice and *opinio juris*. International and internationalised criminal tribunals have attempted to distinguish between evidence of the

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119 Jennings and Watts (eds), *Oppenheim's International Law*, Vol 1, § 13, p 41; Mendelson, 'The International Court of Justice and the Sources of International Law', 81-83; UN Doc A/73/10 (2018), para 65, Conclusion 13.2; UN Doc A/71/10 (2016), para 62, Conclusions 13.2.

120 Tom Ginsburg, 'Bounded Discretion in International Judicial Lawmaking' (2004) 45 *Virginia J Intl L* 631, 639; Powderly, 'The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function: Reflections on Sources of Law and Interpretative Technique', 483; Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol I: Rules, xxxiv; UN Doc A/71/10 (2016), para 62, Conclusion 13; UN Doc A/73/10 (2018), para 65, Conclusion 13. For International Case Law Database, see World Courts, available at: http://www.worldcourts.com/ [accessed 4 March 2018].

121 Volker Nerlich, 'The Status of ICTY and ICTR Precedent in Proceedings before the ICC' in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Brill 2009) 313 and fn 36, 316-24.

122 UN Doc A/71/10 (2016), paras 62-63, Conclusion 13.1 and its commentary § (3).

123 Nerlich, 'The Status of ICTY and ICTR Precedent in Proceedings before the ICC', 314.

124 UN Doc A/73/10 (2018), para 65, Conclusions 6.2-6.3; UN Doc A/71/10 (2016), para 62, Conclusions 6.2-6.3.

125 For criticism of double counting, see Mendelson, 'The International Court of Justice and the Sources of International Law', 68, 87.

two elements, but most of them also failed.[126] As the ICRC claimed in its 2005 *Study,* the separation of practice and *opinio juris* is 'very difficult and largely theoretical'.

Although a strict separation is hard, this study counts bilateral and multilateral (verbal and written) statements as forms of practice. Unilateral statements are considered as forms of *opinio juris.*[127] The drafting and voting for resolutions count as forms of practice, while subsequent conduct in accordance with resolutions indicating commitments is deemed evidence of *opinio juris*. Furthermore, whether decisions of national courts count as State practice or *opinio juris* depends on the subject matter of these decisions. National decisions exercising universal jurisdiction over international crimes are mostly considered as practice of States. Other national decisions, dealing with civil liabilities, refugee status, and immigration issues related to international crimes, might also address positions of judicial organs of States with respect to customary law. One has to admit that, as for national decisions, 'more often than not, one and the same act reflects practice and legal conviction'.[128] If these national decisions are expressed in a general and abstract way, or they are inconsistent with government legal opinions simultaneously, they may be of less or no value as forms of *opinio juris*.

Treaties as a form of evidence of *opinio juris* deserve two comments. Firstly, tribunals as well as scholars differ on the role of a treaty rule as evidence of State practice or *opinio juris*.[129] The ICTY resorted to the 1998 Rome Statute to confirm its findings on the existence and content of a customary rule.[130] In the ILC's draft conclusions, the conduct and position in connection with treaties (voting and accession) count as evidence of practice, while the attitude

126 Schabas, 'Customary Law or "Judge-Made" Law: Judicial Creativity at the UN Criminal Tribunals', 77-101; Schlütter, *Developments in Customary International Law*; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* 234.

127 Yee, 'Report on the ILC Project on "Identification of Customary International Law"', paras 39-42.

128 Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol I: Rules, § 4942.

129 The Rome Statute as evidence of *opinio juris* of States, see *Furundžija* Trial Judgment, para 227; Riccardo Pisillo-Mazzeschi, 'Treaty and Custom: Reflections on the Codification of International Law' (1997) 23 *CLB* 549, 559; *Tadić* Appeals Chamber Judgment, para 223; *Kuprešić et al* Trial Judgment, paras 579-81; Lepard, *Customary International Law: A New Theory with Practical Applications* 191-207. The Rome Statute as evidence of State practice, see *Prosecutor v Krnojelac* (Judgement) ICTY-97-25-A (17 September 2003) [*Krnojelac* Appeals Chamber Judgment], para 2211; Anthony D'Amato, 'Treaty-Based Rules of Custom' in A. D'Amato (ed), *International Law Anthology* (Cincinnati: Anderson Publishing Company 1994) 94-101; Treves, 'Customary International Law', para 47. For discussions on a treaty as evidence of State practice, see Lepard, *Customary International Law: A New Theory with Practical Applications* 34, 191-207.

130 *Prosecutor v Furundžija* (Judgement) ICTY-95-17/1-T (10 December 1998) [*Furundžija* Trial Judgment], para 227; *Tadić* Appeals Chamber Judgment, para 223; *Krnojelac* Appeals Chamber Judgment, para 221. For other cases, see Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 336 and fn 16.

to material terms of the treaty rule is regarded as evidence of *opinio juris*.[131] Indeed, verbal statements of States and the corresponding legal views of States may not be present at the same time in the drafting of a rule of a treaty. For example, States may support the inclusion of war crimes in non-international armed conflict for different reasons: either serious violations 'are' or 'should be' legally criminalised as an international crime in international law, or only in the spirit of compromise. Therefore, acts and statements related to a treaty rule may either indicate State practice or illustrate *opinio juris*, depending on how States have articulated their views and explained their voting. These forms of evidence include States' comments, proposals and debates at the conference on the text of a treaty rule, the voting, adoption and ratification of the treaty, as well as explanations and statements about voting. In addition, subsequent practice, interpretation, application and modification of a treaty, if going beyond the meaning of treaty rules, would also be considered as practice of States giving rise a new customary rule.[132]

Secondly, a clarification of three phrases: 'treaty as evidence of *opinio juris*/State practice of custom', 'the nature of treaty as evidence of custom', and 'treaty as evidence of the state of custom' is needed. The first phrase is used to elaborate on materials/manifestations relating to treaties as forms of evidence of the two elements of custom. Its essence is what States do and say. The second phrase is the main question of this research and provides a clear exposition on whether a treaty rule constitutes a declaration of an existing customary rule on the same subject matter. Its essence is the formulation of the treaty rule and the establishment of a customary rule. The third phrase: 'treaty as evidence of the state of custom' concerns the role of a treaty in the identification of the existence of a customary rule. The meaning of this phrase is further clarified in the next section.

2.3.3 Other indicators for the identification of customary law

There are other subsidiary means for the determination of the rules in customary international law. For instance, official statements of the ICRC, the work of the ILC, as well as teachings of the most highly qualified publicists.[133] These indicators are not evidence of practice of States or international organisations, but they do play an essential role in shaping the content of customary law.

The work of the ILC on international law is an important indicator, in particular, which was adopted by the General Assembly, even if it was not formed as a treaty, such as the 1996 Draft Code of Crimes. The ICTY Trial Chamber remarked that:

131 UN Doc A/73/10 (2018), para 66, commentary to Conclusion 6, § (5), commentary to Conclusion 11, § (5); Schlütter, *Developments in Customary International Law* 337-40.

132 Treves, 'Customary International Law', para 86.

133 UN Doc A/71/10 (2016), paras 62-63, Conclusion 4 and its commentary § (10), Conclusions 13.1 and 14.

> […] the Draft Code is an authoritative international instrument which, depending upon the specific question at issue, may (i) constitute evidence of customary law, or (ii) shed light on customary rules which are of uncertain contents or are in the process of formation, or, at the very least, (iii) be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world.[134]

The Institut de Droit International (IDI, Institute of International Law) and the ILA are two examples of collective communities in academia. Their output may provide important sources. However, 'the value of each output needs to be carefully assessed in the light of the mandate and expertise of the body concerned, the care and objectivity with which it works on a particular issue, the support a particular output enjoys within the body and the reception of the output by States.'[135]

2.3.4 Summary

The above observation shows that the two-element approach continues to apply in the identification of customary rules of international criminal law. Scarce or limited physical practice by States does not hinder the formation of customary law. A flexible formula of the two elements is also acceptable in certain contexts. This study adopts a flexible two-element approach in the identification of customary law by focusing more on *opinio juris*. In this research, practice refers to physical behaviour and verbal acts (statements) between or among States. In some contexts, practice also includes acts of international organisations.[136] *Opinio juris* refers to the acceptance of practice that reflects of international law. The weight of evidence of the two elements among States should be analysed on a case-by-case basis as to a specific rule. Apart from the evidence of the two elements, other indicators are also helpful for the identification of the state of customary law.

2.4 Terms: treaty was or is of a 'declaratory' nature of custom

This section aims to clarify the role of a treaty as evidence of the state of customary law and the terms employed to illustrate the finding on the relationship between a treaty rule and a customary rule on a same subject matter.

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134 *Furundžija* Trial Judgment, para 227. See also Timothy McCormack and Gerry Simpson, 'The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions' (1994) 5 *CLF* 1; John Allain and John Jones, 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind' (1997) 8 *EJIL* 100.

135 UN Doc A/71/10 (2016), paras 62-63, Conclusion 14 and its commentary § (5).

136 But see Asian-African Legal Consultative Organisation Informal Expert Group (AALCOIEG), 'Comments on the ILC Project on Identification of Customary International Law', Comment G '(1) only State conduct in relation to an international question be counted as practice'.

To this end, this section first discusses Richard Baxter's view concerning the role of 'a treaty rule as evidence of custom', and then analyses the meaning of the term 'declaratory' employed in this research.

2.4.1 The role of treaties as evidence of the state of customary law

In 1965, Baxter described the role of treaties as evidence of the state of customary law in a journal article about multilateral treaties as evidence of custom.[137] He argued that a treaty rule might be a reflection, crystallisation, or the origin of adoption of customary international law.[138] The ICJ in the 1969 *North Sea Continental Shelf* cases later adopted Baxter's idea on this point.[139] The 1969 Vienna Convention on the Law of Treaties also recognises that a customary rule continues to exist in parallel with a treaty provision about an identical subject and that a treaty rule can pass into a customary law.[140] In 1970, Baxter gave a lecture on 'treaties and custom' in The Hague Academy of International Law.[141] He further addressed the distinction between a treaty of 'declaratory' nature of custom and a treaty of 'constitutive' nature of custom. This distinction was later endorsed by the ICJ in the 1986 *Military and Paramilitary Activities* case, which stated: 'those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to "crystallise", or because it had influenced its subsequent adoption'.[142] Many scholars have confirmed such a role for treaties, including D'Amato, Villiger and Yoram Dinstein.[143] The ILC specifically endorsed a treaty rule of declaratory function and a treaty rule of an innovative character in its draft conclusions on 'Identification of Customary International Law'.[144]

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137 Baxter, 'Multilateral Treaties as Evidence of Customary International Law', 275.

138 ibid, 287.

139 *North Sea Continental Shelf* cases, 39, 41, 45, paras 63, 71, 81; *Libya-Malta Continental Shelf* Judgment, 29-30, para 27.

140 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Preamble, arts 38, 43.

141 Baxter, 'Treaties and Custom', 42.

142 *Military and Paramilitary Activities* Judgment, 95, para 177; *Maritime Delimitation and Territorial* (*Qatar v Bahrain*), 100, para 201.

143 Shihata, 'The Treaty as a Law-Declaring and Custom-Making Instrument' (1966*) Egyptian R Intl L* 51, cited in Anthony D'Amato, 'Manifest Intent and the Generation by Treaty of Customary Rules of International Law', (1970) 64 *AJIL* 892, 899 and fn 37, D'Amato employed the wording of 'the generation' by treaty of customary rules rather 'constitutive'; Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the* Interrelation *of Sources*; Dinstein, 'The Interaction between Customary Law and Treaty'. But see Pisillo-Mazzeschi, 'Treaty and Custom: Reflections on the Codification of International Law', 552, commenting on the difference between a treaty of 'declaratory' nature and a treaty of 'innovative' nature of customary law. For a summary of the role of the treaty in the identification of *opinio juris*, see Lepard, *Customary International Law: A New Theory with Practical Applications* 30-32.

144 UN Doc A/73/10 (2018), para 65, Conclusion 11.

2.4.2.1 Baxter's concept of 'declaratory' nature of custom

According to Baxter, if a contemporary treaty rule has codified or crystallised custom, the treaty rule is declaratory of custom. He adopted two means to establish a treaty rule that is declaratory of custom.[145] The first one is to check the textual language of the treaty rule or other treaty provisions, such as the preamble of the treaty.[146] Baxter expressed concern that 'the draftsmen of treaties will attempt to disguise a change in the law as a mere expression of existing law'.[147] The second alternative is to examine the preparatory works of the specific treaty rule or 'the instrument under the authority of which the treaty was drawn up'. Dinstein also confirmed the two methods.[148]

D'Amato criticised the two methods for subjectivity.[149] In his view, the text of a treaty may be abused, as Baxter admitted. The statements of negotiators in the preparatory works may be 'self-serving words of declaration'. Some negotiators may also use the term 'declaratory' as a strategy to persuade the other side to accept its position by arguing that these rules accurately reflect existing law.[150] D'Amato argued that it is sufficient to decide whether a treaty rule is law-declaring through analysis of the treaty text and the treaty structure.

2.4.2.2 Baxter's concept of 'constitutive' nature of custom

As noted by Baxter, a treaty rule that does not purport to be declaratory at the time when the treaty was adopted may formulate the substantial content of a rule to develop or change a customary rule on the same subject matter.[151] If such a treaty rule has passed into a customary rule at present, the treaty rule is 'constitutive' of custom.[152] The treaty rule is a starting point for a new or modified customary rule, and it becomes a mirror of an existing customary rule by post-treaty progress or State practice.[153] If a customary rule is not established when the assessment is made, the treaty is not of a constitutive nature. In addition, article 38 of the 1969 Vienna Convention on the Law of Treaties confirms the interaction between a treaty rule and a

145 Baxter, 'Multilateral Treaties as Evidence of Customary International Law', 275-300; Baxter, 'Treaties and Custom', 42.
146 Baxter, 'Treaties and Custom', 42.
147 Baxter, 'Multilateral Treaties as Evidence of Customary International Law', 290.
148 Dinstein, 'The Interaction between Customary Law and Treaty', 363.
149 D'Amato, 'Manifest Intent and the Generation by Treaty of Customary Rules of International Law', 895-902.
150 ibid, 900.
151 Baxter, 'Treaties and Custom', 57.
152 Baxter, 'Multilateral Treaties as Evidence of Customary International Law', 278, 291, 299-300.
153 ibid.

customary rule by providing that 'nothing […] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognised as such'. The result of this process is that the same obligations and rights of international law bind all States, including non-party States to the treaty. Roberts also suggested that substantive 'moral customs' adopted by a representative majority of States in treaties are to prescribe future action based on 'normative evaluation of ideal practice'.[154]

In his 1965 article, Baxter did not discuss the test to determine the constitutive nature of a treaty rule.[155] The ICJ in the *North Sea Continental Shelf* cases analysed whether a treaty rule had passed into customary law binding on all States. The ICJ set forth three conditions for a treaty rule to be transformed into a customary rule.[156] The first requirement is the 'norm-creating character' of that rule (a treaty rule was intended to generate customary law). The other two conditions, 'accepted by other State practice with the sense of legal obligation', in effect, are the two elements required for the formation of customary law.[157]

Accordingly, for a treaty rule to be constitutive of custom, the first step is to determine whether a treaty provision was of a norm-making character. The second step is to check whether such a provision passed into a customary rule later on.[158] The custom identification method applies to decide whether a norm-creating treaty rule is of a constitutive nature at the present time.[159] The ICJ in the *North Sea Continental Shelf* cases set up an objective test. In its view, the treaty rule concerned 'should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law'.[160] The ICJ further clarified this test with references to the particular form of a treaty rule and the structure of that treaty.[161] The ICJ did not suggest whether the preparatory works of that treaty rule are relevant for the determination of the norm-creating nature. Different from a treaty rule of a declaratory nature, the actual intent of the drafters seems to be irrelevant. D'Amato supported the ICJ's approach and called it the 'manifest intent' test.[162] It seems that Baxter also agreed with the general approach of the ICJ on this point.[163] A treaty rule of a 'norm-creating' character manifests a presumed *opinio juris* of States Parties to that practice.

154 Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 764.
155 Baxter, 'Multilateral Treaties as Evidence of Customary International Law', 290.
156 *North Sea Continental Shelf* cases, 42-43, paras 71-72.
157 ibid; Baxter, 'Treaties and Custom', 73.
158 *North Sea Continental Shelf* cases, 43, para 73.
159 Baxter, 'Treaties and Custom'.
160 *North Sea Continental Shelf* cases, 42-43, para 72.
161 ibid.
162 D'Amato, 'Manifest Intent and the Generation by Treaty of Customary Rules of International Law', 895-902.
163 Baxter, 'Treaties and Custom', 62-64.

2.4.2.3 Assessment and conclusions

A comment on the concepts of 'declaratory' and 'constitutive' as defined by Baxter is necessary. First of all, if there is no claim in the treaty or preparatory works of the treaty, it does not preclude the treaty from having a declaratory attribute.[164] In addition, a treaty rule of norm-making nature may have never passed into a customary rule. It means that the States Parties wanted to establish a rule and pushed the content of the rule in such a direction. Practice, however, develops in different ways, and a new customary rule may be established. Despite attitudes expressed by States in the treaty, if there is no general practice among States, no new customary rule is formed from that treaty rule. The customary rule and the treaty rule diverge in this circumstance.[165]

In addition, it seems that apart from State practice and *opinio juris*, the ICJ might not have intended to add a third element for a treaty rule passing into custom. Simply put, a treaty rule not of a norm-making nature may also be transformed into customary law. The ICJ had borne in mind rules in the 1958 Geneva Convention on the Continental Shelf that entered into force in 1964. The 'norm-making' requirement provides a shortcut for further analysis of the attitude and positions of States Parties and signatory States. A norm-making character is not a necessity for a treaty rule to pass into custom but can simplify proof of evidence of the two elements. Akehurst notes that 'whether a rule laid down in a treaty is subsequently accepted as a rule of customary law is a question of fact'.[166] The norm-making character has never been accepted as a requirement for a treaty rule developing into custom.

Furthermore, it should also be stressed that the declaratory or constitutive nature of a treaty rule as defined by Baxter provides preliminary rather than conclusive evidence as to the state of customary law. The ICJ has observed that

> It 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.[167]

As Villiger stated, 'the conventional text has only a stimulating function'.[168]

Finally, Baxter's ideas of a treaty rule either of declaratory or constitutive nature does not deal with the issue of 'whether there are any law-creating consequences', as pointed out by D'Amato.[169] On the one hand, a pre-exist-

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164 Dinstein, 'The Interaction between Customary Law and Treaty'.
165 Baxter, 'Treaties and Custom'.
166 Akehurst, 'Custom as a Source of International Law', 50.
167 *Libya-Malta Continental Shelf* Judgment, 29-30, para 27.
168 Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* 193.
169 D'Amato, 'Manifest Intent and the Generation by Treaty of Customary Rules of International Law', 901.

ing customary rule that is parallel to a treaty rule of a declaratory nature may be modified by subsequent practice after the adoption of a treaty. On the other hand, a treaty rule might be neither declaratory nor norm-creating. For example, according to the ICTY, '[d]epending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modified existing law.' Although States Parties did not 'intend' to alter an existing customary rule or to formulate a new customary rule, practice, later on, develops in the same direction as the text of that rule and forms a customary rule.[170] The construction of the concept 'constitutive' is, thus, of limited utility to describe the current relationship between custom and a treaty rule that was neither law-declaring nor norm-creating.

Despite its inconclusive nature, a preliminary observation of whether a treaty rule was of a 'declaratory' or 'norm-making' nature is valuable for this research. As analysed by many commentators, a treaty rule articulating itself as a codification of customary law provides substantial evidence of the *opinio juris* of States to a particular rule.[171] Also, in general, statements and conducts of non-party States to a treaty, in general, are evidence of State practice.[172] It is hard to ascertain whether a State Party behaved with the general acceptance of practice as custom because States Parties to a treaty may invoke a treaty rule rather than custom.[173] The ICJ in the *North Sea Continental Shelf* cases held that only practice of non-parties to a treaty counts as evidence to analyse whether a treaty rule has passed into customary law.[174] Nevertheless, if the practice of States Parties to a treaty is not deemed valuable for the development of custom, it is difficult to find State practice.[175] Baxter argued that a successful treaty with a substantial number of States Parties might lead to a paradox in the identification of customary law (the 'Baxter Paradox').[176] Due to the requirement of 'general' (the widespread and representative consistent) practice, the greater the number of States Parties, and correspondingly the smaller the number of non-party States, the more difficult it becomes to demonstrate what is the state of customary international law outside the treaty is.[177] D'Amato also noted that the idea of relying only on the practice of non-party States would render the treaty itself

170 *Furundžija* Trial Judgment, para 227. Confirmed by *Tadić* Appeals Chamber Judgment, para 223; *Kupreškić et al* Trial Judgment, para 580.
171 Lepard, *Customary International Law: A New Theory with Practical Applications* 204-05.
172 *North Sea Continental Shelf* cases, 43, para 76.
173 Baxter, 'Treaties and Custom', 64; Mark Villiger, 'The 1969 Vienna Convention on the Law of Treaties: 40 Years After' (2009) 344 *Recueil des cours* 9, 67-69.
174 *North Sea Continental Shelf* cases, 43, para 76.
175 D'Amato, 'Manifest Intent and the Generation by Treaty of Customary Rules of International Law', 900-01.
176 Baxter, 'Treaties and Custom', 64, 73.
177 ibid.

valueless.[178] If a treaty rule in itself recognised its law-declaring or norm-creating nature of custom, the practice of States Parties in accordance with that rule also counts as valuable evidence of State practice. Other commentators have also proposed that if the content of an emerging customary rule is identical to the treaty formulation, a conclusion might be reached with less practice of non-party States but more *opinio juris* reflected in a multilateral treaty as to the customary status of a treaty rule.[179] A better view might be that both practice of States Parties under a treaty and practice of non-party States count as evidence of practice for a treaty rule developing into custom.[180] The value of practice of States Parties is strengthened if a treaty rule is of a norm-making nature, whereas the value is weakened if a denial exists in the treaty that acts of States Parties are not informed by *opinio juris*.[181]

Accordingly, the preliminary law-declaring or norm-creating nature of a treaty rule adds another layer of analysis in this research. Baxter's idea of declaratory nature merely revealed the state of customary rules at the adoption of an ideal 'contemporary' treaty, rather than a treaty in the past.[182] Indeed, the difference between past and contemporary is relative for observers. The 1998 Rome Statute, as a treaty in the past for observers at present, was deemed a 'contemporary' treaty for observers in 1998. The term 'declaratory' applies to describe the preliminary finding on a rule of the Rome Statute as declaratory of custom in 1998. The concepts of law-declaring and norm-making nature, therefore, are used as an analytical tool to illustrate the 'preliminary findings' on the relationship between the Rome Statute and custom in 1998. The law-declaring nature is identified through expressive statements in the treaty and the drafting history to that effect.[183] The norm-making nature is analysed with reference to the form of a treaty rule, the structure of that treaty as well as its preparatory works.[184]

178 D'Amato, 'Manifest Intent and the Generation by Treaty of Customary Rules of International Law', 901; Lepard, *Customary International Law: A New Theory with Practical Applications* 196-99.

179 Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *AJIL* 413, 435; Gary Scott and Craig Carr, 'Multilateral Treaties and the Formation of Customary International Law' (1996) 25 *Denver J Intl L& P* 71, 78.

180 Lepard, *Customary International Law: A New Theory with Practical Applications* 196-99; Treves, 'Customary International Law', para 86.

181 Arthur M. Weisburd, 'Customary International Law: The Problem of Treaties' (1988) 21 *Vand J Transnatl L* 1, 23-29. For further clarification see section 2.5.2.

182 Baxter, 'Treaties and Custom', 37.

183 ibid, 37, 54, 56.

184 For debates about the hierarchy of the evidential value of internal indicia (a treaty text) and the external indicia (the preparatory works of the treaty text and concrete conducts of States), see Dinstein, 'The Interaction between Customary Law and Treaty', 363; Mark Villiger, *Customary International Law and Treaties: A Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Martinus Nijhoff 1985) 244, 247; Pisillo-Mazzeschi, 'Treaty and Custom: Reflections on the Codification of International Law', 556-57, 559.

In conclusion, a treaty rule plays a role as evidence of the state of customary law. An observation of the law-declaring nature or norm-making character of a treaty rule assists in identifying a customary rule but is not conclusive. In this research, after interpreting the treaty rule, a layer of analysis is followed to answer the question whether a treaty rule is preliminary evidence as declaratory of customary law. Bearing in mind that the actual intent of the drafters might be ambiguous, this study adopts the subjective and objective tests to show whether a treaty rule articulated itself as declaratory of customary law. This layer of analysis examines the text of the treaty rule and the preamble of the treaty, the structure and context of the treaty rule, and the preparatory works of that treaty rule.

2.4.2 Terminology: declaratory

This study employs the term 'declaratory' in determining the nature of selected provisions of the Rome Statute as evidence of customary law on the same subject in the past and at present. As observed above, Baxter's term 'constitutive' illustrates the preliminary findings that before the adoption of a norm-making treaty rule, a customary rule with the same content did not exist but come into being afterwards. This term is of limited utility to cover a situation where a treaty rule was not of a norm-making nature but also passed into custom. Therefore, this study does not employ this notion of 'constitutive' to describe the nature of treaty at present. Baxter's notion of 'declaratory' focuses on the role of a treaty rule in the identification of customary law, but the term 'declaratory' in this research aims to qualify the relationship between a treaty text and a (potential) customary rule. The paragraphs that follow attempt to clarify the main meaning of 'declaratory' in this research.

In this research, a treaty rule 'was declaratory' of custom at the time when the Rome Statute was adopted if: (1) it was a reflection of a pre-existing customary rule governing a particular matter, or (2) it was a crystallisation of an emerging customary rule during the process of formation and adoption of that treaty rule on a particular matter. In addition, a treaty rule 'is declaratory' of custom if: (1) the rule that was declaratory continues to be declaratory of custom, or (2) the rule that was not declaratory has become declaratory of custom. The finding of a treaty rule 'is declaratory' only if it endeavours to show the customary status of a rule at present, instead of disclosing the non-existence of customary rule at the adoption of the treaty. If a treaty rule was of a declaratory nature, the two elements should be satisfied to determine whether a treaty rule continues to be declaratory of contemporary custom. In the case of a treaty rule that was not declaratory, the two-element approach also applies in ascertaining whether the treaty rule has passed into a customary rule.

The phrases 'was declaratory' and 'is declaratory' simply describe the factual nature of a treaty rule as evidence of custom in the past or at present. The former phrase does not disclose the current nature of the treaty rule as

evidence of custom at present, while the latter expression does not attempt to indicate the nature of a treaty rule as evidence of custom in the past. Simply put, a treaty rule that 'is or is not declaratory' of custom does not mean that this treaty rule 'was or was not declaratory' of custom in the past. The converse is also true.

Lastly, this research defines three categories of distinction. Firstly, a distinction is made between a rule of 'reflection' and a rule of 'crystallisation'. Secondly, a difference exists between the declaratory nature in the past (was declaratory) and the declaratory nature at present (is declaratory). Thirdly, the last distinction is between the positive finding of a treaty rule 'was/is' declaratory of custom and the negative finding of 'was not/is not' declaratory of custom. The first distinction indicates that the time when a customary rule of international criminal law came into existence may be slightly different. The second differentiation reveals the existence of a customary rule at the time when the Rome Statute was adopted and subsequently. This requires an historical overview of the development of practice before and after 1998. The third distinction relates to the central question of whether a rule of the Rome Statute was/is declaratory of custom.

These three distinctions are of 'central importance in the context of sources' as well as in the context of custom as an interpretative aid.[185] It is true that the difference between codification of existing customary rules, crystallisation of a rule into custom during the process of adoption of a treaty,[186] and the progressive development of international law, is 'a matter of degree',[187] 'between minor and major changes of the law'.[188] D'Amato also criticised that 'insofar as most treaties at present purport to declare existing law rather than to signal their departure from it, the distinction suggested by professor Baxter might diminish in objective importance'.[189]

The first category of distinction remains crucial to tribunals that relies on customary law to punish international crimes at present. States can and indeed do prosecute crimes that occurred decades ago, for instance, Kosovo and Bangladesh. In the future, the distinction between reflection and crystallisation may fade into irrelevance as many suspects in advanced age die. Yet, the second and third categories of distinction continue to provide a per-

185 Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* 126.

186 Pisillo-Mazzeschi, 'Treaty and Custom: Reflections on the Codification of International Law', 552; Clause Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2001) 30 *Israel Ybk HR* 103, 175.

187 Jennings and Watts (eds), *Oppenheim's International Law*, Vol 1, § 31, p 110. For discussions of the differences between codification and progressive development of law, see Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 231-42.

188 Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* 126.

189 D'Amato, 'Manifest Intent and the Generation by Treaty of Customary Rules of International Law', 899-901.

spective to understand the customary status of a treaty rule along with the development of international law as well as new amendments to the Rome Statute. In short, ascertaining the customary status of a provision of the Statute before and after its adoption is necessary, whether or not a treaty rule is applicable and a given customary rule exists concerning a specific criminal matter.

2.5 Preconditions for this research

This section analyses whether the rules in the Rome Statute negatively affect the declaratory nature of a treaty rule. For this purpose, this section first examines rules of the Statute concerning reservation as well as the jurisdictional mechanisms to show whether provisions of the Rome Statute deny or hinder analysis of the treaty rule to determine whether the provisions are declaratory of customary law. Then, it evaluates whether the Rome Statute itself impedes its rules developing into custom.

2.5.1 A treaty rule of a declaratory nature in 1998: any obstacles in the Rome Statute?

This subsection examines whether obstacles to determining whether a rule of the Rome Statute was declaratory of custom at the time when the treaty was adopted exist. This subsection mainly focuses on the legal impact of reservation as well as the ICC jurisdictional mechanisms.

In the Rome Statute, article 120 provides that '[n]o reservation may be made to this Statute'. Article 120 prohibits a State from making an express reservation or making a reservation through an 'interpretative declaration' to limit its obligation under the Statute.[190] For example, Uruguay made an interpretative declaration that 'as a State party to the Rome Statute, the Eastern Republic of Uruguay shall ensure its application to the full extent of the powers of the State insofar as it is competent in that respect and in strict accordance with the Constitutional provisions of the Republic'. This declaration constitutes a reservation 'to limit the application of the Statute within national legislation'. Finland, Denmark, Ireland, Germany, Norway and the Netherlands, as well as the UK objected to this declaration. Later on, Uruguay withdrew its interpretative declaration.[191]

Article 124, on the other hand, allows States to enter a declaration suspending the ICC's jurisdiction for up to seven years concerning war crimes. Some commentators have also deemed article 10 of the Statute to be a kind

190 UN Doc A/C.6/55/SR.9 (2000), para 34 (Canada). For a slightly different view, see Shana Tabak, 'Article 124, War Crimes, and the Development of the Rome Statute' (2009) 40 *Georgetown J Intl L* 1069, 1076-77, arguing that the Rome Statute does not prohibit an interpretive declaration by invoking article 124.

191 Available at: https://treaties.un.org [accessed on 1 May 2018].

of 'reservation clause'.[192] The following paragraphs first analyse whether articles 10 and 124 are reservation clauses, and then briefly examines whether a reservation clause to a treaty (rule) is relevant for the analysis in this research.

In fact, article 10 of the Rome Statute is not a true reservation clause. Article 10 provides that '[n]othing in this Part [about jurisdiction, admissibility and applicable law] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'. This provision as a 'without prejudice clause' reserves the status of custom as an independent source outside the Statute, which is similar to the function of article 43 of the Vienna Convention providing that a State may 'be subject [to obligations] under international law independently of the treaty'.[193] Other provisions related to the Statute endorse this interpretation. Firstly, footnotes for the Elements for articles 8(2)(b)(xviii) and 8(2)(e)(xiv) mentioned that '[n]othing in this element shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to the development, production, stockpiling and use of chemical weapons'.[194] Secondly, in the negotiation process of the definition of aggression, the US delegation stated that the definition in article 8*bis* 'does not truly reflect customary international law'.[195] Finally, Understanding 4 in Annex III to the Resolution on Aggression provides that 'the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only', whereas Understanding 4 further adds a similar wording to article 10.[196] Both the footnotes and Understanding 4 confirm that article 10 is not a valid reservation clause.

Article 124 is a transitional provision on war crimes that provides an exception to the prohibition on reservation in article 120. To date, only France and Colombia have invoked article 124 to lodge declarations. France withdrew its declaration, and Colombia's declaration has expired. It is said that Burundi aimed to invoke article 124 but finally ratified the Statute without making a declaration.[197] In 2015, the ASP adopted an amendment to

192 For discussions, see Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 264-65; Otto Triffterer and Alexander Heinze, 'Article 10' in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 648.

193 Vienna Convention on the Law of Treaties, art 43.

194 Elements of Crimes for article 8(2)(e)(xiv) of the Rome Statute, 'employing prohibited gases, liquids, materials or devices in internal armed conflicts', element 2 reads: 'the gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties'.

195 Harold H. Koh, Legal Adviser, US Department of State, 'Statement at the Review Conference of the International Criminal Court' (Kampala, Uganda, 4 June 2010).

196 'Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression', ASP Resolution RC/Res 6, Annexe III.

197 Tabak, 'Article 124, War Crimes, and the Development of the Rome Statute', 1094-95 and fn 150.

delete this transitional provision, which has not yet entered into force.[198] It is clear that article 124 is a temporal jurisdiction limitation rather a substantive reservation or modification to the definition of war crimes.[199] In brief, articles 10 and 124 are not substantive reservation clauses.

Even if articles 10 and 124 were deemed reservation clauses, these texts do not exclude the possibility that the definition of crimes (or war crimes) in the jurisdiction of the ICC was of a declaratory nature. The ICJ in the *North Sea Continental Shelf* cases examined whether a treaty allowing reservation excludes its declaratory nature of custom. The ICJ held that reservations of a treaty rule of a declaratory nature are incompatible with customary law.[200] However, the ICJ in the *Nicaragua* case held that the legal effect of reservation has no direct impact on existing customary law.[201] Baxter and Villiger both shared the latter view that a treaty rule permitting a reservation does not indicate it cannot be of a declaratory nature. In determining if a treaty was declaratory of custom, whether the provision is permitted to be reserved is not relevant.[202] The ILC in its 2011 'Guide to Practice on Reservations to Treaties' further endorsed the ICJ's view in *Nicaragua*.[203] The view of the ICJ in the *North Sea Continental Shelf* cases thus might be less persuasive on this point.[204] The examination shows that a reservation clause in a treaty has no direct legal impact on the analysis of whether a treaty rule was declaratory

198 Amendment to Article 124 of the Rome Statute of the International Criminal Court, ICC-ASP/14/Res2, 26 November 2015, 6 parties. One year after the ratification or acceptance by the 78th of States Parties to this amendment is required for its entry into force, see 1998 Rome Statute, art 121(4).

199 For debates about the legal effect of a temporal jurisdiction restriction, see Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 1519-20; Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 258-59. For discussions on the expiry of the transitional period, see Elizabeth Wilmshurst, 'Jurisdiction of the Court' in R.S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* 127-41; Tabak, 'Article 124, War Crimes, and the Development of the Rome Statute', 1082-83.

200 *North Sea Continental Shelf* cases, 38-39, para 63. Also in *Reservations to the Convention on the Prevention and Punishment of the Crimes of Genocide*, Advisory Opinion, [1951] ICJ Rep 15; Human Rights Committee (HRC), CCPR 'General Comment No 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant' (4 November 1994), UN Doc CCPR/C/21/Rev.1/Add.6, para 8. However, see *North Sea Continental Shelf* cases (Dissenting Opinion of Judge Morelli), 198-99.

201 *Military and Paramilitary Activities* Judgment, 38, 93, paras 56, 174.

202 Baxter, 'Treaties and Custom', 47-51; Villiger, 'The 1969 Vienna Convention on the Law of Treaties: 40 Years After', 67-69. See also Meron, *Human Rights and Humanitarian Norms as Customary Law* 7-8, 10-25; 'Report of the International Law Commission', GAOR 65th Session Supp No 10, UN Doc A/65/10 (2010), pp 171-74; Lepard, *Customary International Law: A New Theory with Practical Applications* 199-200.

203 'Report of the International Law Commission', GAOR 66th Session Supp No 10, UN Doc A/66/10/Add.1 (2011), para 2, Guideline 3.1.5.3.

204 Villiger, 'The 1969 Vienna Convention on the Law of Treaties: 40 Years After'; Baxter, 'Treaties and Custom'.

of custom. In brief, articles 10 and 124 are not obstacles to the examination of provisions of the Rome Statute as being declaratory of custom.

A further observation of whether other specific obstacles exist for the discussions of war crimes and crimes against humanity being of a declaratory nature is necessary. Most provisions of the Statute are irrelevant for the analysis here. Rules of the Statute concerning the jurisdictional mechanisms of the ICC might be relevant. Articles 11 and 24 (temporal jurisdiction) as well as articles 12-13 (personal jurisdiction) design the ICC jurisdictional mechanisms. Meanwhile, the Rome Statute does not adopt universal jurisdiction for the ICC. It seems that these rules are not hard evidence to conclude that crimes defined in the Rome Statute are not the subject for the analysis of a rule as declaratory of custom.[205] Should the Statute have adopted universal jurisdiction, the recognition of universal jurisdiction would indirectly suggest that crimes in the Statute are declaratory of custom.[206] By contrast, the absence of universal jurisdiction is not relevant for the analysis in this research because it can neither affirm nor deny that the offences are international crimes in custom. Thus, rules concerning the limited jurisdictional mechanisms of the ICC as opposed to universal jurisdiction are not obstacles to the discussion of whether crimes are declaratory of custom.[207] The phrase 'under this Statute' in article 22(1) of the Rome Statute concerning the principle of legality also indicates that the crimes outlined in the Statute may be retrogressive than custom, which is not an obstacle to an analysis of their declaratory nature. In short, provisions of the Rome Statute do not impede the analysis of crimes being declaratory of custom.

2.5.2 A treaty rule develops into custom: any obstacles on the passage?

As noted above, the ICJ in the 1969 *North Sea Continental Shelf* cases required that a treaty rule be of a fundamentally 'norm-making' character, forming 'the basis of a general rule of law', to be transformed into customary law.[208] The ICJ also implicitly concluded that a treaty rule subject to reservation would affect its norm-making character.[209] This subsection discusses the issues of norm-making character and reservation clauses, as well as restrictions on the passage in the Rome Statute.

Firstly, as analysed above, the norm-making character is not a legal requirement for a treaty rule passing into custom. Secondly, articles 10 and 124 were not inserted as substantive reservation provisions. Baxter has argued that a treaty rule of 'norm-making' nature can also be subject to reservation. In his view, in determining the nature of a treaty rule after its adop-

205 Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 250-53.
206 UN Doc A/C.6/52/SR.15 (1997), para 15 (ICRC); 'Summary record of the 11th meeting [of the Sixth Committee]', UN Doc A/C.6/55/SR.11 (2000), para 47 (ICRC).
207 Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 250-53.
208 *North Sea Continental Shelf* cases, 42-43, paras 71-72.
209 ibid, 41-42, 50.

tion, the fact that States avail themselves of their rights to reservation demonstrates the acceptance of the rule by States Parties.[210] Therefore, even if articles 10 and 124 were reservation clauses in the Rome Statute, they would not affect the norm-making nature of its rules or hinder the passage of its rule into custom.

Thirdly, the legal impact of a treaty rule with restrictions on its passage into custom is significant. William Butler admitted that drafters of a treaty and States Parties can 'expressly restrict the passage of a treaty rule into custom'.[211] It is the rights of the parties, whether expressly or implicitly, to deny that 'their practice is informed by *opinio juris* and can contribute little to establishing a rule of customary international law'.[212] In this circumstance, a treaty rule plays a lesser role as evidence of the customary status of a rule. These denials, however, do not indicate that a customary rule would not emerge outside the treaty on the subject. They suggest that the treaty provisions as well as practice of States Parties concerning treaty obligations should be given reduced weight. In general, the Rome Statute provides no obstacles to a treaty provision passing into customary law after its adoption in 1998. The Rome Statute contains an express disclaimer in article 80 that provisions on penalties in articles 77-79 do not affect national practice of States.[213] Therefore, these provisions on penalty are of limited value in an assessment of whether they have developed into custom at present. Parts II and III of the Rome Statute, however, do not contain a disclaimer such as article 80. As noted in the Introduction, article 10 in Part II implies the potential impact of the Rome Statute on the 'existing or developing rules of international law' as an aid to interpreting other treaties. Accordingly, drafters of the Rome Statute did not deny, expressly or implicitly, that the selected provisions in this research may affect the development of law outside the instrument. States Parties also do not send such a message. Subsequent practice of States Parties to the Statute will significantly contribute to the development of customary law. The Rome Statute itself does not provide a hindrance to its provisions being declaratory of customary law.

210 Baxter, 'Treaties and Custom', 63-64, arguing that denunciation and revision share the same feature.

211 William Butler, 'Custom, Treaty, State Practice and the 1982 Convention' (1988) 12 *Marine Policy* 182, 184-85.

212 Weisburd, 'Customary International Law: The Problem of Treaties', 23-29.

213 ILA, *Formation of General Customary International Law* 745, § 17; 1998 Rome Statute, article 80 reads: 'Nothing in this Part [Part 7 penalties] affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.'

2.6 Concluding remarks

In this study, a treaty rule is the starting point for determining whether the rule is declaratory of custom. As shown above, the 1969 Vienna Convention and the Rome Statute qualify the interpretation of provisions in the Statute. The two-element approach serves as a general guideline for the identification of customary law. This approach, however, should not be too rigid for specific rules. This research adopts a flexible two-element approach focusing more on *opinio juris* to identify the existence of customary law. Before ascertaining the status of custom, another layer of analysis is added as to whether a treaty rule articulates itself as a reflection of a pre-existing customary rule or is of a norm-making nature. This layer of analysis provides a preliminary but inconclusive finding for the status of a customary rule. It is the evidence of the two elements that assists in identifying the existence or non-existence of a customary rule. In this study, a treaty rule of 'declaratory' nature illustrates the relationship between a treaty rule and custom on the same subject matter in 1998 and at present. The following chapters examine the nature of selected provisions of the Rome Statute based on this methodological framework.

3 War Crimes in Non-International Armed Conflict: Article 8 of the Rome Statute and Custom

3.1 Introductory remarks

War crimes in the strict sense are violations of international humanitarian law that are criminalised under international law.[1] The main part of international humanitarian law is contained in 'Hague law' and 'Geneva law', named after the conventions that were adopted in those two cities. The primary rules applicable to non-international armed conflict are Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II of 1977. Apart from treaty law, customary law mostly codified in treaties is the other main source of international humanitarian law.

Although only a few conventions of international humanitarian law expressly incriminate violations of their rules as war crimes,[2] the definition of war crimes under international law was well developed after World War II. War crimes were explicitly provided in a series of treaty provisions, such as article 6 of the 1945 Nuremberg Charter, articles 2 and 3 of the 1993 Statute of the ICTY, and article 4 of the 1994 Statute of the ICTR, as well as article 8 of the Rome Statute. Article 8 of the Rome Statute includes war crimes committed in both international and non-international armed conflicts (also referred to as internal armed conflict).[3] The definition of war crimes in article 8 is divided into four categories based on the nature of the armed conflict and the specific area of international humanitarian law. Articles 8(2)(c) and 8(2)(e) of the Rome Statute list serious violations of Common Article 3 of the 1949 Geneva Conventions and other serious violations of the laws and customs committed in the context of non-international armed conflict.[4]

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1 The concept of war crimes is different from crimes occurred in or of war, see Georges Abi-Saab, 'The Concept of War Crimes' in S. Yee and T. Wang (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (New York: Routledge 2001) 112-13; Michael Cottier, 'Article 8' in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 304-05 and fn 1; Timothy McCormack, 'Crimes against Humanity' in D. McGoldrick *et al* (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart Publishing 2004) 204-05.

2 Geneva Convention I, art 49; Geneva Convention II, art 51; Geneva Convention III, art 130; Geneva Convention IV, art 147; the 1977 Additional Protocol I, arts 11 and 85.

3 1998 Rome Statute, art 8.

4 ibid, arts 8(2)(a) and (b).

This Chapter examines the relationship between articles 8(2)(c) and (e) of the Rome Statute and customary law with regard to the definition of war crimes committed in non-international armed conflict.[5] Up to the early 1990s, the customary nature of war crimes in non-international armed conflict was controversial. In 1995, the Appeals Chamber of the ICTY in the *Tadić* decision on jurisdiction upheld, however, that war crimes can also be committed in non-international armed conflict, and that this reflects customary international law.[6] At the present time, commentators agree that the rule of war crimes in non-international armed conflict is a part of customary law.[7] For example, Rule 156 of the 2005 ICRC *Study* provides that 'serious violations of international humanitarian law constitute war crimes, applicable in both international and non-international armed conflicts'.[8]

The central question here is whether articles 8(2)(c) and (e) were and are of a declaratory nature (reflection or crystallisation) of customary law in 1998 and at present with respect to war crimes in non-international armed conflict. For this purpose, section 3.2 interprets the texts of the Rome Statute to show whether articles 8(2)(c) and (e) are articulated as being declaratory of custom concerning war crimes in non-international armed conflict. Section 3.3 explores the development of war crimes trials and the concept of war crimes in armed conflict before and after World War II to show whether the definition of war crimes in non-international armed conflict under international law developed after World War II and before the 1998 Rome Conference. The 1949 Geneva Conventions, the 1977 Additional Protocol II, the two *Tadić* decisions on jurisdiction and the work of the International Law Commission on the Draft Code of Crimes are mainly discussed in section 3.3. Section 3.4 observes the drafting of the Rome Statute on the issue of war crimes in non-international armed conflict, in which positions of States and their statements at the Rome Conference are carefully explored. Further developments of war crimes in this context after the adoption of the Rome Statute are examined in section 3.5. Section 3.6 concludes with closing remarks based on this examination of the relationship between article 8 and custom on war crimes in non-international armed conflict.

5 ibid, art 8.

6 *Tadić* Appeals Chamber Decision on Jurisdiction, paras 130-34.

7 JM. Henckaerts and L. Doswald-beck (eds), *Customary International Humanitarian Law*, Vols I and II (New York: CUP 2005), Rule 156 and accompanying commentary; Robert Heinsch, '*Commentary on Rule 84 "Individual Criminal Responsibility for War Crimes"*' in M.N. Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Warfare* (2nd edn, Cambridge: CUP 2017) 392.

8 Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol I, Rule 156.

3.2 War crimes in non-international armed conflict in the Rome Statute

The text of article 8 does not expressly address whether article 8 is declaratory of custom with respect to war crimes in non-international armed conflict. A further assessment of the Rome Statute helps to answer whether other provisions indicate a preliminary affirmation for article 8 as declaratory of custom. First, the Preamble of the Rome Statute provides that crimes in the jurisdiction of the ICC are 'grave crimes [that] threaten the peace, security and well-being of the world'.[9] These crimes are 'the most serious crimes of concern to the international community as a whole' and 'must not go unpunished'.[10] The notion of 'seriousness' is also reiterated in articles 8(2)(c) and (e) of the Rome Statute.[11] The wording of grave and serious crimes in the Preamble does not suggest that these crimes are in nature crimes under customary law rather than that these offences are widespread and heinous.[12]

In addition, the statement that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'[13] suggests that normally States rather than international tribunals are obliged to prosecute international crimes, including war crimes. The ICJ once held that some international crimes give rise to the *erga omnes* nature of an obligation.[14] However, the *erga omnes* obligation does not indicate the crime is of a customary status. The '*erga omnes*' status of an obligation may derive from crimes embedded in either treaty or custom.[15] Thus, the duty to prosecute crimes in the Preamble of the Rome Statute does not indicate whether these crimes are exclusively crimes under customary law. Leena Grover also supports this view.[16] The Preamble, therefore, does not assist in assessing whether articles 8(2)(c) and (e) were declaratory rules of custom concerning war crimes.

According to Grover, article 5 of the Statute (material jurisdiction) and the *jus cogens* nature of these crimes also suggest that article 8 may well be reflective of custom about war crimes.[17] She concluded that crimes in the

9 1998 Rome Statute, Preamble, para 3.
10 ibid, para 4.
11 Elements of Crimes, in 'Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court', ICC-ASP/1/3 and Corr.1, p 108, UN Doc PCNICC/2000/1/Add.2.
12 Margaret M. deGuzman, 'Gravity and Legitimacy of the International Criminal Court' (2008) 32 *Fordham Intl LJ* 1400.
13 1998 Rome Statute, Preamble, para 6.
14 *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*), Judgment, [1970] ICJ Rep 3, 32, para 33.
15 Institut de Droit International, 'Obligations and rights *erga omnes* in international law', Resolution of the Fifth Commission (2005) (Rapporteur Giorgio Gaja), art 1; Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 250.
16 ibid, 249-50.
17 ibid, 247-50.

Rome Statute might be reflective of customary law.[18] Indeed, if the prohibition of war crimes is a rule of *jus cogens*, all individuals under customary law are prohibited from committing war crimes, and States cannot derogate from this rule by reserving the right to permit impugned conducts of war crimes. However, the *jus cogens* nature of war crimes does not inherently imply an obligation upon all States to prosecute war crimes.[19] The gravity threshold, article 5 and the *jus cogens* nature of war crimes are evidence but not conclusive as to whether war crimes in non-international armed conflict and its underlying offences in the Statute were declaratory of custom. Other provisions of the Statute do not clarify whether these war crimes are declaratory of custom.[20] These findings also apply to crimes against humanity, discussed in the next chapter.

The text of article 8 and other rules of the Rome Statute only draw a frame for the picture of war crimes in non-international armed conflict as a mirror of custom in general. Detailed issues about the inclusion of war crimes in non-international armed conflict beg the question whether war crimes in non-international armed conflict were a restatement (codification) or crystallisation of custom at the Rome Conference. During the preparatory works for the 1998 Rome Statute of the International Criminal Court, representatives of States expressed their claims and acceptable options for the inclusion of war crimes in armed conflict in the Rome Statute.[21] One issue fiercely debated was whether the concept of war crimes covers violations in non-international armed conflict. The majority of State representatives supported the inclusion of war crimes in non-international armed conflict;[22] arguments to the contrary existed among a small group of States.[23]

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18 ibid, 220-344.

19 See a different view, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi', UN Doc A/CN.4/L.682 and Corr.1 (2006), paras 188-89; Leila N. Sadat and Richard Carden, 'The New International Criminal Court: An Uneasy Revolution' (1999) 88 *Geo LJ* 381, 409-10; Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 250 arguing that these crimes in art 5 of the Rome Statute have 'the status of custom and even of *jus cogens* obligation'.

20 For a detailed analysis, see Grover, ibid, 246-70.

21 UN Doc A/CONF.183/2/Add.1 and Corr.1, UN Doc A/CONF.183/2/Add.1 and Corr.1, UN Doc A/CONF.183/C.1/L.1 and Corr.1, and UN Doc A/CONF.183/C.1/L.4; Mahnoush Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *AJIL* 22, 32.

22 UN Doc A/CONF.183/SR.7, 25 January 1997, pp 4-5 (Bangladesh); US, 'Statement by the US delegation to the Preparatory Committee on the Establishment of an International Criminal Court', 23 March 1998.

23 UN Doc A/CONF.183/C.1/SR.33, paras 33 (Syrian Arab Republic), 37 (India); UN Doc A/CONF.183/C.1/SR.34, para 48 (Turkey); UN Doc A/CONF.183/C.1/SR.35, paras 2, 4 (Egypt), 54 (Pakistan), 64 (Iraq); UN Doc A/CONF.183/C.1/SR.36, para 6 (Libya).

Some States continued to challenge the customary status of war crimes in non-international armed conflict.[24] These debates indicate that the answer is unclear. Issues of war crimes in non-international armed conflict under customary law before and during the adoption of the Rome Statute must be considered separately because this difference remains crucial for present and future national authorities in prosecuting war crimes committed in the past based on *ex post facto* laws.

3.3 War crimes in armed conflict

This section provides an historical overview of the concept of war crimes. For clarity of argument, this section covers three periods, first from 1919 to 1945, then from 1945 to 1949, and last from 1949 to the early 1990s. During the first two periods, war crimes in non-international armed conflict were not discussed. A short overview of war crimes trials in the first two periods intends to provide a background for understanding some arguments in the following sections of this Chapter and the following chapters.

3.3.1 Stocktaking of war crimes and war crimes trials: 1919-1945

The idea of prosecuting war crimes through international tribunals against large-scale atrocities has emerged mainly only after World War I,[25] although war crimes trials have been conducted by national authorities for a long time.[26] After World War I, the Preliminary Peace Conference of Paris established the Commission on Responsibilities of the Authors of the War and on Enforcement of Penalties (1919 Commission on Responsibilities) to inquire into 'the responsibilities relating to the war'.[27] The 1919 Commission on Responsibilities elaborated a list of 32 offences criminalising violations of

24 For example, China, see UN Doc A/CONF.183/C.1/SR.5, para 120; A/CONF.183/C.1/SR.25, para 36, UN Doc A/CONF.183/SR.9, para 38.

25 Y. Dinstein and M. Tabory (eds), *War Crimes in International Law* (The Hague: Martinus Nijhoff Publishers 1996) 51; Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (Cambridge: CUP 2014) 266-68.

26 William A. Schabas, 'Atrocity Crimes (Genocide, Crimes against Humanity and War Crimes)' in W.A. Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge: CUP 2016) 208; M Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, Leiden: Brill 2013) 540-48; Anthony Cullen, 'War Crimes' in N. Bernaz and W.A. Schabas (eds), *Routledge Handbook of International Criminal Law* (London: Routledge 2011); Timothy McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime' in T. McCormack and G.J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (The Hague: Martinus Nijhoff Publishers 1997).

27 See Geo A. Finch, 'The Peace Conference of Paris, 1919' (1919) 13 *AJIL* 159, 168-71; United Nations War Crimes Commission (ed), *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO 1948) [UNWCC (ed), *History of the UNWCC and the Development of the Laws of War*] 34.

the laws and customs of law.[28] The list was not a text invention but reflected main facts at that time.[29] The idea of prosecuting individuals for war crimes was included under article 228 of the 1919 Treaty of Versailles.[30] In fact, there were trials of Germans accused of war crimes by the Allied national tribunals, but there was no extradition after the armistice. Meanwhile, few of the accused were tried for mistreating prisoners of war and murdering survivors of shipwrecks by the German Reichsgericht (Supreme Court) in Leipzig.[31]

The Report of the Commission on Responsibilities and article 228 evidenced that the Allies States attempted to prosecute individuals for war crimes at an international level. Nevertheless, it is uncertain whether they intended to pursue justice or only to achieve political ends by using justice. The US supported that persons should be punished for their violations of the laws and customs of war in national courts, instead of an international tribunal.[32] From World War I to World War II, except for the ILA's effort to include war crimes as an international crime, not much constructive contribution to the definition of war crimes existed.[33] In 1926, the International Law Asso-

28 Commission on Responsibilities, 'Report on the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties Presented to the Preliminary Peace Conference' reprinted in (1920) 14 *AJIL* 95 [Report of the Commission on Responsibilities], 114-15. The 32 offences are listed as follows: '(1) Murders and massacres; systematic terrorism; (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 in connection with the military operations of the enemy; (10) Usurpation of sovereignty during military occupation; (11) Compulsory enlistment of soldiers among the inhabitants of occupied territory; (12) Attempts to denationalise the inhabitants of occupied territory; (13) Pillage; (14) Confiscation of property; (15) Exaction of illegitimate or of exorbitant contributions and requisitions; (16) Debasement of currency, and issue of spurious currency; (17) Imposition of collective penalty; (18) Wanton devastation and destruction of property; (19) Deliberate bombardment of undefended places; (20) Wanton destruction of religious, charitable, educational and historic buildings and monuments; (21) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew; (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 other inhuman appliances; (28) Direction to give no quarter; (29) Ill-treatment of wounded and prisoners of war; (30) Employment of prisoners of war on unauthorised works; (31) Misuse of flags of truce; and (32) Poisoning of wells.'

29 Yves Sandoz, 'The History of the Grave Breaches Regime' (2009) 7 *JICJ* 657, 667-69.

30 Treaty of Peace with Germany (Treaty of Versailles), 28 June 1919, in 2 Bevans 43, p 137, art 228(1).

31 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 45-51; Bassiouni, *Introduction to International Criminal Law* 547-48.

32 Report of the Commission on Responsibilities, 127, 140-42.

33 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 45-51; William A. Schabas, 'The United Nations War Crimes Commission's Proposal for an International Criminal Court' (2014) 25 *CLF* 171.

ciation (ILA) adopted a Draft Statute for a Permanent International Criminal Court, which suggested including 'violations of treaties, conventions or declarations regulating the methods of conduct of warfare and violations of the laws and customs of war' into the jurisdiction of that proposed court.[34] This definition of war crimes is quite open. During the period from 1919 to 1945, the notion of war crimes is mostly defined as 'violations of the laws and customs of law'. The wording 'crime' in the phrase 'war crimes' referred to the non-fulfilment of obligations under the law or 'violations' of law, instead of 'serious' violations of the laws at that time. The phrase 'war crimes' was not used in a technical legal sense but in a general sense.[35] This general definition constitutes the main substantive part of war crimes now. The notion of international prosecution of war crimes in non-international armed conflict was not considered in the period from 1919 to 1945.

3.3.2 War crimes trials after World War II: 1945-1949

The outcome of World War I practice was unsatisfactory, but it began a trend of trying individuals for violations of international law during a war. The first actual international prosecution of war crimes before international tribunals began after World War II.[36] The work of the United Nations War Crimes Commission (UN War Crimes Commission) paved the way for this.[37] In 1943, the Allied Powers established the UN War Crimes Commission to investigate and collect evidence of war crimes for further prosecutions at national courts.[38] The UN War Crimes Commission adopted a 'draft convention of a permanent United Nations War Crimes Court' (Draft Convention), relying on a draft statute prepared by Lawrence Preuss (Preuss Draft).[39] Article 1 of the Preuss Draft provided a list of offences constituting

34 Committee on Permanent International Criminal Court, 'Statute of the Court (as amended by the Conference)' in International Law Association Report of the 34th Conference (Vienna 1926) (ILA, London 1926) 118, art 21.

35 'Report of the International Law Commission', GAOR 51st Session Supp No 10, UN Doc A/51/10 (1996), para 50, p 54.

36 William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: CUP 2006) 226-27.

37 Schabas, 'The United Nations War Crimes Commission's Proposal for an International Criminal Court'; Bassiouni, *Introduction to International Criminal Law* 549-51.

38 It was established by the meeting of the Allied and Dominions representatives held in London on 20 October 1943. The 'United Nations' in this Commission was unrelated to the present world body founded in 1945. The evidence collected by the United Nations War Crimes Commission was not relied upon by the later international tribunals, but by national prosecutions. See Bassiouni, *Introduction to International Criminal Law* 549-51.

39 'Draft Convention on the Trial and Punishment of War Criminals', II/11 (14 April 1944); Schabas, 'The United Nations War Crimes Commission's Proposal for an International Criminal Court', 175-76; 'Minutes of Thirty-third Meeting' (26 September 1944), M. 33 (corrected text), 6; 'Draft Convention for the Establishment of a United Nations War Crimes Court' (30 September 1944), C. 50(1).

war crimes with 15 offences.[40] By contrast, the UN War Crimes Commission dropped the list so as to 'give the [UN War Crimes] Court the necessary latitude of action to carry out the intention of the Allied governments' to prosecute Germans.[41] It seems that it did not aim to provide a detailed enumeration of war crimes.

The Preamble and article 1 of the Draft Convention restricted jurisdiction to war crimes committed by the enemies.[42] Some States were worried about the risk of prosecuting offences committed by the Allied parties.[43] The London Conference involving the UK, the US, France and the Union of Soviet Socialist Republics (USSR) had been advocating the establishment of the international military tribunal since late June 1945.[44] Aiming to prosecute and punish German major war criminals of the European Axis in World War II,[45] governments of the four States adopted the London Agreement, to which they annexed the Nuremberg Charter, on 8 August 1945.[46] Other States as main contributors to the work of the UN War Crimes Commission were excluded from the negotiation of the London Agreement, but they finally acceded to this Agreement.[47] In accordance with the London Agreement, the International Military Tribunal (IMT) was established, and the Nuremberg Charter set out the IMT's constitution, jurisdiction, and function.[48]

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40 These offences were murder or massacre, rape, enforced prosecution, terrorisation, wanton devastation, other serious acts, which by reason of their atrocious character, their ruthless disregard of the sanctity of human life and personality or their wanton interference with rights of property, are unrelated to reasonably conceived requirements of military necessity.

41 'Explanatory Memorandum to Accompany the Draft Convention for the Establishment of a United Nations War Crimes Court' (6 October 1944), C. 58.

42 'Draft Convention for the Establishment of a United Nations War Crimes Court' (30 September 1944), C. 50(1).

43 William A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: OUP 2012) 74-75.

44 *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Washington, DC: USGPO 1949).

45 The Moscow Declaration on General Security, Joint Four-Nation Declaration, 30 October 1943.

46 Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, 82 UNTS 280 [London Agreement]; Charter of the International Military Tribunal-Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, 82 UNTS 284 [Nuremberg Charter].

47 Greece, Denmark, Yugoslavia, Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay. See *France et al v Göring et al*, Judgement and Sentence of the Nuremberg International Military Tribunals, in *Trial of the Major War Criminals before the International Military Tribunals: Nuremberg, 14 November 1945-1 October 1946* (Blue Series) (Nuremberg: International Military Tribunal 1947), (1948) 1 TMWC 171, (1946) 41 *AJIL* 172 [*France et al v Göring et al*, (1948) 1 TMWC 171].

48 London Agreement, art 2; Nuremberg Charter; *France et al v Göring et al*, Preliminary Hearing (14-15, 17 November 1945, in Berlin), (1948) 2 TMWC 1, pp 1-27.

According to article 6(b) of the Nuremberg Charter the IMT had jurisdiction over:

> War crimes: *namely*, violations of the laws or customs of war. Such violations shall include, *but not be limited to*, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.[49]

Article 6(b) defined war crimes with a non-exhaustive catalogue and from a general aspect of actions that violate 'the laws or customs of war'. The IMT held that '[t]his law [of war] is not static, but by continual adaptation follows the needs of a changing world.'[50] The UN Secretary-General commented that

> Any enumeration or exemplification of particular war crimes […] seems to be […] of rather limited value for the future. Such a catalogue may be an adequate expression of the present situation […].[51]

In this way, the Nuremberg Charter left the door open for further development. In the IMT, 18 of 24 individuals were indicted for war crimes, and 16 of the 18 indicted were convicted of war crimes.[52]

Based on the Tokyo Charter, the Tokyo International Military Tribunal for the Far East (IMTFE) was established to try Japanese officials.[53] Article 5(b) of the Tokyo Charter stipulated that the IMTFE had jurisdiction over 'conventional war crimes: namely, violations of the laws or customs of war'.[54] Article 5(b) did not specify what and the extent to which acts constituted violations of laws of war leading to criminalisation.[55] In addition, the IMTFE was required to establish a connection between war crimes and crimes against peace in exercising jurisdiction over war crimes. This jurisdictional requirement, instead of a legal element of war crimes, limited the suspects prosecuted in the Tribunal to major war criminals. The IMTFE

49 Italics by the author.
50 *France et al v Göring et al*, (1948) 1 TMWC 171, p 221.
51 'The Charter and Judgment of the Nuremberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General', UN Doc A/CN.4/5 (1949), pp 62-63.
52 *France et al v Göring et al*, (1948) 1 TMWC 171; Bassiouni, *Crimes against Humanity* 154.
53 Charter of the International Military Tribunal for the Far East, 19 January 1946, as amended on 26 April 1946, in 4 Bevans 21 [Tokyo Charter].
54 Tokyo Charter, art 5.
55 *France et al v Göring et al*, (1948) 1 TMWC 171, p 221; UN Doc A/CN.4/5 (1949), p 51.

found seven of 28 Japanese individuals guilty of conventional war crimes.[56] The Dutch Judge Röling argued that three defendants had been wrongfully acquitted of some charges of war crimes,[57] while another two should have been convicted of war crimes.[58]

A number of national trials also took place.[59] From 1946 to 1949, the Nuremberg Military Tribunals (the NMTs) held 12 trials (Subsequent Proceedings)[60] in Germany in accordance with Control Council Law No. 10.[61] The definition of war crimes in Control Council Law No. 10 is substantively consistent with that in the Nuremberg Charter.[62] In addition, some other States also prosecuted suspects of war crimes committed during World War II.[63] Australia, China, the US, the USSR, the UK, the Philippines and the Netherlands (Indonesia) were all involved in war crimes trials.[64] There

56 *US et al v Araki et al*, Judgment, in United Nations War Crimes Commission (ed), Transcripts of Proceedings and Documents of the International Military Tribunals for the Far East (Tokyo Trials): Judgment [*US et al v Araki et al*, Judgment], verdicts, pp 1145-211. Two individuals were dead during the proceeding for diseases. One charge was dropped because the accused was found mentally unfit for trial. The seven defendants were Kōki Hirota, Akira Mutō, Heitarō Kimura, Seishirō Itaganki, Iwane Matsui, Kenji Dohihara and Hideki Tōjō.

57 The three defendants were Takasumi Oka, Kenryo Stato and Shigetaro Shimada.

58 Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: CUP 2005) 45. *US et al v Araki et al*, Dissenting Opinion of Judge Röling, pp 178-249. The two defendants were Mamoru Shigemitsu and Kōki Hirota.

59 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War*, 522-24; United States *et al*, 'Report of the Deputy Judge Advocate for War Crimes, European Command June 1944 to July 1948' (War Crimes Division, Office of the Judge Advocate General, 1948) concerning German and other Axis individuals, there were practices of charging, prosecuting or trying at Separate locations, in and outside German.

60 *US v Brandt* [*Medical* case], *US v Milch* [*Milch* case], *US v Altstötter* [*Justice* case], *US v Pohl* [*Pohl* case], *US v Flick* [*Flick* case], *US v Krauch* [*I.G. Farben* case], *US v List* [*Hostage* case], *US v Greifelt* [*RuSHA* case], *US v Ohlendorf* [*Einsatzgruppen* case], *US v Krupp* [*Krupp* case], *US v von Weizaecker* [*Ministries* case], *US v von Leeb* [*High Command* case], in *Trials of the War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* [TWC] (Washington, DC: USGPO 1946-1949).

61 Control Council Law No. 10, 'Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity', enacted by the Allied Control Council of German, in Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10* (Washington, DC: USGPO 1949) 6. For detailed analysis of these trials, see Kevin J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: OUP 2011).

62 Control Council Law No. 10, art II.

63 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War*; *R v Finta* (Judgment, Supreme Court), [1994] 1 SCR 701; *Advocate General v Klaus Barbie* (Judgment, Court of Cassation, France), (1985) 78 ILR 124; *Polyukhovich v The Commonwealth of Australia and Anor* (Order, High Court), (1991) 172 CLR 501; *Public Prosecutor v Menten* (Judgment, Supreme Court), (1981) 75 ILR 331; *R v Sawoniuk* (Judgment), [2000] EWCA Crim 9 (10 February 2000).

64 See S. Linton (ed), *Hong Kong's War Crimes Trials* (Oxford: OUP 2013); K. Sellars, *Trials for International Crimes in Asia* (Cambridge: CUP 2016); G. Fitzpatrick, T. McCormack and N. Morris (eds), *Australia's War Crimes Trials 1945-51* (Leiden: Brill 2016); Fred L. Borch, *Military Trials of War Criminals in the Netherlands East Indies 1946-1949* (Oxford: OUP 2017).

were proceedings in the Asia Pacific region, including war crimes trials at Yokohama.[65] Many suspected war criminals were accused of or found guilty of ordering or perpetrating 'conventional war crimes' in these national tribunals.[66] These post-World War II trials leave much legacy for the latter UN *ad hoc* tribunals and the ICC,[67] despite criticism of their procedures.[68]

One point deserves attention with respect to war crimes. Despite debates about retroactive prosecution over other crimes, war crimes as international crimes in the jurisdiction of the IMT was well supported.[69] It is accepted that the Nuremberg Charter contributed to the formation of customary international law and it forms part of contemporary customary law.[70] The following international instruments and subsequent case law also confirmed that the Nuremberg Charter was an established part of international law.[71] A unanimously adopted General Assembly resolution, 'Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal'

65 *Yamashita v United States of America*, [1946] USSC 27, (1948) 4 LRTWC 1; *Prosecutor v Eisentrager et al* (Judgment, Military Commission, the US), (1949) 14 LRTWC 8. For a table of war crimes trials in the Far East, see P. Post *et al* (eds), *The Encyclopedia of Indonesia in the Pacific War* (Leiden: Brill 2010) 409.

66 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War*; Philip Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951* (Austin: University of Texas Press 2013).

67 David Luban, 'The Legacies of Nuremberg' (1987) 54 *Social Research* 779; George Ginsburgs and Vladimir N. Kudr͡iav͡tsev, *The Nuremberg Trial and International Law* (The Hague: Martinus Nijhoff Publishers 1990); Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 *JICJ* 830; Antonio Cassese, 'Introductory Note', UN Audiovisual Library of International Law, Historical Archives.

68 Bassiouni, *Introduction to International Criminal Law* 556; Ginsburgs and Kudr͡iav͡tsev, *The Nuremberg Trial and International Law*; Telford Taylor, 'The Nuremberg Trials' (1955) 55 *Columbia L Rev* 488; Hans Ehard, 'The Nuremberg Trial against the Major War Criminals and International Law' (1949) 43 *AJIL* 223.

69 For debates, see *France et al v Göring et al*, (1948) 1 TMWC 171, pp 218-20; 'Summary record of the 44th meeting of the 2nd session', UN Doc A/CN.4/SR.44 (1950), paras 71, 72, 77, 79; Josef L. Kunz, 'The Nature of Customary International Law' (1953) 47 *AJIL* 662, 669; Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* 123-24. For support, see Lord Wright, 'War Crimes under International Law' (1946) 62 *LQR* 40, 41; 'Minutes of Conference Session of July 19, 1945' and 'Minutes of Conference Session of July 23, 1945', in *Report of Robert H. Jackson* 296 (Professor André Gros), 331 (Justice Robert H. Jackson).

70 'Universal Declaration of Human Rights', GA Res 217 (III) A (1948), UN Doc A/RES/217 (III) A; Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 5 November 1950, 3 September 1953, 213 UNTS 221, art 7(2); UN Doc S/25704 (1993), para 35; *Tadić* Appeals Chamber Decision on Jurisdiction, para 141.

71 *Justice* case, (1948) 3 TWC 3, p 966; *Attorney General v Eichmann* (Appeal Judgment, Supreme Court, Israel), 29 May 1962, (1968) 36 ILR 277, para 11; *Prosecutor v Erdemović* (Joint Separate Opinion of Judge McDonald and Judge Vohrah) ICTY-96-22-A (7 October 1997), para 51; *Tadić* Appeals Chamber Judgment, para 289; 'Summary record of the Fifty-Fourth Meeting', UN Doc E/CN.4/SR.54 (1948), 13; *Kononov v Latvia* (Judgment, Merits and Just Satisfaction, Third Section) ECtHR Application No. 36376/04 (24 July 2008), para 115(b); William A. Schabas, 'Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights' (2011) 9 *JICJ* 609, 609-10; William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: OUP 2015).

(1946 GA Resolution) directly confirmed that a war crime is an international crime.[72] William Schabas argued that by referring to 'international law' in article 11 of the 1948 Universal Declaration of Human Rights,[73] debates about the rule against non-retroactivity in article 11 indicate States' recognition of the legitimacy of the IMT judgment and the Subsequent Proceedings.[74] War crimes embedded in the 1950 Nuremberg Principles, which was adopted by the ILC,[75] are part of the corpus of customary law now.[76]

In a nutshell, the notion of war crimes has been well recognised in international law. Nevertheless, similar to the period after World War I, issues about war crimes in non-international armed conflict were not raised during the discussions in the IMT and IMTFE judgments as well as these subsequent international instruments, including the 1950 Nuremberg Principles.[77]

3.3.3 Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II of 1977: 1949–early 1990s

During the timeframe from 1949 to the early 1990s, the four 1949 Geneva Conventions and their two 1977 Additional Protocols further developed the definition of war crimes.[78] The 1960 ICRC Commentary wrote that '[t]he Geneva Conventions form part of what are generally known as the laws and customs of war, violations of which are commonly called "war crimes"'.[79] This subsection first briefly examines Common Article 3 of the 1949 Geneva Conventions and then introduces article 6 of Additional Protocol II in non-international armed conflict.

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72 'Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal', GA Res 95 (I) (1946), UN Doc A/RES/95 (I).

73 UN Doc A/RES/217 (III) A.

74 'Summary record of the Hundred and Fifteenth Meeting [of the Third Committee]' (28 October 1948), UN Doc A/C.3/SR.115; 'Summary record of the Hundred and Sixteenth Meeting [of the Third Committee]' (29 October 1948), UN Doc A/C.3/SR.116; 'Summary record of the Fifty-Fourth Meeting' (10 June 1948), UN Doc E/CN.4/SR.54, p 13. See W.A. Schabas (ed), *The Universal Declaration of Human Rights: The Travaux Préparatoires* (Cambridge: CUP 2013) 2369-78, 2380-90.

75 The ILC was not established at that time, but the establishment of it had been recommended by a drafting-committee of its predecessor, Committee on the Progressive Development of International Law and its Codification to the General Assembly. See 'Report of the Committee on the plans for the formulation of the principles of the Nuremberg Charter and judgment' (17 June 1947), UN Doc A/AC.10/52 (1947), para 2; UN Doc A/RES/94 (I) (1946).

76 Cassese, 'Introductory Note', pp 6-7.

77 For discussions of war crimes, see 'Summary record of the 49th meeting of the 2nd session', UN Doc A/CN.4/SR.49 (1950), paras 2, 15.

78 Geneva Convention I, arts 49 and 50; Geneva Convention II, arts 51 and 52; Geneva Convention III, arts 130 and 131; and Geneva Convention IV, arts 147 and 148. See Cullen, 'War Crimes'; Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law*.

79 Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Vol II (Geneva: ICRC 1960) 261.

3.3.3.1 Common Article 3 of the Geneva Conventions

Common Article 3 of the 1949 Geneva Conventions concerns the application of principles of the Geneva Conventions to non-international armed conflicts. Common Article 3 prohibits the following acts against protected persons:

> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples.[80]

This provision was the only provision in the Geneva Conventions that dealt with the protection of persons as human beings rather than as combatants in non-international armed conflict.[81] Common Article 3 applies to both kinds of armed conflicts because this 'minimum requirement of humanitarian guarantees in the case of a non-international armed conflict is a *fortiori* applicable in international conflicts'.[82]

However, Common Article 3 does not include an enforcement mechanism by prosecuting violations of it as war crimes in international law.[83] At the 1949 Geneva Conference, there was no discussion on violations of Common Article 3 as war crimes.[84] Common Article 3 was finally adopted with the compromise that:

> It makes it absolutely clear that the object of the Convention is a purely humanitarian one, that it is in no way concerned with the internal affairs of States, and that it merely ensures respect for the few essential rules of humanity […]. Consequently, the fact of applying Article 3 does not in itself constitute any recognition by the *de jure* Government that the adverse Party has authority of any kind; […]; it does not in any way affect its [the Government's] right to prosecute, try and sentence its adversaries for their crimes, according to its own laws.[85]

The parties to a non-international armed conflict are neither obliged nor entitled by Common Article 3 to punish violations of Common Article 3 as 'war crimes' at the international level at that time. Rather, Common Article 3

80 1949 Geneva Conventions, Common Article 3.

81 Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Vol I (Geneva: ICRC 1952) 48.

82 *Military and Paramilitary Activities* Judgment 114, para 218; Jean de Preux, *Commentary on the Geneva Conventions of 12 August 1949*, Vol III (Geneva: ICRC 1960) 16.

83 Lindsey Cameron et al, 'Article 3-Conflicts not of an international character' in ICRC (ed), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge: CUP 2016), para 520.

84 Final Record of the Diplomatic Conference of Geneva of 1949, Vol II-B.

85 Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Vol I, 60-61.

simply recognises the competency of a State Party to punish rebels and soldiers' violations as crimes at the national level 'according to its own laws'.[86]

At that time, the grave breaches regime of the Geneva Conventions was the only category of war crimes recognised at the international level, which is one of four categories of war crimes now.[87] In addition, the idea of extending the grave breaches regime to non-international armed conflict was not envisaged by the 1949 Conference.[88] As Sandesh Sivakumaran observed, although the majority of States favoured the extension of regulation to non-international armed conflict, 'a number of States took the view that civil wars should not be regulated through international law'.[89] It is inconclusive to argue that those States supporting regulation of civil wars had considered the criminalisation of violations of Common Article 3 as war crimes.[90]

To sum up, at the 1949 Geneva Conference, States Parties had not recognised such violations in non-international armed conflict as war crimes. The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity simply referred to the definition of war crimes committed in international armed conflict in the Nuremberg Charter.[91] There was no further development about war crimes in non-international armed conflict in international law in that period, despite many conflicts at that time.

3.3.3.2 Additional Protocol II of 1977

The 1977 Additional Protocol II, according to its article 1(1), covers the applicable humanitarian law in non-international armed conflict. The following paragraph discusses whether the notion of war crimes was recognised in Protocol II. Article 6 of Additional Protocol II deals with 'penal prosecution'. Article 6(1) provides the scope of the application of article 6 to the trial of 'criminal offences related to the armed conflict'. Article 6(5) of Protocol II

86 Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol I: Rules, Rule 157; Cameron *et al*, 'Article 3', para 528.

87 Jean-Marie Henckaerts and Heike Niebergall-Lackner, 'Introduction' in ICRC (ed), *Commentary on the First Geneva Convention*, paras 1, 11.

88 'Fourth Report drawn up by the Special Committee of the Joint Committee' in *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol II-B, pp 114-18; *Tadić* Appeals Chamber Decision on Jurisdiction, paras 79-81, 84. But see 'Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v Tadić*, 17 July 1995 (Case No. IT-94-1-T)', p 35; *Tadić* Appeals Chamber Decision on Jurisdiction, para 83.

89 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP: Oxford 2012) 40-41.

90 'Prosecutor's Response to the Defence's Motions filed on 23 June 1995' (7 July 1995), 44-47; The 2016 *Commentary on the First Geneva Convention* confirmed this interpretation.

91 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968, 11 November 1970, 754 UNTS 73.

concerns amnesty. It reads that '[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.' Meanwhile, according to Rule 159 of the 2005 ICRC *Study*,

> At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes.[92]

By referring to article 6(5) to support Rule 159, the ICRC *Study* appears to interpret article 6(5) in such a way that amnesty does not apply to war crimes committed in non-international armed conflict.[93] This interpretation is contestable.[94] If States Parties had not recognised serious violations in non-international armed conflict as war crimes in the text of Additional Protocol II, how could they deem war crimes in this context as an exception to amnesty?

The text of article 6 does not stipulate war crimes. It seems that drafters of Additional Protocol II also did not aim to include war crimes in non-international armed conflict in international law.[95] Article 6(2)(c) of Additional Protocol II confirms the non-retroactivity principle under 'the law' that 'no one shall be held guilty of any criminal offence […] which did not constitute a criminal offence, under the law, at the time when it was committed'. The French text of the phrase 'the law' in article 6(2)(c) refers to 'national or international law'.[96] What criminal offences in international law were in the mind of the drafters? The commentary to article 6(2)(c) explained that 'the reference to international law is mainly intended to cover crimes against humanity'.[97] There was no mention of war crimes. The drafters did not address whether the notion of war crimes in non-international armed conflict is recognised in international law. They did not recognise or deny the authorisation of amnesty to war crimes in non-international armed con-

92 Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol I: Rules, Rule 159.

93 ibid.

94 Claus Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2001) 30 *Israel Ybk HR* 103, 133-34.

95 Schabas, *Unimaginable Atrocities* 180.

96 See also Amendment to art 10(1)(d), 'Belgium, Netherlands, New Zealand' (24 March 1975), CDDH/I/262, in 'Official Records of the Diplomatic Conference in Geneva (1974-1977), Vol IV', p 35; C. Pilloud *et al* (eds), *Commentary on the Additional Protocol: of 8 June 1977 to the Geneva Conventions of 12 August 1949* (The Hague: Martinus Nijhoff Publishers 1987) § 4606.

97 Pilloud *et al* (eds), ibid, § 4607; 'Summary Record of Committee I, Second Session, 33rd meeting' (20 March 1975), in 'Official Records of the Diplomatic Conference in Geneva (1974-1977), Vol VIII', CDDH/I/SR.33, para 26.

flict.[98] In fact, during the 1974-1977 negotiations, war crimes for violations of Protocol II were discussed but never recognised. States intended to avoid interference in their sovereign right to punish individuals' taking part in hostilities. [99] Article 6(2), thus, was irrelevant to the issue of war crimes in non-international armed conflict at that time.[100]

As cited above, article 6(5) of Additional Protocol II concerns the granting of amnesty. According to articles 6(1) and (5), State authorities should grant an amnesty to persons who have 'participated in the armed conflict', been 'deprived of liberty for reasons related to the armed conflict', or committed other offences related to non-international armed conflict. In fact, article 6(5) aimed to promote the peace and development of a State rather than justice through prosecution of national offences or war crimes.[101] Some States considered the amnesty provision as interference and limitation of their sovereignty.[102] They also gave further explanations and considered article 6(5) as a recommendation.[103] As Canada's military manual (2001) notes,

> When AP II [the 1977 Additional Protocol II] was adopted, states refused to make violations of its provisions regarding criminal offences. Certain nations were reluctant to allow other states to interfere in their internal affairs by way of trials for war crimes alleged to have taken place in their national territory.[104]

Given the reluctance of States Parties to recognise rebels as combatants, individuals participating in civil wars against the government, regardless of whether they comply with international humanitarian law, may be prosecuted for national offences in national law, for instance, crimes of rebellion,

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98 'Amendment to Article 10, Bulgaria, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, Democratic Republic of Viet Nam, German Democratic Republic, Hungary, Mongolia, Poland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics' (24 March 1975), CDDH/I/260, in 'Official Records of the Diplomatic Conference in Geneva (1974-1977), Vol IV', p 34.

99 'Summary Record of Committee I, Second Session, 34th meeting' (20 March 1975), in ibid, Vol VIII, CDDH/I/SR.34, paras 7 (ICRC), 13 (India), 15 (Sweden), 17 (Pakistan), 34 (Mongolia); 'Amendment to Article 10, Sweden' (24 March 1975), CDDH/I/261, in ibid, Vol IV, p 35. There was no discussion on this issue in the plenary meeting, see 'Summary record of the 50th plenary meeting', and 'Annex-Explanations of vote', CDDH/SR.50, in ibid, Vol VII, paras 56-102.

100 Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 *AJIL* 78, 80; 'The Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)' (27 May 1994), UN Doc S/1994/674, annex, para 42.

101 Pilloud *et al* (eds), *Commentary on the Additional Protocols*, § 4618.

102 'Summary record of the 50th plenary meeting', and 'Annex-Explanations of vote', CDDH/SR.50, Nigeria, Spain. See also CDDH/I/SR.34, para 21 (Nigeria).

103 For instance, CDDH/SR.50, ibid, paras 70 (Nigeria), 73 (Syria), 78 (Saudi Arabia), 79 (Canada), Explanations of Saudi Arabia, Spain, Zaire.

104 Canada, Law of Armed Conflict at the Operational and Tactical Levels 2001, § 1725.1 'Breaches of Protocol II'. See also Rüdiger Wolfrum, 'Enforcement of International Humanitarian Law' in D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: OUP 1995) 524.

rather than war crimes in international law. Thus, the idea of war crimes in non-international armed conflict was not covered under article 6(5) at that time.

In short, the notion of war crimes in non-international armed conflict was not envisaged in article 6 of Additional Protocol II. Article 6(5) does not reveal the idea that war crimes committed in this context was accepted in international law at that time.

3.3.3.3 Summary

The above observation reveals that States did not recognise war crimes in non-international armed conflict in Common Article 3 of 1949 Geneva Conventions or 1977 Additional Protocol II. Common Article 3 did not criminalise violations of the law of war in non-international armed conflict as war crimes. The concept of war crimes in non-international armed conflict was not well developed in 1977. During this period, States did not contemplate treating serious violations in non-international armed conflict as war crimes, and they seldom prosecuted serious violations of Common Article 3 at the national level.[105] Even in the early 1990s, a legal adviser to the ICRC pointed out that 'international humanitarian law applicable to non-international armed conflict does not provide for international penal responsibility of persons guilty of violations'.[106] In international law, no sign indicated a shift to criminalise offences committed in non-international armed conflict as war crimes until the establishment of the two UN *ad hoc* tribunals.

3.3.4 Shifts since the establishment of the two UN *ad hoc* tribunals: 1993–1996

Concerning the two UN *ad hoc* tribunals, this subsection first examines the Statutes of the two tribunals and then considers the *Tadić* Appeals Chamber Decision on Jurisdiction as well as certain shifts subsequent to this decision.

3.3.4.1 Statutes of the two UN ad hoc tribunals

The ICTY Statute does not use the term 'war crimes'. However, its article 2 refers to 'grave breaches' of the four Geneva Conventions, and its article 3 provides for 'violations of the laws or customs of war'.[107] The preparatory process of the two UN *ad hoc* tribunals' Statutes appears to show that no consensus existed among States concerning war crimes in non-international armed conflict.

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105 Laura Perna, *The Formation of the Treaty Rules Applicable in Non-International Armed Conflicts* (The Hague: Brill | Nijhoff 2006) 139-43, on the absence of domestic prosecutions for serious violations of Common Article 3.

106 Denise Planner, 'The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts' (1990) 30 *IRRC* 409, 414.

107 1993 ICTY Statute, art 3.

First, drafters for the ICTY Statute in the UN Secretariat did not distinguish war crimes in international armed conflict from offences committed in non-international armed conflict.[108] The Secretary-General commented that 'the laws or customs of war' included the 1907 Hague Convention (IV) and its Annex as well as the Hague Regulations. He added that 'war crimes defined in the Nuremberg Charter were already recognised as war crimes under international law'.[109]

However, some States expressed a different view about the term 'the laws or customs of war' in article 3 of the ICTY Statute at the UN Security Council debate. France, the US and the UK gave an interpretative clarification of this term to cover all applicable international conventions.[110] Representatives of the US commented to the Security Council:

> […] it is understood that the 'laws or customs of war' referred to in Article 3 [of the ICTY Statute] include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to those Conventions.[111]

The US delegation noted that 'other members of the [Security] Council share our view regarding the […] clarifications related to the Statute'.[112] This interpretative statement indicates that some member States of the Security Council intended to include all applicable 'humanitarian law agreements', including Common Article 3 and the Additional Protocols.

The absence of protest by other States also showed the implicit willingness of the Security Council to criminalise serious violations in non-international armed conflict. The Security Council continually asserted that individuals would be held responsible for serious violations of international humanitarian law in non-international armed conflict, such as on the occasions of armed conflicts in Afghanistan, Somalia and Rwanda.[113] The call for the creation of the Commission of Inquiry further confirmed the Security Council's aim to criminalise serious violations in non-international armed conflict.[114]

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108 UN Doc S/25704 (1993), para 62.

109 ibid, paras 41-43, 62.

110 Security Council, 'Provisional Verbatim Record of the 3217th meeting' (25 May 1993), UN Doc S/PV. 3217, pp 11 (France), 15 (US), 19 (UK).

111 ibid, p 15 (US).

112 ibid.

113 UN Doc S/PRST/1994/12; UN Doc S/RES/794 (1992), para 5; UN Doc S/RES/814 (1993), para 13; UN Doc S/RES/935 (1994). For other resolutions in the Security Council and the General Assembly, see Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol I: Rules, Rule 151, p 554 and fn 15.

114 For a detailed analysis, see *Tadić* Appeals Chamber Decision on Jurisdiction, paras 72-78; Djamchid Momtaz, 'War Crimes in Non-International Armed Conflicts under the Statute of the International Criminal Court' (1999) 2 *YIHL* 177.

A Commission of Experts made a distinction between international and non-international armed conflict. The Commission of Experts, chaired by Frits Kalshoven and later by Cherif Bassiouni,[115] was set up in 1992 by the Security Council to investigate violations of international humanitarian law in the former Yugoslavia.[116] In its 1994 Report, the Commission of Experts stated that:

> […] unless the parties to an internal armed conflict agree otherwise, the only offences committed in internal armed conflict for which universal jurisdiction exists are 'crimes against humanity' and genocide, which apply irrespective of the conflicts' classification. […] It is probable that common article 3 would be viewed as a statement of customary international law, but unlikely that the other instruments would be so viewed. In particular, there does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes.[117]

In addition, '[i]t must be observed that the violations of the laws or customs of war referred to in article 3 of the statute of the International Tribunal [the ICTY] are offences when committed in international, but not in internal [,] armed conflicts.'[118] The statements show that according to the Commission of Experts, war crimes in non-international armed conflict may be a treaty-based crime, while article 3 of the ICTY Statute is confined to violations committed in international armed conflict. This Report shared the view of Theodor Meron, who wrote in 1993 that:

> Were any part of the former Yugoslav conflict deemed internal rather than international, the perpetrators of even the worst atrocities could not be prosecuted for grave breaches or war crimes but only for the crime of genocide, which is much more difficult to establish, and for crimes against humanity.[119]

Article 4 of the ICTR Statute is the first provision that expressly criminalised violations of Additional Protocol II of 1977 and Common Article 3 in non-international armed conflict.[120] The UN Secretary-General commented that the Security Council incorporated article 4 into the Statute because the

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115 'Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council' (27 May 1994), UN Doc S/1994/674, para 2.

116 UN SC Res 780 (1992), UN Doc S/RES/780 (1992), para 2; 'Secretary-General Report on the establishment of the Commission of Experts submitted to the Security Council' (14 October 1992), UN Doc S/24657 (1992).

117 'The Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)' (27 May 1994), UN Doc S/1994/674, annex, paras 42, 52.

118 ibid, para 54.

119 Theodor Meron, 'The Case for War Crimes Trials in Yugoslavia' (1993) 72 *Foreign Affairs* 122, 128; repeated in Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 *AJIL* 78, 80.

120 'Report of the Secretary-General Pursuant to Paragraph 5 of the Security Council Resolution 955 (1994)' (13 February 1995), UN Doc S/1995/134, para 12; Larissa van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (The Hague: Martinus Nijhoff 2005) 205.

Rwanda conflict in nature was a non-international armed conflict.[121] The Secretary-General also admitted the progressive innovation of article 4 criminalising serious violations in non-international armed conflict as war crimes. He noted that as opposed to the ICTY Statute, 'the Security Council took a more expansive approach to include the applicable law and international instruments [namely, Additional Protocol II and Common Article 3 to the Geneva Conventions] […] regardless of whether they customarily entailed the individual criminal responsibility of the perpetrator of the crime'.[122] The explanatory statement of this paragraph cited added that:

> Although the question of whether common article 3 entails the individual responsibility of the perpetrator of the crime [war crimes] is still debatable, some of the crimes included therein, when committed against the civilian population, also constitute crimes against humanity and as such are customarily recognised as entailing the criminal responsibility of the individual.[123]

The Secretary-General, thus, acknowledged that the Security Council adopted an 'expansive approach' by including violations of Additional Protocol II and Common Article 3.

The observation indicated that the Security Council as well as States at the Council supported prosecuting individuals for violations in non-international armed conflict. The US in its interpretative statement, however, did not clarify whether serious violations in non-international armed conflict constitute war crimes or crimes against humanity. It is also unclear whether other States considered 'war crimes in non-international armed conflict' when they in Security Council meetings or other fora addressed individual responsibility for violations of international humanitarian law in non-international armed conflict.[124] These practices, therefore, do not demonstrate the strong acceptance of a customary rule criminalising these violations as war crimes at that time. Also, the establishment of the two UN *ad hoc* tribunals by the Security Council is not an explicit articulation of concession of the sovereignty of the community of nations about war crimes.[125] The Secretary-General was doubtful whether violations of Common Article 3 in non-international armed conflict entail individual criminal responsibility for 'war crimes'.

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121 UN Doc S/1995/134, para 11.

122 ibid, para 12.

123 ibid, para 12 and fn 8.

124 France, 'Minister of State and Minister of Foreign Affairs, Letter dated 16 January 1993 to the Procurator-General of the Court of Cassation and Chairman of the Committee of French Jurists, annexed to Letter dated 10 February 1993 to the UN Secretary-General', UN Doc S/25266 (10 February 1993) p 52; Statement before the UN Security Council, UN Doc S/PV.3217 (Provisional) (1993), pp 20 (Hungary), 25(France); UN Doc S/PV.3400 (1994), p 8 (UK); UN Doc S/PV.3692 (1996), pp 12 (South Africa), 21(Indonesia); Ethiopia, 'Transitional Government, Statement by the Chief Special Prosecutor before the UN Commission on Human Rights' (17 February 1994), UN Doc E/CN.4/1994/SR.28, para 2.

125 Bassiouni, *Introduction to International Criminal Law* 535-36.

In light of these divergent positions, it is less convincing to conclude that the UN Security Council and the Secretary-General intended to confirm a pre-existing customary rule of war crimes in non-international armed conflict.

3.3.4.2 Tadić Appeals Chamber decision on jurisdiction

Article 4 of the ICTR Statute first criminalised violations in non-international armed conflict,[126] whereas it is generally argued that the ICTY in the 1995 *Tadić* jurisdiction decision for the first time addressed war crimes in non-international armed conflict. Similar to the idea of expanding article 3 of the ICTY Statute advanced by the US, the ICTY progressively departed from the restrictive idea of the Commission of Experts by applying article 3 to offences committed in non-international armed conflict. The ICTY appears to follow the Security Council's approach concerning article 4 of the ICTR Statute. The court of Bosnia and Herzegovina held that 'the customary status of criminal liability for […] war crimes against civilians and individual responsibility for war crimes committed in 1992 was confirmed by UN Secretary-General, International Law Commission and jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR).'[127] In light of the above observation and as will be seen below, this statement is not persuasive.

The ICTY indeed extended article 3 to cover violations in international and non-international armed conflicts. The most frequently referred case is the 1995 *Tadić* Interlocutory Appeal Decision on jurisdiction, the reasoning of which was subscribed to in subsequent cases.[128] In this case, the prosecution charged Dusko Tadić with a list of crimes allegedly committed in a region of Bosnia-Herzegovina in 1992. Some of the charges were cruel treatment and murder under article 3 of the ICTY Statute. Tadić challenged the jurisdiction of the tribunal. One reason was that article 3 of the ICTY Statute only conferred jurisdiction over violations of the laws or customs of war in international armed conflict because war crimes were confined to conflicts of that character. In fact, the acts charged happened in a non-international armed conflict.[129]

The prosecution replied that these crimes were committed in the context of international armed conflict.[130] Alternatively, even if the conflict was non-international, the ICTY also had jurisdiction, because 'violations of law or customs of war' in article 3 were not confined to violations committed

126 UN Doc S/1995/134, para 12.

127 *Prosecutor's Office v Anić* (Preliminary Hearing Decision, Court of Bosnia and Herzegovina) S11 K 005596 11 Kro (31 May 2011), para 35.

128 *Tadić* Appeals Chamber Decision on Jurisdiction, para 94.

129 Brief to Support the Motion on the Jurisdiction of the Tribunal (23 June 1995), Section 3; ibid, para 65.

130 'Prosecutor's Response to the Defence's Motions filed on 23 June 1995' (7 July 1995), paras 36-45.

in international armed conflict.[131] The US also submitted its *amicus curiae* addressing the same view. In its view, article 3 of the ICTY Statute 'is only an exemplary and not an exhaustive list, and the language of Article 3 is otherwise broad enough to cover all relevant violations of the laws or customs of war, whether applicable in international or non-international armed conflict'.[132] The Trial Chamber dismissed Tadić's challenge to the ICTY's subject-matter jurisdiction. Also, the Chamber supported the prosecutor's alternative argument about the interpretation of 'violations of law or customs of war' without further explanation.[133]

The defendant appealed on this issue. The Appeals Chamber rejected the challenge to its jurisdiction.[134] After examining the 'intent of the Security Council and the logical and systematic interpretation of article 3 as well as customary international law', the Appeals Chamber upheld the view that 'violations of the laws and customs of war' under article 3 of the ICTY Statute included violations of international humanitarian law applicable in non-international armed conflict.[135] Firstly, it explained that article 3 aimed to prosecute all serious violations of international humanitarian law,[136] including Common Article 3 applicable to non-international armed conflict.[137] Violations of laws and customs of war as war crimes go beyond grave breaches regime in the Geneva Conventions to include 'serious' violations in non-international armed conflict.[138]

Secondly, the Appeals Chamber provided four cumulative requirements for violations to be subject to being charged under article 3. These four requirements are:

> (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature, or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[139]

131 ibid.
132 US, '*Amicus Curiae* brief presented to the ICTY, *Tadić* case, Motion Hearing' (25 July 1995), pp 35-37.
133 *Prosecutor v Tadić* (Decision on the Defence Motion on Jurisdiction) ICTY-94-1-T (10 August 1995), para 53.
134 *Tadić* Appeals Chamber Decision on Jurisdiction, paras 71-137.
135 ibid, para 86.
136 ibid, paras 87-93.
137 ibid, paras 94-127; *Mucić et al* Appeals Chamber Judgment, para 136.
138 The ICTY Statute does not mention whether 'serious' is necessary for the assessment of a war crime of 'violations of laws or customs of war'.
139 *Tadić* Appeals Chamber Decision on Jurisdiction, para 94; Jennifer Trahan, *Genocide, War Crimes, and Crimes against Humanity: A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia* (New York: Human Rights Watch 2006) 55-76.

The Appeals Chamber concluded that only if the four requirements are satisfied, 'the tribunal has jurisdiction over **any** serious violations of laws or customs of war, regardless of whether they occurred within an internal or international armed conflict'.[140]

The Appeals Chamber carefully analysed the last requirement.[141] The Chamber held that an express treaty rule criminalising violation in non-international armed conflict and entailing individual criminal responsibility is not necessary for the prosecution of war crimes.[142] The absence of penalising provisions in a treaty does not mean that serious violations of them cannot be prosecuted as international crimes.

The Appeals Chamber then resorted to customary international law. The Chamber stressed that, if the two criteria of 'the clear and unequivocal recognition of the rules of warfare in international law' and 'States practice indicating an intention to criminalise the norm' were satisfied, prohibitions in international humanitarian law entails individual criminal responsibility under customary law.[143] According to the Appeals Chamber, '[n]o one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition' and 'many elements of international practice show that States intend to criminalise serious breaches' in non-international armed conflict.[144] Thus, the two requirements were fulfilled, and an individual who seriously violated law applicable in non-international armed conflict could incur individual responsibility under customary law.[145] In addition, after analysing the prosecution in Nigeria, military manuals of four States, national legislation of two States (Belgium and the former Yugoslavia) as well as a Security Council resolution on Somalia, the Appeals Chamber concluded that 'customary international law imposes criminal liability for serious violations of Common Article 3' in non-international armed conflict.[146]

In discussing the individual responsibility, the Appeals Chamber might have considered the idea proposed by Meron. In his paper published in 1995, months before the delivery of the *Tadić* Appeals Chamber Decision, Meron argued that 'the concept of international criminality' should be extended 'to violations of Common Article 3 and Protocol II' because serious violations of them are of universal concern and subject to universal condemnation.[147] He wrote that 'whether the prohibition is unequivocal in character, the gravity of the act and the interests of the international commu-

140 *Tadić* Appeals Chamber Decision on Jurisdiction, paras 91, 94, 137 (emphasis in original).
141 ibid, paras 128-36.
142 ibid, para 128.
143 ibid.
144 ibid.
145 ibid, paras 128-37.
146 ibid, paras 130-34, Germany, Military Manual 1992; New Zealand, Interim Law of Armed Conflict Manual 1992; US, Manual of the United States 1956; UK, LOAC Manual 1958.
147 Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *AJIL* 554, 576.

nity are all relevant factors in determining the criminality of various acts.'[148] This statement is very similar to the sentences in the *Tadić* Appeals Chamber Decision cited above.[149] Nevertheless, Meron did not claim that violations of Common Article 3 and Additional Protocol II incur individual criminal responsibility for 'war crimes', because at that time he did not classify these violations as 'war crimes'. [150] In fact, Meron referred to the US Joint Chiefs of Staff's proposal defining 'other inhumane acts' in article 5 (crimes against humanity) of the ICTY Statute to cover violations of Common Article 3.[151] He considered that Article 4 of the ICTR Statute 'enhances the prospects for treating egregious violations of human rights law – not only of international humanitarian law – as offences under international law'.[152] As cited above in his journal article in 1993, Meron might have preferred to criminalise some violations in non-international armed conflict as crimes against humanity or genocide, rather than war crimes.[153] Even the *Tadić* Appeals Chamber did not expressly declare that those guilty under article 3 of the ICTY Statute were responsible for 'war crimes'. Instead, the Appeals Chamber interpreted article 3 as a 'residual clause' that covers violations of international humanitarian law not falling under the definitions of other crimes (crimes against humanity, genocide and grave breaches of Geneva Conventions).[154]

Judge Li in his separate opinion took a different position on the issue of war crimes in non-international armed conflict. Judge Li agreed with the US's interpretative interpretations of article 3 of the ICTY Statute proposed covering violations of Additional Protocol II and Common Article 3.[155] He also referred to the reports of the Commission of Experts and Meron's work published in 1995 as noted above. He considered that 'the notion of war crimes is limited to situations in international armed conflicts.'[156] In light of these observations, Judge Li might also share Meron's view that violations of Common Article 3 and Additional Protocol II in non-international armed conflict incur individual criminal responsibility for crimes against humanity or genocide.

148 ibid, 562.
149 ibid, paras 128-29.
150 Theodor Meron, 'The Case for War Crimes Trials in Yugoslavia' (1993) 72 *Foreign Affairs* 122, 128; Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 *AJIL* 78, 80.
151 Meron, 'International Criminalization of Internal Atrocities', 560-61.
152 ibid, 568.
153 Meron, 'The Case for War Crimes Trials in Yugoslavia', 128; repeated in Meron, 'War Crimes in Yugoslavia and the Development of International Law', 80.
154 *Tadić* Appeals Chamber Decision on Jurisdiction, paras 87, 89, and 91.
155 *Tadić* Appeals Chamber Decision on Jurisdiction (Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction), para 12.
156 ibid, paras 8-10.

In fact, the *Tadić* Appeals Chamber's analysis of individual liability for violations in non-international armed conflict is rather brief as compared to its discussion on customary rules of international humanitarian law.[157] The Appeals Chamber concluded that a customary rule existed at that time based on only scarce authorities. The Chamber heavily relied on *opinio juris* in the identification of a customary rule, leaving State practice as an indication of 'intention'.[158] Apart from some military manuals, there is limited evidence providing that serious violations of rules applicable in non-international armed conflict are punishable as 'war crimes' in international law at that time.[159] The Chamber also referred to 'substantive justice and equity' and national legislation of the former Yugoslavia to justify its finding.[160]

To sum up, individuals are criminally responsible for violations of Common Article 3 in non-international armed conflict before the ICTY and the ICTR. These violations may constitute crimes against humanity or genocide. This idea of individual criminal responsibility in non-international armed conflict does not show that a general agreement has been reached on criminalising violations in this context as 'war crimes' in international law. However, as Larissa van den Herik noted, the *Tadić* Appeals Chamber Decision indeed 'paved the way for future prosecution' of 'war crimes'.[161] The ICTY's subsequent decisions endorsed this interpretation of article 3.[162] Its four requirements for the application of article 3 of the ICTY Statute were

157 Analysing customary rules of international humanitarian law governing non-international armed conflict, see *Tadić* Appeals Chamber Decision on Jurisdiction, paras 96-127.

158 Theodor Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law' (1996) 90 *AJIL* 238, 242.

159 Manuals of the UK, Swiss, Norwegian, Federal Republic of Yugoslavia and Canadian. See Michael Bothe, 'War Crimes in Non-International Armed Conflicts' in Y. Dinstein and M. Tabory (eds), *War Crimes in International Law* (The Hague: Martinus Nijhoff Publishers 1996) 297.

160 *Tadić* Appeals Chamber Decision on Jurisdiction, paras 135-36.

161 For an analysis of the development of jurisprudence in the ICTY and the ICTR after this decision, see Van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* 208-14.

162 *Prosecutor v Martić* (Decision on the Issuance of an International Arrest Warrant) Transcript of Oral Proceedings (8 March 1996), paras 135-36; *Prosecutor v Tadić* (Sentencing Judgement) ICTY-94-1-T (14 July 1997) [*Tadić* Sentencing Judgment], paras 609, 613, 639; *Mucić et al* Trial Judgment, para 306; *Mucić et al* Appeals Chamber Judgment, paras 143, 147, 154.

also subscribed to in many subsequent ICTY cases.[163] After the delivery of the *Tadić* Appeals Chamber Decision on Jurisdiction, the early 1990s saw a shift towards including the notion of war crimes in non-international armed conflict.

3.3.4.3 *Shifts subsequent to the Tadić Appeals Chamber Decision on Jurisdiction*

Before the delivery of the *Tadić* Appeals Chamber Decision, commentators differed on whether a rule of violations in non-international armed conflict entailing individual criminal responsibility had been established in international law. Michael Bothe argued that there was ample basis for the punishment of individuals for their violations in non-international armed conflict as war crimes.[164] The majority of commentators, however, answered negatively.[165] James O'Brien was uncertain whether violations of Common Article 3 in non-international armed conflict gave rise to individual criminal responsibility.[166] Meron noted that even in 1995 the accepted wisdom was that Common Article 3 and Protocol II constituted an uncertain basis for individual criminal responsibility on the international plane.[167] As observed above, some commentators contended that violations of these provisions involved individual liability, but it is unclear whether the perpetrators were liable for crimes against humanity or war crimes.[168]

After the delivery of the *Tadić* Appeals Chamber Decision, commentators responded differently. Rowe disagreed with the idea of considering violations of Common Article 3 in non-international armed conflict as war

163 *Prosecutor v Prlić et al* (Judgement) ICTY-04-74-T (29 May 2013) [*Prlić et al* Trial Judgment], para 142; *Prosecutor v Perišić* (Judgement) ICTY-04-81-T (6 September 2011) [*Perišić* Trial Judgment], para 75; *Prosecutor v Delić* (Judgement) ICTY-04-83-T (15 September 2008), para 42; *Prosecutor v Boškoski & Tarčulovski* (Judgement) ICTY-04-82-T (10 July 2008), para 296; *Prosecutor v Krajišnik* (Judgement) ICTY-00-39-T (27 September 2006) [*Krajišnik* Trial Judgment], para 842; *Prosecutor v Orić* (Judgement) ICTY-03-68-T (30 June 2006), para 257; *Prosecutor v Halilović* (Judgement) ICTY-01-48-T (16 November 2005), para 30 (*Halilović* Trial Judgment); *Prosecutor v Hadžihasanović & Kubura* (Judgement) ICTY-01-47-T (15 March 2006), para 17 (*Hadžihasanović & Kubura* Trial Judgment); *Prosecutor v Limaj et al* (Judgement) ICTY-03-66-T (30 November 2005) [*Limaj et al* Trial Judgment], para 175; *Prosecutor v Strugar et al* (Judgement) ICTY-01-42-T (31 January 2005), para 218; *Prosecutor v Blagojević et al* (Judgement) ICTY-02-53-T (17 January 2005), para 37.

164 Bothe, 'War Crimes', 251.

165 Meron, 'War Crimes in Yugoslavia and the Development of International Law', 82-83.

166 James O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993) 87 *AJIL* 639, 647.

167 Meron, 'International Criminalisation of Internal Atrocities', 559.

168 For other debates, see Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law'; George Aldrich, 'Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia' (1996) 90 *AJIL* 64.

crimes.[169] He maintained that the *Tadić* Appeals Chamber Decision was not entirely consistent with treaty provisions and would create legal difficulties concerning the status of rebels. Even if the Decision was reached because of the development of customary law, disagreements also existed about the state of customary law.[170] By contrast, some commentators supported the decision on the war crimes issue. In 1996, Meron wrote that 'I entirely agree with the Tribunal's views that violations of Article 3 common to the Geneva Conventions entail individual criminal responsibility under customary law'.[171] Again, he did not refer to war crimes or crimes against humanity. But in 1998, he developed three strategies for the criminalisation of war crimes in non-international armed conflict.[172] An increasing number of scholars recognised then that criminal responsibility can be attached to individuals for war crimes committed in non-international armed conflict.[173] Judge Cassese, the presiding judge of the Appeals Chamber in the *Tadić* Appeals Chamber Decision, opined that 'particularly after *Tadić*', 'it is now widely accepted that serious infringements of customary or applicable treaty law on internal armed conflicts must also be regarded as amounting to war crimes'.[174]

The International Committee of the Red Cross (ICRC) also shifted its position that war crimes were limited to international armed conflict.[175] In its 1993 comments on the proposal to establish the ICTY, the ICRC contended that 'according to international humanitarian law as it stands today, the notion of war crimes is limited to situations of international armed

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169 Peter Rowe, 'Liability for War Crimes during a Non-International Armed Conflict' (1995) 34 *Military L & L War Rev* 149, 155-56.

170 Peter Rowe, 'Duress as a Defence to War Crimes after *Erdemović*: A Laboratory for a Permanent Court?' (1998) 1 *YIHL* 210, 222-25.

171 Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', 243.

172 Theodor Meron, 'Is International Law Moving towards Criminalisation?' (1998) 9 *EJIL* 18, 25-30.

173 Christopher Greenwood, 'International Humanitarian Law and the *Tadić* Case' (1996) 7 *EJIL* 265, 277-78; Rein Mullerson, 'International Humanitarian Law in Internal Conflicts' (1997) 2 *J Armed Conflict L* 109, 122; Avril McDonald, 'The Year in Review' (1998) 1 *YIHL* 113, 121-22; Catherine Cissé, 'The End of a Culture of Impunity in Rwanda? Prosecution of Genocide and War Crimes before Rwandan Courts and the International Criminal Tribunal for Rwanda' (1998) 1 *YIHL* 161, 167; Bruno Simma and Andreas Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 *AJIL* 302, 313; Sonja Boelaert-Suominen, 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving towards a Uniform Enforcement Mechanism for All Armed Conflicts' (2000) 5 *J Conflict & Security L* 63; Jan E. Aldykiewicz and Geoffrey S. Corn, 'Authority to Court-Martial Non-US Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts' (2001) 167 *Military L Rev* 74, 101-43.

174 Antonio Cassese, *International Law* (2nd edn, Oxford: OUP 2005) 437.

175 ICRC, DDM/JUR/442 b, para 4; ICRC, 'Statement in the 9th UN Congress on the Prevention of Crimes and Treatment of Offenders' (Cairo, 30 April 1995), UN Doc A/CONF.169/NGO/ICRC/1, p 4, reprinted in JM. Henckaerts and L. Doswald-beck (eds), *Customary International Humanitarian Law*, Vol II: Practices (New York: CUP 2005) 3703, § 405.

conflict'.[176] It then gradually abandoned this position. In February 1997, the ICRC prepared a working paper regarding war crimes,[177] in which it classified war crimes into three categories, including other serious violations committed in international armed conflict and war crimes in non-international armed conflict.[178] In its 2005 ICRC *Study*, Rule 156 concludes that trials for war crimes before national and international tribunals support a customary rule of war crimes in non-international armed conflict.[179] Although the method employed in the 2005 ICRC *Study* has been criticised for its flexibility,[180] this critique of Rule 156 with respect to war crimes is now insignificant.

In sum, after the delivery of the *Tadić* Appeals Chamber Decision, the positions of commentators and the ICRC changed quickly. Commentators and the ICRC tend to support the view that individual responsibility for war crimes is limited to international armed conflict is outdated.[181] These academic and institutional demands for such a norm indirectly imply that a positive customary rule, providing individual responsibility for war crimes in non-international armed conflict, had not yet fully emerged in 1995.[182] After the *Tadić* Appeals Chamber Decision on Jurisdiction, a rule was emerging concerning war crimes in non-international armed conflict.

3.3.5 The work of the International Law Commission

An overview of the ILC's work on the Draft Code of Crimes and the drafts of the International Criminal Court Statute helps in understanding comments of State delegations at the Sixth Committee on these drafts related to the issue of war crimes in non-international armed conflict. This subsection also examines the viewpoint concerning the extension of war crimes occurring in non-international armed conflict among members of the ILC.

176 ICRC, 'Preliminary Remarks' (25 March 1993), DDM/JUR/442 b, reprinted in Virginia Morris and Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Vol 2 (New York: Transnational Publishers 1995) 391-92.

177 ICRC, 'War Crimes, Working Paper Prepared by the ICRC for the Preparatory Committee for the Establishment of an International Criminal Court' (13 February 1997).

178 Convention on the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 7 August 1956, 249 UNTS 215.

179 Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol II.

180 Scobbie, 'The Approach to Customary International Law in the Study'; Bethlehem, 'The Methodological Framework of the Study' and Charles Garraway, 'War Crimes' in E. Wilmshurst and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge: CUP 2011); Claude Emanuelli, 'Comments on the ICRC Study on Customary International Humanitarian Law' (2006) 44 *Canadian Ybk Intl L* 437, 440.

181 Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *EJIL* 2, 2-17.

182 New Zealand, Military Manual 1992; Argentina, Law of War Manual 1989.

3.3.5.1 *Draft Code of Offences (Crimes)*

The ILC was re-entrusted by the General Assembly to prepare a draft code of offences and security of mankind (Draft Code of Offences (Crimes)) in 1981.[183] Doudou Thiam was appointed as the Special Rapporteur for this task.[184] In the 1980s and the early 1990s, the issue of war crimes was debated at many meetings of the ILC.[185] In the 1980s, governments did not discuss war crimes in non-international armed conflict.[186] In his fourth and seventh reports, Thiam did not include serious violations of Common Article 3 and other serious violations of Additional Protocol II in the scope of war crimes.[187] In the fourth report, he used the phrase 'non-international armed conflicts' in two alternatives to define war crimes in draft article 13.[188] Thiam, however, did not use the phrase in a technical way as we consider it at the present time. He might have intended to use the phrase to cover conflicts between States and non-State entities, including fighting against colonial domination, alien occupation or racist regimes in the exercise of self-determination, without noticing that article 1(4) of Additional Protocol I characterises these conflicts as international armed conflict instead of non-inter-

183 'Draft Code of Offences against the Peace and Security of Mankind', GA Res 897 (IX) (1954), UN Doc A/RES/897 (IX); 'Draft Code of Offences against the Peace and Security of Mankind', GA Res 36/106 (1981), UN Doc A/RES/36/106, paras 1-2.

184 'Report of the International Law Commission', GAOR 37th Session Supp No 10, UN Doc A/37/10 (1982), para 252, p 121; 'Draft Code of Offences against the Peace and Security of Mankind', GA Res 37/102 (1982), UN Doc A/RES/37/102.

185 'Report of the International Law Commission', GAOR 38th Session Supp No 10, UN Doc A/38/10 (1983); 'Fourth report on the Draft Code of Crimes against the Peace and Security of Mankind, by Doudou Thiam, Special Rapporteur', UN Doc A/CN.4/398 and Corr.1-3 (1986); 'Report of the International Law Commission', GAOR 41st Session Supp No 10, UN Doc A/41/10 (1986); 'Fifth report on the Draft Code of Crimes against the Peace and Security of Mankind, by Doudou Thiam, Special Rapporteur', UN Doc A/CN.4/404 (1987); 'Report of the International Law Commission', GAOR 43rd Session Supp No 10, UN Doc A/43/10 (1988); 'Draft Code of Crimes against the Peace and Security of Mankind' (1986-1989), UN Doc A/RES/41/75, UN Doc A/RES/42/151, UN Doc A/RES/43/164, UN Doc A/RES/44/32; 'Seventh report on the Draft Code of Crimes against the Peace and Security of Mankind, by Doudou Thiam, Special Rapporteur', UN Doc A/CN.4/419 and Add.1 (1989); UN Doc A/51/10 (1996). For draft texts, see the Analytical Guide to the Work of the International Law Commission regarding Draft Code of Crimes against the Peace and Security of Mankind.

186 'Comments and observations received pursuant to General Assembly resolution 37/102' (8 March 1983), Suriname.

187 UN Doc A/CN.4/398 and Corr.1-3 (1986); UN Doc A/CN.4/419 and Add.l (1989).

188 For discussions of nuclear weapons in 1986 and 1989, see 'Summary record of the 1958th meeting of the 38th session', UN Doc A/CN.4/SR.1958 (1986), para 23; 'Summary record of the 1960th meeting of the 38th session', UN Doc A/CN.4/SR.1960 (1986), para 20, 'Summary record of the 1961st meeting of the 38th session', UN Doc A/CN.4/SR.1961 (1986), para 28; 'Summary record of the 1962nd meeting of the 38th session', UN Doc A/CN.4/SR.1962 (1986), paras 13, 35; 'Summary record of the 1965th meeting of the 38th session', UN Doc A/CN.4/SR.1965 (1986), para 12; UN Doc A/41/10 (1986), paras 103-14; UN Doc A/CN.4/419 and Add.l (1989), paras 19, 25.

national armed conflict.[189] Later he replaced the phrase 'non-international armed conflicts' with 'rules of international law applicable in armed conflict' in his seventh report.[190]

The issue of war crimes in non-international armed conflict emerged in discussing the seventh report in 1989, but the majority of Commission members did not contemplate the extension of war crimes to non-international armed conflict.[191] One member stated that the new phrase 'rules of international law applicable in armed conflict' was controversial and would raise a question whether offences committed in non-international armed conflict could be regarded as war crimes.[192] Some members argued that this new phrase indeed covered non-international armed conflict[193] and that serious violations of Common Article 3 and Additional Protocol II were included as war crimes.[194] However, Thiam suggested that the scope of 'rules of international law applicable in armed conflict' was limited to the 1907 Hague Convention, grave breaches of the 1949 Geneva Conventions, as well as articles 11 and 85 of Additional Protocol I.[195]

In the 1991 text of the Draft Code of Crimes, the definition of war crimes also referred to violations of international law applicable in 'armed conflict'.[196] The phrase 'armed conflict' did not limit itself to international armed conflict. One member insisted that war crimes were limited to serious violations in international armed conflict,[197] while three members upheld different views.[198] The Netherlands expressed its positive attitude towards the inclusion of war crimes in non-international armed conflict.[199] It 'agreed with the ILC that [war crimes] should also be applicable to national armed conflicts, given that serious war crimes can likewise be committed in these

189 The 1977 Additional Protocol I, art 1(4).

190 UN Doc A/CN.4/419 and Add.l (1989), pp 82-83, para 8.

191 UN Doc A/CN.4/SR.1962 (1986), para 34; 'Summary record of the 1963rd meeting of the 38th session', UN Doc A/CN.4/SR.1963 (1986), para 30.

192 'Summary record of the 2101st meeting of the 41st session', UN Doc A/CN.4/SR.2101 (1989), para 24 (Mr Jacovides).

193 'Summary record of the 2096th meeting of the 41st session', UN Doc A/CN.4/SR.2096 (1989), para 34 (Mr Roucounas); 'Summary record of the 2097th meeting of the 41st session', UN Doc A/CN.4/SR.2097 (1989), paras 22-23 (Mr Barsegov).

194 'Report of the International Law Commission', GAOR 44th Session Supp No 10, UN Doc A/44/10 (1989), paras 107-08.

195 UN Doc A/CN.4/419 and Add.l (1989), pp 82-83, para 8.

196 'Draft Code of Crimes against the Peace and Security of Mankind, Titles and texts of articles adopted by the Drafting Committee', UN Doc A/CN.4/L.459 and Corr.l and Add.1 (1994), para 22. 'Thirteenth report on the Draft Code of Crimes against the Peace and Security of Mankind, by Doudou Thiam, Special Rapporteur', UN Doc A/CN.4/466 (1995), paras 95-110.

197 'Summary record of the 2240th meeting of the 43rd session', UN Doc A/CN.4/SR.2240 (1991), paras 48-49, 73 (Mr Pellet).

198 UN Doc A/CN.4/SR.2240 (1991), paras 64 (Mr Graefrath), 66 (Mr Calero Rodrigues), 71 (Mr Eriksson).

199 'Comments and observations received from Governments', UN Doc A/CN.4/448 and Add.1(1993), Netherlands, para 70, pp 87-88.

circumstances'.[200] The chairperson of the Drafting Committee, established by the ILC to prepare the text of the Draft Code of Crimes, stated that 'this ambiguity is constructive, in light of the fact that Common Article 3 applied in non-international armed conflicts'.[201] Hence, the ambiguous text in the 1991 draft kept the door open for the inclusion of war crimes in non-international armed conflict, at the very least, including serious violations of Common Article 3.

In discussing war crimes in the 1995 ILC draft text, different views were expressed whether to expand the law of war crimes to non-international armed conflict. By citing the ICTR Statute, some Commission members argued that the notion of war crimes should be extended to non-international armed conflict.[202] Other members disagreed with such a construction.[203] At the Sixth Committee in February 1996, State delegations also expressed divergent views.[204] In June 1996, draft article 18 included serious violations in non-international armed conflict as war crimes.[205] Draft article 18 stated that:

> Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale: (a) Any of the following acts committed in violation of international humanitarian law: […] (b) Any of the following acts committed wilfully in violation of international humanitarian law and causing death or serious injury to body or health: […] (c) Any of the following acts committed wilfully in violation of international humanitarian law: […] (d) Outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (e) Any of the following acts committed in violation of the laws or customs of war: […] (f) Any of the following acts committed in violation of international humanitarian law applicable in armed conflict not of an international character: […] (g) In the case of armed conflict, […].[206]

200 ibid.

201 UN Doc A/CN.4/SR.2240 (1991), para 29 (Mr Pawlak).

202 'Summary record of the 2384th meeting of the 47th session', UN Doc A/CN.4/SR.2384 (1995), paras 26 (Mr Fomba), 71 (Mr Rosenstock); 'Thirteenth report on the Draft Code of Crimes against the Peace and Security of Mankind, by Doudou Thiam, Special Rapporteur', UN Doc A/CN.4/466 (1995), p 46, para 107. New proposed draft article 22 'war crimes' read that: '[a]n individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to...]. For the purposes of this Code, a war crime means: 1. Grave breaches of the Geneva Conventions of 1949, namely: […] 2. Violations of the laws or customs of war, which include, but are not limited to […]'.

203 UN Doc A/50/10 (1995), para 101.

204 'Topical summary of the discussion held in the Sixth Committee of the General Assembly during its 50th session', UN Doc A/CN.4/472 (1996), paras 139-40, 145.

205 'Draft Code of Crimes against the Peace and Security of Mankind-Titles and texts of articles adopted by the Drafting Committee on second reading at the 47th and 48th sessions', reproduced in 'Summary record of the 2437th meeting of the 48th session', UN Doc A/CN.4/SR.2437 (1996), para 7, p 32.

206 ibid, para 7, pp 33-34.

Draft articles 18(d) and (g) covered violations in both kinds of armed conflict. Draft article 18(d) criminalised violations of fundamental guarantees embodied in Common Article 3 and article 4(2) of Additional Protocol II. Draft article 18(g) criminalised the method of warfare causing widespread, long-term and severe damage to the natural environment if these violations cause serious consequences to the population in armed conflict, whether of international or internal character.[207] In addition, draft article 18(f) listed seven acts committed in violation of international humanitarian law applicable in non-international armed conflict as war crimes.[208] The list is identical to the definition of war crimes in article 4 of the ICTR Statute. The ILC almost adopted draft article 18 in its entirety under draft article 20 of the final 1996 Draft Code of Crimes.[209] Based on the text of the 1996 Draft Code of Crimes, a new regime of war crimes in non-international armed conflict was emerging.

3.3.5.2 1993 and 1994 drafts of the International Law Commission for an International Criminal Court

The General Assembly had also entrusted the ILC to consider the issue of an international judicial organ.[210] The ILC earnestly worked on this mandate, but the General Assembly later deferred this because the definitions of crimes were not completed.[211] In 1989, based on a proposal of Trinidad and Tobago and a request of the General Assembly, the ILC resumed its work on the issue of an international criminal court.[212] From 1989 to 1991, the ILC's work on an international criminal court was included as part of its work for the Draft Code of Crimes. The initial draft texts of the judicial organ focused on procedural matters instead of substantive definitions of crimes, which were covered by the Draft Code of Crimes.[213]

In 1992, a working group, established by the ILC to work on the issue of international criminal jurisdiction, submitted its proposals.[214] In discussing these proposals in the Sixth Committee, only the Italian delegate implicitly

207 ibid, p 34.
208 ibid.
209 'Draft Code of Crimes against the Peace and Security of Mankind with commentaries', in UN Doc A/51/10 (1996), para 50, p 56 [1996 Draft Code of Crimes], art 20.
210 'Prevention and Punishment of the Crime of Genocide, Study by the International Law Commission of the question of an International Criminal Jurisdiction', GA Res 260 B (III) (1948), UN Doc A/Res/260 B (III).
211 'Question of Defining Aggression', GA Res 688 (VII) (1952), UN Doc A/RES/688 (VII); 'International Criminal Jurisdiction', GA Res 687 (VII) (1952), UN Doc A/RES/687 (VII); 'International Criminal Jurisdiction', GA Res 898 (IX) (1954), UN Doc A/RES/898 (IX); 'International Criminal Jurisdiction', GA Res 1187 (XII) (1957), UN Doc A/RES/1187 (XII).
212 UN Doc A/RES/44/39.
213 'Eleventh report on the Draft Code of Offences against the Peace and Security of Mankind, by Doudou Thiam, Special Rapporteur', UN Doc A/CN.4/449 and Corr.1 (1993), pp 113-24.
214 'Working Group established pursuant to the request contained in General Assembly resolution 44/39 of 4 December 1989' (16 May 1990).

mentioned the issue of war crimes in non-international armed conflict.[215] In its written comments, the Italian government recommended that war crimes considered by the Geneva Conventions and its protocols be listed in the jurisdiction of the proposed court.[216]

In 1993, the working group submitted its preliminary but comprehensive text of a draft statute of an international criminal tribunal with commentary to the ILC.[217] The ILC then attached this Draft text to its report to the General Assembly for discussion.[218] Article 22 of the 1993 Draft text provided a list of crimes defined by treaties as international crimes. The working group's commentary on article 22 stated that 1977 Additional Protocol II was not included in the list, as Protocol II contains no provision about grave breaches.[219] The Slovenian delegation, however, did not share the working group's view. Its delegate argued that the reason for excluding Additional Protocol II from the list of article 22 was not convincing, as the Protocol also prohibited acts characterised as serious violations of humanitarian law.[220] In the Sixth Committee, one delegate supported incorporating Additional Protocol II in the treaty list of article 22.[221] That delegate probably was also Slovenian. In his view, the 'notion of war crimes should be extended to crimes committed in internal armed conflicts'.[222] Slovenia recommended that the ILC should follow the approach of the ICTY Statute to cover war crimes for violations of international humanitarian law applicable in non-international armed conflict under article 22. Other delegates or governments, however, did not share the Slovenia's position.[223] In brief, it is inconclusive to argue that article 22 of the 1993 Draft text covered 'war crimes' in non-international armed conflict.

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215 'Topical summary of the discussion held in the Sixth Committee of the General Assembly during its 47th session' [French], UN Doc A/CN.4/446 (1992), prepared by Secretariat.

216 'Comments of Governments on the report of the Working Group on the question of an international criminal jurisdiction', UN Doc A/CN.4/452 and Add.1-3 (1993), Italy, para 6.

217 'Revised report of the Working Group on a draft statute for an international criminal court', UN Doc A/CN.4/L.490 and Add.1, as reproduced in UN Doc A/48/10 (1993), annex.

218 UN Doc A/48/10 (1993), pp 100-31.

219 ibid, annex, art 22, p 107, para (3).

220 'Observations of Governments on the report of the Working Group on a draft statute for an international criminal court', UN Doc A/CN.4/458 and Add.1-8 (1994), in UN Doc A/CN.4/SER.A/1994/Add.l, para 4 (Slovenia).

221 'Topical summary of the discussion held in the Sixth Committee of the General Assembly during its 48th session', UN Doc A/CN.4/457 (1994), para 84; 'Summary record of the 2330th meeting of the 46th session', UN Doc A/CN.4/SR.2330 (1994), para 23.

222 UN Doc A/CN.4/457 (1994), para 84.

223 UN Doc A/CN.4/458 and Add.1-8 (1994), pp 22-96 (Algeria, Australia, Austria, Belarus, Chile, Cuba, Cyprus, Czech Republic, Denmark, Finland, Germany, Hungary, Iceland, Japan, Kuwait, Malta, Mexico, New Zealand, Nordic countries, Norway, Panama, Romania, Spain, Sri Lanka, Sweden, Tunisia, UK, US, Yugoslavia); UN Doc A/CN.4/457 (1994), paras 84-88.

In addition, article 26(2)(a) of the 1993 Draft text required special acceptance of a jurisdictional clause for crimes 'under general international law' but not covered by article 22.[224] Some members of the ILC argued that article 26(2)(a) covered offences in non-international armed conflict, but the offences were only aggression and crimes against humanity that were not defined by treaties.[225] War crimes in non-international armed conflict, therefore, in their view, were not covered under this article. However, Slovenia claimed that in drafting article 26(2)(a), the working group considered crimes for violations of customary international law applying to non-international armed conflict, for example, Common Article 3 of the four Geneva Conventions.[226] Therefore, article 26(2)(a), at the very most, covered serious violations of Common Article 3 in non-international armed conflict, although the label of the offences is uncertain.

In 1994, the working group, re-established by the ILC and chaired by James Crawford,[227] submitted a report with draft commentaries to the ILC.[228] The ILC adopted the 1994 Draft Statute accompanied by commentaries and then submitted it to the General Assembly.[229] Article 20(c) of the 1994 Draft Statute proposed 'serious violations of the laws and customs applicable in armed conflict'.[230] According to its commentary, the ILC shared the idea that a category of war crimes exists under customary international law, which is distinct from the grave breaches regime.[231] The ILC was very cautious and did not directly address whether the term 'armed conflict' covered non-international armed conflict. State delegations in the Sixth Committee said that 'crimes associated with domestic armed conflicts […] should not have been explicitly mentioned as falling within the jurisdiction of the Court'.[232]

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224 1993 Draft Statute, art 26(2)(a) reads: '[i]t was accepted and recognised by the international community of States as a whole as being of such a fundamental character that its violation gives rise to the criminal responsibility of individuals'.

225 'Report of the International Law Commission', UN Doc A/49/10 (1994), para 48 (Mr Crawford); UN Doc A/CN.4/SR.2330 (1994), paras 5 (Mr Crawford), 23 (Mr Villagran Kramer), 31-32 (Mr Kabatsi).

226 UN Doc A/CN.4/458 and Add.1-8 (1994), para 10 (Slovenia).

227 'Summary record of the 2331st meeting of the 46th session', UN Doc A/CN.4/SR.2331 (1994). The Working Group on a draft statute for an international criminal court held 27 meetings. The 1993 text was considered from the 2329th to 2334th meetings, held between 3 and 9 May 1994, UN Doc A/CN.4/SR.2329-2334 (1994).

228 'Report of the Working Group on the question of a Draft Statute for an International Criminal Court-Revision', UN Doc A/CN.4/L.491/Rev.2, UN Doc A/CN.4/L.491/Rev.2/Corr.1, and UN Doc A/CN.4/L.491/Rev.2/Add.1-3 (1994).

229 UN Doc A/49/10 (1994), pp 20-73.

230 ibid, p 39.

231 ibid.

232 'Topical summary of the discussion held in the Sixth Committee of the General Assembly during its 49th session', UN Doc A/CN.4/464/Add.1 (1995), para 89.

In addition, article 20(e) of the 1994 Draft Statute also proposed 'exceptionally serious crimes of international concern' for violations of treaties in an Annex. The Annex provided an exhaustive list of treaty crimes, including 'grave breaches' of the 1949 Geneva Conventions and Additional Protocol I.[233] Similar to the 1993 Draft text and the 1993 Working Group, the ILC expressly excluded Additional Protocol II from the Annex[234] because that Protocol does not specifically contain a provision about grave breaches or criminalising serious violations as war crimes. Since Common Article 3 was not excluded from the Annex, one may argue that grave breaches of Common Article 3 in non-international armed conflict were implicitly included. Its drafters, however, did not contemplate criminalising 'grave breaches' of Common Article 3 in non-international armed conflict as war crimes. Except for some support by a few judges, the jurisprudence of the ICTY also did not support the idea of 'grave breaches' of Common Article 3 in non-international armed conflict.[235] In contrast to its 1993 Draft text, the ILC's 1994 Draft Statute was more modest because it contemplated no offences committed in non-international armed conflict.

States and international organisations submitted their comments on the 1994 Draft Statute to the UN Secretary-General.[236] Belarus argued that Additional Protocol II should be included in the list of Annex in article 20(e),[237] while Switzerland cast doubt on this view by stating that:

> A fifth category of crimes is constituted by 'crimes established under or pursuant to the treaty provisions listed in the annex' (article 20, paragraph (e)), including, in particular, the Geneva Conventions of 12 August 1949 and Protocol I additional thereto of 8 June 1977 (perhaps also Protocol II?).[238]

233 UN Doc A/49/10 (1994), pp 67-69.

234 ibid, Commentary on art 20(e), p 69 (j).

235 *Tadić* Trial Chamber Decision on Jurisdiction, paras 46-52; *Tadić* Appeals Chamber Decision on Jurisdiction (Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction), part IV, para 7; *Mucić et al* Trial Judgment, para 203; *Prosecutor v Aleksovski* (Judgement, Dissenting Opinion of Judge Rodrigues) ICTY-95-14/1-T (25 June 1999), paras 27-49.

236 'Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Court, Report of the Secretary-General' (20 March 1995), UN Doc A/AC.244/1, Belarus, China, Singapore, Sweden, Switzerland, Venezuela, and the ICTY. See also 'Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Court, Report of the Secretary-General, Addendum' (30 March 1995), UN Doc A/AC.244/1/Add.1, Azerbaijan, Czech Republic, Sudan, and the Crime Prevention and Criminal Justice Branch and the United Nations International Drug Control Program; UN Doc A/AC.244/1/Add.2 (1995), Cyprus, France, and US; UN Doc A/AC.244/1/Add.3 (1995), Libya; UN Doc A/AC.244/1/Add.4 (1995), Barbados and Trinidad and Tobago.

237 UN Doc A/AC.244/1(1995), Belarus, para 14.

238 ibid, Switzerland, para 6.

The US opposed the inclusion of violations of Additional Protocol II in the jurisdiction of the proposed Court.[239] In connection with its position, as observed above, the US only opposed the jurisdiction of the Court instead of the criminalisation of violations in non-international armed conflict. In addition, it was unknown what the positions of other States were from their comments on the issue of war crimes in non-international armed conflict. They seemingly did not intend to include serious violations in non-international armed conflict as war crimes at that time.

3.3.5.3 Summary

The examination of the ILC's work on the Draft Code of Crimes shows that the view on war crimes in non-international armed conflict dramatically changed in the final 1996 Draft Code of Crimes. The observation of the ILC's work on the International Criminal Court demonstrates that in 1995 the majority of UN member delegations were reluctant to consider war crimes committed in non-international armed conflict. The ILC did not specify to what extent it codified or progressively developed the notion of war crimes. Some observers of the ILC were ambitious about including violations in non-international armed conflict, but they were more prudent about labelling these offences as war crimes.

3.3.6 Assessment and conclusions

The exploration of the notion of war crimes and its evolution in the context of non-international armed conflict indicates that there is a remarkable trend of criminalising serious violations in non-international armed conflict in the UN Security Council and among scholars.[240] As shown above, after the First and Second World Wars, the practice of prosecution of war crimes emerged in international law. The establishment of international investigation commissions in 1919 and 1943, the criminalisation of violations of international humanitarian law by treaties, and war crimes trials at Nuremberg and Tokyo evidenced the attempts of the international community to prosecute war crimes under international law. The issue of war crimes in non-international armed conflict, however, was not considered from 1919 to 1945. When Common Article 3 and Additional Protocol II were adopted, they did not evidence States' recognition of war crimes in non-international armed conflict. Despite some instances of national legislation, there was no criminalisation of violations in non-international armed conflict as war crimes at the inter-

239 UN Doc A/AC.244/1/Add.2 (1995), US, para 105.
240 Cameron *et al*, 'Article 3', para 522.

national level until the early 1990s.[241] After the *Tadić* Appeals Chamber Decision on jurisdiction, the view emerged among scholars that serious violations of Common Article 3 and of Additional Protocol II in non-international armed conflict were war crimes. The *Tadić* Appeals Chamber Decision and the ICTR Statute also shed light on the drafting of war crimes in the 1996 Draft Code of Crimes. The ICRC and the ILC remarkably accepted the idea of war crimes in non-international armed conflict in 1996. Yet, a rule of war crimes in non-international armed conflict was not widely accepted under customary law at that time.[242]

Indeed, there have been some prosecutions carried out against individuals with respect to acts perpetrated before 1995 in non-international armed conflict. For example, the Hague District Court convicted a former Afghan soldier for committing war crimes in the 1980s civil war for torture of civilians.[243] The Netherlands either prosecuted suspects for war crimes committed in the Rwanda non-international armed conflict in 1994 or granted a request for the surrender for an individual who was charged with war crimes committed in 1994.[244] In recent years, Dutch courts convicted individuals for war crimes committed in the civil war of Ethiopia (the late 1970s).[245] The Netherlands is active in prosecuting war crimes committed in non-international armed conflict. Belgium and Switzerland are also pros-

241 Australia, War Crimes Act 1945, amended 1988, § 5(c); Netherlands, Criminal Law in Wartime Act 1952, amended 1990, Preamble and art 1(3); Nicaragua, Military Penal Code 1996, art 47; Norway, Military Penal Code 1902, arts 107-108; Spain, Penal Code 1995, arts 607-614; Thailand, Prisoners of War Act 1955, §§ 12-19. UN Doc S/1994/674, para 52.

242 Robert Cryer, Håken Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge: CUP 2014) 27; Sivakumaran, *The Law of Non-International Armed Conflict* 475-76; Meron, 'War Crimes in Yugoslavia and the Development of International Law', 82; Daphna Shraga and Ralph Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia' (1994) 5 *EJIL* 360, 366 and fn 20; ICRC, Preliminary Remarks, 25 March 1993, para 4; William J. Fenrick, 'The Prosecution of War Criminals in Canada' (1989) 12 *Dalhousie LJ* 256, 259 and fn 9.

243 *Public Prosecutor v Heshamuddin Hesam* (Judgment, District Court of The Hague, the Netherlands) LJN: AV1163 (14 October 2005); *Public Prosecutor v Heshamuddin Hesam* (Judgment, Supreme Court, the Netherlands) LJN: BG1476 (8 July 2008), paras 5.1, 5.3, 6.6. See also *Public Prosecutor v Habibullah Jalalzoy* (Judgment, Supreme Court, the Netherlands) LJN: BC7418 (8 July 2008); *Public Prosecutor v Abdullah Faqirzada* (Judgment, Supreme Court, the Netherlands) LJN: BR6598 (8 November 2011), para 40, Faqirzada was acquitted for lacking evidence to establish his command responsibility.

244 *Public Prosecutor v Joseph Mpambara* (Judgment, Court of Appeal of The Hague, the Netherlands) LJN: BR0686 (7 July 2011); *Public Prosecutor v Joseph Mpambara* (Judgment, Supreme Court, the Netherlands) ECLI: NL:HR:2013:1420 (26 November 2013); *Public Prosecutor v Yvonne Basebya* (Judgment, District Court of The Hague, the Netherlands) LJN: BZ4292 (1 March 2013), paras 1.2, 19. 37, her individual responsibility was not supported for lack of a nexus with an armed conflict, but she was convicted for incitement to genocide; *Public Prosecutor v Michel Bagaragaza* (Request for surrender, District Court of The Hague, the Netherlands) LJN: BC8211 (21 March 2008).

245 Reuters, 'Dutchman put on trial for Ethiopian war crimes in 1970s', available at: https://www.reuters.com/article/us-netherlands-ethiopia-war-crimes/dutchman-put-on-trial-for-ethiopian-war-crimes-in-1970s-idUSKBN1CT27U?il=0 [accessed 5 March 2018].

ecuting suspects of war crimes in the First Liberian Civil War (1989-1996). A Canadian court found Munyaneza responsible for war crimes committed in Rwanda in 1994 because in its view article 4 of the ICTR Statute reflects customary international law.[246] The Extraordinary African Chambers in Senegal in 2016 decided that Hissène Habré, the former President of Chad, committed war crimes in the 1982-1990 civil wars. Spanish courts are considering prosecuting war crimes committed in Morocco in 1976.[247]

It should be stressed that most of these prosecutions are based on national legislation rather than customary international law. For instance, the 1977 *Criminal Code* of the former Yugoslavia[248] and section 8 of the 1952 Dutch *Wartime Offences Act*[249] clearly provide for violations of 'laws and customs of war'. Dutch courts charged Van Anraat, a Dutch businessperson, for war crimes during the Iran-Iraq war in 1988.[250] In this case, a Dutch Court of Appeal held that 'laws and customs of war' in 1988 included Common Article 3 of the four 1949 Geneva Conventions in 'conflict not of an international nature'. Van Anraat complained to the European Court of Human Rights (ECtHR) about the imprecision of the term 'laws and customs of war'. The ECtHR firstly concluded that 'it is the role of the domestic courts to interpret and apply relevant rules of domestic procedural or substantive law'. The interpretation of the Dutch Court of Appeal was not a violation of article 7 of the European Convention on Human Rights concerning legal certainty.[251] Therefore, it is acceptable for these isolated prosecution of war crimes in civil wars by reference to national laws stipulated before offences occurred. Alternatively, the ECtHR relied on the *Tadić* Appeals Chamber Decision on Jurisdiction in stating that in customary law, a serious violation of Common

246 *R v Munyaneza* (Judgment, Supreme Court of Quebec, Canada) 2009 ACCS 2201 (22 May 2009), paras 131-35, 147.

247 Spain, the *Sahara* case, see International Federation for Human Rights, 'Universal Jurisdiction Developments: January 2006–May 2009', 2 June 2009.

248 Socialist Federal Republic of Yugoslavia, Criminal Code 1977, repealed by the Criminal Code of the Republic of Serbia as of 1 January 2006, arts 142-156.

249 Wartime Offences Act (Wet Oorlgsstrafrecht/WOS), 10 July 1952, amendments to the law dated 27 March 1986 (Bulletin of Acts and Decrees, 1986, 139) and amendment by Act of Parliament of 14 June 1990 (Bulletin of Acts and Decrees, 1990, 369), replaced by the International Crimes Act (Wet internationale misdrijven) of 19 June 2003. Dutch Genocide Convention (Implementation) Act (Uitvoeringswet genocideverdrag) of 1964 and Torture Convention (Implementation) Act (Uitvoeringswet folteringverdrag) of 1988 have been repealed by articles 19 and 20 of the International Crimes Act.

250 *Public Prosecutor v Frans Cornelis Adrianus van Anraat* (Judgment, District Court of The Hague, the Netherlands) LJN: AX6406 (23 December 2005), para 14; *Public Prosecutor v Van Anraat* (Judgment, Court of Appeal of The Hague, the Netherlands) LJN: BA6734 (9 May 2007), para 13; *Public Prosecutor v Van Anraat* (Judgment, Supreme Court, the Netherlands) LJN: BG4822 (30 June 2009).

251 *Van Anraat v the Netherlands* (Decision on admissibility, Third Section) ECtHR Application No. 65389/09 (6 July 2010), paras 93-96.

Article 3 in non-international armed conflict was an international crime in the 1980s.[252] This authority is also an isolated decision. The isolated practice does not contradict the previous point that in 1995, the view that there was international criminal liability for war crimes in non-international armed conflict was not well accepted but isolated.

Some practice exists supporting the view that offences committed in a civil war before the 1990s can be prosecuted as war crimes in 'international law' as we understand it at the present time. This assumption is contestable because a rule of war crimes in non-international armed conflict was less accepted in custom before the early 1990s. Whether this flaw is an obstacle for victims to claim compensation in civil litigation is a separate issue which goes beyond the focus of this topic. Isolated examples of national prosecutions and legislation do not significantly weaken the general observation. States did not reach an agreement on criminalising serious violations in non-international armed conflict as war crimes in international law in late 1995. The next section analyses debates about war crimes in non-international armed conflict to show whether such an agreement was reached in the drafting, or at the adoption, of the Rome Statute.

3.4 War crimes in non-international armed conflict: were articles 8(2)(c) and (e) declaratory of custom?

The work of the ICRC and the ILC's 1996 Draft Code of Crimes inspired the drafting of article 8 of the Rome Statute.[253] A Trial Chamber of the ICTY held that article 8 of the Rome Statute incorporates part of the *Tadić* Appeals Chamber Decision into its definition of war crimes.[254] This section illustrates the process of codification and crystallisation of customary law by depicting the evolution of the notion of war crimes in non-international armed conflict under articles 8(2)(c) and (e) of the Rome Statute. When the International Criminal Court was being established, States and international organs vigorously debated the scope of war crimes, including whether the law of war crimes applies to non-international armed conflict.[255] The drafting history of war crimes is examined following three phases, at the *Ad Hoc* committee, the Preparatory Committee and the Rome Conference.

252 ibid, para 94.

253 Cryer *et al*, *An Introduction to International Criminal Law and Procedure*.

254 *Prosecutor v Milošević* (Decision on Motion for Judgement of Acquittal) ICTY-02-54-T (16 June 2004) [*Milošević* Decision on Acquittal Judgment], para 20.

255 Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: CUP 2005) 45; Mahnoush Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *AJIL* 22, 32.

3.4.1 *Ad Hoc* Committee 1995 sessions

Two related issues were discussed at the *Ad Hoc* Committee. The first one was whether breaching international humanitarian treaty rules formed part of customary law. The second issue was whether violations of these rules could give rise to individual criminal responsibility. After two meetings, the *Ad Hoc* Committee submitted a Report to the General Assembly in September 1995.[256] The Report mentioned that:

> There were different views as to whether the laws and customs applicable in armed conflict […] should include those governing non-international armed conflicts, notably common article 3 of the 1949 Geneva Conventions and Additional Protocol II thereto. Those who favoured the inclusion of such provisions drew attention to the current reality of armed conflicts, the statute of the *ad hoc* Tribunal for Rwanda and the recent decision of the *ad hoc* Tribunal for the former Yugoslavia recognising the customary-law status of common article 3.[257]

The 'recent decision' mentioned here is the *Tadić* Trial Chamber decision on jurisdiction delivered in August 1995. In that decision, Common Article 3 was considered as a customary rule, and serious violations of it were criminalised as war crimes.[258]

The *Ad Hoc* Committee's Report went on to state that:

> However, other delegations expressed serious reservations concerning the possibility of covering non-international armed conflicts and questioned the consistency of such an approach with the principle of complementarity. As regards Additional Protocol II, the view was expressed that that instrument as a whole had not achieved the status of customary law and therefore was binding only on States parties thereto.[259]

Some delegations feared that an 'inherent competence' of the proposed court over war crimes in non-international armed conflict would violate the principle of complementarity.[260] The view was also expressed that violations of Common Article 3 or Additional Protocol II in non-international armed conflict should not fall within the jurisdiction of the Court.[261] The Committee commented that 'the conduct would universally be acknowledge[d] as wrongful […] [, but] there was doubt […] in respect of whether it constituted a crime'.[262] The Report concluded that most delegations supported the idea

256 'Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court', UN Doc A/50/22 (1995), para 74.
257 ibid (italics added).
258 *Prosecutor v Tadić* (Decision on the Defence Motion on Jurisdiction) ICTY-94-1-T (10 August 1995) [*Tadić* Trial Chamber Decision on Jurisdiction], paras 57-74.
259 UN Doc A/50/22 (1995), para 74.
260 ibid, para 74.
261 ibid.
262 ibid, para 72.

of including a rule about war crimes committed in non-international armed conflict in the Statute.[263]

These debates deserve comment. In August 1995, 184 of the 185 UN member States ratified the 1949 Geneva Conventions, whereas only 128 of the 185 States ratified Additional Protocol II. This Report indicates that some delegations had doubts about the customary status of Additional Protocol II as a whole, but not about Common Article 3. Delegations were focused on the customary status of Common Article 3 and Additional Protocol II rather than the customary status of war crimes for violations. Divergent views existed concerning the customary status of treaty rules applicable in non-international armed conflict. In some delegations' logic, individuals are only responsible for acts that violate an international humanitarian rule with customary status.[264] Some States supported the inclusion of violations of a rule of Additional Protocol II in non-international armed conflict, but only if it was recognised as custom. If States had agreed on 'war crimes committed in non-international armed conflict' under customary law, some of them would not argue that only States Parties to Additional Protocol II are subjected to treaty-based crimes. Russia, Turkey, China, India and several other Asian States as well as several Arab States also opposed the inclusion of war crimes in non-international armed conflict at that time. Doubts about the customary status of war crimes in non-international armed conflict did not suddenly evaporate one month later in October 1995, when the *Tadić* Appeals Chamber Decision on Jurisdiction was rendered. The specific *Tadić* Appeals Chamber Decision has to be seen as a starting point for the formation of a new customary rule.

3.4.2 Preparatory Committee sessions and intersessional meetings: 1996–1998

From 1996 to 1998, the Preparatory Committee held six sessions and established different working groups.[265] The working group on the definition of crimes and the working group on definitions and elements of crimes dealt with the war crimes issue. Three intersessional meetings were also held during this period.

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263 ibid.

264 This is not the place here to discuss the customary status of international humanitarian law in non-international armed conflict and its relevance with individual criminal responsibility, see Henckaerts and Doswald-beck, *Customary International Humanitarian Law*, Vol 1.

265 UN Doc A/AC.244/L.5; 'Preparatory Committee on Establishment of International Criminal Court, Provision Agenda', UN Doc A/AC.249/L.1; 'Establishment of an international Criminal Court', GA Res 51/207 (1997), UN Doc A/RES/51/207, para 4. The other working groups: working group on general principle of criminal and penalties; working group on complementarity and trigger mechanism; working group on procedural matters; working group on individual cooperation and judicial assistance.

3.4.2.1 1996 sessions

Before the first session, Judge Cassese, then President of the ICTY, and the US delegation each submitted a document about the definition of war crimes to the Preparatory Committee.[266] These two documents constituted the basis for the discussion of war crimes. Judge Cassese held that article 3 of the ICTY Statute contained 'violations of customary law on internal conflicts, including article 3 Common to the four Geneva Conventions'.[267] The US draft on the other hand distinguished grave breaches of the 1949 Geneva Conventions from other serious violations of the laws and customs.[268] During the first session, several speakers called for the definition of war crimes to include 'grave breaches of the 1949 Geneva Conventions' and 'other serious violations of the laws and customs of war'.[269]

Views were divided on whether to include war crimes in non-international armed conflict and on the scope of the applicable international humanitarian law in this context. Some States upheld the opinion that war crimes in non-international armed conflict should be included as the 1996 Draft Code of Crimes provided. An Austria's draft text with a non-exhaustive list included violations of law applicable to non-international armed conflict in the definition of war crimes.[270] In light of the expansive interpretation of article 3 of the ICTY Statute, France also proposed including 'serious violations' of the laws and customs of war as war crimes in both international and non-international armed conflicts.[271] Italy proposed punishing infringements of the Geneva Conventions in both kinds of armed conflicts.[272] The Italian delegate added that the list of crimes enumerated in article 3 of the ICTY Statute was a useful guide.[273] Egypt's draft included violations of Common Article 3 and articles 4 and 18 of Additional Protocol II as war crimes.[274]

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266 US, 'Redraft of ILC Article 20 on ICC Jurisdiction with Proposed Elements' (23 March 1996); 'Definition of Crimes and General Principles of Criminal Law as Reflected in the International Tribunal's Jurisprudence, submitted by Antonio Cassese' (22 March 1996).

267 'Definition of Crimes and General Principles of Criminal Law as Reflected in the International Tribunal's Jurisprudence', submitted by Antonio Cassese, para 6.

268 'Redraft of ILC Article 20 on ICC Jurisdiction with Proposed Elements', arts 20, 20*bis*, 20 *ter* draft.

269 'Preparatory Committee on Establishment of International Criminal Court discusses inclusion of war crimes in list of "core crimes" 4th Meeting' (26 March 1996), UN Doc L/2764.

270 Austria, 'Serious violations of the laws and customs applicable in armed conflicts' (2 April 1996).

271 France, 'Draft Statute of the International Criminal Court: Working Paper' (6 August 1996), UN Doc A/AC.249/L.3, arts 27 and 31, pp 30-34.

272 UN Doc L/2764, 27 March 1996; Italy, 'Proposal on war crimes' (30 March 1996).

273 Italy, 'Proposal on war crimes' (30 March 1996).

274 Egypt, 'Draft: Optional Approaches to the Definition of War Crimes' (29 March 1996).

Other States neither expressed views nor intended to include crimes in non-international armed conflict within the jurisdiction of the Court. Singapore did not express a view about the inclusion of violations of Common Article 3 and Additional Protocol II because it was considering the Annex list of article 20(e) of the 1994 ILC Draft Statute.[275] A Japanese proposal limited the context of war crimes to international armed conflict. Japanese representatives said it was a State's responsibility to ensure their militaries conformed to international law and to prosecute individuals under the national law.[276] India and Russia also raised doubts about whether the Court should address non-international armed conflict.[277] The UK representative argued for clearly enumerated criminal acts that violated customary international law. However, the Annex submitted by the UK about applicable customary international law excluded Common Article 3.[278] It appears that at the time the UK doubted whether violations of Common Article 3 and Additional Protocol II in non-international armed conflict constituted war crimes under international law.

Considering different State proposals, the Chairman of the Preparatory Committee proposed a text that included the violations of Common Article 3 and Additional Protocol II within square brackets.[279] Square brackets indicate that a consensus has not yet been reached on a proposal. The Chairman's revised text also put the phrases 'whether of an international or of a non-international character' and 'of Additional Protocol II' within square brackets.[280] The Preparatory Committee summarised:

> Some delegations expressed the view that it was important to include violations committed in internal armed conflicts given their increasing frequency in recent years, that national criminal justice systems were less likely to be able to adequately address such violations and that individuals could be held criminally responsible for such violations as a matter of international law, […]. Other delegations expressed the view that violations committed in internal armed conflicts should not be included, that the inclusion of such violations was unrealistic […], that individual criminal responsibility for such violations was not clearly established as a matter of existing law […], and that customary law had not changed in this respect since the Rwanda Tribunal Statute.[281]

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275 Singapore, 'Amendments to Article 20 footnote 3' (4 April 1996).

276 Japan, 'Proposal on the Definition of War Crimes' (27 August 1996), UN Doc A/AC.249/WP.48.

277 UN Doc L/2764, 27 March 1996.

278 UK, 'Graves Breaches, Customary international law – annex' (1 April 1996).

279 'Chairman's Informal Text No 4, Article 20*ter*, War Crimes' (4 April 1996), UN Doc A/AC.249/1996/WG.1/IP.4; 'Summary of the Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996', UN Doc A/AC.249/1 (1996), Annex I, pp 65-67.

280 'Chairman's Revised Informal Text No 4' (5 April 1996), UN Doc A/AC.249/CRP.9/Add.4; 'Draft Summary of Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996' (9 April 1996), UN Doc A/AC.249/CRP.2/Add.2/Rev 1, p 62.

281 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', GAOR 51st Session Supp No 22, UN Doc A/51/22 (1996), Vol I, para 78; UN Doc A/AC.249/1 (1996), para 38.

Similar proposals and arguments for the notion of war crimes were also reflected when the report of the *Ad Hoc* Committee was discussed in the Sixth Committee of the General Assembly. Delegations claimed that a customary rule existed regarding war crimes in international armed conflict, whereas divergent opinions existed concerning war crimes in non-international armed conflict.[282]

3.4.2.2 1997-February-session

In February 1997, three States and the ICRC submitted proposals to the Preparatory Committee on the issue. New Zealand and Switzerland's joint working paper proposed serious violations of international humanitarian law applicable in non-international armed conflict as war crimes.[283] The US supported a restricted idea of war crimes in non-international armed conflict, extending this to violations of Common Article 3 but not of Additional Protocol II.[284] The ICRC included violations in non-international armed conflict as war crimes. The ICRC proposal based on the joint working paper was much broader. Relying on the three State proposals, Working Group I on the definition of crimes worked out text on war crimes and recommended it to the third session of the Preparatory Committee.[285] The text also included many square brackets in Section C of war crimes, which provided that certain serious violations of Common Article 3 in non-international armed conflict could constitute war crimes.[286]

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282 'Summary record of the 26th-30th meetings [of the Sixth Committee]', UN Doc A/C.6/50/R.26-30 and 48-50 (1995); UN Doc A/C.6/50/R.30 (1995), paras 30 (Hungary), 50 (India), 80 (Argentina), 81 (Georgia).

283 'Working Paper submitted by the delegations of New Zealand and Switzerland' (14 February 1997), UN Doc A/AC.249/1997/WG.1/DP.2.

284 US, 'War Crimes: Proposal' (15 February 1997), UN Doc A/AC.249/1997/WG.1/DP.1; Christopher Keith Hall, 'The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1998) 92 *AJIL* 124, 28.

285 'Preparatory Committee of an International Criminal Court approved work program for two-week session' (21 February 1997), UN Doc A/AC.249/1997/L.2; Working Group I, 'War crimes, Draft Consolidated Text' (20 February 1997), UN Doc A/AC.249/1997/WG.1/CRP.2; Working Group I, 'War crimes Preliminary Text' (20 February 1997), UN Doc A/AC.249/1997/WG.1/IP/REV.1; Working Group I, 'War crimes, Draft Consolidated Text' (21 February 1997), UN Doc A/AC.249/1997/WG.1/CRP.2/Corr.1; 'Decision taken by the Preparatory Committee at its Session held from 11 to 21 February 1997' (12 March 1997), UN Doc A/AC.249/1997/L.5.

286 UN Doc A/AC.249/1997/WG.1/CRP.2 and Corr.1, 20 February 1997; 'Preparatory Committee on International Criminal Court Concluded Third Session' (21 February 1997), UN Doc L/2824,.

3.4.2.3 Subsequent sessions and intersessional meetings

In June 1997, Germany convened the first intersessional workshop about the issue of war crimes for NATO experts in Bonn and provided an informal working paper (Bonn Text). The Bonn Text included serious violations of Common Article 3 in non-international armed conflict under Section C and other violations of the laws and customs applicable in non-international armed conflict under Section D.[287] Both sections remained in square brackets. States made remarks about the Bonn Text. Turkey said the two sections should remain in square brackets.[288] The UK held that

> At present, this [Section C] must remain in square brackets as our review [of the UK's position in relation to internal armed conflict] has not yet been completed. However, […] there may be a change to their position.[289]

As to Section D, the UK was 'not yet convinced that this section in principle is reflective of customary international law. This section, therefore, should also remain in square brackets in its entirety'.[290] The ICRC, however, commented that the text missed war crimes committed in non-international armed conflict.[291]

The fourth session of the Preparatory Committee and the second intersessional meeting did not develop the issue of war crimes in non-international armed conflict. In this period, some States and the ICRC in the Sixth Committee and the General Assembly also expressed their demands for the inclusion of war crimes in non-international armed conflict in the Statute.[292]

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287 'Informal working paper on war crimes and preliminary comments on Bonn's text' (15 July 1997), UN Doc A/AC.249/1997/WG.1/IP/REV.1.

288 'United Nations negotiations on the establishment of an International Criminal Court (ICC): Second Informal Inter-Sessional Workshop for experts from Member States of the Atlantic Alliance with regard to the issue of War Crimes'(21 October 1997), UN Doc A/AC.249/1997/WG.1/IP.

289 'Comments submitted by Partners', Annex to the 'Informal working paper on war crimes' (14 July 1997), UN Doc A/AC.249/1997/WG.1/IP/REV.1.

290 ibid.

291 Preparatory Committee, 'Preliminary comments on BONN's Text' (15 July 1997), UN Doc A/AC.249/1997/WG.1/IP/Rev1.

292 UN Doc A/C.6/52/SR.11 (1997), para 46 (Trinidad and Tobago, speaking on behalf of the 14 State members of the Caribbean community); 'Summary record of the 13th meeting [of the Sixth Committee]', UN Doc A/C.6/52/SR.13 (1997), para 16 (Costa Rica); 'Summary record of the 14th meeting [of the Sixth Committee]', UN Doc A/C.6/52/SR.14 (1997), paras 49 (Germany), 55 (Belarus); UN Doc A/C.6/52/SR.15 (1997), para 15 (ICRC); GAOR 52nd session, 23rd plenary meeting, UN Doc A/52/PV.23 (3 October 1997), Ethiopia.

The fifth session in December 1997 was fruitful with respect to war crimes.[293] Working Group I submitted its definition of war crimes.[294] Draft article 20C provided five options on war crimes in non-international armed conflict. Option I contained two sections, Sections C and D (predecessors of articles 8(2)(c) and (e) of the Rome Statute). Option I proposed removing the square brackets in Sections C and D and added a new restrictive clause before Sections C and D. The text of Section C was not substantially distinct from article 8(2)(c) of the Rome Statute, while the text of Section D listed 12 acts of serious violations.[295] Option I provided the original framework for the final version of articles 8(2)(c) and (e) of the Rome Statute. Germany and the UK both submitted a war crimes text that was similar to Option I.[296] Like the proposal in Option I, Option II further suggested inserting another four violations in Section D. Option III advised deleting the restrictive clause of Sections C and D. By contrast, Option IV proposed deleting Section D, and Option V proposed deleting both Sections C and D.[297] Draft article 20C with five options on war crimes in non-international armed conflict was well supported. Both the Report of the Zutphen Intersessional meeting and the Preparatory Committee's 1998 Draft Statute defined war crimes in non-international armed conflict with similar text and structure to Draft article 20C.[298] All these documents with the Report of the Preparatory Committee were transmitted to the 1998 Rome Conference for discussion.[299]

The recapitulation of the drafting works shows that States' attitudes were changing with respect to criminalising serious violations in non-international armed conflict as war crimes. States switched their positions within months of the delivery of *Tadić* Appeals Chamber Decision in October 1995, despite the scarcity of prosecution practice. The US stated that it 'strongly

293 Report of the Working Group on the Definition of the Crime, 'Informal Working paper on war crimes', in 'Decision taken by the Preparatory Committee at its session held from 1 to 12 December 1997', UN Doc A/AC.249/1997/L.9/Rev.1, Annexe I; UN Doc A/AC.249/1997/WG.1/CRP.9. Other versions see UN Doc A/AC.249/1997/WG.1/CRP.7; UN Doc A/AC.249/1997/WG.1/CRP.7 Add.1; UN Doc A/AC.249/1997/WG.1/CRP.8; 'War Crimes, Article 20C', UN Doc A/AC.249/1997/WG.1/CRP.9.

294 UN Doc A/AC.249/1997/WG.1/CRP.9, 12 December 1997.

295 ibid. Section D in Option I listed 12 serious violations, 4 of which contained several sub-options relating to intentionally directly attacking against civilian population, intentionally directing attacks against buildings, monuments, p laces not for military purpose, forcing or recruiting children under the age of fifteen years into armed forces, and prohibited weapons.

296 'Reference Paper on War Crimes submitted by Germany' (12 December 1997), UN Doc A/AC.249/1997/WG.1/DP.23/Rev1; UK and Germany, 'Informal Working Paper on War Crimes Option B' (12 December 1997).

297 UN Doc A/AC.249/1997/WG.1/CRP.9.

298 'Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands' (4 February 1998), UN Doc A/AC.249/1998/L.13; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (14 April 1998), UN Doc A/CONF.183/2, pp 19-20.

299 UN Doc A/CONF.183/2.

believe[d] that serious violations of the elementary customary norms reflected in Common Article 3 should be the centrepiece of the ICC's subject matter jurisdiction with regard to non-international armed conflicts'.[300] The US also 'urged' that 'there should be a section, in addition to Section C, covering other rules regarding the conduct of hostilities in non-international armed conflicts'. The US said it was 'eager to work with other delegations to build strong consensus on these matters'.[301] These concluding remarks indicate that in the US's view, no consensus had been reached on the 'subject matter jurisdiction' in early 1998.[302] The US in fact in 1996 had just passed an Act to cover war crimes in civil wars for 'grave breaches' of humanitarian rules.[303] In addition, according to the German 'Working Paper on War Crimes', a consensus was reached on serious violations of Common Article 3 in non-international armed conflict during the third session of the Preparatory Committee in February 1997.[304] The ICRC in December 1997 observed that 'the emergence of *opinio juris* on a customary rule on criminal liability for violations of international humanitarian law committed in non-international armed conflict has recently been recognised'.[305]

In fact, States either supported or opposed the inclusion of war crimes in non-international armed conflict for several reasons. Only some of them argued that war crimes in non-international armed conflict was or was not part of international law. States' expressions for inclusion of war crimes in non-international armed conflict indicates the practice of these States, but it is less convincing to argue that their support also evidences *opinio juris* for a customary rule of war crimes in non-international armed conflict at that time. In conclusion, a customary rule of war crimes in non-international armed conflict was crystallised before 1998 concerning serious violations of Common Article 3. However, no consensus existed on criminalising serious violations of Additional Protocol II and other rules applicable in non-international armed conflict as war crimes at that time. Discussions on war crimes in non-international armed conflict at the 1998 Rome Conference seem to enhance this conclusion and to demonstrate the crystallisation of customary rule.

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300 'Statement, United States Delegation to the Preparatory Committee on the Establishment of an International Criminal Court' (23 March 1998).

301 ibid.

302 US, War Crimes Act of 1996, 18 USC 2441(c)(3), as amended by Military Commissions Act of 2006, 10 USC 948a note.

303 ibid, 18 USC 2401(c).

304 'German Synoptical Working Paper on War Crimes: Intersessional Workshop for experts from NATO countries with regard to the issue of war crimes' (Bonn, 24 and 25 June 1997).

305 ICRC, 'Commentary on the Definition of War Crimes Submitted to the Preparatory Committee for the Establishment of an International Criminal Court' (1-12 December 1997), p 24.

3.4.3 Crystallisation of war crimes committed in non-international armed conflict in Rome: 1998

During the 1998 Rome Conference, three main issues were discussed with regard to war crimes in non-international armed conflict.[306] The first issue was whether to include provisions on war crimes in non-international armed conflict. The second issue was what acts should be added in addition to violations of Common Article 3 of the Geneva Conventions. The third issue was what the threshold is for war crimes in non-international armed conflict.[307] This section focuses on the inclusion issue in general and the threshold issue. In doing this, this section will analyse the debates of States at the Rome Conference to show whether a customary rule was crystallised that serious violations of Common Article 3 and other serious violations in non-international armed conflict constitute war crimes in international law.

3.4.3.1 The inclusion of war crimes in non-international armed conflict

Delegations debated war crimes in detail at the Rome Conference.[308] This subsection looks into the attitude and explanations of States and organisations towards the inclusion of war crimes in non-international armed conflict.

Many delegations addressed their positions on the inclusion of Sections C and D of war crimes in the meetings.[309] The majority of European States, Arab and South African States, Australia, Canada, Russia, the US, many Latin American States and some Asian States all expressed their support of the

306 UN Doc A/CONF.183/C.1/SR.3, UN Doc A/CONF.183/C.1/SR.4, UN Doc A/CONF.183/C.1/SR.5.

307 Philippe Kirsch and John Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 *AJIL* 2, 7.

308 'Summary Records of meetings of the Committee of the Whole', UN Doc A/CONF.183/C.1/SR.3, UN Doc A/CONF.183/C.1/SR.4, UN Doc A/CONF.183/C.1/SR.5, UN Doc A/CONF.183/C.1/SR.25, UN Doc A/CONF.183/C.1/SR.26, UN Doc A/CONF.183/C.1/SR.27, UN Doc A/CONF.183/C.1/SR.33, UN Doc A/CONF.183/C.1/SR.34, UN Doc A/CONF.183/C.1/SR.35, UN Doc A/CONF.183/C.1/SR.36.

309 From the 1st to 23rd meetings, the 1998 Draft Statute (UN Doc A/CONF.183/2, 14 April 1998) prepared by the Preparatory Committee was discussed in the Committee of the Whole. From the 24th to 32nd meetings, the Discussion Paper (UN Doc A/CONF.183/C.1/L.53, 6 July 1998) prepared by the Bureau of the Committee of the Whole was discussed. From the 33rd to 36th meetings, the Bureau Proposal (UN Doc A/CONF.183/C.1/L.59 and Corr.1, 13 July 1998) was discussed.

inclusion of Section C or both sections.[310] France noted that the 'war crimes' sections covered provisions in 1949 Geneva Conventions and their Additional Protocols and that in practice the 1998 Statute would reflect existing law.[311] The French delegation said that accepting a restriction of war crimes to international armed conflict would be a retrograde step.[312] However, Germany stated that 'war crimes committed in non-international armed conflicts must be included in view of their increasing frequency and the inadequacy of national criminal justice systems in addressing such violations'.[313]

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310 'Summary Records of Plenary meetings of the Conference', UN Doc A/CONF.183/SR.2, paras 13 (South Africa), 34 (UK), 54 (Sweden), 66 (Canada), 81 (Republic of Korea), 91 (Slovenia); UN Doc A/CONF.183/SR.3, paras 21 (Czech Republic), 48 (Lithuania), 74 (Costa Rica), 83 (Armenia); 114 (Observer for the European Community); UN Doc A/CONF.183/SR.4, paras 12 (Albania), 57 (Namibia), 66 (Chile); UN Doc A/CONF.183/SR.5, paras 5 (Slovakia), 13 (Brunei Darussalam), 21 (Hungary), 28 (Zambia), 47 (Estonia), 54 (Bulgaria), 61 (US); UN Doc A/CONF.183/SR.6, paras 2 (Belgium), 12 (Ireland), 77 (France); UN Doc A/CONF.183/SR.7, paras 26 (Bangladesh), 74 (Cape Verde); UN Doc A/CONF.183/SR.8, paras 3 (Denmark), 10-11 (Georgia), 20 (Russian Federation), 38 (Belarus), 45 (Bahrain), 62 (Ecuador), 68 (Uganda); UN Doc A/CONF.183/SR.9, para 21 (Philippines).
'Summary Records of meetings of the Committee of the Whole', UN Doc A/CONF.183/C.1/SR.3, paras 13-14 (Netherlands); UN Doc A/CONF.183/C.1/SR.4, paras 40-41 (Netherlands), 54 (US), 57 (Germany); UN Doc A/CONF.183/C.1/SR.5, paras 64 (Italy), 104 (Australia), 106 (Costa Rica), 108 (Canada), 109 (Belgium), 110 (New Zealand), 111 (Czech Republic), 112 (Ireland), 113 (Republic of Korea), 114 (Brazil), 117 (UK), 119 (Norway); UN Doc A/CONF.183/C.1/SR.6, paras 77 (France), 100 (US); UN Doc A/CONF.183/C.1/SR.25, paras 24 (New Zealand), 14 (Austria on behalf of the EU), 31 (Japan), 38 (Mozambique), 52 (Norway), 55 (Sierra Leone), 59 (Azerbaijan), 62 (Trinidad and Tobago), 65 (Mexico), 68 (UK), 71 (Germany), 73 (Botswana), 76 (Croatia), 78 (Australia), 80 (Senegal); UN Doc A/CONF.183/C.1/SR.26, paras 38 (Liechtenstein), 41 (Switzerland), 44 (Lithuania), 51 (Brazil), 54 (Republic of Korea), 58 (Chile), 66 (Mali), 69 (Italy), 72 (Togo), 78 (Cuba), 81 (Portugal), 107 (Ireland), 116 (Georgia), 118 (Lesotho), 123 (Greece), 126 (Cameroon), 131 (Slovakia); UN Doc A/CONF.183/C.1/SR.27, paras 9 (Uruguay), 13 (Colombia), 17 (Finland), 18 (Nicaragua), 21 (Bahrain), 23 (Slovenia), 27 (Hungary), 34 (Israel), 41 (Angola), 44 (Bosnia and Herzegovina), 49 (Denmark), 51 (Czech Republic), 54 (Poland), 55 (Congo), 58 (Benin), 69 (Cyprus), 81 (Gabon); UN Doc A/CONF.183/C.1/SR.28, paras 4 (Ethiopia), 7 (Burkina Faso), 22 (Brunei Darussalam), 26 (Namibia), 30 (Malta), 33 (Romania), 44 (France), 55 (Spain), 58 (Guatemala), 68 (Philippines), 71 (Ecuador), 73 (Andorra), 77 (Guinea-Bissau), 90 (Venezuela), 83 (Qatar); UN Doc A/CONF.183/C.1/SR.33, paras 18-19 (Switzerland), 24 (US), 68 (Germany), 80 (UK); UN Doc A/CONF.183/C.1/SR.34, paras 4 (Sweden), 22 (Trinidad and Tobago), 34 (Spain), 60 (South Africa), 75 (Jordan), 107-08 (Australia), 112 (Mexico); UN Doc A/CONF.183/C.1/SR.35, paras 8 (Sierra Leone); 15 (Italy), 23 (Uganda), 37 (Finland), 41 (Venezuela), 49 (Tanzania), 62 (Ethiopia), 67 (Canada), 68 (Denmark); 73 (Portugal); 76 (Estonia), 80 (Solomon Island), 84 (Botswana); UN Doc A/CONF.183/C.1/SR.36, paras 2 (Norway), 12 (Congo), 30 (Slovenia), 33 (Zimbabwe), 37 (Costa Rica), 39 (Andorra), 42 (Bosnia and Herzegovina).

311 France, National Consultative Commission on Human Rights, 'Statement by Director of the Legal Department of the French Ministry of Foreign Affairs' (22 April 1998).

312 UN Doc A/CONF.183/C.1/SR.6, para 77 (France).

313 UN Doc A/CONF.183/C.1/SR.4, paras 57, 60 (Germany).

Spain also supported the inclusion of the two sections because offences committed in non-international armed conflict should be dealt with and a consensus seemed to be emerging in that regard.[314] Venezuela said: 'what [sic] important was the nature and seriousness of the crimes, rather than the context in which it was [sic] committed'.[315] Bangladesh upheld the insertion of both sections to achieve 'high standards of justice', and urged that the list of violations in Section D be extended.[316]

Despite voting against the Rome Statute and subsequently declaring that they would not ratify the Statute,[317] the US and Israel showed a positive attitude towards the inclusion of war crimes in non-international armed conflict.[318] The US strongly believed that:

> serious violations of the elementary customary norms reflected in common Article 3 should be the centrepiece of the ICC's subject matter jurisdiction with regard to non-international armed conflicts. Finally, the United States urges that there should be a section, in addition to Section C, covering other rules regarding the conduct of hostilities in non-international armed conflicts. It is good international law, and good policy, to make serious violations of at least some fundamental rules pertaining to the conduct of hostilities in non-international armed conflicts a part of the ICC's jurisdiction.[319]

The US also stressed that:

> [...] concerning war crimes, [...] it was essential to cover internal armed conflicts, which were the most frequent and the most cruel. That area of law had been developed and clearly established and must be included in the Statute.[320]

In its view, the law of war crime in non-international armed conflict was well established under customary law.[321] The US supported the inclusion of war crimes in non-international armed conflict and assisted in ensuring they would be covered by the Rome Statute.[322]

In addition, some States swiftly changed their positions on war crimes in non-international armed conflict. Japan once claimed that the context of war crimes was limited to international armed conflict. In the second plenary

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314 UN Doc A/CONF.183/C.1/SR.28, para 55 (Spain).
315 UN Doc A/CONF.183/C.1/SR.35, para 41 (Venezuela).
316 UN Doc A/CONF.183/C.1/SR.7, paras 26-7 (Bangladesh); UN Doc A/CONF.183/C.1/SR.28, para 40 (Bangladesh).
317 'Statement by Judge Eli Nathan, Head of the Delegation of Israel' (17 July 1998).
318 UN Doc A/CONF.183/SR.9, paras 28 (US), 33 (Israel); UN Doc A/CONF.183/C.1/SR.27, para 34 (Israel).
319 'Statement, United States Delegation to the Preparatory Committee on the Establishment of an International Criminal Court' (23 March 1998).
320 UN Doc A/CONF.183/C.1/SR.9, para 100 (US).
321 UN Doc A/CONF.183/SR.5, para 61 (US); UN Doc A/CONF.183/C.1/SR.4, para 49 (US); UN Doc A/CONF.183/C.1/SR.6, para 100 (US).
322 US, 'Intervention on the Bureau's Discussion Paper (A/CONF.183/C.1/L.53)' (8 July 1998); David J. Scheffer, 'The United States and the International Criminal Court' (1999) 93 *AJIL* 12, 14, 16.

meeting at the Conference, Japan simply stated that 'war crimes that have not become part of customary international law should be excluded from the treaty'.[323] Yet, Japan kept silent on the inclusion of Sections C and D. In connection with the statement cited, its acquiescence might be interpreted as indicating that Japan doubted the customary status of some provisions in Section D at that time or Japan was willing to accept Section D but did not want to do so explicitly. Japan, thus, implicitly accepted that war crimes in non-international armed conflict, in general, had become part of customary law. Likewise, the UK changed its attitude towards violations of Additional Protocol II and 'strongly favoured the inclusion of Sections C and D' as war crimes.[324] When a new threshold was introduced to limit the scope of non-international armed conflict, the UK even criticised this threshold for its potential effect to narrow the ICC's competence.[325] Russia also appreciated the inclusion of Section C, but it doubted the justification for including Section D.[326] Its suspicion of war crimes in non-international armed conflict was erased partly. This observation has shown that these States did not object to war crimes in non-international armed conflict in general but were concerned about violations of Additional Protocol II.

Many intergovernmental and non-governmental organisations at the Conference also addressed the inclusion of war crimes committed in non-international armed conflict.[327] The ICRC noted that crimes committed in non-international armed conflict were crimes under customary international law.[328] It submitted that 'the Court must have jurisdiction over war crimes committed in all types of armed conflict, international or otherwise'.[329] The ICRC further said that 'many of the acts listed in Section D were recognised as crimes by customary law'.[330]

It should also be noted that more than 20 States objected to the inclusion of Section C or Section D or both, as Philippe Kirsch noted.[331] Firstly, some States were concerned that the jurisdiction of the Court would prejudice

323 UN Doc A/CONF.183/SR.2/Add.1 and Corr.1, para 44 (Japan).
324 UN Doc A/CONF.183/C.1/SR.5, para 117 (UK).
325 UN Doc A/CONF.183/C.1/SR.33, para 80 (UK).
326 UN Doc A/CONF.183/SR.7, para 20 (Russian Federation); UN Doc A/CONF.183/C.1/SR.28, para 20 (Russian Federation).
327 UN Doc A/CONF.183/SR.2, the Agence de cooperation culturelle et technique; UN Doc A/CONF.183/SR.3, para 115 (the European Community); UN Doc A/CONF.183/SR.4, paras 67 (League of Arab States), 72 (the Office of the United Nations High Commissioner for Refugees); UN Doc A/CONF.183/SR.5, para 72 (Women's Caucus); UN Doc A/CONF.183/SR.7, para 108 (Huma Rights Watch); UN Doc A/CONF.183/SR.8, para 75 (the Latin American Institute of Alternative Legal Services).
328 UN Doc A/CONF.183/C.1/SR.28, para 108 (ICRC).
329 UN Doc A/CONF.183/SR.4, para 68 (ICRC).
330 UN Doc A/CONF.183/C.1/SR.36, para 52 (ICRC).
331 'Summary record of the 3rd plenary meeting of the Conference', UN Doc A/CONF.183/SR.3, paras 13-14, Thailand, Vietnam, Syria, Iraq, India, Libya, Saudi-Arabia, Pakistan, Qatar, Sudan, Algeria, Turkey, China, Egypt, Iran, Sri Lanka, Yemen, Comoros, Indonesia, Nepal, Oman, Burundi and Russian Federation.

their State sovereignty.[332] One State said that it would accept the inclusion of Section C if the Court would not prejudice State sovereignty. Another two States said that they would accept the inclusion of the two sections as long as the Court's jurisdiction was complementary.[333] Secondly, in the first round of discussions, some States worried about the threshold of non-international armed conflict because how the Court would decide the existence of internal conflicts or internal disturbances was unclear.[334] Sudan was in favour of the inclusion of Section C; however, it argued that Section D implied a double standard that would hamper efforts at amnesty and domestic reconciliation.[335] Turkey called for a threshold of war crimes in both armed conflicts in the context of policies or as part of large-scale crimes.[336] Sudan and Turkey did not object to war crimes in non-international armed conflict, but they either stressed the practical difficulties in identifying a threshold or claimed a higher threshold to restrain the ICC's competence.

Thirdly, some States addressed a variety of other considerations. Indonesia held that acts set out in both sections could be prosecuted as crimes against humanity.[337] India noted that '[t]here is also no agreement about whether or not conflicts not of an international nature could be covered under the definition of such crimes under customary international law'.[338] Comoros mentioned that the content of both sections should be discussed.[339] Some other States expressed their concerns about the conflicts between international law and domestic law or policy, for example, the reference to 'enforced pregnancy'.[340] Iran, Saudi Arabia and some other Arab States argued that express recognition of a crime in non-international armed conflict would tend to legitimise abortion, which would be in conflict with the religious policy of prohibiting abortion in some Arabic States.[341]

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332 UN Doc A/CONF.183/C.1/SR.5, para 115 (India); UN Doc A/CONF.183/C.1/SR.28, paras 88 (Saudi Arabia), 104 (Libya); UN Doc A/CONF.183/C.1/SR.28, para 9 (Pakistan); UN Doc A/CONF.183/C.1/SR.35, paras 54 (Pakistan), 57 (Qatar); UN Doc A/CONF.183/C.1/SR.36, para 6 (Libya).

333 UN Doc A/CONF.183/C.1/SR.27, paras 60 (Indonesia), 61 (Comoros), 73 (Nepal); UN Doc A/CONF.183/C.1/SR.36, para 20 (Oman).

334 UN Doc A/CONF.183/C.1/SR.4, para 76 (Sudan); UN Doc A/CONF.183/C.1/SR.5, para 107 (Turkey); UN Doc A/CONF.183/C.1/SR.27, para 5 (Algeria).

335 UN Doc A/CONF.183/C.1/SR.5, paras 101-03 (Sudan).

336 ibid, para 107 (Turkey).

337 UN Doc A/CONF.183/C.1/SR.27, para 60 (Indonesia).

338 'Statement, by Mr Dilip Lahiri, Additional Secretary (UN) Ministry of External Affairs Head of the Indian Delegation at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', 16 June 1998, para 11.

339 UN Doc A/CONF.183/C.1/SR.27, para 61 (Comoros).

340 UN Doc A/CONF.183/C.1/SR.3, para 32 (Saudi-Arabia); UN Doc A/CONF.183/C.1/SR.4, paras 63 (Libya), 66 (United Arab Emirates); UN Doc A/CONF.183/C.1/SR.5, paras 21 (Saudi-Arabia), 71(Iran). However, abortion was not an issue in Jordan, see UN Doc A/CONF.183/C.1/SR.34, para 73 (Jordan).

341 UN Doc A/CONF.183/C.1/SR.3, para 32 (Saudi-Arabia).

Lastly, Iraq and Syria voiced their objections without giving reasons.[342] Thailand was not satisfied with the two sections, while Vietnam strongly advocated excluding them.[343] Some other States objected to the inclusion, while upholding a flexible view for further discussion. Iran and Sri Lanka firmly opposed the inclusion of Section D because it was not an expression of well-established customary law, whereas they were flexible concerning Section C.[344] China initially favoured the deletion of both sections, but it said it was open to any other suggestions.[345]

Overall, summary records of meetings show that the majority of delegations supported the inclusion of war crimes in non-international armed conflict, in particular, Section C, albeit with different views. Section D is more controversial for its underlying acts and the threshold of non-international armed conflict as opposed to its inclusion in the Rome Statute. States addressed their objections to the inclusion of war crimes in non-international armed conflict on different grounds. The observation demonstrates that these States were worried about specific crimes, the threshold of non-international armed conflict, as well as the relationship between the ICC's and their national tribunals' jurisdiction, instead of objecting to war crimes in non-international armed conflict in general. Some States were uneasy about war crimes in this context being tried by the ICC. In their view, the complementarity mechanism reserved assessment of the unable and unwilling exclusively to the Court, which looked like a form of interference with their internal affairs.[346] Their concerns implicitly confirmed their positive attitude towards the prosecution of war crimes in non-international armed conflict in national courts, although they objected to the inherent jurisdiction of the Court over such crimes.

Many of these opposing States did not insist on their objections. A final compromise formula was agreed that 'enforced pregnancy' was changed to 'forced pregnancy', with the clarification that 'this definition shall not in any

342 UN Doc A/CONF.183/SR.4, para 18 (Syrian Arab Republic); UN Doc A/CONF.183/C.1/SR.27, para 2 (Iraq); 'Indonesia, Philippines, Thailand and Vietnam: Proposal regarding the Bureau Proposal' in UN Doc A/CONF.183/C.1/L.59 and Corr.1, UN Doc A/CONF.183/C.1/L.74, 14 July 1998: 'The provisions of the Sections C and D shall not apply if there is any foreign interference in the situation of armed conflict not of an international character.'

343 UN Doc A/CONF.183/C.1/SR.28, para 51 (Thailand); A/CONF.183/C.1/SR.27, para 64 (Vietnam).

344 UN Doc A/CONF.183/SR.5, para 102 (Iran); UN Doc A/CONF.183/C.1/SR.27, para 80 (Sri Lanka); UN Doc A/CONF.183/C.1/SR.34, paras 62-3 (Iran).

345 UN Doc A/CONF.183/C.1/SR.5, para 120 (China); A/CONF.183/C.1/SR.25, para 36 (China).

346 ICRC (ed), *Commentary on the First Geneva Convention: Convention* (*I*) *for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge: CUP 2016). For discussions on the principle of complementarity, see C. Stahn and M.M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: CUP 2011).

way be interpreted as affecting national laws relating to pregnancy'.[347] As will be seen below, the thresholds of non-international armed conflict also made the two sections less difficult to be accepted. Indonesia, Thailand and Vietnam finally all agreed to prosecute these violations in non-international armed conflict as war crimes.[348] Philippe Kirsch, the Chair of the Committee of the Whole, concluded:

> […] the first section [Section C] […] was supported by almost all delegations. Even some of those delegations that publicly stated that they did not think the statute should apply to internal armed conflicts indicated privately that if it did, they could accept a provision based on Common Article 3. The second section [Section D], which defined the other serious violations of the laws and customs of armed conflict to be governed by the statute, was more controversial.[349]

3.4.3.2 Thresholds of non-international armed conflict

As mentioned above, Working Group I drafted five options for war crimes in non-international armed conflict. Its definition of war crimes was submitted to the Preparatory Committee and later included in the Committee's Draft Statute.[350] In the Draft Statute, Option I set out the content of Sections C and D. Option I also contained a newly added restrictive clause for war crimes.[351] The new provision stated: 'Sections C and D of this article apply to armed conflicts not of an international character and thus do not apply to situations of internal disturbances and tension, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.'[352]

This threshold was not adequately discussed in the first round of discussions. In the second round of discussions, the Discussion Paper, prepared by the Bureau of the Committee of the Whole, re-organised the five options for Sections C and D to satisfy different concerns about war crimes.[353] The Discussion Paper proposed two options for Section C and two options for Section D. Option I of Section C proposed a list of violations of Common Article 3 in non-international armed conflict, whereas Option II of Section C recommended the deletion of the whole section. The two options of Section D

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347 1998 Rome Statute, art 7(2)(f).

348 'Proposal Submitted by Indonesia, Philippines, Thailand and Viet Nam', UN Doc A/CINF.183/C.1/L.74, 14 July 1998.

349 Kirsch and Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', 7 and fn 17.

350 UN Doc A/CONF.183/2, pp 19-20.

351 'Report of the Working Group on the Definition of the Crime, Informal Working paper on war crimes, 18 December, 1997', in 'Decision taken by the Preparatory Committee at its session held from 1 to 12 December 1997', UN Doc A/AC.249/1997/L.9/Rev1, annex I; UN Doc A/AC.249/1997/WG.1/CRP.9, 12 December 1997. See also UN Doc A/AC.249/1997/WG.1/CRP.7, 3 December 1997; UN Doc A/AC.249/1997/WG.1/CRP.7 Add.1, 4 December 1997; UN Doc A/AC.249/1997/WG.1/CRP.8, 5 December 1997.

352 UN Doc A/AC.249/1997/WG.1/CRP.9, 12 December 1997, p 7.

353 'Discussion Paper prepared by the Bureau' (6 July 1998), UN Doc A/CONF.183/C.1/L.53, pp 205-07.

were formulated similar to Section C. The Discussion Paper duplicated the restrictive clause cited above as an opening clause, which was applicable to both Sections C and D. After the second round of discussions, the restrictive opening clause was generally accepted for Section C. It was later wholly integrated into article 8(2)(d) to limit violations of Common Article 3 in article 8(2)(c).

In the Bureau Proposal, also prepared by the Bureau of the Committee of the Whole, the square brackets in Sections C and D were deleted, and there was no option of removing either section. It appears that Sections C and D were no longer options but were assumed as belonging clearly under the jurisdiction of the Court. In the Bureau Proposal, the restrictive clause cited above was relocated to the opening clause of Section D (the first safeguard for Section D).[354] In order to receive delegations' broader support for Section D, the second restriction of Section D was added to its opening clause. The Bureau Proposal added language drawn from article 1(1) of Additional Protocol II:

> It applies to armed conflicts that take place in a territory of a State Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.[355]

In addition, the Bureau Proposal added a negative threshold of armed conflict, which states: 'Nothing in sections C and D shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all means consistent with international law.'[356]

Delegations discussed the Bureau Proposal for a whole day on 13 July 1998. A few delegations, such as India, continued to insist that the Statute should not apply to war crimes in non-international armed conflict.[357] Turkey was not satisfied when limitations were inserted, and emphasised the exclusion of war crimes in non-international armed conflict.[358] Its concern was more focused on a high threshold for the exercise of the jurisdiction by the Court and the method for maintenance of national security, rather than whether serious violations in non-international armed conflict were punishable as war crimes.

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354 'Proposal prepared by the Bureau' (11 July 1998) [Bureau Proposal], UN Doc A/CONF.183/C.1/L.59 and Corr.1, art 5 quarter War Crimes, p 215.

355 ibid, p 213.

356 UN Doc A/CONF.183/C.1/SR.33, para 7 (Netherlands).

357 ibid, paras 33 (Syrian Arab Republic), 37 (India); UN Doc A/CONF.183/C.1/SR.34, para 48 (Turkey); UN Doc A/CONF.183/C.1/SR.35, paras 2, 4 (Egypt), 54 (Pakistan), 64 (Iraq); UN Doc A/CONF.183/C.1/SR.36, para 6 (Libya).

358 UN Doc A/CONF.183/C.1/SR.34, para 48 (Turkey); UN Doc A/CONF.183/SR.9, para 43 (Turkey).

After inserting the second safeguard for Section D and the negative threshold of non-international armed conflict, China did not resist the inclusion of Section D but still had doubts about some subparagraphs listed in this section.[359] Nevertheless, China in the end voted against the Rome Statute.[360] At the Rome Conference and after, China repeatedly explained that '[t]he definition of war crimes committed during domestic armed conflicts in the Statute had far exceeded commonly understood and accepted customary international law' and said that it 'opposed the inclusion of non-international armed conflicts in the jurisdiction of the Court'.[361] Egypt shared a similar view with China and said that the Statute should only deal with war crimes recognised under customary international law. Section D was rejected because its content had not been recognised as customary international law except for the paragraph relating to children.[362] However, unlike China, Egypt did not show any resistance to the inclusion of Section D and even made a declaration to accept the jurisdiction of the ICC.[363] Russia was also not satisfied with the negative threshold of armed conflict, and suggested a reference to 'State sovereignty' after the wording 'affect'.[364] However, Russia did not vote against the Rome Statute and signed it.

On the other hand, some others criticised the second safeguard for Section D and the negative threshold of armed conflict.[365] Some States argued that by introducing the second safeguard, the Bureau Proposal set up a high threshold for other serious violations of war crimes in non-international armed conflict.[366] Others claimed that the very high threshold would inhibit the capacity of the Court to prosecute war crimes committed in non-interna-

359 UN Doc A/CONF.183/C.1/SR.33, para 40 (China), which had difficulty in accepting, paragraphs regarding 'pillaging; conscripting or enlisting children under the age of fifteen; killing treacherously a combatant adversary; subjecting persons to physical mutilation; destroying or seizing the property of an adversary'.

360 'Summary record of the 9th plenary meeting of the Conference', UN Doc A/CONF.183/SR.9, para 38 (China).

361 ibid ; UN Doc A/CONF.183/SR.9, para 38 (China).

362 UN Doc A/CONF.183/C.1/SR.35, paras 2, 4 (Egypt).

363 *Situation in the Arab Republic of Egypt* (Decision on the 'Declaration under Article 12(3) and Complaint regarding International Crimes Committed in Egypt', OTP) OTP-CR-460/13 (23 April 2014).

364 UN Doc A/CONF.183/C.1/SR.34, para 82 (Russian Federation).

365 States did not support the requirements, see UN Doc A/CONF.183/C.1/SR.33, para 14 (Austria (on behalf of European Union)); UN Doc A/CONF.183/C.1/SR.34, para 34 (Spain); UN Doc A/CONF.183/C.1/SR.35, paras 8 (Sierra Leone), 114-15 (Croatia, Czech Republic, Estonia, Hungary, Iceland, Norway, Poland, Slovenia and Austria).

366 UN Doc A/CONF.183/C.1/SR.33, para 7 (the Netherlands, Coordinator).

tional armed conflict between armed groups.[367] The Italian delegation stated that 'the acceptability of the two substantial restrictions was contingent on the acceptance of the entire package of provisions contained in section C and D'.[368] In the spirit of compromise, many States opposing the inclusion of Sections C and D finally gave up their objections.[369] Burundi, which was initially opposed to including war crimes in non-international armed conflict,[370] finally accepted its inclusion.[371] Sudan even recommended adding a reference to conflicts among armed groups to cover a broad scope of war crimes in non-international armed conflict.[372] The final package deleted the requirement of 'responsible command and control over territory' and included conflicts among armed groups for Section D.[373] The two safeguards for Section D with these slight changes were later incorporated into article 8(2)(f) of the Statute.[374] The negative threshold of non-international armed conflict finally applied to the entire article 8 and was integrated into article 8(3) of the Statute.[375]

Discussions on the thresholds reveal that war crimes in non-international armed conflict were widely accepted in international law. As Kirsch pointed out: 'those reactions [towards the two added restrictions in articles 8(2)(e) and (f)] ultimately proved useful, reflecting as they did widespread support

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367 ibid, paras 14 (Austria, on behalf of European Union); 18 (Switzerland), 24 (US), 68 (Germany), 80 (UK); UN Doc A/CONF.183/C.1/SR.34, paras 9 (Trinidad and Tobago), 22 (New Zealand), 34 (Spain), 60 (South Africa), 94 (Sudan), 107 (Australia), 112 (Mexico), 114 (Croatia, Czech Republic, Estonia, Hungary, Iceland, Norway, Poland, Slovenia); UN Doc A/CONF.183/C.1/SR.35, paras 8 (Sierra Leone), 23 (Uganda), 37 (Finland), 49 (Tanzania),60 (Lithuania), 67 (Canada), 68 (Denmark), 76 (Estonia), 77 (Romania), 79 (Solomon Islands); UN Doc A/CONF.183/C.1/SR.36, paras 2 (Norway), 30 (Slovenia), 33 (Zimbabwe), 37 (Costa Rica), 42 (Bosnia and Herzegovina), 52 (ICRC). 'Information conveyed by New Zealand on Behalf of the International Committee of the Red Cross' (13 July 1998), UN Doc A/CONF.183/INF/11; 'Sierra Leone: Proposal regarding the Bureau proposal in UN Doc A/CONF.183/C.1/L.59 and Corr.1' (13 July 1998), UN Doc A/CONF.183/C.1/L.62.

368 UN Doc A/CONF.183/C.1/SR.35, para 15 (Italy).

369 ibid, para 31 (Algeria); UN Doc A/CONF.183/C.1/SR.34, para 85 (Thailand). '§§ C and D would not apply if there was any foreign interference in the non-international armed conflict'; UN Doc A/CONF.183/C.1/SR.35, para 35 (Indonesia); UN Doc A/CONF.183/C.1/SR.27, para 80 (Sri Lanka); UN Doc A/CONF.183/C.1/SR.35, para 44 (Sri Lanka).

370 UN Doc A/CONF.183/C.1/SR.27, para 46 (Burundi).

371 UN Doc A/CONF.183/C.1/SR.35, para 20 (Burundi).

372 UN Doc A/CONF.183/C.1/SR.34, para 96 (Sudan).

373 Kirsch and Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', 10; 'Draft Statute for the International Criminal Court' (16 July 1998), UN Doc A/CONF.183/C.1/L.76 and Add.1.

374 1998 Rome Statute, the second sentence of art 8(2)(f).

375 ibid, art 8(3).

for covering internal armed conflicts'.[376] Considering States' support for the inclusion and their shifts, there is sufficient evidence of State practice showing widespread acceptance that in international law war crimes cover serious violations of Common Article 3 and other rules of international humanitarian law applicable in non-international armed conflict.

3.4.4 Conclusions

This review of the preparatory works demonstrate that the majority of States at the Rome Conference generally accepted a rule of war crimes in non-international armed conflict. War crimes for violations of Common Article 3 in non-international armed conflict were generally accepted before the 1998 Rome Conference, while war crimes for other serious violations in non-international armed conflict were crystallised at the 1998 Rome Conference. As shown above, an overwhelming number of States generally recognised serious violations of war crimes in non-international armed conflict, despite some States' reluctance to expand its scope. After the adoption of the Rome Statute in 1998, satisfaction was also expressed in the General Assembly and the Sixth Committee about the inclusion of war crimes in non-international armed conflict in the Rome Statute.[377] Notwithstanding a few States' concerns, it cannot be denied that based on sufficient practice and *opinio juris*, a customary rule was crystallised to criminalise serious violations of international humanitarian law in non-international armed conflict as war crimes in 1998.[378]

Nepal expressed its concern that the inclusion of serious violations of Additional Protocol II would cause difficulties for a State that is not a party to the Protocol.[379] This concern, in fact, cannot be upheld now. 112 of the 123 States Parties to the Rome Statute were also States Parties to Additional Protocol II when they ratified the Statute.[380] In addition, Colombia declared that:

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376 Kirsch and Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', 7.

377 GAOR 53rd session, 10th plenary meeting, UN Doc A/53/PV.10 (22 September 1998), Finland; GAOR 53rd session, 22nd plenary meeting, UN Doc A/53/PV.22 (30 September 1998), Zambia; 'Summary record of the 10th meeting [of the Sixth Committee]', UN Doc A/C.6/53/SR.10 (1998), para 14 (Greece); 'Summary record of the 11th meeting [of the Sixth Committee]', UN Doc A/C.6/53/SR.11(1998), paras 87 (Liechtenstein), 95-6 (ICRC); 'Summary record of the 12th meeting [of the Sixth Committee]', UN Doc A/C.6/53/SR.12 (1998), paras 42 (UK), 57 (Georgia); 'Summary record of the 12th meeting [of the Sixth Committee]', UN Doc A/C.6/55/SR.12 (2000), para 34 (Libyan Arab Jamahiriya).

378 Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' 104-09, 175.

379 UN Doc A/CONF.183/C.1/SR.27, para 73 (Nepal).

380 8 of the 123 States Parties first ratified the Statute and then ratified Additional Protocol II. These 8 States are Afghanistan, DRC, Fiji, Nauru, Palestine, Serbia and Timor-Leste, as well as Trinidad and Tobago.

> the provisions of the Statute must be applied and interpreted in a manner consistent with the provisions of international humanitarian law and, consequently, that nothing in the Statute affects the rights and obligations embodied in the norms of international humanitarian law, especially those set forth in article 3 common to the four Geneva Conventions and in Protocols I and II Additional thereto.[381]

States accepted that when becoming a party to the Rome Statute, the situation would not be dependent upon the acceptance of legal instruments defining the substance of such crimes. For instance, Mexico, the Marshall Islands and Andorra are States Parties to the Rome Statute but are not States Parties to Additional Protocol II.[382] The three States are not bound by Additional Protocol II, but their citizens are obliged indirectly not to exercise conducts that are considered as violations. In short, with regard to war crimes in non-international armed conflict, article 8(2)(c) was a reflection of pre-existing customary law, and article 8(2)(e) was a crystallisation of customary law. The two provisions of the Rome Statute were declaratory of customary law concerning war crimes in non-international armed conflict at the adoption of the Statute in 1998.

3.5 Further recognition of war crimes in non-international armed conflict: are articles 8(2)(c) and (e) declaratory of custom?

By 31 December 2000, 139 States signed the Rome Statute. As of June 2018, the Statute has been ratified by 123 States and signed by another 30 States.[383] Further practice and statements confirm the establishment of a customary rule of war crimes in non-international armed conflict.

3.5.1 Preparatory Commission: Elements of Crimes

States at the Rome Conference decided to establish a Preparatory Commission for the International Criminal Court to further the operation and arrangements of the Court.[384] There were five sessions of the Preparatory Commission over the course of 1999 and 2000 during which some States submitted proposals and commented on the elements of war crimes in articles

381 'Declarations, Colombia', Rome Statute of the International Criminal Court, 5 August 2002, para 1.

382 'States Parties to the Following International Humanitarian Law and Other Related Treaties as of 14-Dec-2017', available at: https://ihl-databases.icrc.org/ihl [accessed 12 December 2017].

383 In 2018, there exist 195 States, comprising 193 UN member States and two non-member observer States (Holy See and the State of Palestine). Cook Islands and Niue are not included in the list of these States, but they are States with full treaty-making capacity.

384 'Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', UN Doc A/CON.183/10, Annex, Resolution F.

8(2)(c) and (e).[385] By consensus, the Preparatory Commission in 2000 adopted the Elements of Crimes.[386] According to the summaries of the Sixth Committee proceedings: 'all the speakers expressed satisfaction with the conclusion of the finalised draft texts for the Elements of Crimes'.[387] The materials on the drafting of the Elements of Crimes, however, do not contribute anything significant to the debate.[388] The adoption of the Elements of Crimes by consensus as well as the fact that more than 110 States signed the Statute in 2000 further 'provided clear proof of the international community's commitment' to the establishment of the ICC as well as its recognition of war crimes in non-international armed conflict 'within the shortest possible time'.[389]

3.5.2 Practice of States

Before ratifying the Statute, several States passed national law to bring their legislations into line with the provisions of the Statute. Except for a few States that have not enacted or drafted implementing legislation in their national laws,[390] many States Parties have implemented the Rome Statute and the 1949 Geneva Conventions by providing provisions of war crimes in non-inter-

385 Christopher K. Hall, 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court' (2000) 94 *AJIL* 773, 776-79; 'List of documents issued at the first, second and third sessions of the Preparatory Commission, held in 1999, Working Group on Elements of Crimes', in 'Proceedings of the Preparatory Commission at its first, second and third sessions (16-26 February, 26 July-13 August and 29 November-17 December 1999)', PCNICC/1999/L.5/Rev1, 22 December 1999, Annexe I, US, Costa Rica, Hungary and Switzerland, Republic of Korea, Colombia, China and the Russian Federation; 'Proposal submitted by China and the Russian Federation on the elements of article 8, paragraph 2(c)(i)', in the discussion paper proposed by the Coordinator (PCNICC/1999/WGEC/RT.5/Rev1), PCNICC/1999/WGEC/DP.27, 12 August 1999.

386 Elements of Crimes, in 'Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court', ICC-ASP/1/3 and Corr.1, UN Doc PCNICC/2000/1/Add.2. See 'Proceedings of the Preparatory Commission at its fifth session (12-30 June 2000) (summary)', PCNICC/2000/L.3/Rev1, 6 July 2000, para 11; 'Summary record of the 9th meeting [of the Sixth Committee]', UN Doc A/C.6/55/SR.9 (2000), para 9 (France, on behalf of the European Union, Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Malta, Romania, Slovakia and Slovenia).

387 'Summary record of the 9th-13th meetings [of the Sixth Committee]', UN Doc A/C.6/55/SR.9-13 (2000).

388 Knut Dörmann, 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes' (2003) 7 *MPUNYB* 341, 396-402.

389 'Summary record of the 11th meeting [of the Sixth Committee]', UN Doc A/C.6/54/SR.11 (1999), para 31 (Australia); UN Doc A/C.6/55/SR.9 (2000), para 14 (Columbia); UN Doc A/C.6/55/SR.11 (2000), para 19 (Trinidad and Tobago); 'Summary record of the 13th meeting [of the Sixth Committee]', UN Doc A/C.6/55/SR.13 (2000), paras 1 (Croatia), 34 (Slovakia).

390 Serbia, Criminal Code 2005, art 376; Peru, Presidential Decree on the National Human Rights Plan 2005, para 3.1.3 A1. 20 States have ratified the Rome Statute as of 1 January 2007. Mexico, Penal Code 1931, amended 2000, art 149 (ratified in 2005); Estonia, Penal Code 2001, para 94 (ratified in 2002).

national armed conflict.[391] For instance, in December 1999, Canada passed the *Crimes against Humanity and War Crimes Act*, which stipulates: 'crimes described in […] paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date'.[392] The German *Code of Crimes against International Law* is going even beyond the inclusion of war crimes for non-international armed conflict by almost completely abandoning the distinction between international and non-international armed conflict.[393] The 2004 UK *Manual of the Law of Armed Conflict* even clearly states:

> Although the treaties governing internal armed conflicts contain no grave breach provisions, customary law recognises that serious violations of those treaties can amount to punishable war crimes. It is now recognised that there is a growing area of conduct that is criminal in both international and internal armed conflict. This is relfected in Article 8 of the Rome Statute.[394]

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391 Australia, ICC (Consequential Amendments) Act 2002, §§ 268.69-268.94; Belgium, Law relating to the Repression of Grave Breaches of International Humanitarian Law 1993, amended 2003, art 1*ter*; Burundi, Law on Genocide, Crimes against Humanity and War Crimes 2003, art 4; Bangladesh, The International Crimes (Tribunals) Act 1973, amended 2009, art 3(2)(d); Bosnia and Herzegovina, Criminal Code 2003, arts 173-175, 177-179; Cambodia, Law on the Establishment of the ECCC, art 1; Canada, Crimes against Humanity and War Crimes Act 2000, §§ 4 and 6; Central African Republic, Penal Code 2010, arts 156-157; Congo, Genocide, War Crimes and Crimes against Humanity Act (1998), art 4(c) and (d); Finland, Criminal Code 1889, amended 2008, § 5(1); France, Penal Code 1994, amended 2010, art 461-1; Germany, Law Introducing the International Crimes Code 2002, §§ 8(1)-(2), 9(1), 10(1)-(2), 11(1)-(2),12; Georgia, Criminal Code 1999, arts 411-412; Ireland, International Criminal Court Act 2006, para 6(1); Ireland, Geneva Conventions Act 1962, amended 1998, § 4; Jordan, Military Penal Code 2000, art 41; Kenya, International Crimes Act 2008, para 6(4); Latvia, Criminal Code 1998, § 78; Lithuania, Criminal Code 1961, amended 1998, arts 333-344; The Republic of Moldova, Penal Code 2002, art 391; New Zealand, International Crimes and ICC Act 2000, § 11; Netherlands, The International Crimes Act 2003, art 6; Nicaragua, Revised Penal Code 1998, art 551; Niger, Penal Code 1961, amended 2003, art 208.8; Norway, Penal Code 1902, amended 2008, § 107; Rwanda, Law Setting up Gacaca Jurisdictions 2001, art 1; Senegal, Penal Code 1965, amended 2007, art 431-3(d); South Africa, ICC Act 2002, § 4(1); Spain, Penal Code 1995, amended 2010, art 614; Sweden, Penal Code 1962, amended 1998, para 6; Switzerland, Military Criminal Code 1927, amended 2011, arts 111-112d; Switzerland, Penal Code 1937, amended 2017, art 264b; Tajikistan, Criminal Code 1998, art 404; UK, International Criminal Court Act 2001, part 5, § 50; US, Military Commissions Act of 2006, 10 USC§ 948a 6(b)(1)(A); Venezuela, Code of Military Justice 1998, art 474; Vietnam, Penal Code 1999, §§ 313-314, 336-340, 343; The Socialist Federal Republic of Yugoslavia, Penal Code 1976, amended 2001, art 142.

392 Canada, Crimes against Humanity and War Crimes Act 2000, art 6(4); Canada, Law of Armed Conflict at the Operational and Tactical Levels 2001, § 1725.2: 'Today, however, many provisions of AP II are nevertheless recognised under customary International Law as prohibitions that entail individual criminal responsibility when breaches are committed during internal armed conflicts.'

393 International Criminal Code (VStGB) of 26 June 2002, entered into force on 30 June 2002, amended by art 1 of the Law of 22 December 2016, paras 8-12; Australia, ICC (Consequential Amendments) Act 2002, §§ 268.69-268.94.

394 UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: OUP 2004) 397, §§ 15.32, 15.32.1.

Enactment of these national laws confirmed the customary status of war crimes in non-international armed conflict.

Other jurisprudence further enhances the customary status of war crimes in non-international armed conflict. For instance, German courts have examined whether war crimes were committed in recent civil wars in Afghanistan, Chechnya, the Democratic Republic of Congo (DRC) and Syria.[395] The German Federal Administrative Court in the *Chechnya* case had to determine whether a person is excluded from refugee protection for committing war crimes in a civil war. The court considered whether war crimes in civil war existed in 2002 by referring to article 8 of the Rome Statute.[396] The Dutch Public Prosecutor charged a Dutch national for war crimes committed during the Second Liberian War (1999-2003), although the charge was dismissed for lack of evidence.[397] In the *Liberation Tigers of Tamil Elam* (LTTE) case, one charge was war crimes in civil wars in Sri Lanka from 2003 to 2010. Referring to article 6(2)(f) of the *International Crimes Act*, The Hague District Court affirmed that it had jurisdiction over war crimes relating to non-international armed conflict.[398]

In addition, the Constitutional Chamber of the Venezuelan Supreme Tribunal of Justice held that 'according to the Rome Statute, […] [war crimes] refer to various acts against persons and objects that include: […] or serious violations of article 3 common […] in the case of an armed conflict not of an international character'.[399] A military court of the DRC relied on the Rome Statute indirectly to decide charges of war crimes committed in its non-international armed conflict from 2003 to 2006.[400] Belgium, Finland and Sweden, as well as other States have been engaged in prosecuting war crimes com-

395 *Prosecutor v Ignace Murwanashyaka* and *Straton Musoni* [*DRC* case] (Judgment, Higher Regional Court, 5th Criminal Senate, Stuttgart, Germany) 3 StE 6/10 (28 September 2015); *DRC* case (Decision, Federal Supreme Court (Bundesgerichtshof/BGH), Germany) AK/13 (17 June 2010), paras 3(bb)(1)-(3); *Prosecutor v Klein and Wilhem* [*Fuel Tankers* case] (Termination of proceedings pursuant to Penal Procedure Code, Federal Public Prosecutor General, Germany) 3 BJs 6/10-4 (16 April 2010), paras D.II.4.a); *Prosecutor v Aria Ladjedvardi* (Decision, Federal Supreme Court, Germany) 3 StR 57/17 (27 July 2017), paras II (3)-(4); *Prosecutor v Abdelkarim El. B.* (Judgment, Higher Regional Court, 5th Criminal Senate, Frankfurt am Main, Germany) 3 StE 4/16 (8 November 2016).

396 *Chechen Refugee* case (Judgment, Federal Supreme Administrative Court (BVerwG), Germany) 10.C.7.09 (16 February 2010), paras 26-27.

397 *Public Prosecutor v Guus Kouwenhoven* (Judgment, District Court of The Hague, the Netherlands) LJN: AX7098 (7 June 2006).

398 *Public Prosecutor v Ramalingam/Liberation Tigers of Tamil Eelam* (*LTTE*) (Judgment, District Court of The Hague, the Netherlands) LJN: BU9716, 09/748802-09 (21 October 2011) pp 12-14.

399 *Recao* case (Judgment, Supreme Tribunal of Justice, Venezuela) 27 July 2004, pp 10-11.

400 *Garrison Military Auditor, Public Prosecutor's Office and civil parties v Kyungu Mutanga* (Judgment, Military Garrison Court of Haut-Katanga, DRC) 5 March 2009, pp 69-70.

mitted in recent civil wars by exercising personal or universal jurisdiction.[401] The absence of objection to the exercise of universal jurisdiction and the support of other States through extradition of suspects, for instance, Chad, Ethiopia, Spain and Turkey, at the very least, indicate their practice of supporting a rule of war crimes in non-international armed conflict in international law.[402]

Practice of other non-party States also indicates support for war crimes in non-international armed conflict.[403] National laws of some non-party States have confirmed war crimes in civil wars.[404] Some non-party States are preparing to accede to the Rome Statute.[405] The amendment of its Constitution for ratification of the Rome Statute and the two *ad hoc* declarations according to article 12(3) of the Rome Statute manifest Ukraine's positive attitude towards war crimes in civil war.[406] Despite its vote against the Statute, Israel did not object to war crimes in non-international armed conflict

401 *Public Prosecutor v Mouhannad Droubi* (Judgment, Svea Court of Appeal, Sweden) B 4770-16 (5 August 2016); *Public Prosecutor v Haisam Omar Sakhanh* (Judgment, District Court of Stockholm, Sweden) B 378716 (16 February 2017) for war crimes committed in Syria. For more details about complaints, investigations, arrests and prosecutions of war crimes committed in non-international armed conflict, see Human Rights Watch, 'These are the Crimes we are Fleeing' Justice for Syria in Swedish and German Courts and Annex, 3 October 2017; FIDH, ECCHR, REDRESS, FIBGAR, 'Make Way for Justice #3: Universal Jurisdiction Annual Review 2017', March 2017; TRIAL, ECCHR, FIDH, FIBGAR, 'Make Way for Justice #2: Universal Jurisdiction Annual Review 2016', February 2016; TRIAL, ECCHR, FIDH, 'Make Way for Justice: Universal Jurisdiction Annual Review 2015', April 2015; International Federation for Human Rights, Universal Jurisdiction Developments: January 2006-May 2009, 2 June 2009; ICRC, Customary IHL Database; *Repak* case (Judgment, Court of Appeal, Norway) 12 April 2010, p 15; *Public Prosecutor v Momcillo Trajković* (Opinions on Appeals of Conviction of Momcillo Trajković, Office of the Public Prosecutor of Kosovo) 68/2000 (30 November 2001), Section II (D).

402 For instance, Michel Desaedeleer, a Belgian citizen involved in the civil war in Sierra Leone, was arrested by Spain.

403 30 of these non-party States have signed the 1998 Rome Statute.

404 Signature States, see Angola, Constitution of the Republic of Angola 2010, art 61; Armenia, Criminal Code 2003, art 390; Belarus, Criminal Code 1999, arts 134-36, 138; Uzbekistan, Criminal Code 1994, amended 2001, art 152; Thailand, Prisoners of War Act 1955, §§ 12-19; US, War Crimes Act of 1996, 18 USC 2441 (c)(3). Further information is not available due to the language of legislation text in Russia, Spanish and Indonesia. States have not signed or acceded, see Lebanon, Lebanese Criminal Code 1943, art 197; Vietnam, Penal Code 1999, art 343; Report on the Practice of Ethiopia (1998), Chapter 6.4, Ethiopia's Penal Code; Nicaragua, Revised Penal Code 1998, art 551.

405 Indonesia is considering joining the Statute; Nepal, Asian Parliamentarians' Consultation on the Universality of the International Criminal Court, 'An action plan for the Working Group of the Consultative Assembly of Parliamentarians for the ICC and the rule of law on the universality of the Rome Statute in Asia', 16 August 2006, 5. e; Ukraine, Council of Ministers' decision No (82) of 2003 on Approval of Accession to the Statute of the International Criminal Court, 1 April 2003; Yemen's decision to accede to the Rome Statute was reversed due to national decision in 2007.

406 'Declaration by Ukraine lodged under Article 12 (3) of the Rome Statute' (9 April 2014); 'Declaration by Ukraine lodged under Article 12 (3) of the Rome Statute' (8 September 2015). The Ukraine's Criminal Code simply refers to war crimes in war. See Ukraine, Criminal Code of Ukraine 2001, arts 438, 441, 444.

but expressed concerns about the inclusion of forced transfer.[407] The US declared that it would not ratify the Statute, and Russia withdrew its signature. However, they both have recognised war crimes in non-international armed conflict.[408] Pakistan voted for the Statute, and it did not consider war crimes in non-international armed conflict as an issue.

Rules 102, 151 and 156 of the 2005 ICRC *Study* concerning individual criminal responsibility and war crimes further confirmed that serious violations of international humanitarian law in non-international armed conflict constitute war crimes.[409] The 2005 ICRC *Study* demonstrates that some national military manuals address the issue of war crimes in non-international armed conflict,[410] although some of them limit war crimes to grave breaches in this context.[411] Trials for war crimes in international law before international and national tribunals support the conclusion as provided under Rule 156.[412] National laws, case law and many official statements from the early 1990s also endorse the view of criminal responsibility for war crimes in non-international armed conflict.[413]

3.5.3 Post-Rome instruments and cases at the ICC and other tribunals

Post-Rome instruments for international and national tribunals demonstrate the importance of such a customary rule and further confirm the customary status of war crimes in non-international armed conflict. Definitions of war crimes in non-international armed conflict have been adopted to prosecute war crimes in civil war in the following legal documents: Statute of

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407 'Statement by Judge Eli Nathan, Head of the Delegation of Israel' (17 July 1998); 'Summary record of the 14th meeting [of the Sixth Committee]', UN Doc A/C.6/54/SR.14 (1999), para 49 (Israel).

408 GAOR 58th session, 95th plenary meeting, UN Doc A/58/PV.95 (13 September 2004), US; US, War Crimes Act of 1996, 18 USC 2441 (c)(3), as amended by Military Commissions Act of 2006, 10 USC 948a note; Russian Federation, Criminal Code 1996, art 356.

409 Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vols I and II, Rule 156 and its practice.

410 Australia, LOAC Manual 2006, 13. 39; Canada, LOAC Manual 1999, para 2; Canada, Law of Armed Conflicts Manual 2001, paras 1602-03, 1610; UK, LOAC Manual 2004, para 16.26; US, Military Commissions Act of 2006, 10 USC 948a note, § 6(b)(1)(A); Ukraine, IHL Manual 2004, para 1.8.4; Switzerland, Regulation on Legal Bases for Conduct during an Engagement 2005, para 152; Netherlands, Military Manual 2005, paras 1131-32, 1134; Cameroon, Instructor's Manual 2006, para 551; Sierra Leone, Instructor Manual 2007, 65, cited in ICRC, Customary IHL Database.

411 France, Law of Armed Conflicts Manual 2001, pp 44-46; Germany, Soldiers' Manual 2006, RII3; Burundi, Regulations on International Humanitarian Law 2007, Part I*bis*; Mexico, IHL Guidelines 2009, para 5; Nigeria, Manual on the Laws of War States, para 6; Peru, IHL Manual 2004, para 31 a; Peru, IHL and Human Rights Manual 2010, para 32(a), cited in ICRC, Customary IHL Database.

412 Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol II.

413 ibid, Vol I, Rules 102, 151, pp 372-74, 553-54 and fns 12-14. Some practice does not clarify whether violations in non-international armed conflict constitute war crimes or crimes against humanity.

the Special Court for Sierra Leone (SCSL),[414] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC),[415] Statute of the Iraqi High Tribunal,[416] Regulation for East Timor's Serious Crimes Panel,[417] and Statute of the Extraordinary African Chambers within the Senegalese Judicial System.[418] Articles 3 and 4 of the 2002 Statute of the SCSL[419] copy article 4 of the ICTR Statute. The Statute of the African Court of Justice and Human and Peoples' Rights includes war crimes in non-international armed conflict.[420]

The jurisprudence of the two *ad hoc* tribunals after the adoption of the Rome Statute endorses war crimes in non-international armed conflict under customary international law.[421] An ICTY Trial Chamber even referred to article 8 of the Rome Statute to justify the consistency between the ICC Statute and the *Tadić* test about war crimes in non-international armed conflict.[422] Most Situations present before the ICC for consideration today, for instance, CAR, Darfur, DRC, Mali and Uganda, all occurred in non-international armed conflict. The OTP of the ICC also actively prosecuted serious violations in non-international armed conflict as war crimes, and these

414 Statute of the SCSL, arts 3-4.

415 Law on the Establishment of the ECCC, arts 6-7.

416 Statute of the Iraqi Special Tribunal, 43 ILM 231 (2004), art 13(a).

417 United Nations Transitional Administration in East Timor, Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc UNTAET/REG/2000/15, Dili, 6 June 2000 [East Timor, Regulation for Special Panels for Serious Crimes 2000], § 6.

418 Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1990 (unofficial translation by Human Rights Watch, an agreement between the African Union and Senegal) [Statute of the Extraordinary African Chambers within the Senegalese Judicial System], 52 ILM 1028 (2013), art 7(2).

419 Statute of the SCSL.

420 The African Court Statute of the African Court of Justice and Human and People's Rights, annexed to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, STC/Legal/Min/7 (I) Rev 1, 27 June 2014, not entered into force, arts 28 D (c) and (e). It has been signed by 9 States: Benin, Chad, Congo, Ghana, Guinea Bissau, Kenya, Mauritania, São Tomé and Principe, and Sierra Leone.

421 *Mucić et al* Trial Judgment, paras 131-33; *Furundžija* Trial Judgment, para 132; *Prosecutor v Blaškić* (Judgement) ICTY-95-14-T (3 March 2000) [*Blaškić* Trial Judgment], para 176; *Prosecutor v Naletilić & Martinović* (Judgement) ICTY-98-34-T (31March 2003), para 228; *The Prosecutor v Akayesu* (Judgement) ICTR-96-4-T (2 September 1998) [*Akayesu* Trial Judgment], para 611; *The Prosecutor v Musema* (Judgement and Sentence) ICTR-96-13-T (27 January 2000) [*Musema* Trial Judgment and Sentence], para 242; *The Prosecutor v Bagilishema* (Judgement) ICTR-95-1A-T (7 June 2001) [*Bagilishema* Trial Judgment], paras 98-105; *The Prosecutor v Semanza* (Judgement and Sentence) ICTR-97-20-T (15 May 2003) [*Semanza* Trial Judgment and Sentence], paras 354-71; *The Prosecutor v Kamuhanda* (Judgement) ICTR-99-54A-T (22 January 2004) [*Kamuhanda* Trial Judgment], paras 721-24; *The Prosecutor v Ntagerura et al* (Judgement and Sentence) ICTR-99-46-T (25 February 2004) [*Ntagerura et al* Judgment and Sentence], para 766. For further references, see Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vol II, Rule 156.

422 *Milošević* Decision on Acquittal Judgment, para 20.

indicted include Lubanga,[423] Katanga and Ngudjolo,[424] Mbarushimana,[425] and Al Mahdi.[426] The Darfur Situation referred to the ICC by the Security Council further implied the Security Council's willingness to hold individuals responsible for war crimes in non-international armed conflict, despite its mandate to guarantee international peace and security.

The list of war crimes in non-international armed conflict is substantially shorter than that in international armed conflict. In order to overcome the gap between war crimes in international armed conflict and in non-international armed conflict, Belgium proposed harmonising them at the Review Conference.[427] At the 2010 Kampala Review Conference, another three serious violations were added to the list in article 8(2)(e).[428] By consensus, the Assembly of States Parties in 2017 decided to insert another three amendments into the list of war crimes in international and non-international armed conflicts.[429]

In October-November 2016, three African States notified the UN Secretary-General of their intention to withdraw from the Rome Statute. Philippines also did so in March 2018. Two of them, however, rescinded their withdrawal notifications.[430] The impact of their withdrawals or attempts should not be overstated with respect to the generally recognised rule of war crimes in non-international armed conflict.

3.5.4 Assessment and conclusions

All the research about signing, ratification, amendments, national implementation legislation, international and national prosecutions as well as other specified tribunal instruments either echoes the view that article 8 is declara-

423 *The Prosecutor v Lubanga* (Judgment pursuant to Article 74 of the Statute, TC I) ICC-01/04-01/06-2842 (14 March 2012), paras 531, 571.

424 *Katanga & Ngudjolo* Decision on Confirmation of Charges, paras 21, 23-24, 26, 28-32.

425 *Mbarushimana* Decision on Confirmation of Charges, paras 93, 103-07; *The Prosecutor v Mbarushimana* (Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled Decision on the confirmation of charges, A Ch) ICC-01/04-01/10-514 (30 May 2012).

426 *The Prosecutor v Al Mahdi* (Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, PTC I) ICC-01/12-01/15 (24 March 2016); *The Prosecutor v Al Mahdi* (Judgment and Sentence, TC I) ICC-01/12-01/15 (27 September 2016).

427 'Harmonization of the Competences of the ICC Relating to War Crimes in Case of International Armed Conflict and Armed Conflict not of an International Character', Non-paper of Belgium, in Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010, Official Document-RC/11, Annexe VI, p 124.

428 Amendment to Article 8 of the Rome Statute of the International Criminal Court, 10 June 2010, 26 September 2012, 2868 UNTS 195, 36 States Parties.

429 'Resolution on Amendments to Article 8 of the Rome Statute of the International Criminal Court', Resolution ICC-ASP/16/Res 4, 14 December 2017, para 2 and Annexes. Arts 8(2)(b)(xxvii)-(xxix) and arts 8(2)(e)(xvi)-(xviii) were inserted.

430 See C.N.805.2016.TREATIES-XVIII.10, C.N.786.2016.TREATIES-XVIII.10, C.N.62.2017.TREATIES-XVIII.10, C.N.862.2016.TREATIES-XVIII.10, C.N.121.2017.TREATIES-XVIII.10 and C.N.138.2018.TREATIES-XVIII.10.

tory of custom about war crimes in non-international armed conflict, or provides evidence that article 8 is generally recognised as a part of the corpus of customary law now. It is true that some non-party States continue to qualify war crimes as grave breaches of the Geneva Conventions,[431] and some States do not provide for war crimes in national law, not to mention war crimes in non-international armed conflict.[432] These facts are not sufficient to prevent or alter the status of current custom. In general, a customary rule criminalising violations in non-international armed conflict as war crimes is recognised. The two provisions of the Rome Statute continue to be declaratory of customary law concerning war crimes in non-international armed conflict.

3.6 Concluding remarks

Before the 1990s, the international community did not consider war crimes in non-international armed conflict as international crimes under customary law. In 1993, the UN Security Council adopted the ICTY Statute, which set up the first step for legal development. The Security Council expressly recognised serious violations in non-international armed conflict as a category of war crimes when it adopted the 1994 ICTR Statute. In October 1995, the ICTY in the *Tadić* Appeals Chamber Decision on Jurisdiction further contributed to the formation of a customary rule, declaring that the law applied is pre-existing customary law. States generally accepted the rule of war crimes in non-international armed conflict during the preparation and negotiation process of the 1998 Rome Statute. The examination in this Chapter shows that war crimes in non-international armed conflict in general were and are part of the corpus of customary law. This Chapter concludes that article 8(2)(c) of the Rome Statute was a codification of pre-existing customary law, while article 8(2)(e) was a crystallisation of an emerging customary rule concerning war crimes in non-international armed conflict. The two provisions, in general, were declaratory of customary law in 1998 with respect to war crimes in non-international armed conflict. They continue to be declaratory of custom to the present day.

431 Somalia, Constitution of Somalia 1960, para 3.5.4.1; Ethiopia, Criminal Code 2005, arts 269-280; Azerbaijan, Criminal Code 1999, 116.0; Kiribati, Geneva Conventions (Amendment) Act 2010, § 5; Kazakhstan, Criminal Code 1997, § II; Sri Lanka's Geneva Conventions Act (2006); Zimbabwe, Geneva Conventions Act 1981, amended 1996.

432 China, Law Governing the Trial of War Criminals 1946, art 3.

4 Crimes against Humanity: Article 7 of the Rome Statute and Custom

4.1 Introductory remarks

This Chapter aims to identify the relationship between article 7 of the Rome Statute and customary international law concerning crimes against humanity. In 2014, the International Law Commission (ILC) put the topic 'crimes against humanity' on its agenda aiming to adopt a convention on crimes against humanity, and appointed Sean Murphy as the Special Rapporteur.[1] In 2017, the ILC adopted the entire set of draft articles on crimes against humanity on first reading.[2] Draft article 3 of the proposed convention defined the notion of crimes against humanity. The first three paragraphs of draft article 3 are a replica of article 7 of the Rome Statute without any substantive modification.[3] The ILC deemed article 7 of the Rome Statute the legal basis for the draft article 3.[4] One of its explanations is that article 7 of the Rome Statute has been widely accepted by more than 120 States Parties and 'marks the culmination of almost a century of development of the concept of crimes against humanity and expresses the core elements of the crime'.[5]

Despite the general assertion that the notion of crimes against humanity is accepted under customary law, its contextual requirements remain controversial.[6] Article 7 of the Rome Statute provides contextual requirements of 'widespread or systematic attack', 'directed against any civilian popula-

1 UN Doc A/69/10 (2014), para 266; 'Resolution adopted by the General Assembly on 23 December 2015: Report of the International Law Commission on the work of its sixty-seventh session', GA Res 70/236 (2015), UN Doc A/RES/70/236.

2 'Crimes against Humanity', in 'Report of the International Law Commission', GAOR 72nd Session Supp No 10, UN Doc A/72/10 (2017), paras 35-46.

3 'Text of the draft articles on crimes against humanity adopted by the Commission on first reading', UN Doc A/72/10 (2017), para 45, pp 11-12.

4 UN Doc A/72/10 (2017), para 46, p 29.

5 'First report on crimes against humanity, by Sean D. Murphy, Special Rapporteur', UN Doc A/CN.4/680 (2015), para 8.

6 Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 *AJIL* 43; William A. Schabas, 'State Policy as an Element of International Crimes' (2008) 98 *J Crim L & Criminology* 953; *Tadić* Opinion and Judgment, para 644, holding that policy is an element under customary law. *Contra Prosecutor v Kunarac et al* (Judgement) ICTY-96-23 and ICTY-96-23/1-A (12 June 2002) [*Kunarac et al* Appeals Chamber Judgment], para 98 and fn 114; Guénaël Mettraux, 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (2002) 43 *Harvard Intl LJ* 237.

tion', 'state or organisational policy', and 'with knowledge of the attack' as well in its application. Judge Loucaides of the European Court of Human Rights (ECtHR) wrote: '[a]s regards the elements of crimes against humanity, one may take the recent Rome Statute of the International Criminal Court as declaratory of the international law definition of this crime'.[7] In contrast, Antonio Cassese wrote that: 'on some points, article 7 of the Rome Statute departs from customary law',[8] for instance, the 'policy' element goes beyond what is required under customary law.[9] A critical analysis is required on whether article 7 setting forth these elements was and is declaratory of custom.

This Chapter analyses whether article 7 was, and if yes, still is declaratory of custom with regard to crimes against humanity. This Chapter focuses on two issues, the absence of a nexus with an armed conflict and the policy element. The other elements are discussed when necessary. For this purpose, section 4.2 briefly analyses provisions of the Rome Statute to answer whether article 7 was intended by the drafters to be declaratory of custom concerning crimes against humanity. Section 4.3 elaborates on the development of the concept of crimes against humanity to show that crimes against humanity as defined in article 7, in general, were declaratory of custom.[10] The reiteration also serves to provide a common background for discussing the two contextual elements. Two consecutive sections (4.4-4.5) examine the elements of crimes against humanity. Section 4.4 discusses the absence of the nexus with an armed conflict and section 4.5 considers policy as a distinct element in article 7 and under customary law. Finally, some concluding remarks are provided in section 4.6 on the nature of article 7 of the Rome Statute as evidence of customary law on these two issues.

4.2 Provisions on crimes against humanity in the Rome Statute

Article 7 of the Rome Statute defines crimes against humanity. Article 7(1) provides a chapeau with an exhaustive list of underlying prohibited acts of crimes against humanity. Article 7(2) defines some terms used in paragraph one, and article 7(3) further defines the term 'gender'. The chapeau in article 7(1) stipulates that '[f]or the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowl-

7 *Streletz, Kessler and Krenz v Germany* (Merits, Concurring Opinion of Judge Loucaides) ECtHR Application No. 34044/96, 35532/97 and 44801/98 (22 March 2001).

8 Cassese *et al* (eds), *Cassese's International Criminal Law* 106.

9 ibid, 107.

10 The crime of genocide as a specific form of crimes against humanity is mentioned, see *Tadić* Sentencing Judgment, para 8, 'genocide is itself a specific form of crime against humanity'.

edge of the attack'.[11] Article 7(2)(a) defines the term 'attack': 'attack directed against any civilian population' means 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack'.

Similar to article 8 about war crimes, the text of article 7 also does not expressly address whether this provision was declaratory of custom concerning the notion of crimes against humanity. The phrase 'for the purpose of this Statute' merely indicates that the Rome Statute is a self-contained regime. This view is reaffirmed by the 'without prejudice' clause in article 10 of the Rome Statute, which permits a discrepancy between the Rome Statute and customary law. In brief, the phrase 'for the purpose of this Statute' was not relevant to the issue of whether article 7 as a whole was of a declaratory nature. Likewise, as observed in Chapter 3, other texts and the structure of the Rome Statute also do not definitively show that article 7 in its entirety was declaratory of a pre-existing custom before the adoption of the Statute.[12]

The preparatory works of this provision seem to indicate that the notion of crimes against humanity was generally accepted before the 1998 Rome Conference. In discussing the 1996 Draft Code of Crimes in the Sixth Committee, States expressed positive views on whether to include crimes against humanity.[13] In the *Ad Hoc* Committee, discussions focused on the specification of this crime.[14] No State suggested excluding crimes against humanity in the Rome Statute.[15] In the Preparatory Committee, the UK, the US and Japan submitted their proposals for crimes against humanity.[16] Discussions in the Preparatory Committee were pertinent to the elements of crimes against humanity in custom. Some speakers said that the definition of crimes against humanity 'lay in aspects of customary international

11 1998 Rome Statute, art 7(1).

12 See section 3.2.

13 UN Press Release, 'Sixth Committee Hears Differing Views on Code of Crimes against International Peace and Security' (16 October 1995), UN Doc GA/L/2866.

14 'Question of the crimes to be covered and specification of the crimes, Rapporteur: Ms. Kuniko SAEKI (Japan)', UN Doc A/AC.244/CRP.6/Add.3 (1995), paras 6-9; 'Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court', UN Doc A/50/22 (1995), paras 77-80.

15 'Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of An International Criminal Court, Report of the Secretary-General' (20, 30-31 March 1995), and Addendums, UN Doc A/AC.244/1 and Add.1 and Add.2 (1995). See comments of China, 5 March 1995; Czech Republic, 22 March 1995; Sudan, 24 March 1995; US, 30 March 1995. 'Summary of the statement of the delegate of Japan, April 1995'; 'Summary of the Proceedings of the *Ad Hoc* Committee During the Period 3-13 April 1995', UN Doc A/AC.244/2 (1995), paras 32, 36

16 'The UK Proposal on Crimes against humanity' (March 1996); 'Japan Proposal Crimes Against Humanity'; US, 'Crimes Against Humanity, Lack of a Requirement for a Nexus to Armed Conflict' (26 March 1996).

law'.[17] The chair's drafts provided many brackets in its compiled definition of crimes against humanity.[18] Further works focused on defining the elements of crimes against humanity and the list of prohibited acts.[19] The Canadian Minister of Citizenship and Immigration openly stated that crimes against humanity in the Statute are endorsed as customary law in Canada.[20] The ICJ and the Preamble of the ILC's 2017 Draft articles on crimes against humanity provide that the prohibition of crimes against humanity possesses the character of *jus cogens*.[21] As opposed to war crimes in non-international armed conflict, crimes against humanity had been recognised as international crimes under customary law before the adoption of the Rome Statute.[22] Leena Grover also concluded that the provision on crimes against humanity in the Rome Statute was, in general, a codification of existing customary international law.[23] Observations in the next section further support such a preliminary finding.

4.3 Crimes against humanity as international crimes under customary law

This section first examines the origin of crimes against humanity to show that the category was created by the Nuremberg Charter and that the crime was generally accepted as an international crime under customary law

17 UN Press Release, 'Preparatory Committee on Establishment of International Criminal Court First Session 1st Meeting' (25 March 1996), UN Doc GA/L/2761, Australia and Netherlands; UN Press Release, 'Preparatory Committee for Establishment of International Criminal Court, Discussed Definitions of "Genocide", "Crimes Against Humanity"' (25 March 1996), UN Doc GA/L/2762; UN Press Release, '"Crimes Against Humanity" Must be Precisely Defined Say Speakers in Preparatory Committee for International Court' (26 March 1996), UN Doc GA/L/2763; UN Press Release, 'Preparatory Committee on International Criminal Court Concludes First Session' (12 April 1996), UN Doc GA/L/2787.

18 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc A/51/22 (1996), Vol I, paras 82-102; 'Compilation of Proposals', UN Doc A/51/22 (1996), Vol II, pp 65-69.

19 Christopher K. Hall, 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1998) 91 *AJIL* 177, 180; Christopher K. Hall, 'The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1998) 92 *AJIL* 124,126-27.

20 *Sapkota v Canada* (Minister of Citizenship and Immigration), [2013] FC 790, para 28.

21 *Jurisdictional Immunities of the State* Judgment, 141, para 95; 'Report of the International Law Commission', GAOR 72nd Session Supp No 10, UN Doc A/72/10 (2017), para 46, pp 22-23.

22 For further national legislation and prosecution of crimes against humanity after World War II, see M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (New York: CUP 2011) 660-723.

23 Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 220-344.

before 1998.[24] This section then goes on to analyse various definitions of crimes against humanity to demonstrate that the divergences in the definitions of crimes against humanity do not negatively affect the customary status of this crime in international law.

4.3.1 Revisiting the origins of crimes against humanity as international crimes

The notion of crimes against humanity as international crimes was defined by the Nuremberg Charter. Article 6(c) of the Nuremberg Charter provided that:

> Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[25]

The prohibited acts are not listed exhaustively[26] and are generally classified into two types: a murder type and a persecution type.[27] The former type includes all prohibited acts except for persecution.

In academia, there are debates about whether the concept of crimes against humanity was a creation of the Nuremberg Charter. One theory claims that the notion of this crime was created by the four powers (the UK, the US, France and the USSR).[28] The other theory argues that this concept was a codification of a pre-existing customary rule.[29] An American Military

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24 UN Doc A/CN.4/680 (2015), para 51; *Tadić* Appeals Chamber Decision on Jurisdiction, para 141; *Prosecutor v Tadić* (Opinion and Judgement) ICTY-94-1-T (7 May 1997) [*Tadić* Opinion and Trial Judgment], paras 618-23; *Tadić* Appeals Chamber Judgment, para 251; Yoram Dinstein, 'Case Analysis: Crimes against Humanity after *Tadić*' (2000) 13 *Leiden J Intl L* 373.

25 Nuremberg Charter, art 6(c), as amended by the Semi-colon Protocol.

26 'The Charter and Judgment of the Nuremberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General', UN Doc A/CN.4/5 (1949), 67, 81.

27 Egon Schwelb, 'Crimes against Humanity' (1946) 23 *British Ybk Intl L* 178, 191-95; United Nations War Crimes Commission (ed), *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO 1948) 178. The persecution type includes prohibited acts in art 7(1)(h). The murder type includes other prohibited acts.

28 *Tadić* Opinion and Trial Judgment, para 628; Schabas, *Unimaginable Atrocities* 53-54; *Polyukhovich v The Commonwealth of Australia and Anor* (Order, High Court of Australia) [1991]172 CLR 501 (14 August 1991) [*Polyukhovich* case, [1991]172 CLR 501]. Some scholars argued that 'genocide' did not become recognised as an international crime after World War II until the 1948 *Genocide Convention*. See Leslie Green, 'Canadian Law, War Crimes and Crimes against Humanity' (1989) 59 *British Ybk Intl L* 217, 225-26; Josef Kunz, 'The United Nations Convention on Genocide' (1949) 43 *AJIL* 738, 742.

29 *France et al v Göring et al*, Attorney General Sir Hartley Shawcross's Opening Speech (4 December 1945), (1948) 3 TMWC 91, p 92; *Attorney General v Eichmann* (Judgment, District Court of Jerusalem, Israel), 11 November 1961, (1968) 36 ILR 5, 283.

Tribunal in the *Justice* case was aware of the challenge to this new crime and argued that this concept had existed under customary law.[30] The Tribunal in the *Justice* case referred to academic writing of Charles Hyde and of Lassa Oppenheim, political messages before World War II, and the UK Chief Prosecutor's words before the IMT as well as the 1946 General Assembly Resolution regarding genocide. The Tribunal concluded that the notion of crimes against humanity (in particular, persecution) was the product of customary law before World War II.[31] The argumentation of the second theory, however, does not seem persuasive.

In contrast to war crimes with some precedents before World War II, crimes against humanity were first punished as a separate type of international crimes by the IMT.[32] As Schabas noted, the term 'crimes against humanity' had been employed in a general sense for a long time.[33] It had also been employed in a legal sense before the Nuremberg Charter. After World War I, reference to 'the laws of humanity' were made to the Preamble of the 1899 and 1907 Hague Conventions (Martens Clause). The Martens Clause in the Hague Conventions speaks of 'the laws of humanity, and the dictates of the public conscience'.[34] At that time, the laws of humanity were confined to the context of a war between States. The phrase 'the laws of humanity' was not used in a technical legal sense to formulate a separate set of rules different from the 'laws and customs of war'. Violations of 'the laws of humanity' would be deemed a category of 'war crimes' rather than a new crime at that time.

On 28 May 1915, the governments of France, Great Britain and Russia made a Declaration with respect to the offences committed by Turkey against Armenians.[35] The 1915 Declaration about the Armenian atrocities provided that:

30 *US v Altstötter* [*Justice* case], (1948) 3 TWC 3, pp 966-68. A similar view was shared as regarding the customary status of Control Council Law No. 10 in *US v von Leeb* [*High Command* case], (1948) 11 TWC1, p 476; *US v List* [*Hostage* case], (1948) 11 TWC 759, p 1239; *S v Flick* [*Flick* case], (1948) 6 TWC 8, p 1189; *US v Krupp* [*Krupp* case], (1948) 9 TWC 1, p 1331; *US v Ohlendorf* [*Einsatzgruppen* case], (1948) 4 TWC 3, p 154.

31 *Justice* case, (1948) 3 TWC 3, pp 959-71.

32 Nuremberg Charter, art 6(c); UN Doc S/25704 (1993), para 47: 'crimes against humanity were first recognised in the Charter and Judgement of the Nuremberg Tribunal, as well as in Law No 10 of the Control Council for Germany'.

33 Schabas, *Unimaginable Atrocities* 51-53.

34 The Martens Clause states: 'Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the Protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.'

35 M. Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, Leiden: Brill 2012) 544.

> En présence de ces nouveaux crimes de la Turquie contre l'humanité et la civilisation [these new crimes of Turkey against humanity], les Gouvernements alliés font savoir publiquement à la Sublime Porte qu'ils tiendront personnellement responsables des dits crimes tous les membres du Gouvernement ottoman ainsi que ceux de ses agents qui se trouveraient impliqués dans de pareils massacres.[36]

This declaration referred to violations of the laws of humanity in the territory of a State (Turkey). Most scholars deemed this declaration the first expression of 'crimes against humanity' in a document of political and legal significance.[37] The reference to 'crimes of Turkey against humanity' in that context remained in common usage, which was a non-technical term and referred to moral condemnations. This declaration might be considered as the seed of the modern idea of prosecuting inhumane acts committed by a government against its citizens, which acts are internationally condemned.[38]

The 1919 Commission on Responsibilities, established after World War I, considered violations of the laws of humanity as a category of offences, 'crimes against the laws of humanity'.[39] It is unclear whether the Commission deemed the notion of 'crimes against the laws of humanity' an independent offence as opposed to war crimes.[40] At the Paris Peace Conference, States upheld different views about the phrase 'crimes against the laws of humanity' recommended by the Commission on Responsibilities.[41] The Memorandum of the UK supported prosecution of offences against the laws of humanity.[42] However, the US, which later insisted on crimes against humanity as a part of the mandate of the IMT,[43] strongly objected to the reference to 'laws and principles of humanity'. The US delegation argued that this reference was a moral standard. In its view, 'there is no fixed and universal standard of humanity', and such breaches were not recognised

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36 It was quoted in the Armenian Memorandum presented by the Greek Delegation to the Commission on Responsibilities, Conference of Paris, 14 March 1919, as reproduced in UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 35 (translation added); Egon Schwelb, 'Crimes against Humanity' (1946) 23 *British Ybk Intl L* 178, 181.

37 But see Schabas, *Unimaginable Atrocities* 53, arguing that the powers were familiar with this term.

38 ibid.

39 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference' reprinted in (1920) 14 *AJIL* 95 [Report of the Commission on Responsibilities], 121.

40 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 35-36.

41 Report of the Commission on Responsibilities, Annex IV, art I; Annex II, 135-36, 144-45 and Annex III.

42 Schabas, *Unimaginable Atrocities* 53.

43 'Report of the President by Mr. Justice Jackson, June 6, 1945', in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Washington, DC: USGPO 1949) [*Report of Robert H. Jackson*] 50-51.

in international law applicable at that time.[44] Japan also opposed prosecuting 'offences against the laws of humanity'.[45] Finally, the reference to 'the laws of humanity' was omitted in the 1919 Treaty of Versailles. There was no charge of offences against the laws of humanity in the German Leipzig trials.

The 1920 Treaty of Sèvres also proposed prosecuting Turkish nationals, including those people whose victims were subjects of the Ottoman (Turkey) Empire, victims of the genocide of the Armenian people.[46] This idea might be the 'embryo' that was later called crimes against humanity.[47] Eventually, the Treaty of Sèvres was not ratified. There was also no actual prosecution based on this provision, despite some charges for this crime. This treaty later was replaced by the 1923 Treaty of Lausanne, which did not contain a provision on prosecuting Turkish nationals for this crime.[48] Bassiouni commented that political concerns prevailed over the pursuit of justice at that time.[49]

The definition of crimes against humanity was not further developed until the 1945 Nuremberg Charter. According to a 'Draft Statute for the Permanent International Criminal Court', presented at the 1924 ILA Conference by Huge Bellot, 'all offences committed contrary to the laws of humanity and the dictates of public conscience' was included in the jurisdiction of a proposed court.[50] The 1943 United Nations War Crimes Commission (UN War Crimes Commission) observed that the crimes committed against its population in Ethiopia during 1935-36 by the Italian government were qualified as war crimes and crimes against humanity.[51] Many official and semi-official declarations were issued concerning crimes against humanity, including the 1943 resolution passed by the London International Assembly.[52] These practices, however, still do not support the existence of what are now called 'crimes against humanity' as opposed to war crimes.

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44 'Memorandum of Reservations Presented by the Representatives of the United States to the Report of on the Commission on Responsibilities, 4 April 1919', annexed in Report of the Commission on Responsibilities, 135-36, 144, 146. *Violations of the Laws and Customs of War: Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission on Responsibilities, Conference of Paris, 1919* (Oxford: Clarendon Press 1919).

45 Bassiouni, *Introduction to International Criminal Law* 544.

46 Treaty of Peace between the Allied and Associated Powers and the Ottoman Empire (Treaty of Sèvres), 10 August 1920, (1920) UKTS 11, arts 215, 230; William A. Schabas, *An Introduction to the International Criminal Court* (5th edn, Cambridge: CUP 2017) 4.

47 Schabas, ibid.

48 Treaty of Peace with Turkey (Treaty of Lausanne), 24 July 1923, 28 LNTS 11; Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* 93-94.

49 Bassiouni, 544; M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik* (2006) 22 *Ga St U L Rev* 541; M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability Over Realpolitik* (2003) 35 *Case W Res J Intl L* 191; M. Cherif Bassiouni, *Searching for Justice in the World of Realpolitik* (2000)12 *Pace Intl L Rev* 213.

50 Nationality and Naturalisation Committee, 'Draft Statute for the Permanent International Criminal Court, by Huge Bellot' in International Law Association Report of the 33rd Conference (Stockholm 1924) (ILA, London 1924) 81, art 25 (2).

51 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 189-90.

52 ibid, 190-91.

The international prosecution of crimes against humanity first occurred after the end of World War II. There were discussions of crimes against humanity in the UN War Crimes Commission. Desiring to prosecute atrocities committed on Axis territory, including Germany and Austria, as well as in Axis satellite countries, such as Hungary and Romania, against nationals of those countries, in particular, the Jewish population, the UN War Crimes Commission intended to extend international crimes to cover offences not constituting war crimes *stricto sensu*.[53] The US representative designated the 'offences perpetrated on religious or racial grounds against stateless persons or against any persons' as 'crimes against humanity' which were 'justifiable as war crimes'. These offences 'were crimes against the foundations of civilisation, irrespective of place and time, and irrespective of the question as to whether they did or did not represent violations of the law and customs of war'.[54]

Representatives of Czechoslovakia and the Netherlands supported this proposal because for them these offences were a matter of international concern.[55] In contrast, the British, Greek and Norwegian representatives objected to such an idea. They argued that the competence of the UN War Crimes Commission was limited to the punishment of 'war crimes', no matter how compelling it was that the other offences should be punished. In 1944, the Legal Committee of the UN War Crimes Commission, mandated to give legal opinions, submitted a draft resolution to the Commission and recommended that crimes against individuals on the ground of their race or religion should be considered as war crimes in a wider sense.[56] The British government insisted that the 'activities of the Commission should be restricted to the investigation of war crimes *stricto sensu* of which the victims have been Allied nationals'. As for crimes against Axis nationals, the perpetrators 'would one day have the punishment which their actions deserve'.[57] Given these different opinions, the UN War Crimes Commission abandoned the idea of adding another category of crimes to war crimes.[58]

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53 ibid, 11.

54 ibid, 175. See also 'Statement by the President, March 24, 1944', in *Report of Robert H. Jackson* 13.

55 'Notes on Fifth Meeting of Committee III' (27 March 1944).

56 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 175-76. Offences of war crimes sometimes overlap with crimes against humanity in armed conflict, such as murder or torture. The two offences committed in the context of an attack against civilian population might be charged both as a war crime and as a crime against humanity if other requirements are satisfied. See Egon Schwelb, 'Crimes against Humanity' (1946) 23 *British Ybk Intl L* 178, 179-80; *Flick* case, (1948) 6 TWC 8, pp 1187-212; *Hostage* case, (1948) 11 TWC 759; *UK v Bruno Tesch et al* [*Zyklon B* case], (1947) 1 LRTWC 93; *UK v Josef Kramer et al* [*Belsen* case], (1947) 2 LRTWC 1, in *Law Reports of Trial of War Criminals*: *Selected and Prepared by the United Nations War Crimes Commission* (London: HMSO 1947-49); *The Prosecutor v Dominic Ongwen* (Decision on the confirmation of charges, PTC II) ICC-02/04-01/15-422-Red (23 March 2016) [*Ongwen* Decision on Confirmation of Charges], paras 69, 74, 79, 84.

57 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 176.

58 ibid.

In short, during this period, the UN War Crimes Commission considered 'crimes against humanity' as 'war crimes' in a broader, non-technical sense. No agreement was reached among States concerning persecution on religious, racial or political grounds in Axis territory until the Nuremberg Charter, which first recognised crimes against humanity as a separate type of international crime.[59] In fact, in November 1945, the issue of crimes against humanity was raised again in the UN War Crimes Commission. By referring to the Nuremberg Charter, the Norwegian delegation suggested including 'crime against humanity' as a category of war crimes in a wider sense. Many members of the UN War Crimes Commission supported this proposal, and there were no votes opposing.[60] The change in the Commission's attitude was mainly due to the Nuremberg Charter.

As examined in Chapter 3 about war crimes, the UK, the US, France and the USSR adopted the London Agreement to which is annexed the Nuremberg Charter in August 1945.[61] In the final days of the London Conference in 1945, the American delegate Robert Jackson proposed renaming the category of 'atrocities, persecutions and deportations' as 'crimes against humanity'.[62] Article 6(c) of the Nuremberg Charter first designed crimes against humanity as a distinct international crime to cover offences that are related to war but not wholly covered by war crimes.[63] The term 'crimes against humanity' was also employed in the judgment of the IMT.[64] In the IMT, 17 of the 24 defendants were indicted for crimes against humanity, and 15 of the 17 indicted were convicted of this crime. The IMT did not examine the legality of its inclusion and the pre-existence of the crime, as the defences did not challenge crimes against humanity as an innovation. Assuming the issue of retroactive application of the law was put before the IMT, two approaches might have been available for this tribunal. The first approach was used by the IMT to justify its prosecution for crimes against peace. The IMT held that retroactive prosecution could be morally justified in order to pursue 'substantive justice' at that time.[65] The second approach, as adopted by the military tribunal in the *Justice* case, was to argue that the definition of crimes against humanity

59 Nuremberg Charter, art 6(c).

60 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 177; 'Minutes of Ninety-first Meeting, 9 January 1946', M. 91.

61 London Agreement, 82 UNTS 280.

62 Schabas, *Unimaginable Atrocities* 51; 'Minutes of Conference Session of July 23, 1945' and 'Revision of Definition of "Crimes" submitted by American Delegation, July 31, 1945', in *Report of Robert H. Jackson* 332-33, 395. 'Minutes of Conference Session of August 2, 1945', in *Report of Robert H. Jackson* 399-419, 416.

63 M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (Dordrecht: Martinus Nijhoff 1992) 114-19.

64 Nuremberg Charter, art 6(c); *France et al v Göring et al*, (1948) 1 TMWC 171, p 254.

65 *France et al v Göring et al*, (1948) 1 TMWC 171, p 219.

was not an innovation but a reflection of a pre-existing customary rule.[66] This approach was employed by the IMT to justify its prosecution of war crimes.[67]

It appears that the IMT might have adopted the first approach to admit the creation of this new crime but justify its prosecution on grounds of substantive justice.[68] As Robert Jackson stated at the London Conference:

> It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants, is not our affair any more than it is the affair of some other government to interpose itself in our problems.[69]

Following the adoption of the Nuremberg Charter, in his letter to a legal officer in the Foreign Office, Hersch Lauterpacht described 'crimes against humanity' as an 'innovation'.[70] In addition, the 1991 UK *War Crimes Act* limited the jurisdiction to 'war crimes' committed between 1939 and 1945, leaving the issue of crimes against humanity untouched. The UK Parliament explained that 'in 1939 there was no internationally accepted definition of crimes against humanity […] [,] while the moral justification for trying crimes against humanity at Nuremberg is understandable, the legal justification is less clear'.[71] In short, despite having some roots in international law, the notion of crimes against humanity as a category of international crimes was created by the drafters of the Nuremberg Charter.[72] Some subsequent national cases also endorsed this idea indirectly.[73]

On the whole, the concept of crimes against humanity existed before World War II. At the outset, this concept was not designed as a distinct international crime but as part of war crimes in either a strict sense or a broader sense. The above observation suggests that the notion of crimes against humanity in the Nuremberg Charter, as an international crime, was a creation of its drafters. Crimes against humanity as a separate type of international crime were also first punished by the IMT.[74] The notion of crimes

66 *Justice* case, (1948) 3 TWC 3, pp 966-68.

67 *France et al v Göring et al*, (1948) 1 TMWC 171, pp 253-54. 'The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General', UN Doc A/CN.4/5 (1949), 61-64.

68 Schabas, *Unimaginable Atrocities* 49-50.

69 'Minutes of Conference Session of July 23, 1945', in *Report of Robert H. Jackson* 331.

70 Hersch Lauterpacht to Patrick Dean, 30 August 1945, FO 371/51034, cited in Elihu Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge: CUP 2010) 273-74, and quoted in Schabas, *Unimaginable Atrocities* 58.

71 Thomas Hetherington and William Chalmers, *War Crimes: Report of the War Crimes Inquiry*, Command Paper 744, (London: HMSO 1989), paras 5.43 and 6.44.

72 'Minutes of Conference Session of July 23, 1945', in *Report of Robert H. Jackson* 332-33.

73 *R v Finta* (Judgment, Supreme Court), [1994] 1 SCR 701, holding that crimes against humanity did not exist under customary international law in 1942; *Polyukhovich* case, [1991]172 CLR 501, Justice Brennan stated that there is no evidence of widespread State practice or *opinio juris* as to the crimes against humanity in 1942, para 63.

74 Nuremberg Charter, art 6(c); UN Doc S/25704 (1993), para 47.

against humanity embedded in the Nuremberg Charter was the landmark for the formation of customary law.

After article 6(c) of the Nuremberg Charter and prior to the adoption of the Rome Statute, other international instruments formulated various definitions of crimes against humanity, for instance, article 5(c) of the Tokyo Charter, article II(1)(a) of Control Council Law No. 10 of 1945, the 1950 ILC Nuremberg Principles,[75] articles 5 and 3 of the ICTY and ICTR Statutes, as well as the ILC's texts of the Draft Code of Crimes. Crimes against humanity were also confirmed by the 1946 General Assembly Resolution. The notion of crimes against humanity was generally recognised as part of customary law before the adoption of the Rome Statute.[76] After the adoption of the Rome Statute, there were other international and national definitions of crimes against humanity adopted in the Statute of the SCSL,[77] Law of the Extraordinary Chambers in the Courts of Cambodia (ECCC),[78] Statute of the Iraqi High Tribunal,[79] the Regulation for Special Panels of Serious Crimes in East Timor,[80] and the amended Bangladesh International Crimes (Tribunals) Act[81] as well as the Statute of the Extraordinary African Chambers within the Senegalese Judicial System.[82] Other international and national cases prosecuting crimes against humanity as international crimes after World War II further enhance its customary status.[83] The current work of the ILC on a Convention on Crimes agaisnt Humanity shares the same feature.[84] It appears that article 7 of the Rome Statute, in general, was and is declaratory of customary law about the notion of crimes against humanity.

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75 UN Doc A/RES/95 (I); 'Report of the Committee on the plans for the formulation of the principles of the Nuremberg Charter and judgment' (17 June 1947), UN Doc A/AC.10/52, para 2; UN Doc A/RES/94 (I).

76 UN Doc A/RES/217 (III) A; *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), art 7(2); UN Doc S/25704 (1993), para 35; *Tadić* Appeals Chamber Decision on Jurisdiction, para 141.

77 Statute of the SCSL, art 6, para 1.

78 Law on the Establishment of the ECCC, art 5.

79 Statute of the Iraqi Special Tribunal, 43 ILM 231 (2004), art 12.

80 East Timor, Regulation for Special Panels for Serious Crimes 2000, § 5.

81 Bangladesh, The International Crimes (Tribunals) Act 1973, amended 2009, art 3(2)(a).

82 Statute of the Extraordinary African Chambers within the Senegalese Judicial System, arts 4(b) and 6.

83 Identifying crimes against humanity as one of the 'most frequently cited candidates for the status of *jus cogens*', see UN Doc A/CN.4/L.682 and Corr.1 (2006), para 374; *Almonacid Arellano et al v Chile* (Judgment, Preliminary Objections, Merits, Reparations and Costs, Inter-American CtHR), Series C No 154 (26 September 2006), para 96; *Jurisdictional Immunities of the State* Judgment, 141, para 95; *Tadić* Opinion and Trial Judgment, paras 618-23; UN Doc A/CN.4/680 (2015), para 51.

84 'Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-second session, prepared by the Secretariat', UN Doc A/CN.4/713 (2018), para 93; 'Third report on crimes against humanity, by Sean D. Murphy, Special Rapporteur', UN Doc A/CN.4/704 (2017), para 3; UN Doc A/72/10 (2017), para 45.

4.3.2 The definitions of crimes against humanity beyond the Nuremberg Charter

As shown above, after World War II, there were various definitions of crimes against humanity as international crimes. The 1950 and 1991 drafts of the ILC's Draft Code of Crimes even avoided using the term of 'crimes against humanity'.[85] All these definitions of crimes against humanity are different in specific aspects. For example, as opposed to article 7 of the Rome Statute, article 2 of the Statute of the SCSL provides a non-exhaustive list of prohibited acts. Also, according to the Nuremberg and Tokyo Charters as well as the 1950 Nuremberg Principles, a nexus with an armed conflict was a legal requirement. By contrast, this nexus was omitted in the 1945 Control Council Law No. 10 and abandoned in the Rome Statute. Article 5 of the ICTY Statute also explicitly referred to a link with an armed conflict; however, article 3 of the ICTR Statute did not refer to armed conflict despite all offences being committed in the context of a civil war. The 1954, 1991, and 1996 versions of the Draft Code of Offences (Crimes) do not refer to a connection with an armed conflict. In addition, with respect to the policy issue, neither the 1991 version of the Draft Code of Crimes nor Article 5 of the ICTY Statute refer to a 'State or organisational' policy. The 1996 Draft Code of Crimes requires acts committed 'in a systematic manner or on a large scale and instigated or directed by a Government or by any organisation or group'.[86] The definition of crimes against humanity for the ECCC does not require the policy element as set out in article 7(2)(a) of the Rome Statute. The treaty agreement for the Statute of the Extraordinary African Chambers also does not contain the term 'policy' in its definition of crimes against humanity.[87]

A view has been expressed that 'the existence of customary law on [the issue of a nexus with an armed conflict] was questionable in view of the conflicting definitions contained in the various instruments'.[88] Bassiouni pointed out that '[t]hese diverse definitions undermine the certainty of customary international law'.[89] Nevertheless, both statements should not be misinterpreted or exaggerated. These pre-Rome and post-Rome definitions show a lack of uniformity of the text of crimes against humanity. The impact of these definitions should be analysed by considering the jurisprudence of these

85 'Text of a Draft Code of Offenses against the Peace and Security of Mankind suggested as a working paper for the International Law Commission', UN Doc A/CN.4/SER.A/1950/Add.1; 'Draft Code of Offenses against the Peace and Security of Mankind', GAOR 46th Session Supp No 10, UN Doc A/46/10 (1991), para 176, p 96, art 21 'Systematic or mass violations of human right'.

86 1996 Draft Code of Crimes, art 18.

87 Statute of the Extraordinary African Chambers within the Senegalese Judicial System, art 6.

88 'Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court', UN Doc A/50/22 (1995), para 79.

89 M. Cherif Bassiouni, 'Revisiting the Architecture of Crimes against Humanity' in L.N. Sadat (ed), *Forging a Convention for Crimes against Humanity* 58.

international and national tribunals. For instance, the ICTY held that the reference to armed conflict in article 5 of the ICTY Statute was not a substantive element but a jurisdictional threshold for the tribunal.[90]

Some post-Rome definitions applicable at the national level have been limited in temporal scope. For example, the jurisdiction of the SCSL is confined to crimes committed during the period from 1996 to 2002. Likewise, the ECCC only has jurisdiction over crimes committed from 1975 to 1979. These post-Rome definitions endorse the idea of the acceptance of crimes against humanity before the adoption of the Rome Statute. The existence of different definitions would not inherently undermine the claim that there is a consensus on crimes against humanity as an international crime under customary law. The fact of various definitions only indicates different understandings of elements of these crimes.

These understandings are related to the issue of what makes an inhumane act a crime against humanity. Competing views exist in academia on this question.[91] One viewpoint is that these acts threaten the peace and security of the world. The second viewpoint is that these acts are serious violations of fundamental human rights. Third, the victims of the targeted group are human beings who should not be killed solely because of their affiliations. Fourth, from an historically descriptive perspective, most of the crimes were planned and committed by State actors, who are generally not the physical perpetrators who executed the crimes. It is likely that they would go unpunished without the availability of international jurisdiction. As thoroughly demonstrated by Margaret deGuzman, each approach has its merits and flaws to some extent.[92] None of these approaches could provide an entirely rational argument as regards every specific issue.[93] After examining the establishment of the IMT and the IMTFE, the historic experience of mass crimes in Cambodia, in the former Yugoslavia and in Rwanda, Judge Kaul of the ICC concluded that 'historic origins are decisive in understanding the specific nature and fundamental rationale of the category of international crime'.[94] He added that 'a demarcation line must be drawn between international crimes and human rights infractions; between international crimes and ordinary crimes; between those crimes subject to international jurisdiction and those punishable under domestic penal legislation'.[95]

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90 *Tadić* Appeals Chamber Judgment, para 249*; Prosecutor v Stanišić & Simatović* (Judgement) ICYT-03-69-T (30 May 2013) [*Stanišić* & *Simatović* Trial Judgment], para 960.

91 Margaret M. deGuzman, 'Crimes against Humanity' in W. A. Schabas and N. Bernaz (eds), *Routledge Handbook of International Criminal Law* (New York: Routledge 2011) 121-38; Kai Ambos, *Treaties on International Criminal Law, Vol 1*: *Foundations and General Part* (Oxford: OUP 2013) 55-56; *Kenya* Authorisation Decision 2010, fn 62.

92 deGuzman, 'Crimes against Humanity', 121-38.

93 ibid.

94 *Kenya* Authorisation Decision 2010 (Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's Decision), paras 58-65.

95 ibid, para 65.

The historical experience is vital to understanding what the fundamental rationale of crimes against humanity is. This Chapter addresses the issues of the nexus with an armed conflict and the element of policy from an historical perspective.

4.3.3 Assessment and conclusions

Observations of the development of crimes against humanity show that the notion of crimes against humanity was a new type of international crime in the Nuremberg Charter, as opposed to an existing customary rule. However, before the adoption of the Rome Statute, this crime had generally been recognised under customary law.[96] The observations further enhance the preliminary finding that article 7, in general, was declaratory of custom with respect to crimes against humanity. Various definitions of crimes against humanity do not affect the customary status of the crime but demonstrate controversial arguments about the contextual elements. The contextual element means that the underlying acts of crimes against humanity should be committed in this context of and constitute part of the attack.[97] The next section focuses on the issue of the nexus with an armed conflict.

4.4 No nexus with an armed conflict: was and is article 7(1) declaratory of custom?

The text of article 7 of the Rome Statute does not use the phrases 'in connection with an armed conflict' or 'whether or not committed in time of armed conflict'.[98] It is argued that under customary law crimes against humanity can be committed in times of war and peace. This section first briefly interprets article 7 and provides a preliminary examination of the nexus with an armed conflict issue, and then analyses the removal of this nexus under customary law to show whether article 7(1) was and is declaratory of customary law on the nexus issue.

4.4.1 The nexus issue in article 7(1) of the Rome Statute

For the lack of a reference to the connection with an armed conflict, a plain reading of article 7 is impractical on the nexus issue. The aim to 'put an end to impunity for the perpetrators of these crimes' and other provisions of the

96 See *Prosecutor v Marcelino Soares* (Judgment, District Court of Dili) SPSC-11/2003 (11 December 2003), paras 16-17.

97 *Prosecutor v Deronjić* (Judgement) ICTY-02-61-A (20 July 2005), para 109; *Limaj et al* Trial Judgment, paras 180, 188; *Prosecutor v Blagojević & Jokić* (Judgement) ICTY-02-60-T (17 January 2005) [*Blagojević & Jokić* Trial Judgment], para 547; *Prosecutor v Simić et al* (Judgement) ICTY-95-9-T (17 October 2003), para 41; *Tadić* Appeals Chamber Judgment, para 251.

98 UN Doc A/72/10 (2017), para 45, p 11, art 2.

Statute do not help in understanding this issue.[99] It seems that the strict construction requirement in article 22 and the wording 'civilian populations' support a stringent interpretation requiring a nexus with an armed conflict. However, given the reference to armed conflict in many previous definitions of crimes against humanity, the omission of this link in article 7 indicates that such a nexus with an armed conflict is not a requirement for crimes against humanity in the Rome Statute. It is agreed that the armed conflict nexus requirement cannot be implied in article 7.[100] The ICC's interpretation that the 'attack' 'need not constitute a military attack' further indicates that the link with an armed conflict was not a requirement of crimes against humanity.[101]

The drafting history of article 7 also demonstrates that a nexus with an armed conflict is not a legal requirement for the crimes against humanity. The *Ad Hoc* Committee in 1995 reported that 'in light of Nuremberg precedent and the two UN *ad hoc* tribunals, there were different views as to whether crimes against humanity could be committed in peace time'.[102] Australia said there is no longer any requirement of such a nexus between an armed conflict and crimes against humanity in customary law.[103] In the Preparatory Committee, there were debates about the nexus with an armed conflict.[104] It was generally agreed that the crime need not be limited to acts during international armed conflict.[105] The US strongly argued for removing

99 1998 Rome Statute, art 21(3).

100 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 148.

101 *The Prosecutor v Bemba* (Judgment pursuant to Article 74 of the Statute, TC III) ICC-01/05-01/08-3343 (21 March 2016) [*Bemba* Trial Judgment], para 149; *Katanga* Trial Judgment, para 1101; *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, PTC II) ICC-01/05-01/08-424 (15 June 2009) [*Bemba* Decision on Confirmation of Charges 2009], para 75.

102 'Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court', UN Doc A/50/22 (1995), para 79. UN Press Release, 'Sixth Committee Hears Differing Views on Code of Crimes Against International Peace and Security' (16 October 1995), UN Doc GA/L/2866; 'Summary of Interventions by the Australian Delegation on the Specification of Crimes'(17 August 1995), Argentina supported crimes against humanity in peacetime; while India opposed this idea.

103 'Summary of Interventions by the Australian Delegation on the Specification of Crimes' (17 August 1995).

104 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc A/51/22 (1996), Vol I, paras 88-90; UN Press Release, 'Preparatory Committee on International Criminal Court Concludes First Session' (12 April 1996), UN Doc GA/L/2787. For States supporting no armed conflict nexus, see UN Press Release, 'Preparatory Committee on Establishment of International Criminal Court First Session' (25 March 1996), UN Doc GA/L/2761, Australia and Netherlands; 'Proposal by Japan on Crimes against Humanity' (25 March 1996); 'Proposal by the United Kingdom on Crimes against Humanity: Article 20 *quarter*' (25 March 1996); Netherlands, 'Crimes Against Humanity' (27 March 1996); Denmark, 'Crime Against Humanity: Chapeau and residual clause' (27 March 1996).

105 UN Press Release, UN Doc GA/L/2762 (25 March 1996).

a nexus with an armed conflict.[106] By contrast, China and Russia argued for retaining the nexus with an armed conflict.[107] There were proposals to incorporate the wording 'in time of peace or in time of war' in the chapeau of the provision about crimes against humanity. This proposal, however, did not survive in the 1998 Draft Statute adopted by the Preparatory Committee.[108] In the Draft Statute, one alternative of the definition of crimes against humanity retains the phrase 'in armed conflict' in a bracket.[109]

At the 1998 Rome Conference, opinions of States were divided on the issue of a nexus with an armed conflict. The majority of States supported the view that crimes against humanity can be committed both in wartime and in peacetime.[110] The UK clearly stated that 'in international customary law, no such nexus [between crimes against humanity and armed conflict] exists', remarks that were endorsed by other States.[111] Some States wished to limit the provision to crimes against humanity in the context of international armed conflict,[112] while some others claimed that this concept also applied to non-international armed conflict.[113] Some States in the latter group insisted on the nexus requirement,[114] but it is unclear whether others in this group also shared this view. In later discussions, negotiations focused less on the

106 United States Delegation, 'Crimes Against Humanity, Lack of a Requirement for a Nexus to Armed Conflict' (26 March 1996).

107 UN Press Release, UN Doc GA/L/2763 (26 March 1996).

108 UN Doc A/51/22 (1996), Vol II, p 66.

109 'Draft Statute for the International Criminal Court', in 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (14 April 1998), UN Doc A/CONF.183/2, pp 20-21. For a detailed analysis of the Preparatory Committee's drafts, see Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 170.

110 UN Doc A/CONF.183/SR.1, paras 6-7 (Italy), UN Doc A/CONF.183/SR.8, para 62 (Ecuador); UN Doc A/CONF.183/C.1/SR.3, paras 21 (Germany), 36 (Czech Republic), 40 (Malta), 51 (Brazil), 55 (Denmark), 58 (Lesotho), 77 (Republic of Korea), 81 (Poland), 84 (Trinidad and Tobago), 87 (Australia), 89 (UK), 92 (Argentina), 95] (France), 101 (Cuba), 108 (Thailand), 109 (Slovenia), 112 (Norway), 114 (Côte d'Ivoire), 117 (South Africa), 120 (Egypt), 124 (Mexico), 133 (Colombia), 136 (Iran), 138 (US), 147 (Spain), 149 (Romania), 152 (Senegal), 154 (Sri Lanka), 158 (Venezuela), 162 (Italy), 167 (Ireland); UN Doc A/CONF.183/C.1/SR.4, paras 2 (Canada), 4 (Guinea), 7 (Switzerland), 8 (Sweden), 11 (Portugal), 12 (Yemen), 13 (Vietnam), 14 (Netherlands), 15 (Bahrain), 16 (Benin), 17 (Japan), 18 (Bangladesh), 19 (Niger), 20 (Austria), 21 (Uruguay), 23 (Sierra Leone), 25 (Israel), 27 (Chile), 29 (Kenya); UN Doc A/CONF.183/C.1/SR.5, para 51 (Venezuela); UN Doc A/CONF.183/C.1/SR.34, para 15 (Jamaica).

111 Arguing for no nexus with an armed conflict under customary law, see UN Doc A/CONF.183/C.1/SR.3, paras 89 (UK), 92 (Argentina), 109 (Slovenia); UN Doc A/CONF.183/C.1/SR.4, paras 2 (Canada), 25 (Israel).

112 UN Doc A/CONF.183/C.1/SR.3, paras 22 (Syria), 24 (United Arab Emirates), 27 (Bahrain), 28 (Lebanon), 31 (Saudi Arabia), 34 (Tunisia), 39 (Morocco), 42 (Algeria), 68 (Sudan), 86 (Iraq).

113 UN Doc A/CONF.183/C.1/SR.3, paras 28 (Jordan), 30 (Belgium), 53 (Costa Rica), 66 (Malawi), 74 (China), UN Doc A/CONF.183/C.1/SR.4, paras 5 (Russia Federation), 9 (Ukraine), 10 (Syria).

114 UN Doc A/CONF.183/C.1/SR.3, para 74 (China); UN Doc A/CONF.183/C.1/SR.4, para 10 (Syria); UN Doc A/CONF.183/C.1/SR.27, para 64 (Vietnam).

nexus issue of crimes against humanity.[115] The Discussion Paper prepared by the Bureau of the Committee of the Whole formulated the notion of crimes against humanity.[116] After informal consultation, an updated version of this concept was developed in the Recommendation of the Coordinator.[117] Both documents omitted the 'armed conflict' nexus. The Bureau Proposal further confirmed the omission of armed conflict.[118] A large number of States expressed their satisfaction with the absence of the armed conflict nexus.[119] Meanwhile, other States did not openly complain about this.[120] Two States insisted on maintaining the reference to 'armed conflict' in the definition but admitted that crimes against humanity could be committed in peacetime.[121] A few States insisted on the retention of the armed conflict nexus for crimes against humanity.[122]

These observations show that article 7 of the Statute should be interpreted as not requiring a nexus with an armed conflict. The preparatory works also show that States widely accepted the absence of the nexus with an armed conflict at the Rome Conference. However, the text of article 7, the structure of the Statute as well as the preparatory works do not evidence a preliminary finding that article 7 of the Statute was declaratory of customary law on the absence of a nexus.

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115 UN Doc A/CONF.183/2/Add.1 and Corr.1; 'United States of America: proposal regarding an annexe on definitional elements for part 2 crimes' (19 June 1998), A/CONF.183/C.1/L.10.

116 'Discussion Paper prepared by the Bureau' (6 July 1998), UN Doc A/CONF.183/C.1/L.53, pp 204-05.

117 UN Doc A/CONF.183/C.1/L.44 and corr.1, 7 July 1998, pp 221-22.

118 'Proposal prepared by the Bureau' (11 July 1998), UN Doc A/CONF.183/C.1/L.59 and Corr.l, pp 212-13.

119 UN Doc A/CONF.183/C.1/SR.25, paras 8 (South Africa), 39 (Mozambique), 41 (Sweden), 74 (Botswana), 76 (Croatia), 78 (Australia), 79 (Senegal); UN Doc A/CONF.183/C.1/SR.26, paras 34 (Uruguay), 35 (Turkey), 48 (Brazil), 63 (Ghana); UN Doc A/CONF.183/C.1/SR.27, paras 19 (Nicaragua), 74 (Sri Lanka); UN Doc A/CONF.183/C.1/SR.34, para 15 (Jamaica).

120 UN Doc A/CONF.183/C.1/SR.25, paras 22 (Belgium), 27 (Japan), 34 (China), 46 (Syria), 61 (Azerbaijan); UN Doc A/CONF.183/C.1/SR.26, paras 100 (Iran), 118 (Lesotho), 122 (Greece); UN Doc A/CONF.183/C.1/SR.27, paras 2 (Iraq), 57 (Congo), 60 (Indonesia), 61 (Comoros); UN Doc A/CONF.183/C.1/SR.28, paras 72 (Tunisia), 84 (Qatar), 87 (Saudi Arabia), 94 (Nigeria), 104 (Libya); UN Doc A/CONF.183/C.1/SR.34, paras 32 (Spain), 70 (Cuba), 73 (Jordan); UN Doc A/CONF.183/C.1/SR.35, paras 19-20 (Burundi), 38 (Finland), 53 (Liechtenstein), 64 (Iraq); UN Doc A/CONF.183/C.1/SR.36, paras 6 (Libya), 13 (Congo), 30 (Slovenia), 24 (Peru).

121 See UN Doc A/CONF.183/C.1/SR.3, para 27 (Bahrain), UN Doc A/CONF.183/C.1/SR.4, para 15 (Bahrain), UN Doc A/CONF.183/C.1/SR.27, para 22 (Bahrain); UN Doc A/CONF.183/C.1/SR.4, para 13 (Vietnam), UN Doc A/CONF.183/C.1/SR.27, para 64 (Vietnam). Bahrain and Vietnam supported crimes against humanity committed in peacetime, but they also intended to limit the jurisdiction of the Court over this crime in the context of 'international' armed conflict or in 'armed conflict'.

122 UN Doc A/CONF.183/C.1/SR.28, paras 8 (Pakistan), 11 (Kuwait), 90 (Oman). Arguing for a nexus with an armed conflict under customary law, see UN Doc A/CONF.183/SR.9, 17 July 1998, para 38 (China).

4.4.2 A nexus with an armed conflict and its disappearance in custom

In order to determine whether article 7 was declaratory of custom on the nexus issue, it is necessary to discuss the removal of the nexus with a conflict under customary law. For this purpose, this subsection briefly analyses the jurisprudence and authorities after World War II to show whether a nexus with an armed conflict was a legal element of crimes against humanity under customary law and when the nexus disappeared under customary law before 1998.

4.4.2.1 The nexus with an armed conflict

Scholars differ concerning whether a nexus with an armed conflict was a legal element. On the one hand, commentators argue that the link with an armed conflict was never a legal but rather a jurisdictional requirement imposed by the Nuremberg Charter for the purposes of the IMT. On the other hand, some other commentators hold that the nexus with an armed conflict was a legal requirement before the IMT. The second view seems to be the appropriate interpretation of the nexus issue.

According to article 6(c) of the Nuremberg Charter, the definition of crimes against humanity was linked to 'any crime within the jurisdiction of the Tribunal'.[123] It is understood that the phrase 'any crime within the jurisdiction of the Tribunal' refers to crimes against peace and war crimes.[124] In practice, ill-treatment and murder of non-German civilians in concentration camps committed by Germans during the war were charged mostly as both crimes against humanity and war crimes.[125] In addition, as Robert Jackson addressed at the London Conference in 1945:

> The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.[126]

Streicher and von Schirach were found guilty only of crimes against humanity. But the IMT judgment also established that the two defendants' conducts were associated with war crimes committed by others.[127] Thus, article 6(c) of the Nuremberg Charter required a link with crimes against peace or war crimes.

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123 Nuremberg Charter, art 6(c).

124 'The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General', UN Doc A/CN.4/5 (1949), pp 68-69.

125 *Flick* case, (1948) 6 TWC 8, pp 1187-212; *Hostage* case, (1948) 11 TWC 759; *Zyklon B* case, (1947) 1 LRTWC 93; *Belsen* case, (1947) 2 LRTWC 1.

126 'Minutes of Conference Session of July 23, 1945', in *Report of Robert H. Jackson* 331.

127 *France et al v Göring et al*, (1948) 1 TMWC 171, pp 302-04, 318-20.

One may note that the phrase 'before or during the war' in article 6(c) of the Nuremberg Charter permits prosecutions of crimes against humanity before the war.[128] According to the IMT: '[t]o constitute Crimes against Humanity', the acts 'relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal'.[129] In addition, the IMT held that since many of actions committed before the war were not proved in connection with any crime, it could not 'make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter'.[130] Therefore, it was potentially possible for the IMT to prosecute crimes against humanity before the war, but only if a nexus existed between the acts and aggressive wars.[131] The IMT in some specific instances also referred to some acts before the war and admitted their connection with the planning of aggressive wars. Nevertheless, the IMT in practice only considered atrocities committed 'during the war' in connection with the aggressive wars as crimes against humanity.[132] Von Schirach was largely found guilty of crimes against humanity for acts after the beginning of the war, which acts were in connection with Austria's occupation.[133] In the IMT, the essence of the linkage with war crimes or crimes against peace, in fact, was a connection with aggressive wars.[134] For instance, in differentiating war crimes from crimes against humanity during the war, the IMT said:

> […] from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.[135]

128 Schwelb, 'Crimes against Humanity', 188, 193-95, 204.
129 *France et al v Göring et al*, (1948) 1 TMWC 171, p 254.
130 Anatole Goldstein, 'Crimes against Humanity: Some Jewish Aspects' (1948) 1 *Jewish Ybk Intl L* 206, 221.
131 'Report of the International Law Commission', GAOR 5th Session Supp No 12, UN Doc A/1316 (1950), para 122.
132 *France et al v Göring et al*, (1948) 1 TMWC 171, p 254; *Flick* case, (1948) 6 TWC 8, p 1212. Anatole Goldstein, 'Crimes against Humanity: Some Jewish Aspects' (1948) 1 *Jewish Ybk Intl L* 206, 221.
133 *France et al v Göring et al*, (1948) 1 TMWC 171, pp 302-04, 318-20; Schwelb, 'Crimes against Humanity', 205, noting that 'Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes a Crime against Humanity'.
134 Schwelb, 'Crimes against Humanity', 204; Dinstein, 'Case Analysis: Crimes against Humanity after *Tadić*', 383-84.
135 *France et al v Göring et al*, (1948) 1 TMWC 171, pp 254-55.

These observations indicate that only concrete acts committed in connection with an armed conflict would constitute crimes against humanity, regardless of whether they occurred before or during the war. The reference to the phrase 'before the war' does not imply that acts committed in peacetime without any connection to the subsequent wars would constitute crimes against humanity at that time.

Nevertheless, some commentators consider that the nexus with aggressive wars was intentionally inserted by the four powers to limit the jurisdiction of the IMT over individuals of Axis countries.[136] Egon Schwelb and Roger Clark argued that the armed conflict linkage requirement in the Nuremberg Charter was a jurisdictional limit rather than an inherent substantive element of crimes against humanity.[137] In addition, the definition of crimes against humanity in the Nuremberg Charter was almost replicated in article 5(c) of the Tokyo Charter. According to the former Judge Röling of the IMTFE, 'the connection did not restrict *the scope of the crime*, but only *the scope of our jurisdiction*'.[138] Furthermore, the US and the ECCC also once argued that the nexus never existed. By citing the work of the UN War Crimes Commission, the US delegation in 1996 once also stated that '[t]he record of the development of the Nuremberg and Tokyo Charters does not […] indicate that the drafters believed that the nexus was required as a matter of law'.[139] Moreover, a Chamber of the ECCC in the *Duch* case referred to the ICTY's *Tadić* Appeals Chamber Decision on Jurisdiction to justify an argument that a nexus never existed.[140]

Clark first pointed out that in article II of the 1948 Genocide Convention, a nexus with aggressive wars was not required for the crime of genocide, which is closely related to the persecution type of crimes against humanity in the Nuremberg Charter.[141] In addition, he noted that the connection to the 'initiation of war and war crimes' was omitted in Control Council Law No. 10.

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136 Roger Clark, 'History of Efforts to Codify Crimes against Humanity' in L.N. Sadat (ed), *Forging a Convention for Crimes against Humanity* 11; United States Delegation, 'Crimes against Humanity, Lack of a Requirement for a Nexus to Armed Conflict' (26 March 1996).

137 Clark, 'History of Efforts to Codify Crimes against Humanity', 11; Schwelb, 'Crimes against Humanity', 188, 194-95.

138 Bernard V.A. Röling, edited and with an Introduction by Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Cambridge: Polity Press 1993) 56 (italic in original).

139 United States Delegation, 'Crimes against Humanity, Lack of a Requirement for a Nexus to Armed Conflict' (26 March 1996), p 2 and fn 4.

140 *KAING Guek Eav alias Duch* (Trial Judgment) 001/18-07-2007/ECCC/TC (26 July 2010), para 292.

141 Clark, 'History of Efforts to Codify Crimes Against Humanity', 12; Roger S. Clark, 'Crimes against Humanity at Nuremberg' in G. Ginsburgs and V.N. Kudriavtsev (eds), *The Nuremberg Trial and International Law* (The Hague: Martinus Nijhoff Publishers 1990) 190-92.

Last, Clark clarified that in the original English and French texts of article 6(c) of the Nuremberg Charter adopted in August 1945, a semi-colon existed between 'before or during the war' and 'or persecutions'. However, in the original Russian text, a comma was used.[142] This semi-colon in the English and French texts was later amended to a comma in the 'Semi-colon Protocol' in October 1945.[143] Given the modification of this semi-colon, Clark concluded that the phrase 'in execution of or in connection with any crime within the jurisdiction of the Tribunal' was only a requirement for persecutions. With regard to crimes against humanity, acts of 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population' are not required to be linked with the war. As for acts of persecution, the 'crimes' mentioned in the phrase 'link with any crimes' refer to the murder type of underlying offences, such as 'murder, extermination or enslavement', instead of 'crimes against peace and war crimes' or aggressive wars. In his view, a link with these underlying offences is confirmed by the Rome Statute, which requires persecution to be 'in connection with any act referred to in this paragraph'.[144] Accordingly, Clark argued that the Nuremberg Charter did not acknowledge a substantive link with aggressive wars or an armed conflict for crimes against humanity in international law.[145]

A different argument, however, is also tenable by reference to these same sources.[146] It is argued that the nexus with an armed conflict in the Nuremberg Charter was a substantive legal element rather than a jurisdictional limit for the following reasons. Firstly, it is the wording 'trial and punishment of the major war criminals of the European Axis' in article 1 and in the chapeau of article 6 of the Nuremberg Charter, rather than the nexus with war, that was inserted to limit the jurisdiction of the IMT.[147] Secondly, the semi-colon in the English and French texts has not been found in preceding drafts and where it came from is a puzzle. The 'Semi-colon Protocol' amended the semi-colon two months later. This slight revision has a high impact on the definition of crimes against humanity, which required all prohibited murder type acts to be linked to war. It is not persuasive to argue that the reviewers changed it mistakenly and failed to consider the impact of the revision. Thirdly, persecution as a crime against humanity requires a link with the underlying murder-type acts. Such a link for persecution does not exclu-

142 '[c]rimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war [;][,] or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.' See Clark, 'History of Efforts to Codify Crimes against Humanity', 11.

143 'Protocol Rectifying Discrepancy in Text of Charter, Drawn up by the Governments who has concluded the Agreement of 8th August' (6 October 1945), (1948)1 TMWC 17.

144 1998 Rome Statute, art 7(1)(h).

145 Clark, 'History of Efforts to Codify Crimes against Humanity', 11.

146 Schwelb, 'Crimes against Humanity', 195.

147 'Minutes of Conference Session of July 24, 1945', in *Report of Robert H. Jackson* 361.

sively exclude an alternative requirement of a link with any crime within the jurisdiction of the ICC (war crimes, genocide, and aggression). This link builds a relationship between murder type offences and persecution type offences. But this link between the two types of offences cannot justify the view that the concept of crimes against humanity in the Nuremberg Charter substantively required no link with war.

Fourthly, the US delegation might have mixed 'the context of war or peace' with 'the nexus with aggressive wars'. The Legal Committee of the UN War Crimes Commission once declared that '[i]t was irrelevant whether a crime against humanity had been committed before or during the war'.[148] By referring to the Nuremberg and Tokyo Charters,[149] the UN War Crimes Commission confirmed this clarification.[150] Nevertheless, the Legal Committee concluded that 'the inhumane acts committed against any civilian population before the war of which Sepp Dietz was charged fall under crimes against humanity' because the purpose of these clashes was in connection with the contemplated invasion of Czechoslovakia.[151] Thus, crimes against humanity committed before the war (in peacetime) were required to be connected with the later aggressive war. In fact, the ILC in its 1950 *Nuremberg Principles* deleted the phrase 'before or during the war' in defining crimes against humanity, while it specifically referred to the connection with war crimes and aggressive wars. In its commentary to Principle VI(c), the ILC emphasised that crimes against humanity 'need not be committed during a war', but it maintained that 'such crimes may take place also before a war in connexion with crimes against peace'.[152] This is the correct reading of the Nuremberg Charter and the IMT judgment.[153]

On the other hand, the text of Control Council Law No. 10 did not refer to the nexus with war.[154] In practice, except for the *Justice* and the *Einsatzgruppen* cases, subsequent tribunals applying that law required a connection with the aggressive wars for acts committed before and during the war.[155] Suspects in the *Flick* and *Ministries* cases were charged with crimes against humanity committed in peacetime.[156] However, the tribunals in the two cases held that it would not contemplate offences committed before the

148 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 178-79.
149 ibid, 522-24.
150 ibid, 192-93.
151 ibid, 178-79.
152 UN Doc A/1316 (1950), para 123.
153 Dinstein, 'Case Analysis: Crimes against Humanity after *Tadić*', 384.
154 *US vs Altstötter et al* [*Justice* case], (1948) 3 TWC 3, pp 972-73; *US v Ohlendorf* [*Einsatzgruppen* case], (1948) 4 TWC 3, p 499.
155 *Flick* case, (1948) 6 TWC 8, pp 1212-13; *US v Krupp* [*Krupp* case], (1948) 9 TWC 1; *US v Pohl* [*Pohl* case], (1948) 5 TWC 195, pp 991-92; *Ministries* case, (1948) 12 TWC 1. See also Kevin J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: OUP 2011) 236-42.
156 *Flick* case, in NMT Indictment Case No. 5, para 13; *Ministries* case, in NMT Indictment Case No. 11, para 30.

war and having no connection with the war.[157] As shown above, the fact that crimes against humanity might be committed before the war does not indicate that the nexus with aggressive wars was not required. The US delegation went too far to argue that there was no nexus with an armed conflict in the Nuremberg Charter.[158]

Fifthly, the *Tadić* Appeals Chamber of the ICTY, in fact, supported a reading that a nexus with an armed conflict was a legal requirement in the Nuremberg Charter. Article 5 of the ICTY Statute provides a notion of crimes against humanity committed in 'armed conflict'.[159] In the *Tadić* Appeals Chamber Decision on jurisdiction, the Chamber held that:

> […] the nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal. Although the nexus requirement in the Nuremberg Charter was carried over to the 1948 [*sic*] General Assembly resolution affirming the Nuremberg principles, there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity. Most notably, the nexus requirement was eliminated from the definition of crimes against humanity contained in Article II (1)(c) of Control Council Law No. 10 of 20 December 1945.[160]
>
> It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. […] [C]ustomary international law may not require a connection between crimes against humanity and any conflict at all. […] the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. [161]

The literal meaning of the first paragraph is a bit ambiguous. By referring to 'peculiar to the jurisdiction of the Nuremberg Tribunal', the Chamber seems to imply that a nexus with an armed conflict for the crimes against humanity was not a substantive but a jurisdictional requirement in the IMT. At the same time, the Appeals Chamber said that the nexus requirement had been 'abandoned in subsequent state practice' and referred to Control Council Law No. 10 to indicate that the notion of crimes against humanity began to change on 20 December 1945. If the nexus with an armed conflict was not a substantive requirement, how could it be 'abandoned in subsequent State practice'?

In the second paragraph cited above, with reference to 'no connection to international armed conflict' as 'a settled' customary rule, on the one hand, the Appeals Chamber held that the nexus with an armed conflict was

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157 *Flick* case, (1948) 6 TWC 8, p 121; *Ministries* case, (1948) 13 TWC, p 116 and (1948) 14 TWC 1, p 557. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* 236-42.

158 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 170.

159 1993 ICTY Statute, art 5 states that the Tribunal 'shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population'.

160 *Tadić* Appeals Chamber Decision on Jurisdiction, para 140.

161 ibid, para 141. For an analysis of the case concerning the nexus requirement, see Dinstein, 'Case Analysis: Crimes against Humanity after *Tadić*', 386-87.

expanded to include a nexus with non-international armed conflict.[162] On the other hand, the Appeals Chamber held that the text of crimes against humanity with a nexus in article 5 of the ICTY Statute[163] was narrower than what customary law required. The Appeals Chamber acknowledged that a nexus requirement existed, but it said it was 'obsolescent'.[164] There is a cross-reference to the two paragraphs cited, confirming the relationship between them. The Appeals Chamber stated that 'customary international law no longer requires any nexus between crimes against humanity and armed conflict […], Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal.'[165] The expressions of 'no longer' and of 'reintroduce' further discredit the idea that a nexus with an armed conflict was never a requirement. The clarification of the *Tadić* Appeals Chamber Decision demonstrates that a link with an armed conflict was a legal element; at the same time, this clarification also indicates that the chamber of the ECCC in *Duch* misunderstood the *Tadić* case. Therefore, the ECCC decision in *Duch* is also less valuable on the interpretation of the nexus issue.

As the Secretary-General summarised, the nexus with war is a compromise between two ideas.[166] One is the traditional principle that the treatment of nationals is a matter of domestic jurisdiction. The competing principle is that inhumane treatment of human beings is wrong even if it is tolerated or practised by their States, in peace and war, and this wrong should be penalised in the interest of the international community. Without abandoning the traditional principle, the latter idea of guaranteeing a minimum standard of fundamental rights to all human beings was qualified by the nexus requirement at that time.[167] In other words, since aggressive wars affect the rights of other States, the nexus with an armed conflict justifies an international prosecution. A construction of no nexus at that time means that acts of their governmental leaders against their citizens in peacetime might be charged with crimes against humanity. It would be going too far to conclude that States aimed to create the notion of crimes against humanity without any association with war.

The four powers knew that they were creating a new regime that would be binding on all States in the future. The American delegate Jackson stated that:

> If certain acts and violations of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us.[168]

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162 *Tadić* Appeals Chamber Decision on Jurisdiction, para 142.
163 1993 ICTY Statute, art 5.
164 *Tadić* Appeals Chamber Decision on Jurisdiction, para 140.
165 ibid, para 78.
166 UN Doc A/CN.4/5 (1949), pp 70-72.
167 ibid.
168 'Minutes of Conference Session of July 23, 1945', in *Report of Robert H. Jackson* 330.

> […] ordinarily we do not consider that the acts of a government toward its own citizens warrant our interference. We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.[169]

These statements demonstrate that without a link with aggressive wars, the leaders of those countries that created the IMT might be at a real risk for murder or persecution of their own civilian populations. The UK Chief Prosecutor Hartley Shawcross shared this view of the nexus with war. The prosecutor believed that acts, not associated with aggressive wars, committed by a government against their civilian populations should not constitute crimes against humanity as a distinct international crime.[170]

As shown above, the nexus with aggressive wars was required for crimes against humanity in the Nuremberg Charter and IMT. Meanwhile, this nexus was not a jurisdictional link but a substantive element of crimes against humanity.[171] The IMT focused on the need to show a connection to aggressive wars.[172] This idea was confirmed by the ILC in its 1950 Nuremberg Principles and its 1950 Draft Code of Offenses.[173] As Schabas noted: '[t]he nexus between armed conflict and crimes against humanity that existed at Nuremberg was part of the original understanding, and was only removed at some point subsequent to 1945'.[174]

4.4.2.2 The disappearance of the nexus with an armed conflict

Currently, the notion of crimes against humanity does not require a nexus with an armed conflict under customary law. However, scholars also differ with respect to the disappearance of a nexus with an armed conflict as a legal element. As for commentators arguing for the nexus as a jurisdictional requirement in the Nuremberg Charter, it is not necessary to assess when

169 ibid, 333.

170 *France et al v Göring et al*, Sir Hartley Shawcross Makes Final Speech on behalf of Prosecution (26 July 1946), (1948) 19 TMWC 433, pp 470-71. In his view, 'the Charter merely develops a preexisting principle' and the crimes against humanity in the jurisdiction of the IMT 'are limited to this extent-they must be crimes the commission of which was in some way connected with, in anticipation of or in furtherance of the crimes against the peace or the war crimes *stricto sensu* with which the defendants are indicted.'

171 Schabas, *Unimaginable Atrocities* 60; Editors, 'Jurisdiction: Universal Jurisdiction–War Crimes and Crimes against humanity' (1991) 13 *Australian Ybk Intl L* 239, 246.

172 *France et al v Göring et al*, (1948) 1 TMWC 171, p 184.

173 'Formulation of the Nuremberg Principles, Report by Jean Spiropoulos, Special Rapporteur', UN Doc A/CN.4/22 (1950), p 187; 'Text of a Draft Code of Offenses against the Peace and Security of Mankind suggested as a working paper for the International Law Commission', UN Doc A/CN.4/SER.A/1950/Add.1.

174 Schabas, *Unimaginable Atrocities* 59.

this link disappeared, since it never existed. For other commentators deeming the nexus a substantive legal element, the nexus with an armed conflict disappeared at some time. As observed above, the second viewpoint is the appropriate interpretation. A nexus with an armed conflict was a substantive legal requirement for crimes against humanity. A further question here is determining when that link with an armed conflict disappeared under customary law.

The disappearance of the nexus remains crucial for tribunals in prosecuting crimes against humanity committed in the past if no relevant treaty or national criminal prohibitions existed at the relevant time. Indeed, national courts can and indeed do prosecute crimes against humanity that occurred decades ago, for instance, the International Crimes Tribunal in Bangladesh. According to the amended *International Crimes (Tribunals) Act* 1973, the International Crimes Tribunal in Bangladesh was created in 2010 to deal with international crimes including crimes against humanity committed since the liberation war of 1971. In the absence of prohibitions in Bangladesh from 1971 to 1973, how can the tribunals prosecute crimes against humanity without violating the principle of non-retroactivity? The existing customary international rules play a vital role in this circumstance. It is essential to analyse whether crimes against humanity still required the armed conflict nexus under customary law at the material time. The following paragraphs survey post-Nuremberg instruments, jurisprudence and the attitude of the UN organs to show the existing confusion about determining the moment of the disappearance of the nexus.

As shown above, the text of Control Council Law No. 10 did not refer to the nexus with war. However, in the application of Control Council Law No. 10, the Subsequent Proceedings required a link with an armed conflict. In addition, violations of Common Article 3 of the 1949 Geneva Conventions might constitute crimes against humanity.[175] It should be stressed that this article only applies in 'internal' and 'international' armed conflict. The drafters of the 1949 Geneva Conventions neither discussed nor contemplated the criminalisation of violation of Common Article 3 as crimes against humanity without a link to war.[176]

Additionally, the ILC's Nuremberg Principles adopted in 1950 also upheld the requirement that the underlying acts of crimes against humanity, before or during the war, be connected to aggressive wars. The formulation of crimes against humanity in the 1951 Draft Code of Offences required that '[i]nhuman acts […] are committed in execution of or in connexion with other

175 UN Doc S/1995/134, para 12 and fn 8.

176 Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Vol III (Geneva: ICRC 1952) 422.

offences defined in this article'.[177] This formulation did not substantively remove the armed conflict nexus requirement.[178] The definition in the 1954 Draft Code of Offences, however, did not follow the essence of the 1951 version on the nexus issue but enlarged the scope of crimes against humanity to cover acts not committed in connection with other offences.[179] Article 1(b) of the 1968 Convention on the Non-Applicability of Statutory Limitations referred to '[c]rimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the Nuremberg International Military Tribunal'.[180] Given its very ratification by States, article 1(b) of the Convention is less significant evidence to justify that a nexus was not required under customary law in 1968.

Jurisprudence of international and internationalised tribunals also does not show consistency on when the armed conflict nexus disappeared for crimes against humanity. The 2006 *Kolk* and *Kislyiy v Estonia* case before the ECtHR concerned the punishment against two individuals by Estonia based on the 2002 Estonia *Penal Code* for crimes against humanity committed in peacetime in 1949. The ECtHR declared that the application was inadmissible because article 7 of the European Convention on Human Rights prohibited retroactive application of crimes under national or international law. The Chamber of the ECtHR implicitly upheld that by virtue of international law, the prosecution of crimes against humanity committed in peacetime in 1949 was not a violation of non-retroactive application of the law. In its logic, international law in 1949 did not require a nexus with an armed conflict for crimes against humanity.[181]

177 1951 'Draft Code of Offences against the Peace and Security of Mankind', UN Doc A/CN.4/SER.A/1951, p 136, art 2(10) reads: 'Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article.'

178 ibid, pp 59, 136.

179 1954 'Draft Code of Offences against the Peace and Security of Mankind', UN Doc A/CN.4/SER.A/1954/Add.1, p 150, art 2(11) reads: 'Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities'.

180 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968, 11 November 1970, 754 UNTS 73, 55 Parties and 9 Signatories.

181 *Kolk and Kislyiy v Estonia* (Decision, Fourth Section Court) ECtHR Application No. 23052/04 (17 January 2006).

Antonio Cassese criticised the decision in the *Kolk* and *Kislyiy v Estonia* case and argued that the link with war was an indispensable element for prohibited acts of crimes against humanity before 1949. In his view, it is 'only later, in the late 1960s, that a general rule gradually began to evolve, prohibiting crimes against humanity even when committed in time of peace'.[182] By contrast, the Grand Chamber of the ECtHR in the 2008 *Korbely v Hungary* case held that the link with an armed conflict 'may no longer have been relevant by 1956'.[183] Also, a Chamber of the ECCC found that 'customary international law between 1975 and 1979 required that crimes against humanity be committed in the context of an armed conflict.'[184] The observation on case law shows that different views exist about when the nexus with an armed conflict was or was not relevant.

The UN Secretary-General and the Security Council considered that the nexus with an armed conflict was not required for crimes against humanity under customary law in 1993. In 1993, the Report of the UN Secretary-General on the establishment of the ICTY stated that:

> Crimes against humanity were first recognised in the Charter and the Judgement of the Nuremberg Tribunal, as well as in Law No. 10 of the Control Council for Germany. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.[185]

A plain reading indicates no nexus with an armed conflict. The Secretary-General held that the nexus with an armed conflict is not required for punishable acts constituting crimes against humanity under customary law.[186] The Secretary-General, however, proposed interpreting article 5 of the draft statute of the ICTY by restricting the crime 'when committed in armed conflict, whether international or internal in character'. The Secretary-General may have intentionally 'defined the crime in Article 5 more narrowly than necessary under customary international law'.[187] The UN Security Council adopted the draft statute of the ICTY without modification.[188] In its interpretative clarification of the ICTY Statute, the UK delegation also stated that:

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182 Antonio Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: *The Kolk and Kislyiy v Estonia* Case before the ECHR' (2006) 4 *JICJ* 410, 413.

183 *Korbely v Hungary* (Merits and Just Satisfaction, Grand Chamber) ECtHR Application No. 9174/02 (19 September 2008), para 82.

184 *Co-Prosecutors v Ieng Sary* (Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order) 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146) (15 February 2011), para 144.

185 UN Doc S/25704 (1993), para 47 (citations omitted).

186 ibid, para 34.

187 *Tadić* Appeals Chamber Decision on Jurisdiction, para 141.

188 UN Doc S/RES/827 (1993).

> Articles 2 to 5 of the draft [ICTY] Statute describe the crimes within the jurisdiction of the Tribunal. The Statute does not, of course, create new law, but reflects existing international law in this field. […] Article 5 covers acts committed in time of armed conflict.[189]

This statement demonstrates that a notion of crimes against humanity in non-international and international armed conflicts reflects part of 'existing international law'. In addition, the possibility that acts committed in peacetime constitute crimes against humanity under customary law at that time is not excluded.[190] The Security Council then implicitly confirms the absence of the nexus requirement in adopting the 1994 ICTR Statute.[191]

The 1995 *Tadić* Appeals Chamber Decision has a significant impact on the clarification of the absence of nexus in custom. As mentioned above, the Appeals Chamber in the *Tadić* decision on jurisdiction observed that the practice of States began to abandon the nexus requirement. The Appeals Chamber was confident in claiming no connection to an armed conflict under customary law in 1993. In its view, offences with no connection to an armed conflict constituted crimes against humanity in 1993, whereas the ICTY only has jurisdiction over crimes against humanity committed in armed conflicts or linked geographically and temporally with an armed conflict.[192] Subsequent ICTY cases upheld the view that there was no nexus with an armed conflict under customary law, at least at the material time in 1993.[193] The preparatory works of article 7 of the Rome Statute, as observed above in section 4.4.1, also demonstrate that States generally recognised the definition of crimes against humanity committed without association with an armed conflict at the 1998 Rome Conference.

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189 UN Doc S/PV.3217 (Provisional) (1993), p 19 (UK).

190 See also UN Doc S/25704 (1993), para 47 and fn 9: 'In this context, it is to be noted that the International Court of Justice has recognised that the prohibitions contained in common article 3 of the 1949 Geneva Convention are based on 'elementary considerations of humanity' and cannot be breached in an armed conflict, regardless of whether it is international or internal in character.'

191 But see Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 169.

192 *Kunarać* Appeals Chamber Judgment, para 83; *Prosecutor v Šešelj* (Decision on the Interlocutory Appeal Concerning Jurisdiction) ICTY-03-67-AR72.1 (31 August 2004), para 14; *Prosecutor v Šešelj* (Decision on Motion for Reconsideration of the 'Decision on the Interlocutory Appeal Concerning Jurisdiction' Dated 31 August 2004) ICTY-03-67-AR72.1 (15 June 2006), para 25.

193 *Furundžija* Trial Judgment, para 59; *Tadić* Appeals Chamber Judgment, paras 249, 251; *Prosecutor v Kunarać* (Judgement) ICTY-96-23-A (12 June 2002), paras 82-83; *Prosecutor v Šešelj* (Decision on the Interlocutory Appeal Concerning Jurisdiction) ICTY-03-67-AR72.1 (31 August 2004), para 13; *Prosecutor v Šešelj* (Decision on Motion for Reconsideration of the 'Decision on the Interlocutory Appeal Concerning Jurisdiction' Dated 31 August 2004) ICTY-03-67-AR72.1 (15 June 2006), para 21; *Stanišić* & *Simatović* Trial Judgment, para 960.

To sum up, instruments and jurisprudence after World War II and the view of the UN organs further justify that the nexus with an armed conflict was a legal element in the Nuremberg Charter, leaving the moment of its disappearance more confusing in 1949, 1951, 1956, the 1960s, 1968 or later in 1993. For lack of practice in prosecuting crimes against humanity, it is inappropriate to conclude at what moment the customary rule of crimes against humanity was modified by dismissing the armed conflict nexus. However, it is reasonable to argue that the nexus requirement was removed, at the very latest, in 1998 at the Rome Conference. Article 3 of the Statute of the SCSL further provides that the existence of an armed conflict is not a precondition for crimes against humanity. To date, national legislation of almost 60 States, including the UK, the US, Canada, Germany, Australia, New Zealand, the Philippines, and Vietnam as well as some African States, does not require a link with an armed conflict for crimes against humanity.[194] The ILC also endorsed the view of no nexus with an armed conflict in its recent draft convention on crimes against humanity.[195]

4.4.3 Assessment and conclusions

Article 7 of the Rome Statute provides that underlying offences disassociated from an armed conflict constitute crimes against humanity.[196] These post-World War II cases and instruments show that the armed conflict nexus requirement was a substantive element for the notion of crimes against humanity in the Nuremberg Charter. Later on, the nexus with an armed conflict was disassociated from crimes against humanity under customary law. It remains unclear when this nexus disappeared under customary law. In conclusion, article 7 of the Rome Statute restated or, at the very least, crystallised the notion of crimes against humanity under customary law by excluding the armed conflict nexus. Article 7 was and is declaratory of custom on the nexus element of crimes against humanity. The following section examines the policy issue of crimes against humanity.

194 Vietnam, Penal Code 1999, art 342; National Implementing Legislation Database.

195 UN Doc A/72/10 (2017), paras 45-46, draft article 2 and commentary, pp 25-28; UN Doc A/70/10 (2015), para 117, p 59.

196 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 146-47; Amnesty International, 'The International Criminal Court: Making the Right Choices', Part I (1997) 33.

4.5 The policy element: was and is article 7(2)(a) declaratory of custom?

After the insertion of the word 'policy' in article 7(2)(a) of the Rome Statute, debates continued as to whether policy should be or is a legal requirement for crimes against humanity under customary law.[197] The issue of whether policy should or should not be a legal element goes beyond the focus of this section. This section analyses whether article 7(2)(a) of the Rome Statute was and is declaratory of custom on the policy element of crimes against humanity. Before analysing the main question, another issue arising here is whether the policy is a distinct element of crimes against humanity in the Rome Statute.[198] This section first examines the concept of policy in the Rome Statute and then discusses the issue of the policy element under customary law.

4.5.1 Policy as a legal element in article 7(2)(a) of the Rome Statute

Article 7(2)(a) of the Rome Statute states that an 'attack directed against civilian population means a course of conduct […] against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack'. This provision contains a threshold for crimes against humanity, requiring that the attack be pursuant to or in furtherance of 'a State or organisational policy'. The following paragraphs answer whether policy is a legal element for crimes against humanity as defined in article 7 of the Rome Statute. For this purpose, it is necessary to first briefly clarify the meaning of policy as well as the phrase 'State or organisational policy'.

197 For policy as an independent element, see Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference', 48-52; William A. Schabas, 'State Policy as an Element of International Crimes' (2008) 98 *J Crim L & Criminology* 953; M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (New York: CUP 2011) 14-19; Christopher Hall and Carsten Stahn, 'Article 7' in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 157-58. *Contra* see Guénaël Mettraux, 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (2002) 43 *Harvard Intl LJ* 237; Leila N. Sadat, 'Preface' in L.N. Sadat (ed), *Forging a Convention for Crimes against Humanity*, xxii; Göran Sluiter, '"Chapeau Elements" of Crimes Against Humanity in the Jurisprudence of the UN *ad hoc* Tribunals' in L.N. Sadat (ed), *Forging a Convention for Crimes against Humanity* 108; David Hunt, 'The International Criminal Court: High Hopes, "Creative Ambiguity" and an Unfortunate Mistrust in International Judges' (2004) 2 *JICJ* 56, 65; Cassese *et al* (eds), *Cassese's International Criminal Law* 107.

198 Guénaël Mettraux, 'The definition of crimes against humanity and the question of a "policy" element' in L.N. Sadat (ed), *Forging a Convention for Crimes against Humanity* 156-66.

4.5.1.1 The notion of policy

The Rome Statute does not define the word 'policy' in article 7(2)(a). The *Oxford English Dictionary* defines 'policy' as 'senses related to public or politic practice'.[199] The Trial Chamber in *Bemba* held that policy need not be formalised and that it may be inferred from other factors. These factors include:

> (i) that the attack was planned, directed or organised; (ii) a recurrent pattern of violence; (iii) the use of public or private resources to further the policy; (iv) the involvement of the State or organisational forces in the commission of crimes; (v) statements, instructions or documentation attributable to the State or the organisation condoning or encouraging the commission of crimes; and/or (vi) an underlying motivation.[200]

In addition, it is doubtful whether the policy for crimes against humanity is limited to the policy of 'States'.

A plain reading of the phrase 'State or organisational policy' in article 7(2)(a) seems to suggest that a State is not the solo policy-making entity involving in offences of crimes against humanity. The English text 'organisational policy', however, does not require the policy to be authored by an entity of an 'organisation', but the policy is in essence organised and planned. By contrast, the French, Spanish and Arabic texts indicate policy to be adopted by an 'organisation'.[201] The Chinese text '组织的政策' shares the same meaning as the latter three equally authentic texts. The texts of the Rome Statute, therefore, do not provide guidance concerning the interpretation of the phrase 'State or organisational policy'.

It is also hard to know how the drafters understood 'State or organisational policy' by simply referring to their statements at the Rome Conference.[202] Reflections of scholars attending the Conference provide guidance to understand the meaning of organisation, but real intention and the purpose of Rome Statute's drafters on this phrase remain doubtful.[203] The Elements of Crimes, however, provides that the policy requires the 'State or organisation' to 'actively promote an attack'.[204] According to the ICC's jurisprudence, the

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199 OED, the now usual sense is: 'A principle or course of action adopted or proposed as desirable, advantageous, or expedient; *esp*. one formally advocated by a government, political party, etc'.

200 *Bemba* Trial Judgment, para 160 (citations omitted).

201 *Kenya* Authorisation Decision 2010 (Dissenting Opinion by Judge Hans-Peter Kaul), para 38.

202 UN Press Release, UN Doc GA/L/2787 (12 April 1996); UN. Doc A/CONF.183/C.1/SR.27, para 74 (Sri Lanka); States did not comment on the meaning of organisational policy, see 'Discussion Paper prepared by the Bureau' (6 July 1998), UN Doc A/CONF.183/C.1/L.53, p 204.

203 M.C. Bassiouni and W.A. Schabas (eds), *The Legislative History of the International Criminal Court* (2nd revised and expanded edn, Leiden: Brill|Nijhoff 2016) 169-70; Schabas, 'State Policy as an Element of International Crimes', 972-74; Bassiouni, 'Revisiting the Architecture of Crimes Against Humanity', 57.

204 Elements of Crimes, in 'Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court', ICC-ASP/1/3 and Corr.1, p 108, UN Doc PCNICC/2000/1/Add.2, art 7, introduction, para 2.

phrase 'State or organisational policy' includes two concepts: 'policy of State' and 'policy of organisation'.[205] Debates at the ICC on the standard of qualifying a non-State actor as an organisation have further endorsed this interpretation implicitly.[206] These interpretations merit discussion but go beyond the focus of this research.[207] This brief clarification sets out the basic understanding of policy. The following paragraphs analyse whether a 'policy' in general is a legal element for crimes against humanity under article 7.

4.5.1.2 Policy as a legal element in the Rome Statute

The legal effect of the reference to 'policy' in article 7 of the Rome Statute is not self-explanatory as to whether the policy is an independent legal element for crimes against humanity. Nevertheless, the Rome Statute leaves no room to argue against the policy element at the ICC. The Elements of Crimes explicitly notes that 'policy to commit such attack requires that the State or organisation actively promote or encourage such an attack against a civilian population' and 'in exceptional circumstances, [policy may] be implemented

205 *Bemba* Decision on Confirmation of Charges 2009, para 115; *Kenya* Authorisation Decision 2010, para 89; *Kenya* Authorisation Decision 2010 (Dissenting Opinion by Judge Hans-Peter Kaul), para 38; *Katanga* Trial Judgment, para 1108; *The Prosecutor v Laurent Gbagbo* (Decision on the confirmation of charges against Laurent Gbagbo, PTC I) ICC-02/11-01/11-656-Red (12 June 2014) [*Laurent Gbagbo* Decision on Confirmation of Charges], para 216. For further discussions, see UN Doc A/72/10 (2017), para 46, pp 40-41, §§ (28)-(31).

206 For capacity test, see *Kenya* Authorisation Decision 2010, paras 90-92; *The Prosecutor v Muthaura et al* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II) ICC-01/09-02/11-382-Red (23 January 2012) [*Muthaura et al* Decision on Confirmation of Charges], paras 112-14; *Ruto et al* Decision on Confirmation of Charges, para 184; *The Prosecutor v Katanga* (Judgment pursuant to Article 74 of the Statute, TC II) ICC-01/04-01/07-3436-tENG (27 March 2014) [*Katanga* Trial Judgment], paras 1119-20; *Bemba* Trial Judgment, para 149. For State-like organisation test, see *Kenya* Authorisation Decision 2010 (Dissenting Opinion by Judge Hans-Peter Kaul), para 51; *The Prosecutor v Ruto et al* (Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang') ICC-01/09-01/11-2 (15 March 2011), paras 2-15; *The Prosecutor v Muthaura et al* (Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali') ICC-01/09-02/11-3 (15 March 2011), paras 2-15; *Ruto et al* Decision on Confirmation of Charges (Dissenting Opinion by Judge Hans-Peter Kaul), paras 8-10; *Muthaura et al* Decision on Confirmation of Charges (Dissenting Opinion by Judge Hans-Peter Kaul) ICC-01/09-02/11-382-Red (26 January 2012), paras 8-10.

207 ibid.

by a deliberate failure to take action, which is consciously aimed at encouraging such attack'.[208]

The preparatory works of article 7 also indirectly clarify the distinct status of the policy element in discussing the relationship between the 'widespread or systematic' test and the policy element.[209] The Preparatory Committee considered 'a policy, plan, conspiracy or a campaign' as a potential element of crimes against humanity.[210] In its report, the Preparatory Committee summarised that:

> There was general support for the widespread or systematic criteria to indicate the scale and magnitude of the offences. The following were also mentioned as elements to be taken into account: an element of planning, policy, conspiracy or organisation; a multiplicity of victims; acts of a certain duration rather than a temporary, exceptional or limited phenomenon; and acts committed as part of a policy, plan, conspiracy or a campaign rather than random, individual or isolated acts in contrast to war crimes. Some delegations expressed the view that this criterion could be further clarified by referring to widespread and systematic acts of international concern to indicate acts that were appropriate for international adjudication; acts committed on a massive scale to indicate a multiplicity of victims in contrast to ordinary crimes under national law; acts committed systematically or as part of a public policy against a segment of the civilian population; acts committed in application of a concerted plan to indicate the necessary degree of intent, concert or planning; acts committed with the consent of a Government or of a party in control of territory; and exceptionally serious crimes of international concern to exclude minor offences, as in article 20, paragraph (e). Some delegations expressed the view that the criteria should be cumulative rather than alternative.[211]

At the Rome Conference, delegations agreed that 'not every inhumane act amounts to a crime against humanity' and a threshold is required.[212] Similar to the situation at the Preparatory Committee, views of State delegations were divided as to the relationship between the two qualifiers 'widespread' and 'systematic': a conjunctive test, i.e., widespread and systematic; or a disjunctive test, i.e., widespread or systematic.[213] By referring to the jurisprudence of the two UN *ad hoc* tribunals and the ICTR Statute, a large number

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208 Elements of Crimes, UN Doc PCNICC/2000/1/Add.2, p 5 and fn 6: '[a] policy which has a civilian population as the object of the attack would be implemented by State or organisational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organisational action'.

209 The ICC's jurisprudence affirmed that the conditions of 'widespread' and 'systematic' in art 7 of the Rome Statute are disjunctive. See *Kenya* Authorisation Decision 2010, para 94; see also *Bemba* Decision on Confirmation of Charges 2009, para 82.

210 UN Doc A/51/22 (1996), Vol I, para 85.

211 ibid.

212 ibid, para 84.

213 Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference'; Christopher K. Hall, 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1998) 91 *AJIL* 180.

of delegations favoured the disjunctive test.[214] In contrast, many other delegations supported a conjunctive test.[215] Supporters of the conjunctive test doubted whether the 'widespread' test was sufficient to exclude unrelated crimes, such as serial killings, from crimes against humanity. Delegations favouring a disjunctive test responded that this doubt was addressed by the phrase 'an attack directed against any civilian population'. Despite their different positions, State delegations acknowledged that the two qualifiers were not sufficient to define the scope of crimes against humanity. Another qualifier is required under the disjunctive test. Those objecting to the disjunctive test proposed describing the third qualifier explicitly. Article 7(2)(a) was therefore drafted during the Rome Conference, and only two States objected to the inclusion of the third qualifier, the policy.[216] Accordingly, if the attack is not shown to be systematic, the policy requirement serves to exclude widespread but unrelated acts from the scope of crimes against humanity.

Discussions at the Rome Conference indicate political compromise between those worrying about the limitation of national sovereignty and those working for a definition reflecting positive developments.[217] The insertion of the policy paragraph in article 7(2)(a) shares this feature. The final threshold with the policy element in article 7, as Darryl Robinson has noted, is the 'middle ground' between the too restrictive conjunctive test and the too extensive disjunctive test. Judge Kaul pointed out that 'drafters of the Rome Statute confirmed in 1998 in article 7(2)(a) of the Statute the policy requirement […] as a decisive, characteristic and indispensable feature of crimes against humanity'.[218] 'It is a fundamental rationale of crimes against

214 'Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole', UN Doc A/CONF./183/C.1/SR.3, paras 21 (Germany); 36 (Czech Republic), 61 (Greece), 66 (Malawi), 77 (Korea), 88 (Australia), 93 (Argentina), 109 (Slovenia),112 (Norway), 114 (Côte d'Ivoire), 117 (South Africa), 124 (Mexico), 130 (Finland), 148 (Spain), 150 (Romania), 158 (Venezuela), 162 (Italy), 168 (Ireland); UN Doc A/CONF.183/C.1/SR.4, paras 7 (Switzerland), 8 (Sweden), 11(Portugal), 13 (Vietnam), 14 (Netherlands), 18 (Bangladesh), 20 (Austria), 23 (Sierra Leone), 27(Chile); UN Doc A/CONF./183/C.1/SR.25, paras 27(Japan), 78 (Australia), 118 (Lesotho); UN Doc A/CONF./183/C.1/SR.27, para 57 (Congo).

215 The 1996 Japan Proposal on the Crimes against humanity supported the conjunctive idea; 'Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole', UN Doc A/CONF./183/C.1/SR.3, paras 45 (India), 90 (UK), 96 (France), 108 (Thailand), 120 (Egypt), 136 (Iran), 144(Indonesia), 172 (Turkey); UN Doc A/CONF.183/C.1/SR.4, paras 5 (Russian Federation), 15 (Bahrain), 17 (Japan), 21 (Uruguay), 30 (Peru); UN Doc A/CONF./183/C.1/SR.25, para 46 (Syria); UN Doc A/CONF./183/C.1/SR.27, paras 11 (Uruguay), 22 (Bahrain).

216 'Discussion Paper prepared by the Bureau' (6 July 1998), UN Doc A/CONF.183/C.1/L.53; 'Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole', UN Doc A/CONF.183/C.1/SR.34, para 15 (Jamaica); UN Doc A/CONF.183/C.1/SR.36, para 13 (Congo).

217 *Tadić* Opinion and Judgment, para 654; Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference'.

218 *Kenya* Authorisation Decision 2010 (Dissenting Opinion by Judge Hans-Peter Kaul), para 63.

humanity to protect the international community against the extremely grave threat emanating from such policies.'[219] The ICC's jurisprudence further confirms that the policy is an independent requirement for the crimes against humanity, directly or indirectly.[220] Judge Kaul also stated that 'there is little doubt that the attack as a contextual component pertaining to State or organisational policy forms *de lege lata* a constitutive contextual requirement of the concept of crimes against humanity as defined in the Statute'.[221] The ICC in *Bemba* upheld this view and found that the course of conduct 'must reflect a link with the State or organisational policy'.[222] The policy is a threshold to exclude 'spontaneous or isolated acts of violation' from the ambit of crimes against humanity.[223]

It should be noted that some commentators argue that only if the requirement of either widespread or systematic attack is satisfied, may offences constitute crimes against humanity. In their view, the 'widespread or systematic' disjunctive test is sufficient 'to exclude isolated offences from crimes against humanity'.[224] Some tribunals held that the policy is an evidentiary factor in establishing a systematic character of an attack.[225] These interpretations are contestable as to article 7 of the Rome Statute. As shown above, an independent status of the policy element was established by the

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219 ibid.

220 *Ongwen* Decision on Confirmation of Charges, para 63; Office of the Prosecutor, 'Situation in Honduras, Article 5 Report', October 2015, para. 103; *Katanga* Trial Judgment, para 1112; *Laurent Gbagbo* Decision on Confirmation of Charges, paras 211-12, 215; *The Prosecutor v Laurent Gbagbo* (Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to Article 61(7)(c)(i) of the Rome Statute', A Ch) ICC-02/11-01/11-572 (16 December 2013), paras 51, 53; *The Prosecutor v Laurent Gbagbo* (Decision adjourning the hearing on the confirmation of charges pursuant to Article 61(7)(c)(i) of the Rome Statute, PTC I) ICC-02/11-01/11-432 (3 June 2013), para 36; *Muthaura et al* Decision on Confirmation of Charges, para 111; *Ruto et al* Decision on Confirmation of Charges, paras 181-221; *The Prosecutor v Mbarushimana* (Decision on the confirmation of charges, PTC I) ICC-01/04-01/10-465-Red (16 December 2011) [*Mbarushimana* Decision on Confirmation of Charges], paras 263; *Situation in the Republic of Côte d'Ivoire* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, PTC III) ICC-02/11-14-Corr (15 November 2011), paras 96-101; *Kenya* Authorisation Decision 2010, paras 83-93; *Katanga & Ngudjolo* Decision on Confirmation of Charges, paras 396, 398.

221 *Kenya* Authorisation Decision 2010 (Dissenting Opinion by Judge Hans-Peter Kaul), para 26.

222 *Bemba* Trial Judgment, para 161; *Katanga* Trial Judgment, para 1097.

223 *Bemba* Decision on Confirmation of Charges 2009, para 81.

224 Mettraux, 'The definition of crimes against humanity and the question of a "policy" element', 163; Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (Oxford: OUP 2014) 345; *Ntakirutimana* Appeals Chamber Judgment, para 93 and fn 883; *Kordić & Čerkez* Appeals Chamber Judgment, para 93; *Blaškić* Appeals Chamber Judgment, para 98; *Kunarac et al* Appeals Chamber Judgment, para 97.

225 *The Prosecutor v Muhimana* (Judgement) ICTR-95-1B-T (28 April 2005), para 527; *Semanza* Trial Judgment and Sentence, para 512; *Semanza v The Prosecutor* (Judgement) ICTR-97-20-A (20 May 2005) [*Semanza* Appeals Chamber Judgment], para 269.

drafters of the Statute. The jurisprudence of the ICC has repeatedly clarified that policy is not interchangeable with 'systematic'.[226] If policy were only an evidentiary factor of the systematic test, the 'widespread' practice of gang activities would be considered as a crime against humanity in international law.[227] The element of policy still serves the function of excluding ordinary national crimes committed by individuals, for example, serial killings, from being considered as crimes against humanity.[228]

All these observations indicate that policy is an independent element for crimes against humanity set out in article 7 of the Rome Statute. The element of policy is considered as a distinct legal element, rather than an evidentiary factor in identifying the systematic character of an attack.

4.5.2 Policy as a legal element of crimes against humanity in custom

Based on the finding that policy is an independent legal element, the task of this subsection is to determine whether article 7(2)(a) was or is declaratory of custom on the element of 'policy'. The first issue arising is whether policy was a distinct element for crimes against humanity under customary law before the adoption of the Rome Statute in 1998. [229] If the answer is affirmative, then a second issue is whether it continues to be an element for crimes against humanity under customary law. Thirdly, if policy was not a distinct element under customary law before 1998, another question is whether the element of policy stipulated in article 7(2)(a) has subsequently developed into customary law.

The examination of the preparatory works of article 7 provides no preliminary indication of whether the element of policy was declaratory of customary law in 1998. The texts and the structure of the Rome Statute also offer no hint on this point. This subsection endeavours to analyse post-World War II instruments and cases as well as the jurisprudence of the two UN *ad hoc* tribunals to assess whether article 7(2)(a) was and is declaratory of custom on the element of policy.

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226 *Katanga* Trial Judgment, para 1112; *Laurent Gbagbo* Decision on Confirmation of Charges, para 208.

227 Bassiouni, 'Revisiting the Architecture of Crimes against Humanity', 54.

228 Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference'; Darryl Robinson, 'Chapter 11: Crimes against Humanity' in R. Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge: CUP 2014) 229, 239; Hall and Stahn, 'Article 7', 157-58.

229 Schabas, 'State Policy as an Element of International Crimes', 972-74, 982; Gerhard Werle and Boris Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a "State-like" Organisation?' (2012) 10 *JICJ* 1151, 1169.

4.5.2.1 Policy as a legal element before 1998

Several instruments have been referred to in arguing for or against policy as a distinct element under customary law.[230] These documents include article 6(c) of the Nuremberg Charter, the judgment of the IMT, the Report of the Secretary-General on the establishment of the ICTY, the draft ICTY Statute, various versions of the Draft Code of Crimes, as well as national cases of Australia, Israel, Canada and Yugoslavia.[231] Analysis of whether the policy was a distinct element of this crime in these instruments mostly overlaps with the identification of its customary status because many of these authorities also evidence the formation process of a customary rule. The following paragraphs mainly focus on these instruments and cases to show whether the element of policy was generally recognised before the adoption of the Rome Statute.

Both the Nuremberg and Tokyo Charters did not expressly refer to a plan or policy. However, the absence of an express reference to 'policy' does not lead to the conclusion that policy was not a requirement. A literal reading approach should be adopted carefully. For instance, based on a literal reading, it might be said that the 'widespread or systematic' test, which was not explicitly contained in the ICTY Statute, is not a requirement for crimes against humanity.[232] This idea is not correct. Therefore, a further examination of the two Charters is required on the issue of policy.

Three main points deserve attention. It should be first noted that the Nuremberg and Tokyo Charters were illustrative rather than exhaustive attempts at definition, which means that they may not provide a complete definition of crimes against humanity. Second, the drafters of the Nuremberg Charter designed crimes against humanity, as observed above, connected with an armed conflict, as a part of 'a plan' for aggressive wars committed by Germany against German nationals. At the London Conference, Robert Jackson said:

> The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. […] They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.[233]

230 Mettraux, 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', 270-82.

231 *Kunarac et al* Appeals Chamber Judgment, para 98 and fn 114.

232 *Tadić* Opinion and Judgment, para 656.

233 'Minutes of Conference Session of July 23, 1945', in *Report of Robert H. Jackson* 331.

Third, the two Charters were adopted to deal with crimes committed by the aggressive regimes of Germany and Japan. The existence of the policy of aggressive wars was not an issue in the two tribunals.[234] The IMT did state that:

> The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic. The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt.[235]

The IMT, therefore, recognised the existence of a 'policy of persecution and murder' of political opponents and Jewish population for crimes against humanity. The historical reality that most crimes against humanity were committed in furtherance of a plan or policy might justify that the drafters of the Nuremberg Charter considered this contextual element in creating the notion of crimes against humanity.[236]

Two examples are frequently referred to argue for the non-existence of the element of policy in the Nuremberg Charter. Streicher and Von Schirach were convicted only of crimes against humanity by the IMT. Stretcher as a Nazi propagandist was found guilty of crimes against humanity for his incitement to persecution, which was connected with war crimes committed by others.[237] Von Schirach was found guilty of crimes against humanity for his participation in the deportation plan in occupied Austria since 1940.[238] The two examples in effect indicate the existence rather than the non-existence of the policy element because the policy of aggressive wars was the background for all charges of crimes against humanity before the IMT. In the British *Belsen* Trial, the military tribunal also stated that 'the concentration camp system was in any case intended to further the German war effort'.[239] On the whole, the 'policy' underlying crimes against humanity was implicit in the Nazi Party policy of aggressive wars.[240]

One different view should be addressed. Some commentators argue that the reference to policy simply recognises a form of criminal participation, by which the furtherance of policy is equally applied to war crimes and crimes against peace.[241] Jean Graven explained that:

234 Schabas, 'State Policy as an Element of International Crimes'.
235 *France et al v Göring et al*, (1948) 1 TMWC 171, p 254.
236 But see deGuzman, 'Crimes against Humanity', 121-38.
237 *France et al v Göring et al*, (1948) 1 TMWC 171, pp 318-20.
238 ibid, pp 302-04.
239 *Belsen* case, (1947) 2 LRTWC 1, pp 1-2, 73.
240 'Minutes of Conference Session of July 24, 1945', in *Report of Robert H. Jackson* 361.
241 Mettraux, 'The definition of crimes against humanity and the question of a 'policy' element', 165.

> The confusion of the 'conspiracy' condition resulted from the last paragraph of article 6 of the Nuremberg Charter, stipulating that '[l]eaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.' However, it does not mean that the perpetrator of crimes against humanity is punishable only if a crime results from such a plan.[242]

This argument has some merit. According to Graven, the reference to a 'plan' stipulated in the concluding paragraph of article 6 of the Nuremberg Charter concerns individual responsibility of leaders and members of an organisation for acts in execution of a plan. In the *Justice* case, the military tribunal applying Control Council Law No. 10 considered participation in a conspiracy to commit crimes against humanity as a mode of liability.[243] By referring to a 'plan', the focus of the authority is the attribution of liability.[244] Simply put, the existence of the 'plan/policy' is regarded as an essential factor for the assessment of individual contributions to offences of crimes against humanity, war crimes and crimes against peace, rather than a unique requirement for crimes against humanity. Therefore, the existence of policy is not a contextual element to convict a person of crimes against humanity.[245] This idea reveals an alternative function of a plan/policy as a material element of the complicity liability.[246] Yet, this function of policy does not lead to a conclusive finding that policy does not serve as an element of crimes against humanity. An alternative function of policy neither confirms nor challenges the view that policy is or is not a legal element.

The Nazi and Japanese policies of aggressive wars were not only the background facts. Further evidence tends to enhance this viewpoint and develop the notion of crimes against humanity under customary law. By referring to definitions of crimes against humanity in the Nuremberg and Tokyo Charters, as well as Control Council Law No. 10, the UN War Crimes

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242 Jean Graven, 'Les Crimes contre l'Humanité' (1950) 76 *Recueil des cours* 427, 560 and fn 4. 'La confusion et la généralisation de cette condition sont dues sans doute à l'alinéa final de l'article 6 du Statut de Nuremberg, disposant que 'les chefs, les organisateurs, les instigateurs et les complices qui participèrent à l'élaboration ou à l'exécution d'un plan commun ou complot destiné à commettre l'un des susdits crimes – crimes contre l'humanité compris – sont responsables des actes de toute personne ayant exécuté un tel plan ou complot.' Cela ne veut toutefois pas dire que l'instigateur ou l'exécutant d'un crime contre la paix ne soit punissable que si le crime résulte d'un tel complot'.

243 *Justice* case, (1948) 3 TWC 1, pp 954, 1063.

244 ibid.

245 Graven, 'Les Crimes contre l'Humanité', 560, 'En revanche, s'il est naturel et juste de punir « entente » active et agissant en vue du crime, il est erroné de subordonner l'existence et la punition du crime lui-même à là préexistence d'une entente ou d'un « complot », comme on a voulu le faire souvent à la suite du statut et du jugement de Nuremberg. C'est là, juridiquement, une confusion que rien ne justifie et dont il faut désormais absolument se garder'.

246 Some trials have stressed the significance of policy in other different perspectives, see *Poland v Goeth* [*Goeth* case], (1948) 7 LRTWC 1; *Poland v Hoess Commandant of the Auschwitz Camp* [*Hoess* case], (1948) 7 LRTWC 11, p 24; *Ministries* case, (1948) 12 TWC 1.

Commission concluded that '[n]ot only the ringleaders, but also the actual perpetrators of crimes against humanity were criminally responsible'.[247] This statement implies that the drafters of the Nuremberg Charter stressed the leaders' role in shaping and formulating the policy of aggressive war, a top-to-bottom perspective. To constitute crimes against humanity, authorities' involvement is the initially designed requirement.

In addition, the ILC's Drafts Code of Crimes implicitly endorsed the element of policy in its drafts of 1951, 1954, 1991 and 1996. For instance, the words 'by the authorities of a State or by private individuals' were added in the 1951 Draft Code of Crimes.[248] The phrase 'private individuals' initiated a debate about whether this crime requires a connection to a State or group, which is a 'threshold requirement'[249] in recent discussions that was not used in the 1950s debates. The 1954 formulation of crimes against humanity confirmed the reference to 'authorities of a State or private individuals' and added the phrase 'acting at the instigation or with the toleration of such authorities'.[250] This new insertion shows great strength of a plan or policy as a contextual element. The 1991 and 1996 Drafts included the new phrase of 'instigation by Government, organisation and groups'.[251] This phrase is a modified version of the State involvement requirement. The phrase 'involvement or toleration of State authorities' was introduced for the notion of crimes against humanity.[252] The drafting committee and commentaries on the 1996 *Draft Code of Crimes* explained that this new phrase was added to exclude random acts or an isolated inhumane act.[253] In short, a logical conclusion is that the existence of policy was a contextual legal element for the crimes against humanity in the Nuremberg Charter.

Several post-World War II cases also deemed policy as a legal element for the crimes against humanity. The military tribunal in the *Justice* case expressly stated that only criminals who consciously participated in 'systematic governmentally organised or approved procedures' would be punished for crimes against humanity.[254] The tribunal in *Ministries* held that 'governmental participation is a material element of crimes against humanity.'[255] Additionally, the French Court of Appeal in the *Barbie* case stated that crimes against humanity within the meaning of article 6(c) of the

247 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 178-79.
248 1951 'Draft Code of Offences against the Peace and Security of Mankind', UN Doc A/CN.4/SER.A/1951, art 2 (9).
249 See observations above in section 4.5.1.1.
250 1954 'Draft Code of Offences against the Peace and Security of Mankind', UN Doc A/2693, in UN Doc A/CN.4/SER.A/1954/Add.1, Vol II, p 150.
251 1996 Draft Code of Crimes, art 18.
252 1954 Draft Code of Offences, art 2; ibid, art 18.5.
253 Schabas, 'State Policy as an Element of International Crimes'.
254 *Justice* case, (1948) 3 TWC1, pp 954, 982, 984.
255 *Ministries* case, (1948) 14 TWC 1, p 984.

Nuremberg Charter are 'inhuman acts and acts of persecution committed by the State pursuing a policy of ideological supremacy in a systematic way against individuals'.[256] In contrast, the Australian High Court held that with respect to 'systematic governmental procedures', the idea in the *Justice* case 'had not been accepted as an authoritative statement of customary international law'.[257] This decision, however, does not discredit the view of policy as a legal element. The purpose of the High Court was not to reject the element of policy but rather to include the policy of other non-state actors. All other cases or claims, aiming to extend the scope of policy-making entities or dissatisfying with a narrow scope of policy-making entities, implicitly acknowledged that the element of policy was required for crimes against humanity.

Further confirmation of the element of policy in international law can be found in recent national laws and courts prosecuting crimes against humanity or genocide committed before 1998. The Dutch Supreme Court in the *Menten* case interpreted that the element of policy is embedded in the definition of article 6(c) of the Nuremberg Charter.[258] The Iraqi High Tribunal in the *Al-Dujail* case affirmed the policy requirement for crimes against humanity in 1982.[259] A Panama court recognised the policy requirement for crimes against humanity committed from 1968 to 1989.[260] The Argentine Supreme Court confirmed the existence of the element of policy by referring to a report,[261] which asserted that during the 'Dirty War' between 1976 and 1983 'a series of acts were committed as a part of a common criminal

256 *Advocate General v Klaus Barbie* (Judgement, Court of Cassation, France) 86-92714 (25 November 1986) 3. 'Les actes inhumains et les persécutions qui, au nom d'un Etat pratiquant une politique d'hégémonie idéologique, ont été commis de façon systématique, contre les personnes'. See also *Advocate General v Klaus Barbie* (Judgement, Court of Cassation, France) 85-95166 (20 December 1985) 14-15, (1985) 78 ILR 124, holding that Jews and members of the Resistance persecuted in a systematic manner in the name of a State pursuing a policy of ideological supremacy can equally be the victims of crimes against humanity; *Advocate General v Touvier* (Judgment, Court of Cassation, France), (1995) 100 ILR 337.

257 *Polyukhovich* case, [1991]172 CLR 501.

258 *Public Prosecutor v Menten* (Judgment, Supreme Court, the Netherlands), (1981) 75 ILR 331, 362-63.

259 *The Public Prosecutor in the High Iraqi Court et al v Saddam Hussein Al Majeed et al* (Opinion, Iraqi High Tribunal, Appeals Commission) 29/c/2006 (26 December 2006) 7-8.

260 *Cruz Mojica Flores* Case (Appeal motion, Supreme Court, Panama) (List of Judgments 11.c), in Ximena Medellín-Urquiaga, *Digest of Latin American Jurisprudence on International Crimes*, Vol I (Washington DC: Due Process of Law Foundation 2010) 37.

261 'Doctrinal Report on the distinction between the crimes of genocide and crimes against humanity' (Brussels: Equipo Nizkor 2007), quoted in Ximena Medellín-Urquiaga, *Digest of Latin American Jurisprudence on International Crimes*, Vol II (Washington DC: Due Process of Law Foundation 2013) 6. This report requires acts of crimes against humanity with widespread and systematic nature.

plan'.[262] Colombia and Chile in the *Pinochet* cases also endorsed the necessity of policy.[263] A Peruvian court held that '[t]he murders and severe bodily harm inflicted in Barrios Altos and La Cantuta also constitute crimes against humanity, fundamentally because they were committed within the framework of a State policy for the selective but systematic elimination of alleged members of subversive groups.'[264] The Canadian Supreme Court in the *Finta* case affirmed that the policy was an element of crimes against humanity.[265]

In national law before the adoption of the Rome Statute, there is more discrepancy than consistency concerning the policy requirement. The criminal laws of some States referred to a premeditated plan.[266] Australia, Bangladesh and other States' criminal codes did not refer to the wording 'policy' or 'plan'.[267] As analysed above, the texts of these national law with no reference to policy do not exclusively demonstrate State practice and attitude towards the element of 'policy' for crimes against humanity under customary law. There is a need for further interpretation and application of these provisions from an international law perspective. This argument is also true in cases where national laws refer to a plan/policy. For instance, the Australian Criminal Code did not refer to the term policy, but Australian courts

262 *Victorio Derganz and Carlos Jose Fateche* case (Juan Demetrio Luna, accused) (Judgement, Supreme Court, Argentina) Case No. 2203, in Medellín-Urquiaga, *Digest of Latin American Jurisprudence on International Crimes*, Vol II, 6-7: (List of Judgments 1.e, Whereas IV); *Jorge Rafaél Videla* case (Motion submitted by the defence of Jorge Rafaél Videla, Incident of res judicata and lack of jurisdiction, Supreme Court, Argentina) Record V.34.XXXVI (21 August 2003) in *Digest of Latin American Jurisprudence on International Crimes*, Vol I, 40: (List of Judgments 1.a, Whereas 13)

263 *José Rubén Peña Tobón et al* case (Ruling and motion for comprehensive reparations, Colombia) 1 December 2011 (List of Judgments 2.b), in Medellín-Urquiaga, *Digest of Latin American Jurisprudence on International Crimes*, Vol II, 4-5; *Clandestine Detention Centres of DINA* case (Application for revocation of immunity of Augusto Pinochet Ugarte, Supreme Court, Chile) 21 April 2006 (List of Judgments 3.c), Whereas 3, in Medellín-Urquiaga, *Digest of Latin American Jurisprudence on International Crimes*, Vol I, 38-39 and fn 39. Pinochet was alleged responsible for acts of State-sponsored torture and illegal detention at the Villa Grimaldi from 1973 to 1978 and his immunity was revoked by the Chilean Supreme Court in September 2006. However, following the issuance of an arrest warrant, he died in December 2006 putting an end of all legal procedures in Chile.

264 *Prosecutor v Alberto Fujimori* (Judgment, Supreme Court of Justice, Special Criminal Chamber, Peru) A.V 19-2001 (7 April 2009) (List of Judgments 13.j), in Medellín-Urquiaga, *Digest of Latin American Jurisprudence on International Crimes*, Vol I, 40: whereas 717.

265 *R v Finta* (Judgment, Supreme Court), [1994] 1 SCR 701, paras 814, 823. For comments on this case, see Mettraux, 'The definition of crimes against humanity and the question of a 'policy' element', 166, noting that the Supreme Court in this case cited no precedents but exclusively relied on the view of Professor Bassiouni.

266 Cambodia, Provisions relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period 1992, art 188; Albania, Criminal Code 1995, art 74; Spain, Criminal Code 1995, art 607*bis*; Finland, The Penal Code 1996, Chapter 1, § 7(3) and (4).

267 Australia, Criminal Code Act 1995, §§ 268.8-268.23; Canada, Criminal Code 1985, subsection 7(3.76); Croatia, Criminal Code 1998, art 157 a; Latvia, Criminal Law 1998, § 71.2; Bangladesh, International Crimes (Tribunals) Act 1973, § 1(2)(a), amended 2009, § 3(2)(a).

supported the element of policy.[268] On the other hand, despite a reference to 'premeditated plan' in the definition of crimes against humanity, the Bangladesh International Tribunals argued for no policy in custom by directly citing the ICTY *Kunarac et al* Appeals Chamber judgment.[269] This observation goes to show that these national laws alone are less valuable for the assessment of the existence of the element of policy.

It is true that the policy in the definition of crimes against humanity was first explicitly mentioned in the Rome Statute. However, as shown above, these post-World War II authorities indicate that evidence of practice and opinions at the international and national levels support policy as an element for crimes against humanity. The work of the ILC tends to require the policy element in its draft codes of offences.[270] The drafting of article 7 of the Rome Statute mentioned above further provides evidence of *opinio juris* as to the development of custom when recommendations of States were adopted in 1998. The preparatory works of the Statute show that States attending the Rome Conference widely recognised this element. Canada's lawmakers also upheld the element of policy under customary law. A recent instance can be found in the 2000 *Crimes against Humanity and War Crimes Act* of Canada, which provides that '[a]rticle 7 of the Rome Statute is customary international law since 1998'.[271] Thus, article 7 of the Statute crystallised the element of policy for crimes against humanity under customary law at the very least in 1998. Overwhelming evidence shows that the element of policy was required for crimes against humanity. Robinson argues that 'the applicability of the policy element is supported by the bulk of authority [including decisions of national courts] since Nuremberg'.[272] Schabas also claims that sufficient authorities confirm policy as an element of crimes against humanity.[273] These authorities seem to reveal that policy was a distinct element under customary law before 1998.

4.5.2.2 Policy as a legal element in the jurisprudence of the two UN ad hoc tribunals

Attention must also be drawn to the jurisprudence of two UN *ad hoc* tribunals. Their judgments have also been relied on by some national courts in determining the policy element for crimes against humanity in international

268 *Polyukhovich* case, [1991] 172 CLR 501.

269 *Chief Prosecutor v Delowar Hossain Sayeedi* (Judgment, International Crimes Tribunal-1) ICT-BD 01 of 2011 (28 February 2013), para 30(4); *Chief Prosecutor v Salauddin Quader Chowdhury* (Judgment, International Crimes Tribunal-1) ICT-BD 02 of 2011 (1 October 2013), para 36(4). All subsequent judgments subscribe to this position.

270 UN Doc A/72/10 (2017), paras 45-46, draft article 3 and commentary, pp 37-42.

271 Canada, Criminal Code 1998, art 459 c.1; Canada, Crimes Against Humanity and War Crimes Act 2000, amended 2013, arts 4(3) and 6(4).

272 Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 *AJIL* 43, 48.

273 ibid; Schabas, 'State Policy as an Element of International Crimes', 972-74.

law.[274] The following paragraphs analyse the jurisprudence of the ICTY and the ICTR to show whether this indicates that article 7(2)(a) was not declaratory of custom on the element of policy. Most of these decisions were delivered after the adoption of the Rome Statute, but they dealt with crimes committed prior to 1998.

The jurisprudence of the ICTY shows two trends on the issue of policy. At the outset, the ICTY case law required the 'policy' element for crimes against humanity. In interpreting the phrase 'attack against any civilian population', the Trial Chamber in the *Tadić* case confirmed that 'there must be some form of a governmental, organisational or group policy to commit these acts'.[275] The Chamber considered policy as a distinct requirement aside from the widespread and systematic tests.

The Trial Chamber in the *Blaškić* case held that policy was a legal element implied in the 'systematic' requirement.[276] The *Blaškić* Trial judgment led subsequent Chambers to doubt the independent status of the element of policy. For instance, the *Kupreškić* Trial Chamber held that 'there is some doubt as to whether [policy] is strictly a *requirement*, as such, for crimes against humanity.'[277] By endorsing the *Kupreškić* decision, the *Kordić* Trial Chamber concluded that 'the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity'.[278]

In the *Kunarac et al* case, the Trial Chamber commented that 'there has been some difference of approach […] as to whether a policy element is required under existing customary law'. In that case, the defendants were held responsible for crimes against humanity for sexual assault or rape of detained Muslim women performed by themselves and their subordinates. Deeming that the policy requirement was satisfied, the Trial Chamber did not decide on this issue in that case. However, in a footnote, the Chamber wrote that 'it was open to question whether the [...] sources often cited by Chambers of the ICTY and of the ICTR support[ed] the existence of such a requirement'.[279] Later on, by citing this sentence quoted and without providing further interpretations, the Trial Chamber in the *Krnojelac* case asserted

274 For instance, the Canada's 1994 *Finta* decision has been overruled by the Supreme Court in 2005. See *Mugesera v Canada* (Minister of Citizenship and Immigration), [2005] 2 SCR 100, para 158.

275 *Tadić* Opinion and Judgment, para 644.

276 *Blaškić* Trial Judgment, paras 203-05, 254; *Prosecutor v Blaškić* (Judgement) ICTY-95-14-A (29 July 2004) [*Blaškić* Appeals Chamber Judgment], paras 119-20.

277 *Kuprešić et al* Trial Judgment, para 551 (emphasis in original).

278 *Prosecutor v Kordić & Čerkez* (Judgment) ICTY-95-14/2-T (26 February 2001), paras 181-82.

279 *Prosecutor v Kunarac et al* (Judgement) ICTY-96-23-T and ICTY-96-23/1-T (22 February 2001), paras 432, 479 and fn 1109.

that 'there is no requirement under customary international law that the acts of the accused person […] be connected to a policy or plan'.[280]

A door was opened at the Appeals Chamber in *Kunarac et al* to consider policy as an evidentiary factor in establishing the systematic character of an attack instead of an independent legal requirement. The Appeals Chamber in the *Kunarac et al* case concluded that:

> […] the attack [does not need] to be supported by any form of 'policy' or 'plan'. There was nothing in the [ICTY] Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes.[281]

According to the Chamber:

> […] proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.[282]

After the *Kunarac et al* Appeals Chamber judgment, the jurisprudence of the ICTY did not support the element of policy for crimes against humanity under customary law.[283] The ICTY Chambers deemed the 'policy' an evidentiary factor rather a distinct element of crimes against humanity.[284]

The jurisprudence of the ICTR followed in the same footsteps as the ICTY on the issue of the element of policy.[285] Its earlier decisions held that '[a] systematic attack is one carried out pursuant to a preconceived policy

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280 *Prosecutor v Krnojelac* (Judgment) ICTY-97-25-T (15 March 2002) [*Krnojelac* Trial Judgment], para 58.

281 *Kunarac et al* Appeals Chamber Judgment, paras 98, 101.

282 ibid, para 98.

283 *Prosecutor v Vasiljević* (Judgement) ICTY-98-32-T (29 November 2002), para 36; *Simić et al* Trial Judgment, para 44; *Galić* Trial Judgment, para 147; *Blaškić* Appeals Chamber Judgment, paras 119-20; *Brđanin* Trial Judgment, para 137; *Prosecutor v Kordić & Čerkez* (Judgment) ICTY-95-14/2-A (17 December 2004), para 98; *Blagojević & Jokić* Trial Judgment, para 546; *Limaj et al* Trial Judgment, para 212; *Krajišnik* Trial Judgment, para 706.

284 *Limaj et al* Trial Judgment, para 212; *Galić* Trial Judgment, para 147; *Simić et al* Trial Judgment, para 44; *Blagojević & Jokić* Trial Judgment, para 546; *Limaj et al* Trial Judgment, paras 184, 212; *Prosecutor v Martić* (Judgement) ICTY-95-11-T (12 June 2007), para 49; *Perišić* Trial Judgment, para 86; *Prosecutor v Tolimir* (Judgement) ICTY-05-88/2-T (12 December 2012), para 698; *Prosecutor v Stanišić & Župljanin* (Judgement) ICTY-08-91-T (27 March 2013), Vol, para 28; *Stanišić & Simatović* Trial Judgment, para 963.

285 *Akayesu* Trial Judgment, paras 579-80; *Kayishema & Ruzindana* Trial Judgment, paras 122-24 and fn 28; *Rutaganda* Trial Judgment and Sentence, paras 69, 71; *Musema* Trial Judgment and Sentence, para 204; *The Prosecutor v Ruggiu* (Judgement and Sentence) ICTR-97-32-T (1 June 2000), para 20; *Bagilishema* Trial Judgment, paras 77-78.

or plan',[286] and that the element of policy effectively excludes acts carried out outside of a broader policy or plan for purely personal motives.[287] By endorsing the *Kunarac et al* Appeals Chamber judgment of the ICTY, its later cases abandoned the view of policy as a legal requirement.[288] Similar to the jurisprudence of the ICTY, subsequent trials of the ICTR treated policy as an evidentiary factor for the assessment of attack.[289] It is worthwhile noting that these Rwanda cases are insignificant on the issue of policy because the existence of a policy was never in doubt. However, the *Kunarac et al* Appeals Chamber judgment of the ICTY is substantial because in that case no policy existed in the background.[290]

According to the *Kunarac et al* Appeals Chamber, the element of policy for crimes against humanity never existed under customary law. This view has been subscribed to not only by the ICTR but also by other tribunals, for example, the SCSL.[291] Some national courts also simply referred to the *Kunarac et al* Appeals Chamber judgment to argue for no policy element for crimes against humanity.[292] The Appeals Chamber only briefly explained its argument in a footnote, which said: 'although there has been some debate[s] in the jurisprudence of this Tribunal as to whether a policy or plan constitutes an element of the definition of crimes against humanity; [t]he practice […] overwhelmingly supports the contention that no such requirement exists under customary international law'.[293] These authorities addressed in the footnotes include:

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286 *Akayesu* Trial Judgment, paras 579-80. Followed by *Mugesera v Canada* (Minister of Citizenship and Immigration), [2003] FCA 325, para 52; *Bukumba v Canada* (Minister of Citizenship and Immigration), [2004] FC 93, para 15.

287 *Kayishema & Ruzindana* Trial Judgment, paras 122-24 and fn 28.

288 *Semanza* Trial Judgment and Sentence, para 329; *Semanza* Appeals Chamber Judgment, para 269; *The Prosecutor v Kajelijeli* (Judgment and Sentence) ICTR-98-44A-T (1 December 2003), para 872; *Kamuhanda* Trial Judgment, para 665; *Ntagerura et al* Judgment and Sentence, para 698; *The Prosecutor v Gacumbitsi* (Judgement) ICTR-01-64-T (17 June 2004), para 299; *Gacumbitsi v The Prosecutor* (Judgement) ICTR-2001-64-A (7 July 2006), para 512; *Seromba* Trial Judgment, para 356; *The Prosecutor v Seromba* (Judgement) ICTR-01-66-A (12 March 2008), para 149; *Nahimana et al v The Prosecutor* (Judgement) ICTR-99-52-A (28 November 2007), para 922.

289 *Semanza* Trial Judgment and Sentence, para 329; *Semanza* Appeals Chamber Judgment, para 269.

290 *Kunarac et al* Appeals Chamber Judgment, para 75.

291 *Prosecutor v Brima et al* (Judgment) SCSL-04-16-T (20 June 2007), para 215; *Prosecutor v Fofana & Kondewa* (Judgment) SCSL-2004-14-T (2 August 2007), para 113; *Prosecutor v Fofana & Kondewa* (Judgment) SCSL-2004-14-A (28 May 2008), para 246; *Prosecutor v Sesay et al* (Judgment) SCSL-04-15-T (2 March 2009), para 79.

292 See *Mugesera v Canada* (Minister of Citizenship and Immigration), [2005] 2 SCR 100, para 158; *Chief Prosecutor v Delowar Hossain Sayeedi* (Judgment, International Crimes Tribunal-1) ICT-BD 01 of 2011 (28 February 2013), para 30(4); *Chief Prosecutor v Salauddin Quader Chowdhury* (Judgment, International Crimes Tribunal-1) ICT-BD 02 of 2011 (1 October 2013), para 36(4).

293 *Kunarac et al* Appeals Chamber Judgment, para 98 and fn 114.

> Article 6(c) of the Nuremberg Charter; Nuremberg Judgement […]; Article II(1)(c) of Control Council Law No 10; *In re Ahlbrecht*, ILR 16/1949, 396; *Ivan Timofeyevich Polyukhovich v The Commonwealth of Australia and Anor*, (1991) 172 CLR 501; Case FC 91/026; *Attorney-General v Adolph Eichmann*, District Court of Jerusalem, Criminal Case No 40/61; *Mugesera et al v Minister of Citizenship and Immigration*, IMM-5946-98, […]; *In re Trajkovic*, District Court of Gjilan (Kosovo, Federal Republic of Yugoslavia), […]; *Moreno v Canada* (Minister of Employment and Immigration), […]; *Sivakumar v Canada* (Minister of Employment and Immigration). See also […], S/25704, 3 May 1993, paras 47-48; Yearbook of the International Law Commission (ILC), 1954, Vol II, 150; […] (UN Doc No A/46/10), 265-266; […] (UN Doc No A/49/10), 75-76; […] (UN Doc No A/51/10), 93 and 95-96. The Appeals Chamber reached the same conclusion in relation to the crime of genocide […]. Some of the decisions which suggest that a plan or policy is required in law went, in that respect, clearly beyond the text of the statute to be applied (see e.g., *Public Prosecutor v Menten*, […]). Other references to a plan or policy which have sometimes been used to support this additional requirement in fact merely highlight the *factual* circumstances of the case at hand, rather than impose an independent constitutive element (see, e.g., […]). Finally, another decision, which has often been quoted in support of the plan or policy requirement, has been shown not to constitute an authoritative statement of customary international law (see *In re Altstötter*, ILR 14/1947 […]).[294]

The Chamber, however, failed to provide a detailed explanation as to how the evidence supports its position. Some commentators have endorsed its conclusion by referring to similar authorities.[295]

In contrast, Bassiouni pointed out that this Chamber

> […] misapplied the law with respect to a State policy […] on the basis of a misstatement of precedential authority. […] [T]he Tribunal relied on precedents that held to the contrary of the proposition of which these precedents were cited.[296]

As analysed above, the authorities cited in the *Kunarac et al* Appeals Chamber judgment have been misinterpreted. Some authorities are not closely relevant to the issue of policy, while some authorities recognise policy as a legal element for crimes against humanity.[297] The Appeals Chamber in *Kunarac et al* cited three Canadian cases from lower courts but ignored the 1994 Supreme Court *Finta* case. The *Kunarac et al* Appeals Chamber judgment is less persuasive on the point of policy.[298] The fact that the *Kunarac et al* Appeals Chamber judgment has repeatedly been endorsed by later jurisprudence cannot make it a convincing authority. Thus, the element of policy was a legal requirement under customary law.

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294 ibid (emphasis in original).

295 Mettraux, 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda'; David Hunt, 'The International Criminal Court-High Hopes, Creative Ambiguity and an Unfortunate Mistrust in International Judges' (2004) 2 *JICJ* 56.

296 Bassiouni, 'Revisiting the Architecture of Crimes against Humanity', 54.

297 Charles C. Jalloh, 'What Makes Crimes against Humanity Crimes against Humanity?' (2013) 28 *Am U Intl L Rev* 381, 400-01.

298 ibid; Schabas, 'State Policy as an Element of International Crimes', 959-64.

In sum, the two UN *ad hoc* tribunals confirmed policy as an element of crimes against humanity in their early jurisprudence. The two tribunals in their subsequent decisions held that customary law requires no policy for crimes against humanity. The *Kunarac et al* Appeals Chamber judgment is the turning point on the issue of the element of policy. The fact that subsequent jurisprudence of the ICTY repeatedly subscribed to this view in the *Kunarac et al* Appeals Chamber judgment does not guarantee that the debate about the element of policy is well settled under customary law. The above observations tend to support the initial jurisprudence of the two UN *ad hoc* tribunals. Therefore, article 7(2)(a) was declaratory of customary law on the element of policy.

4.5.2.3 Policy as a legal element in customary international law after 1998

Regardless of whether the *Kunarac et al* Appeals Chamber judgment is convincing, it is worthwhile noting that this judgment is not conclusive evidence for the status of customary law on the element of policy at present.[299] The *Kunarac et al* Appeals Chamber reached its conclusion by qualifying the time 'at which the crimes occurred' in 1992 to 1993, although subsequent cases citing this decision did not cautiously restate this phrase. These ICTY decisions were delivered after the adoption of the Rome Statute,[300] but they did not examine the text of article 7(2)(a) of the Rome Statute. Meanwhile, chambers of these decisions also did not analyse the impact of article 7(2)(a) on the formation of customary international law as other chambers did in other judgments.[301] Therefore, by merely referring to the *Kunarac et al* Appeals Chamber judgment, it is unclear whether the policy element outlined in the Rome Statute is declaratory of a customary rule now. The following paragraphs address this issue.

At the present time, the Rome Statute has been adopted and signed by more than two-thirds of the States in the world.[302] The ICC itself has interpreted policy as an element of crimes against humanity. After the adoption of the Rome Statute, most national implementation legislation further supports policy as a legal element for crimes against humanity. Much of the imple-

299 *Furundžija* Trial Judgment, para 227.

300 It was delivered on 12 June 2002. The Rome Statute was adopted on 17 July 1998 and 60 ratifications for its entry into force had been reached on 11 April 2002.

301 *Furundžija* Trial Judgment, paras 227, 231, *actus reus* of aiding and abetting under customary law requires that the assistance substantially rather than essentially affects the perpetration of the crime; *Tadić* Appeals Chamber Judgment, paras 222-23, 255-71, concerning joint criminal enterprise and purely personal motive for a crime against humanity under customary law; *Blaškić* Appeals Chamber Judgment, para 653, fn 1366, concerning the use of human shields as war crimes; *Prosecutor v Šainović et al* (Appeal Judgement) ICTY-05-87-A (23 January 2014) [*Šainović et al* Appeals Chamber Judgment], paras 1626-50, concerning the specific direction as a requirement of aiding and abetting under customary law.

302 123 ratifications and 30 signatures.

mentation legislation refers to policy. Some legislation refers to the phrase 'instigated or directed by a State or an organisation' in the 1996 version of the Draft Code of Crimes.[303] Some others directly or indirectly incorporate article 7(2)(a) of the Rome Statute into their national law with small revisions.[304] In addition, many other national laws merely incorporate the definition set out in article 7(1). Thus, they do not refer to the policy requirement as provided for in article 7(2)(a) of the Statute.[305] Furthermore, most legislation supports policy as a legal requirement for crimes against humanity as to underlying acts. For example, the Swiss Criminal Code provides that the act of enforced disappearance of persons should be committed on behalf of or with the acquiescence of a State or political organisation.[306] However, different views remain. The Turkish Criminal Code regards plan as factual evidence to show the existence of specific intent for acts of persecution.[307] Some of these national laws should not be given too much weight to discredit the element of policy under customary law. A plain reading should be carefully

303 Estonia, Penal Code 2001, Chapter 6 Division 2, para 89; Greece, Law on the adaptation of internal law to the provisions of the ICC Statute 2002, amended 2011, art 8.

304 Bosnia and Herzegovina, Criminal Code 2003, art 172; Ireland, International Criminal Court Act 2006; Liechtenstein, Law on Cooperation with the International Criminal Court and other International Tribunals 2004, art 3; Malta, International Criminal Court Act 2003, Preliminary, 2 (1); Mauritius, International Criminal Court Act 2011, preliminary 2 and Part I of the Schedule; Lithuania, Criminal Code of the Republic of Lithuania 2000, art 100; Republic of Korea, Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court 2007, art 9; Kenya, The International Crimes Act 2008; Netherlands, 270 Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act), § 2(4); New Zealand, International Crimes and International Criminal Court Act 2000, Part 2, § 10(2); Samoa, International Criminal Court Act 2007, art 6; Slovakia, Criminal Code 2005, § 425; South Africa, Implementation of the Rome Statute of the International Criminal Court 2002, Chapter 1, § 1, and schedule 1; Uganda, International Criminal Court Act 2010, art 8; UK, International Criminal Court Act 2001, schedule 8; UK, International Criminal Court (Scotland) Act 2001.

305 Georgia, Criminal Code 1999, art 408; Costa Rica, Criminal Prosecution to Punish War Crimes and Crimes Against Humanity 2002, art 2; Australia, International Criminal Court (Consequential Amendments) Act 2002, Subdivision C; Azerbaijan, Criminal Code 1999, arts 105-113; Belgium, Act of 5 August 2003 on Serious Violations of International Humanitarian Law, Chapter II Amendments to the Criminal Code, art 7; Canada, Crimes against Humanity and War Crimes Act 2000, arts 4(3), 6(3) and 6(5); Fiji, Crimes Decree 2009, Part 12, Division 3; Germany, Act to Introduce the Code of Crimes against International Law 2002, art 1(7); Latvia, Criminal Law 1998, § 71.2; Lesotho, Penal Code Act 2012; Montenegro, Criminal Code 2003, art 427; Philippine, Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity 2009, § 6; Romania, Criminal Code 2005, art 175 (1); Slovenia, Criminal Code 2008; Timor-Leste, Criminal Code 2009, art 124; Trinidad and Tobago, International Criminal Court Act 2006, § 10.

306 Switzerland, Criminal Code 1937, amended 2017, art 264a(1)(E). For similar provision, see Norway, Penal Code 2008, Chapter 16, §§ 101-10; Portugal, Adaptation of Criminal Legislation to ICC Statute 2004, art 9.

307 Turkey, Criminal Code 2004, art 77(1); see also Cassese *et al* (eds), *Cassese's International Criminal Law* 126.

employed. Instances in national legislation where there is no reference to policy do not exclusively amount to substantial evidence of *opinio juris* on the issue of the element of policy. These laws do not weaken the view that crimes against humanity require the element of policy under customary law.

In contrast to national laws, some national cases have taken a clear position on the issue of policy. In interpreting article 7(2)(a) of the Rome Statute, the Supreme Court of Argentina concluded that the facts of the case must be linked with a sort of 'policy', understanding this term as directions and guidelines followed by an entity's practice on a specific ground.[308] An Indonesian court reaffirmed the policy element in 2002 by saying that 'the accused had knowledge of, and sympathised with, the policy to carry out crimes [against humanity], and this is an essential element that distinguishes him from an ordinary criminal'.[309] The court in Bosnia and Herzegovina requires an attack 'pursuant to or in furtherance of a State or organisational policy'.[310] It seems that the idea of the element of policy in customary law is further enhanced following the adoption of the Rome Statute. The ILC's recent work on the proposed Convention on crimes against humanity also supports the policy element.[311]

On the other hand, other evidence implies that the element of policy is not a part of customary law at a particular moment. By citing article 7(2)(a) of the Rome Statute, the Supreme Court of Canada in 2005 once concluded that 'it seems that there is currently no requirement in customary international law that a policy underlies [sic] the attack, though we do not discount the possibility that customary international law may evolve over time so as to incorporate a policy requirement'.[312] Following its logic, article 7 of the Statute was not declaratory of custom on the element of policy in 1998; in addition, the element of policy had not developed into customary law in 2005. However, the position of the Supreme Court should be given less weight for its reference to the *Kunarac et al* Appeals Chamber judgment and its inconsistency with Canada's law. In contrast to the Supreme Court, Canada's legislation maintains that the element of policy has been crystallised into custom since 1998.

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308 *René Jesús Derecho* case (Decision about incidental proceeding on the extinguishment of a criminal complaint, Supreme Court, Argentina) Case No. 24079 (11 July 2007) 10-12; *René Jesús Derecho* case (Judgment, Argentina) Case No. 24079 (29 November 2011).

309 *Prosecution v Abílio Soares* (Judgment, Indonesian *Ad Hoc* Human Rights Court for East Timor, Central Jakarta District Court) 01/PID.HAM/AD.Hoc/2002/ph.JKT.PST (14 August 2002).

310 *Prosecutor's Office v Rašević and Todović* (First Instance Verdict, Court of Bosnia and Herzegovina) (28 February 2008) pp 37-38. This case was cited in *Prosecutor's Office v Bundalo et al* (Second Instance Verdict, Court of Bosnia and Herzegovina, Section I for War Crimes, the Appellate Division Panel) X-KRŽ-07/419 (28 Jan 2011), para 289.

311 UN Doc A/72/10 (2017), paras 45-46, draft article 3 and commentary, pp 37-42.

312 *Mugesera v Canada* (Minister of Citizenship and Immigration), [2005] 2 SCR 100, para 158 (citations omitted).

To sum up, the element of policy continues to be a legal element for crimes against humanity in international law. Alternatively, even if policy as a legal element was not a pre-existing norm in 1998, further evidence after the adoption of the Rome Statute shows that it has developed into a customary rule. At present, the element of policy as a requirement is widely recognised. This leads to the conclusion that article 7(2)(a) is declaratory of custom on the issue of the element of policy.

4.5.3 Conclusions

To conclude, the wording 'policy' was explicitly inserted in article 7(2)(a) of the Rome Statute. Policy is considered a distinct legal requirement for crimes against humanity. The Rome Statute did not depart from customary international law but declared existing customary law with respect to the issue of policy. The *Kunarac et al* Appeals Chamber judgment of the ICTY, which deemed policy an evidentiary factor in establishing an attack, is not persuasive on this point. The Elements of Crimes providing that a 'policy of committing such attack' requires that 'the State or organisation actively promote or encourage such an attack against a civilian population' further confirmed this idea.[313] Sufficient evidence suggests that the element of policy was embedded in customary international law in 1998 and that it continues to be a legal element of crimes against humanity under customary law. In short, article 7(2)(a) was and is declaratory of customary law about the policy requirement.

4.6 Concluding remarks

Crimes against humanity was a new type of international crime in the Nuremberg Charter. However, before the adoption of the Rome Statute, which provides for crimes against humanity in its article 7, this crime, in general, had already been recognised as a crime under customary law. This Chapter critically analysed two contextual requirements in article 7, the removal of the nexus with an armed conflict and the element of policy. This Chapter first argues that the texts and the preparatory works of the Rome Statute preliminarily show that article 7 was declaratory of customary law on the nexus issue. Second, this research observes that the armed conflict nexus requirement was a substantive element for the notion of crimes against humanity in the Nuremberg Charter. Later on, as a departure from pre-existing customary law, the link with an armed conflict disassociated itself from crimes against humanity. It remains unclear when this nexus disappeared under customary law, but it indeed occurred before 1998. Article 7 of the Rome Statute codified or, at the very least, crystallised crimes against

313 Elements of Crimes, PCNICC/2000/1/Add.2, p 5.

humanity under customary law by excluding the nexus with an armed conflict. Chapter 4 concludes that article 7(1) of the Statute was and is declaratory of custom concerning the disassociation with an armed conflict for crimes against humanity.

In addition, Chapter 4 looked into the notion of policy, arguing that policy is a legal element articulated in article 7 of the Rome Statute. The texts and the preparatory works do not assist in answering whether article 7 was declaratory of custom on the issue of the element of policy. Authorities after World War II indicate that policy was always in the background of prosecution as a contextual element. The *Kunarac et al* Appeals Chamber judgment of the ICTY deemed policy an evidentiary factor instead a distinct legal element to establish an attack. The authorities prior to this judgment, however, do not assist its conclusion. Its reasoning is not convincing on the policy point. In short, Article 7(2)(a) of the Rome Statute was declaratory of pre-existing custom on the issue of policy. Far from indicating a trend towards removal of the element of policy under customary law, practice since the adoption of the Rome Statute confirms its validity. Therefore, article 7(2)(a) is declaratory of custom about the element of policy.

5 Indirect Co-Perpetration: Article 25(3)(a) of the Rome Statute and Custom

5.1 Introductory remarks

Chapters 3 and 4 have examined articles 8 and 7 of the Rome Statute as evidence of customary law concerning war crimes and crimes against humanity. This Chapter moves on to criminal liability of individuals at the leadership level. The ICC has interpreted that the liability of indirect co-perpetration (jointly with another through another person) is subsumed in article 25(3)(a) of the Rome Statute.[1] The *Stakić* Appeals Chamber held that this liability lacked support under customary law.[2] However, some commentators claimed that indirect co-perpetration 'may well have support in customary international law'.[3] This Chapter explores the relationship between article 25(3)(a) of the Rome Statute and custom concerning the liability of indirect co-perpetration.

For this purpose, section 5.2 discusses the necessity and different approaches to attribute liability to leaders. Section 5.3 analyses the text of article 25(3)(a) and the controversial indirect co-perpetration liability in the *Katanga* & *Ngudjolo* case to see whether indirect co-perpetration is encompassed in article 25(3)(a) of the Rome Statute as a fourth category of perpetration or a form of co-perpetration. Section 5.3 concludes that this liability is a new creation by the ICC. Alternatively, since the ICC has frequently endorsed the idea of indirect co-perpetration as a mode of liability embedded in article 25(3)(a), it is necessary to examine the customary status of this liability. Section 5.4, therefore, touches upon the practice of post-World War II tribunals as well as the drafting history of article 25(3)(a) to examine whether this mode of liability was deemed a way to attribute liability. Conspiracy liability and commission through association are briefly commented on in this section. Section 5.5 analyses practice after the adoption of the Rome Statute to show whether indirect co-perpetration has generally been accepted at the present time. The focus will be on the jurisprudence of the UN *ad hoc* tribunals concerning the notion of joint criminal enterprise

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1 *Katanga & Ngudjolo* Decision on Confirmation of Charges, paras 506-08; *Ruto et al* Decision on Confirmation of Charges, para 289.

2 *Prosecutor v Milutinović et al* (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration) ICTY-05-87-PT (22 March 2006) [*Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006], para 40; *Prosecutor v Stakić* (Judgement) ICTY-97-24-A (22 March 2006) [*Stakić* Appeals Chamber Judgment], para 62.

3 Boas *et al*, *International Criminal Law Practitioner Library*: Vol 1, 121.

(JCE) as established in *Tadić*, indirect co-perpetration, and JCE as established in *Brđanin*. Other instruments for international crimes, national cases and implementation laws are also examined. It seems that rare evidence shows acceptance of indirect co-perpetration liability. This unique mode of liability has not generally been recognised as a customary rule. Chapter 5 concludes that article 25(3)(a) neither was nor is declaratory of a customary rule with regard to indirect co-perpetration.

5.2 The attribution of liability to individuals at the leadership level

The attribution of liability to high-level leaders is complicated in international criminal law. Different approaches are developed to hold the accused of non-physical perpetrators at the leadership level accountable for the crimes committed by others. This section first analyses the basis of attributing a crime to an accused at the leadership level and then qualifies the scope of the present chapter.

5.2.1 The rationale to attribute liability to high-level leaders

The notion of modes of liability assists to establish a link between the crime committed and the accused.[4] An individual is held liable for his/her physical acts or omissions if all elements of that crime have been satisfied. This is the basic mode of liability.[5] In practice, if a plurality of individuals are involved in multiple acts of an offence, this lead to the 'systematic criminality' nature of international crimes.[6] Apart from the physical acts or omissions, each person may contribute to a crime through different forms of perpetration and participation. International criminal tribunals and authorities have adopted different approaches to attribute liability to an accused (a non-physical perpetrator) for the crime where others (physical executors) performed the physical act.[7] Several modes of liability exist in international criminal law, such as command responsibility, aiding and abetting, planning, ordering and instigation as well as incitement.

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4 For an analysis of individual (criminal) responsibility for violations of international humanitarian law, see Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vols I and II (New York: CUP 2005), Rules 102 (individual criminal responsibility), 151(individual responsibility); ICRC, Customary IHL Database.

5 1998 Rome Statute, art 7(2). *Tadić* Opinion and Trial Judgment, paras 663-69, holding that art 7(1) of the ICTY Statute concerning individual criminal responsibility is part of customary international law.

6 *Tadić* Appeals Chamber Judgment, paras 191-92; Jann K. Kleffner, 'The Collective Accountability of Organised Armed Groups for System Crimes' in A. Nollkaemper and H. Van der Wilt (eds), *System Criminality in International Law* (New York: CUP 2009) 238-69.

7 The wording of 'executor' in this research covers both physical perpetrators who are held liable and physical executors who are not responsible for their acts.

Ringleaders, 'masterminds' or intellectual culprits, as non-physical perpetrators are usually physically distant from the execution of the crime. Post-World War II trials revealed that leaders were held responsible for the crimes executed by others.[8] Different grounds support prosecution of these non-physical perpetrators at the political or military leadership level. One viewpoint is that they are criminalised because of their contribution to the crimes committed. These intellectual leaders designed a common criminal plan, which was later executed through physical executors' acts.[9] A Report of the UN Secretary-General stated that 'all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible'.[10]

Another view claims that these masterminds are punishable for the moral gravity of their participation in systemic international crimes.[11] 'The moral gravity of such participation in a JCE [joint criminal enterprise] is often no […] different from that of those actually carrying out the acts in question.'[12] These leaders are deemed the 'most responsible' one, specifically for the crime of aggression.[13] In its commentary to the 1996 Draft Code of Crimes against the Peace and Security of Mankind (Draft Code of Crimes), the International Law Commission (ILC) stated that '[a] government official may […] be considered to be even more culpable than the subordinate who actually commits the criminal act'.[14] In contrast to the first legal ground, the second ground is of a moral and supplementary basis. For example, the US representative at the London Conference, Robert Jackson, once stated:

> We are prepared to show that as against the top men, not merely against the little soldiers who were out in the field and did these things, but against the top Nazis who ordered them. […] [T]hey [the top Nazis] were guilty […] because they personally knew and directed and planned these violations as their deliberate method of conducting war.[15]

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8 M. Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, Leiden: Brill 2013) 263.

9 *Tadić* Appeals Chamber Judgment, para 191; *Attorney General v Eichmann* (Judgment, District Court of Jerusalem, Israel), 11 November 1961, (1968) 36 ILR 5, para 194; Stefano Manacorda and Chantal Meloni, 'Indirect Perpetration versus Joint Criminal Enterprise Concurring Approaches in the Practice of International Criminal Law?' (2011) 9 *JICJ* 159.

10 UN Doc S/25704 (1993), para 54.

11 *Tadić* Appeals Chamber Judgment, para 191; *Prosecutor v Kvočka et al* (Judgement) ICTY-98-30/1-A (28 February 2005) [*Kvočka et al* Appeals Chamber Judgment], para 80; *Blagojević & Jokić* Trial Judgment, para 695.

12 *Tadić* Appeals Chamber Judgment, para 191; *Kvočka et al* Appeals Chamber Judgment, para 80; Nicola Piacente, 'Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy' (2004) 2 *JICJ* 446-54.

13 1998 Rome Statute, arts 8*bis*(1) and 25(3)*bis*.

14 UN Doc A/51/10 (1996), p 26.

15 'Minutes of Conference Session of July 23, 1945', in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Washington, DC: USGPO 1949) [*Report of Robert H. Jackson*] 332.

The practice of international tribunals has also developed prosecution of leaders mainly based on the first ground. This gives rise to the question of how to attribute liability to high-level leaders who are far from the crimes performed by physical executors.[16]

5.2.2 Approaches to attribute liability to high-level leaders

National criminal law might enlighten the establishment of a link between the crimes and a leader, such as co-perpetration, aiding and abetting liability.[17] With regard to the detailed approaches to attribute liability to the accused for crimes physically executed by others, more differences than similarities exist in various national criminal legal systems for various national legislative considerations and policies.[18] Recent Statutes and jurisprudence of international criminal tribunals progressively develop unique modes of liability in international criminal law.[19] For instance, article 25(3)(b) of the Rome Statute stipulates the liability for ordering the commission of crimes. Article 28 clearly provides 'responsibility of commanders and other superiors', which has been developed since the IMT and its subsequent trials. Another way to attribute liability is the idea of joint criminal enterprise established by the ICTY jurisprudence.[20] All these forms of liability in national and international systems merit attention but go beyond the focus of this research. This Chapter focuses on indirect co-perpetration as defined by the ICC.

In contrast to other provisions or drafts of individual liability for international crimes,[21] article 25 of the Rome Statute provides many explicit rules

16 Manacorda and Meloni, 'Indirect Perpetration versus Joint Criminal Enterprise Concurring Approaches in the Practice of International Criminal Law?'.

17 Van Sliedregt, *Individual Criminal Responsibility in International Law* 65.

18 ibid; M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (New York: CUP 2011) 472.

19 1993 ICTY Statute, art 7(1); 1994 ICTR Statute, art 6(1); Statute of the SCSL, art 6(1); Law on the Establishment of the ECCC, art 29(1); Statute of the African Court of Justice and Human and People's Rights (not entered into force), art 28N; as well as 1998 Rome Statute, arts 25 and 28; *Tadić* Appeals Chamber Judgment, para 192; *Blagojević & Jokić* Trial Judgment, para 695. Elies van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide' (2006) 5 *JICJ* 184, 199 concluding that 'JCE in international law is a merger of common law and civil law, and it is a unique (*sui generis*) concept in that it combines and mixes two legal cultures and systems'.

20 *Tadić* Appeals Chamber Judgment, para 192; 1993 ICTY Statute, art 7(1).

21 Nuremberg Charter, art 6(2); Control Council Law No. 10, art 2(2); 1950 ILC Nuremberg Principles, Principles I, VI (a)(ii), and VII; 1948 Genocide Convention, art III; 1949 Geneva Conventions (GC: art 49 of GC I; art 50 of GC II; art 129 of GC III; and art 146 of GC IV); the 1977 Additional Protocol I, art 86; 1991 Draft Code of Crimes, arts 3(1)-(2); 1996 Draft Code of Crimes, art 2(3); 1993 ICTY Statute, art 7(1); 1994 ICTR Statute, art 6(1); Statute of the SCSL, art 6(1); Law on the Establishment of the ECCC, art 29(1); and Statute of the African Court of Justice and Human and People's Rights, art 28N.

of individual criminal responsibility.[22] Article 25(3)(a) provides the ways of committing a crime: 'commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible'. Based on the phrases 'jointly with another person' and 'through another person', Chambers of the ICC interpreted that article 25(3)(a) covers a way of 'commission jointly with another through another person', or indirect co-perpetration.[23] The term 'commission' is said to be synonymous with 'perpetration'.[24] The concept of indirect co-perpetration allows the Court to attach liability to leaders for crimes committed by physical executors, who were used by these leaders' co-perpetrators.[25]

Chambers of the ICC in their recent decisions frequently employed indirect co-perpetration to impute liability to the accused.[26] Prosecutions and the ICTY's Trial Chamber in *Stakić* have also relied on indirect co-perpetration to attach liability to defendants.[27] Some commentators even contended that indirect co-perpetration 'may well have support in customary international law'.[28] By contrast, the *Stakić* Appeals Chamber rejected this liability for its lack of basis in customary international law.[29] This Chapter explores the relationship between article 25(3)(a) of the Rome Statute and the possible customary law concerning indirect co-perpetration. The first step is to clarify whether indirect co-perpetration is embedded in article 25(3)(a) as a way of perpetration.

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22 See 1998 Rome Statute, arts 25, 25(3)(e) and 25(3)*bis*. Kai Ambos, 'Article 25' in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 983-85; Albin Eser, 'Individual Criminal Responsibility' in A. Cassese *et al* (eds), *The Rome Statute of the International Criminal Court: A Commentary* 767; Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 562; Elies van Sliedregt, *Individual Criminal Responsibility in International Law* 61-65.

23 *Katanga & Ngudjolo* Decision on the Confirmation of Charges, paras 491-92; *The Prosecutor v Lubanga* (Judgment on the Appeal of Thomas Lubanga Dyilo against his Conviction, A Ch) ICC-01/04-01/06-3121-Red (1 December 2014) [*Lubanga* Conviction Appeals Chamber Judgment], paras 458, 460.

24 Ambos, 'Article 25', 984-85.

25 *Katanga & Ngudjolo* Decision on the Confirmation of Charges, para 492.

26 ibid, paras 491-92; *Katanga* Trial Judgment, para 1416; *The Prosecutor v Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, PTC II) ICC-01/04-02/06-309 (9 June 2014), paras 104, 121; *Laurent Gbagbo* Decision on Confirmation of Charges, para 241; *Lubanga* Conviction Appeals Chamber Judgment, paras 458, 460; *The Prosecutor v Blé Goudé* (Decision on the Confirmation of Charges against Charles Blé Goudé, PTC I) ICC-02/11-02/11-186 (11 December 2014) [*Blé Goudé* Decision on Confirmation of Charges], paras 136-37; *Ongwen* Decision on Confirmation of Charges, para 41.

27 *Prosecutor v Stakić* (Judgement) ICTY-97-24-T (31 July 2003) [*Stakić* Trial Judgment], paras 438-42.

28 Boas *et al*, *International Criminal Law Practitioner Library*: Vol 1, 121.

29 *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006, para 40; *Stakić* Appeals Chamber Judgment, para 62.

5.3 Is indirect co-perpetration encompassed in article 25(3)(a) of the Rome Statute?

As quoted above, article 25(3)(a) of the Rome Statute stipulates that an individual will be responsible if s/he commits a crime, whether 'jointly with another or through another person, regardless of whether that other person is criminally responsible'. This section first analyses article 25(3)(a) and then jurisprudence of the ICC to seek whether indirect co-perpetration is encompassed in article 25(3)(a) as a way of perpetration.

5.3.1 The text of article 25(3)(a): three forms of perpetration

It is generally commented that article 25(3)(a) depicts three alternatives of committing a crime: direct perpetration, co-perpetration and indirect perpetration.[30]

5.3.1.1 Direct perpetration and co-perpetration

Direct perpetration means that the accused herself/himself physically executed all acts of the crime. If the individual fulfilled all the mental and material elements of the crime, s/he is held liable as a direct perpetrator. Co-perpetration means that individuals jointly committed a crime, in which all offenders exercise control over their own offences. Co-perpetration requires that all offenders act together in a common plan and their essential functional divisions in the accomplishment of that crime.[31] Co-perpetrators, those individuals who did not carry out all objective elements of the crime, can be held liable as principals for that crime, due to the mutual attribution between them.[32] The co-perpetrators can only realise their plan insofar as they act together, but each can ruin the whole plan if s/he does not carry out her/his part. To this extent, the individual is in control of the act.[33] Apart from the two liabilities, article 25(3)(a) also contains the liability of indirect perpetration, which is the result of a struggled compromise of common law and civil law at the Rome Conference.[34]

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30 Darryl Robinson, 'Crimes against Humanity' in R. Cryer *et al* (eds), *An Introduction to International Criminal Law and Procedure* 302; Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 568-69; *Katanga* & *Ngudjolo* Decision on the Confirmation of Charges, para 488; *Katanga* Trial Judgment, para 1396.

31 Schabas, ibid.

32 Eser, 'Individual Criminal Responsibility', 789-95; *Katanga & Ngudjolo* Decision on the Confirmation of Charges, para 492.

33 *Stakić* Trial Judgment, paras 440-41. For comments on the joint control approach to interpreting co-perpetration, see Lachezar D. Yanev and Tijs Kooijmans, 'Divided Minds in the Lubanga Trial Judgment: A Case against the Joint Control Theory' (2013) 13 *ICLR* 789.

34 Bassiouni, *Introduction to International Criminal Law* 286.

5.3.1.2 Indirect perpetration

In international criminal law, indirect perpetration had not been considered as a mode of liability in previous international instruments until the Rome Statute. Indirect perpetration (commission through another person, regardless of whether that other person is criminally responsible) means that the accused committed a crime through another by exerting their will over that person to complete the crime, in which that person is deemed as a/an tool/instrument.[35] Two points deserve attention with regard to indirect perpetration.

The first issue is how to interpret the phrase 'regardless of whether that other person is criminally responsible'. It is generally agreed that this phrase is irrelevant to co-perpetration but was inserted to restrict the wording 'committing […] through a person'. The drafting history of this provision confirms this view.[36] A plain reading of this phrase indicates that the accused's liability as an indirect perpetrator does not depend on the responsibility of physical executors. The person used is not limited to innocent agents but includes a responsible person. However, it is unclear to what extent the person is 'responsible'. Can that person be fully responsible for the crimes committed? The text of the Rome Statute and the drafting history of article 25(3)(a) were silent on this issue. ICTY Judge Schomburg, who advocates indirect perpetration, held that direct and physical perpetrators were used as a mere 'instrument'. He added that 'a particular "defect" on the part of the direct and physical perpetrators' is required because the will or the act is controlled, although the phrase 'perpetrators behind perpetrator' seems to include an entirely responsible perpetrator.[37] The accused are considered as indirect perpetrators, if they used the physical executors, for example, children and persons acting under duress who are held innocent or partly responsible for any deficiency, to commit crimes.

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35 *Lubanga* Decision on Confirmation of Charges, para 332; *Katanga & Ngudjolo* Decision on the Confirmation of Charges, paras 495, 499 and fn 660.

36 'Informal Group on General Principles of Criminal Law, Proposed new Part [III bis] for the Statute of an International Criminal Court General principles of Criminal Law' (26 August 1996), UN Doc A/AC.249/CRP.13, pp 4-8; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc A/51/22 (1996), Vol II, pp 80-85; 'Working paper submitted by Canada, Germany, the Netherlands and the United Kingdom' (14 February 1997), UN Doc A/AC.249/1997/WG.2/DP.1; 'Chairman's Text, Article B b., c. and d.1, Individual criminal responsibility' (19 February 1997), UN Doc A/AC.249/1997/WG.2/CRP.2/Add.2; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (14 April 1998), UN Doc A/CONF.183/2, pp 30-31, art 23(7)(a).

37 *Gacumbitsi* Appeals Chamber Judgment (Separate Opinion of Judge Schomburg), para 20; *Simić et al* Appeals Chamber Judgment (Dissenting Opinion of Judge Schomburg) ICTY-95-9-A (28 November 2006), para 19. See also *The Prosecutor v Seromba* (Dissenting Opinion of Judge Liu) ICTR-01-66-A (12 March 2008), para 8 and fn 17.

In addition, academic writing and the ICC seem to support a formulation of 'fully' responsible executors. If a fully responsible person executed a crime, the crime is 'attributable to' the accused on the basis of complicity, rather indirectly 'committed' by that accused on the commission basis. Article 25(3)(a) is different from national constructions on the point of indirect perpetration alternative. This argumentation implicitly endorsed the view that the person used may be a 'fully' physical executor. Accordingly, an indirect perpetrator may indirectly 'commit' the crime through a 'fully' criminal responsible perpetrator. The ICC also supported that an accused would be deemed an indirect perpetrator when the crime was committed through 'fully responsible' perpetrators. Relying on the term 'perpetration behind perpetration', the ICC held that 'a person who acts through another may be individually criminally responsible, regardless of whether the executor (the direct perpetrator) is also responsible'.[38] The Pre-Trial Chamber also referred to 'responsible, direct perpetration' and 'non-innocent individual'.[39] Accordingly, the person used may be innocent, partly responsible, or wholly responsible.

Evidence supporting fully responsible executors is most relevant to the doctrine of 'control over an organisation' proposed by German jurist Claus Roxin.[40] The second issue arises concerning the ICC's formulation of indirect perpetration 'by means of control over an organisation'.[41] Based on the doctrine of 'control over an organisation', the ICC held that indirect perpetration contains 'commission through another person by means of control over the organisation'.[42] This idea of perpetration by means of 'control over an organised apparatus of power' is that the accused in a leading position in an organised structure of power used the organisation as an instrument to commit the crime indirectly, and the accused is liable for all crimes committed by members of the organisation. Judge Schomburg also noted that there is a new trend of punishing organised crimes through the term 'indirect perpetration'.[43] For example, according to the Criminal Law of the

38 *Katanga & Ngudjolo* Decision on Confirmation of Charges, para 495.

39 ibid, paras 496-99.

40 ibid, para 498 and fn 659.

41 ibid, paras 499-500.

42 *The Prosecutor v Al Bashir* (Public Redacted Version of the Prosecution's Application under Article 58, OTP) ICC-02/05-157-AnxA (12 September 2008), para 248; *Katanga & Ngudjolo* Decision on Confirmation of Charges, para 525; *First Warrant of Arrest* Decision for *Al Bashir*, para 223; *Bemba* Decision on Confirmation of Charges 2009, paras 350-51; *The Prosecutor v Abu Garda* (Decision on the Confirmation of Charges, PTC I) ICC-02/05-02/09-243-Red (8 February 2010) [*Abu Garda* Decision on Confirmation of Charges], paras 162, 216; *Katanga* Trial Judgment, para 1404; *Lubanga* Conviction Appeals Chamber Judgment, para 465; *Blé Goudé* Decision on Confirmation of Charges, para 136. For comments on indirect perpetration in the *Katanga* Trial Judgment, see Carsten Stahn, 'Justice Delivered or Justice Denied? The Legacy of the *Katanga* Judgment' (2014) 12 *JICJ* 809, 823-25.

43 *Prosecutor v Simić et al* (Dissenting Opinion of Judge Schomburg) ICTY-95-9-A (28 November 2006), fn 32.

People's Republic of China (PRC), organisational leaders are criminally liable for all crimes committed by fully responsible members of the organisation.[44] The idea of by means of 'control over organisation' is reminiscent of leaders' liability for their formulation of the common plan and the criminal organisation issues embedded in the Nuremberg Charter.[45] The ICC's construction of indirect perpetration by 'control over an organisation' appears to disregard the fact that the Rome Statute bears no provision similar to that in national criminal provisions or in the Nuremberg Charter to impose liability on organisations' leaders.[46] As Judge Van den Wyngaert pointed out:

> Article 25(3)(a) only speaks of commission 'through another person'. It is hard to see how this could be read to mean that this form of criminal responsibility also attaches when an accused commits crimes through an organisation. […] In this instance, there is no indication that the States Parties meant the word 'person' to mean 'organisation'. […] [T]he type of control over an organisation that is envisaged by the Pre-Trial Chamber could be an important evidentiary factor to demonstrate that an accused did in fact dominate the will of certain individuals who were part of this organisation. However, in such cases, the level of discipline within an organisation and the accused's role in maintaining it are elements of proof and not legal criteria. […] The words 'commission through another person' in Article 25(3)(a) […] should be given their ordinary meaning.[47]

5.3.2 Indirect co-perpetration at the ICC

Apart from the three alternatives, the ICC interprets that indirect co-perpetration is also subsumed in article 25(3)(a). At the ICC, the concept of indirect co-perpetration (or joint indirect perpetration) was introduced in the *Katanga & Ngudjolo* case in 2008.[48] The following paragraphs first analyse this case as to the interpretation of article 25(3)(a) and then briefly evaluate indirect co-perpetration.

5.3.2.1 A 'literal' reading of article 25(3)(a) in Katanga & Ngudjolo

In *Katanga & Ngudjolo*, both accused were rebel military leaders in the Democratic Republic of Congo (DRC). Katanga and Ngudjolo were alleged to have designed a plan to 'wipe out' the village of Bogoro in the Ituri district, DRC. The prosecutor charged both of the accused with crimes committed by members of their two troops in implementing that plan, during and after the attack on civilians.[49]

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44 China, Criminal Law of the People's Republic of China 1979, amended 2017, art 26(3). Chinese commentators have considered this special form of liability embedded in article 26 as a type of joint commission rather than a form of indirect perpetration.

45 Nuremberg Charter, arts 9 and 10.

46 Argentina, Code of Military Justice, art 514; Argentina, Penal Code, art 45.

47 *Ngudjolo* Trial Judgment (Concurring Opinion of Judge Christine Van den Wyngaert), paras 52, 55, 57.

48 *Katanga & Ngudjolo* Decision on Confirmation of Charges, para 492.

49 ibid, para 33.

Pre-Trial Chamber I confirmed the charges based on indirect co-perpetration.[50] The Pre-Trial Chamber first stated that the accused jointly controlled the organised troops based on the hierarchical relations between the accused and their subordinates. The accused, as perpetrators behind perpetrators (their subordinates), both mobilised their power within troops to secure automatic compliance with their orders to achieve the plan.[51] The Chamber further claimed that the crime committed by the accused with an agreement is mutually attributed to both of them. In its wording, 'if he acts jointly with another individual – one who controls the person used as an instrument – these crimes can be attributed to him on the basis of mutual attribution.'[52] Accordingly, through a combination of joint perpetration at the senior level and perpetration 'through other persons by means of control over an organisation', the Chamber introduced the notion of indirect co-perpetration. The accused at the leadership level were held liable for committing a crime through other persons (subordinates) at the executive level, by means of joint control over the troops. In other words, the accused was liable for the crime indirectly committed by his co-perpetrator, who used a third person to execute that crime.[53]

Defences have constantly challenged that the liability of indirect co-perpetration neither exists in the Rome Statute nor is supported by customary law.[54] The ICC rejected this argument. Pre-Trial Chamber I in *Katanga & Ngudjolo* interpreted the wording 'or' in article 25(3)(a) by addressing:

> […] article 25(3)(a) uses the connective 'or', a disjunction (or alternation). Two meanings can be attributed to the word 'or'-one known as weak or *inclusive* and the other strong or *exclusive*. An inclusive disjunction has the sense of 'either one or the other, and possibly both' whereas an exclusive disjunction has the sense of 'either one or the other but not both'. Therefore, to interpret the disjunction in article 25(3)(a) of the Statute as either 'inclusive' or 'exclusive' is possible from a strict textualist interpretation. In the view of the Chamber, basing a person's criminal responsibility upon the joint commission of a crime through one or more persons is therefore a mode of liability 'in accordance with the Statute'.[55]

The Chamber in a footnote referred to the element of 'widespread or systematic' attack in article 7 of the Rome Statute to support its inclusive disjunctive interpretation.[56] The Chamber concluded that indirect co-perpetration

50 ibid, para 466.
51 ibid, paras 513-14.
52 ibid, para 492.
53 ibid, paras 492-93.
54 *The Prosecutor v Katanga & Ngudjolo* (Defence Written Observations Addressing Matters that Were Discussed at the Confirmation Hearing, Defence) ICC-01/04-01/07-698 (28 July 2008), paras 13-32; *Katanga & Ngudjolo* Decision on Confirmation of Charges, para 474; *The Prosecutor v Katanga & Ngudjolo* (Defence for Germain Katanga's Pre-Trial Brief on the Interpretation of Article 25(3)(a) of the Rome Statute, Defence) ICC-01/04-01/07-1578-Corr (30 October 2009), paras 2, 7, 9-26; *Katanga* Trial Judgment, paras 1373-76.
55 *Katanga & Ngudjolo* Decision on Confirmation of Charges, para 491 (emphasis in original and citations omitted).
56 ibid, para 491 and fn 652.

is encompassed in article 25(3)(a) through the wording 'jointly through another person'.[57] Trial Chambers in the *Katanga* and *Ngudjolo* cases both confirmed this finding.[58]

However, a 'textual' reading of article 25(3)(a) does not to lead to such a construction. The reasoning behind the interpretation of the wording 'or' is misguided. In the *Ngudjolo* case, Judge Van den Wyngaert in her concurring opinion noted that the 'inclusive disjunction' is not an ordinary language interpretation but a concept of formal logic. The term in this Statute should be interpreted 'in accordance with the ordinary meaning' rather than through its formal logic formulation.[59] In her view, '[t]his combined reading leads to a radical expansion of Article 25(3)(a) of the Statute, and indeed is a totally new mode of liability'.[60] With regard to the element of 'widespread or systematic' attack, the Pre-Trial Chamber of the ICC held that 'the attack can be widespread, or systematic, or both'. This Chamber conflated legal element of 'widespread or systematic' with the factual coincidence of 'widespread and systematic' attack. This factual situation does not introduce a legal requirement of 'widespread and systematic' for the crimes against humanity.[61] Likewise, two persons may jointly commit crimes through another person. This factual situation, however, does not lead to a conclusion that a form of indirect co-perpetration exists.[62] The 'textual' interpretation of the term 'or' in article 25(3)(a) is not persuasive. The ordinary meaning of article 25(3)(a) is that three alternatives of perpetrations are listed.

The drafting history also appears to show that the drafters did not intend to give the term 'or' a special meaning to include indirect co-perpetration. In the *Ad Hoc* Committee, a special working group summarily listed some general principles for discussion.[63] In the early two sessions of the Preparatory Committee, some States submitted several proposals.[64] These proposals contained direct perpetration and co-perpetration categories but did not contain commission through another person as a form of perpetration. Later on, the informal group re-organised States' submissions and provided possible

57 ibid, para 493.

58 *Katanga* Trial Judgment, para 1381; *Ngudjolo* Trial Judgment, paras 58-64.

59 *Ngudjolo* Trial Judgment (Concurring Opinion of Judge Christine Van den Wyngaert), para 60 and fn 76.

60 ibid, paras 60-61.

61 ibid, para 60 and fn 76.

62 *Contra* Thomas Weigend, 'Perpetration through an Organisation: The Unexpected Career of a German Legal Concept' (2011) 9 *JICJ* 91, 110-11, arguing that 'joint indirect perpetration is a factual coincidence of two recognised forms of perpetration. There is no doctrinal obstacle to applying Article 25(3)(a) ICC Statute to this situation'.

63 'Guidelines for consideration of the question of general principles of criminal law', annexed in 'Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court', UN Doc A/50/22 (1995), p 58.

64 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc A/51/22 (1996), Vol I, paras 191-92, 202-03; Canada, 'Applicable Law: non-paper' (27 March 1996); 'General Rules of Criminal Law: Non-Paper, submitted by Sweden' (4 April 1996).

proposals for further discussion,[65] with an additional paragraph inserted. This additional paragraph introduced indirect perpetration by addressing that a person 'shall be deemed to be a principal where that person commits the crime through an innocent agent who is not aware of the criminal nature of the act committed'. In addition, a proposal suggested combining responsibility of principal liability and responsibility of participation/complicity, which stated that '(b) those who commit such crimes; (c) those who jointly commit such crimes; (d) those who commit such crimes by means of a third person' are perpetrators of the crime.[66] This combinatory proposal detours the original shape of article 25(3)(a) of the Rome Statute.

In the Preparatory Committee's third session, a text, which supported the combining proposal and refined its wording, emerged.[67] Canada, Germany, the Netherlands and the UK submitted that: 'a person is criminally responsible and liable for punishment for a crime defined […] if that person: (a) commits such a crime, whether as an individual, jointly with another, or through a person who is not criminally responsible'. This text was widely supported by the Preparatory Committee after revising the third category of the commission to 'through another person regardless of whether that person is criminally responsible'.[68] The final adopted text of the Preparatory Committee is that 'commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible'.[69] This text is nearly identical to the final version of article 25(3)(a) except for minor changes. This text was neither discussed at the Rome Conference nor amended by the working group on General Principles of Criminal Law.[70] Nevertheless, this text was slightly refined by the Drafting Committee. The Drafting Committee removed the comma between the phrase 'jointly with another' and the phrase 'or through another' and added a comma before 'regardless'.[71] The Drafting Committee's refined text

65 'Informal Group on General Principles of Criminal Law, Proposed new Part [III bis] for the Statute of an International Criminal Court General principles of Criminal Law' (26 August 1996), UN Doc A/AC.249/CRP.13, pp 4-8; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc A/51/22 (1996), Vol II, pp 80-85.

66 UN Doc A/51/22 (1996), Vol II, pp 80-85.

67 'Working paper submitted by Canada, Germany, the Netherlands and the United Kingdom' (14 February 1997), UN Doc A/AC.249/1997/WG.2/DP.1.

68 'Chairman's Text, Article B b., c. and d., Individual criminal responsibility' (19 February 1997), UN Doc A/AC.249/1997/WG.2/CRP.2/Add.2; 'Decision taken by the Preparatory Committee at its Session held from 11 to 21 February 1997' (12 March 1997), UN Doc A/AC.249/1997/L.5.

69 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (14 April 1998), UN Doc A/CONF.183/2, pp 30-31, art 23(7)(a).

70 UN Doc A/CONF.183/C.1/SR.1, A/CONF.183/C.1/SR.8, A/CONF.183/C1/SR.23, A/CONF.183/C1/SR.24, A/CONF.183/C1/SR.26; 'Report of the Working Group on General Principles of Criminal Law' (18 June 1998), UN Doc A/CONF.183/C.1/WGGP/L.4 and Corr.1, p 254.

71 'Report of the Drafting Committee, Draft Statute for the International Criminal Court' (14 July 1998), UN Doc A/CONF.183/C.1/L.65/Rev.1.

was wholly adopted and incorporated in the Draft Statute of the Committee of the Whole, which was transmitted to the final plenary meeting of the Rome Conference for voting.[72]

The examination of the drafting history first indicates that the liability for commission 'jointly with another person' and the liability for commission 'through another person' were designed separately. The idea of indirect co-perpetration as a form of perpetration was neither in the mind of civil law lawyers nor consistent with the knowledge of common law representatives at the Rome Conference. Alternatively, the removal of the comma by the Drafting Committee did not aim to include an alternative of commission 'jointly through another person' as defined by the ICC. The above observation reveals that indirect co-perpetration is not encompassed in article 25(3)(a) as a form of perpetration.

5.3.2.2 Observations and assessment of indirect co-perpetration

Other issues merit further discussions to understand the notion of indirect co-perpetration. The first issue is the way to establish a link between the accused and the crime committed by subordinates. In the *Katanga & Ngudjolo* case, Katanga was a top commander of Ngiti ethnicity armed forces, while Ngudjolo was the military leader of Lendu ethnicity fighters. Based on 'indirect perpetration of commission through control over the organisation', the accused as the armed group's leader may be held liable for the commission of crimes through subordinates by means of control over their own troops. It should be emphasised that the question how to prove a crime was executed by an individual is closely related to evidence. In practice, it is sometimes difficult to ascertain which member of which troop executed a specific crime because the two troops implemented plans together. One may suggest attributing all offences committed by members of both troops to the accused if a link exists between the accused and the other troop. Nevertheless, the fact, in this case, is that despite a shared common plan between the two accused, subordinates of each troop belonging to different ethnic origins are 'unlikely to comply with orders of a leader not of their own ethnicity'. In this circumstance, based on indirect perpetration, both accused would not be held liable for crimes executed by the other troop due to their lack of control over that other troop. It seems that if there is any doubt about the membership of the executor, both accused might not be liable for that offence committed. The difficulty in locating physical perpetrators in each troop seems to be a motivation for the prosecutor to introduce indirect co-perpetration to attribute liability to the accused. In this way, each indirect co-perpetrator is liable for all crimes.

According to the Pre-Trial Chamber, the accused and his co-perpetrators contributed to the crime through their joint control of the fulfilment of the

72 'Report of the Committee of the Whole, Draft Statute for the International Criminal Court' (17 July 1998), UN Doc A/CONF.183/8.

material elements of a crime. It means that on the one hand, Ngudjolo had control over the Lendu troop and is liable for the crimes committed by the Lendu troop's subordinates; on the other hand, the accused Katanga would be liable for the crime 'attached' to his co-perpetrator Ngudjolo based on mutual attribution. Accordingly, Katanga is liable for the crimes committed by the Lendu troop's subordinates, despite no direct link between him and the Lendu troop. The creation of indirect co-perpetration liability establishes a link between the crime committed by a lower level perpetrator of other group and the accused at the higher leadership level.[73]

Secondly, apart from interpreting indirect co-perpetration as the fourth way of perpetration, a different construction of it was illustrated by the *Lubanga* Appeals Chamber. Bearing in mind Judge Van den Wyngaert's different view,[74] the *Lubanga* Appeals Chamber pointed out that divergent views exist at the ICC and held that there are only three rather than four forms of perpetration embedded in article 25(3)(a). Meanwhile, in interpreting co-perpetration liability, the Appeals Chamber implicitly endorsed 'joint commission through another person' as a form of co-perpetration instead of using the label of indirect co-perpetration. The *Lubanga* Appeals Chamber found that 'co-perpetrators need [not] to carry out the crime personally and directly'.[75] Subsequent cases subscribed to this interpretation of co-perpetration.[76] After the *Katanga* & *Ngudjolo* confirmation of charges decision, indirect co-perpetration was confirmed in the *Al Bashir, Bemba*, *Abu Garda*, *Ruto et al*, *Gaddafi et al*, *Muthaura et al*, *Lubanga, Laurent Gbagbo* and *Blé Goudé* as well as *Ntaganda* and most recently the *Ongwen* cases.[77]

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73 *The Prosecutor v Muthaura & Kenyatta* (Prosecutions Submissions on the Law of Indirect co-perpetration under Article 25(3)(a) of the Statute and Application for Notice to be Given under Regulation 55 (2) with respect to the Individual's Individual Criminal Responsibility, OTP) ICC-01/09-01/11-433 (3 July 2012), paras 5-6, 8-35.

74 *Ngudjolo* Trial Judgment (Concurring Opinion of Judge Christine Van den Wyngaert), paras 63-64; *The Prosecutor v Katanga* (Minority Opinion of Judge Christine Van den Wyngaert) ICC-01/04-01/07-3436-AnxI (7 March 2014), para 278.

75 *Lubanga* Conviction Appeals Chamber Judgment, paras 458, 460, 465.

76 See also *Bemba* Decision on Confirmation of Charges 2009, para 348; *Ruto et al* Decision on Confirmation of Charges, para 292; *Ongwen* Decision on Confirmation of Charges, paras 38-41.

77 *First Warrant of Arrest* Decision for *Al Bashir*, paras 209-13; *Bemba* Decision on Confirmation of Charges 2009, paras 350-51; *Abu Garda* Decision on Confirmation of Charges, para 169; *The Prosecutor v Gaddafi et al* (Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abuminyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al Senussi", PTC I) ICC-01/11-01/11-1 (30 June 2011), para 69; *Ruto et al* Decision on Confirmation of Charges, paras 280-90, 299, 349; *Muthaura et al* Decision on Confirmation of Charges, paras 298-99; *The Prosecutor v Ngudjolo* (Judgment pursuant to Article 74 of the Statute, TC II) ICC-01/04-02/12-3-tENG (20 December 2012) [*Ngudjolo* Trial Judgment], paras 7, 58-64; *Katanga* Trial Judgment, paras 1381, 1416; *The Prosecutor v Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, PTC II) ICC-01/04-02/06-309 (9 June 2014), paras 104, 121; *Laurent Gbagbo* Decision on Confirmation of Charges, para 241; *Lubanga* Conviction Appeals Chamber Judgment, paras 458, 460; *Blé Goudé* Decision on Confirmation of Charges, paras 136-37; *Ongwen* Decision on Confirmation of Charges, para 41.

Thirdly, the Pre-Trial Chamber of the ICC even applies this liability to a crime committed outside the common plan. In *Katanga* & *Ngudjolo*, aside from the charge against the offence of attack on civilians, the prosecution also charged both of the accused with sexual offences committed by soldiers after the attack on Bogoro. The Chamber relied on indirect co-perpetration liability and held that although the sexual offences were not a part of the common plan, as a consequence of the plan, the accused knew that these sexual offences 'would occur in the ordinary course of the events'.[78] The ICC further clarified the subjective and objective elements of indirect co-perpetration. The Trial Chambers in the *Katanga* and *Ngudjolo* cases combined the two elements of indirect perpetration and co-perpetration to flesh out the elements of indirect co-perpetration. The objective (material) elements are:

> (i) the suspect must be part of a common plan or an agreement with one or more persons;
> (ii) the suspect and the other co-perpetrators must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime;
> (iii) the suspect must have control over the organisation; and
> (iv) the suspect and the other co-perpetrators' joint control is actually possible.[79]

The subjective (mental) elements are:

> (i) the suspect must carry out the subjective elements of the crimes;
> (ii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s); and
> (iii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfilment of the objective elements of the crime.[80]

Lastly, the ICC's construction of indirect co-perpetration deserves a comment. Criminal proceedings against high-ranked individuals would be highly desirable from a moral perspective; nonetheless, moral arguments should not be the primary reason for introducing such a new mode of liability. We cannot say that prosecution of them based on other modes of liability is not an effort to prevent and narrow the impunity gap. Jens Ohlin remarks that indirect co-perpetration liability is a form of 'double vicarious liability', a by-product of co-perpetration and indirect perpetration liabilities.[81] In the ICC's view, 'there are no legal grounds for limiting the joint commission of the crime solely to cases in which the perpetrators execute a portion of the crime

78 *Katanga & Ngudjolo* Decision on Confirmation of Charges, paras 565, 567.

79 It requires that (i) the organisation must consist of an organised and hierarchal apparatus of power; and that (ii) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect.

80 *Katanga & Ngudjolo* Decision on Confirmation of Charges, paras 495-537; *Ruto et al* Decision on Confirmation of Charges, para 292; *Al Bashir* Warrant of Arrest Decision, paras 209-231; *Bemba* Decision on Confirmation of Charges, paras 350-51.

81 Jens D. Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability' (2012) 25 *Leiden J Intl L* 771.

by exercising direct control over it'.[82] It is true that two suspects may commit a crime through a third person by having joint control over the latter's will. This situation, however, is distinct from the cases covered by indirect co-perpetration as defined by the ICC. As shown above, it is not relevant whether the accused shared intent with the physical perpetrators or exercised any direct authority over the latter.[83]

Relying on the construction of indirect perpetration 'by control over an organisation', indirect co-perpetration not only covers commission jointly 'through another person' but also includes commission 'by means of joint control over an organisation'. This construction of indirect co-perpetration serves to attribute liability to a leader of an organisation for the crimes performed by physical executors belonging to another organisation, regardless of whether offences were a part of the common plan shared between the accused and their co-perpetrators. The ICC created indirect co-perpetration in a way either by combining co-perpetration and indirect perpetration 'by control over an organisation' as the fourth way of perpetration or by expansively interpreting co-perpetration to cover a new form of co-perpetration 'through another person by control over the organisation'. Consequently, relying on indirect co-perpetration, the accused might be held liable for all crimes committed 'indirectly' by their co-perpetrators who used physical executors to perform crimes, regardless of whether the crime is a part of the common plan.

5.3.3 Assessment and conclusions

The above analysis reveals that three categories of perpetration are encompassed in article 25(3)(a). Although indirect co-perpetration is called a form of co-perpetration or a fourth alternative of perpetration, it is in nature a creation by combining co-perpetration and indirect perpetration. This interpretation is not consistent with a textual reading, nor was it especially defined by the drafters. Indirect co-perpetration was introduced through an expansive interpretation by the ICC to deal with the liability of the accused at the leadership level for the crime executed by a person belonging to another group.

In this research, the analysis of the relationship between a treaty provision and custom requires a treaty rule covering a same subject. It seems that this precondition is not satisfied because indirect co-perpetration is not subsumed in the text of article 25(3)(a). Therefore, a preliminary analysis of the form and the structure of the text, as well as the preparatory works of article 25(3)(a) does not assist in assessing whether article 25(3)(a) was declaratory of custom on indirect co-perpetration. In fact, subsequent jurisprudence of the ICC has subscribed to indirect co-perpetration. Its subsequent application of article 25(3)(a) may establish indirect co-perpetration, which might

82 *Katanga & Ngudjolo* Decision on Confirmation of Charges, para 492.
83 *Lubanga* Decision on Confirmation of Charges, paras 349-67.

be binding on all States Parties to the Statute. A further examination of its customary status is required. Based on the arguable presumption that the interpretation of indirect co-perpetration subsumed in article 25(3)(a) is well accepted, the following sections evaluate whether article 25(3)(a) was or is declaratory of customary law concerning indirect co-perpetration.

5.4 Indirect co-perpetration: was article 25(3)(a) declaratory of custom?

This section analyses whether article 25(3)(a) was declaratory of customary law on indirect co-perpetration. For this purpose, this section looks into instruments and case law before the adoption of the Rome Statute to survey whether indirect co-perpetration existed or was emerging under customary law before 1998.

5.4.1 Post-World War II instruments

Previous provisions or drafts of individual criminal responsibility for international crimes did not use wording similar to that in article 25(3)(a).[84] The concluding paragraph of article 6 of the Nuremberg Charter focused on the liability of leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit crimes for the acts performed by any person in the execution of the crime.[85] Article 5 of the Tokyo Charter contained a provision similar to that in the Nuremberg Charter.[86] Article 7(1) of the ICTY Statute provides that a person 'who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime' is responsible. Article 6(1) of the ICTR Statute provides a similar construction. The 1994 ILC Draft Statute of the court did not contain a provision about individual criminal responsibility.[87] Article 2(3) of the 1996 ILC Draft Code of Crimes addressed various forms of perpetration and participation,[88] including intentionally committing, ordering, aiding and abetting, direct participa-

84 Control Council Law No. 10, art 2(2); 1950 ILC Nuremberg Principles, Principles I, VI (a) (ii), and VII; 1948 Genocide Convention, art III; 1949 Geneva Conventions (GC: art 49 of GC I; art 50 of GC II; art 129 of GC III; and art 146 of GC IV); the 1977Additional Protocol I, art 86; the 1991 Draft Code of Crimes, arts 3(1)-(2; 1996 Draft Code of Crimes, art 2(3); 1993 ICTY Statute, art 7(1); 1994 ICTR Statute, art 6(1); Statute of the SCSL, art 6(1); Law on the Establishment of the ECCC, art 29(1); and the Statute of the African Court of Justice and Human and People's Rights (not entered into force), art 28N.

85 Nuremberg Charter, art 6(2); Bassiouni, *Crimes against Humanity* 382-83.

86 Tokyo Charter, art 5.

87 'Report of the International Law Commission on the Work of its Forty-sixth Session, Note by the Secretary-General', UN Doc A/49/355 (1994), pp 3-31.

88 1996 Draft Code of Crimes, art 2(3).

tion in planning or conspiring, incitement and attempts.[89] Article 25(3)(a) seems to contain no trace of this Draft Code of Crimes. In short, no precedent in international treaties has explicitly set out indirect co-perpetration. The absence of the term 'indirect co-perpetration' is not conclusive evidence of its lack of customary basis. A mode of liability in a different label or terminology may serve the same function of indirect co-perpetration. The next subsection explores whether indirect co-perpetration can trace its roots to post-World War II cases in international law.

5.4.2 Post-World War II trials

Supporters of indirect co-perpetration under customary law have referred to post-World War II trials to justify their claims.[90] Their references at least indicate that some post-World War II trials may be relevant for the examination of the customary state of indirect co-perpetration. This subsection surveys post-World War II trials relating to conspiracy, complicity through the organisation and concerted actions to show whether these trials evidence the practice of indirect co-perpetration as emerging customary law.

5.4.2.1 Liability for the offence of conspiracy, conspiracy liability, and complicity through association

The IMT judgment and the Nuremberg Subsequent Proceedings concerning the conspiracy issue may be relevant for the identification of customary law. A clarification is first necessary due to the distinction between conspiracy as an inchoate crime and liability for participation in a conspiracy as a form of complicity (conspiracy liability). Commentators have closely examined proposals about conspiracy debated in the drafting of the Nuremberg Charter and in following World War II cases.[91] The wording 'common plan or conspiracy' was contained in two paragraphs of the Nuremberg Charter, article 6(a) and the concluding paragraph of article 6. The IMT differentiated between the meaning of conspiracy in these two paragraphs.

Article 6(a) criminalised aggressive wars (planning, preparation, initiation and waging) and participation in a conspiracy to prepare and wage aggressive war.[92] The drafters of the Nuremberg Charter defined the notion

89 'Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc A/CN.4/398 and Corr.1-3 (1986), paras 89-145; 'Report of the International Law Commission', GAOR 42nd Session Supp No 10, UN Doc A/42/10 (1987), pp 14-15.

90 *Prosecutor v Simić et al* (Dissenting Opinion of Judge Schomburg) ICTY-95-9-A (28 November 2006), para 14.

91 Lachezar D. Yanev, 'A Janus-Faced Concept: Nuremberg's Law on Conspiracy vis-à-vis the Notion of Joint Criminal Enterprise' (2015) 26 *CLF* 419, 456.

92 Nuremberg Charter, art 6(a): 'Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'.

of 'conspiracy' here as a punishable inchoate crime.[93] The IMT confirmed this interpretation and considered 'conspiracy to wage aggressive war' as a separate crime. In addition, the concluding paragraph of article 6 of the Nuremberg Charter provides: 'Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.'[94] By referring to this concluding paragraph, the prosecution brought charges of participation in a conspiracy to commit crimes against humanity and war crimes as independent crimes.[95]

The IMT rejected the two charges. The IMT interpreted this concluding paragraph as a provision stipulating individual responsibility for any crimes listed in articles 6(a)-(c). In its view: 'the words […] [in the concluding paragraph] are designed to establish the responsibility of persons participating in a common plan.'[96] The wording 'common plan or conspiracy' in the concluding paragraph serves as an element of the complicity liability rather than a distinct crime in a technical sense.[97] The responsibility of leaders and organisers does not lie in their actions of conspiracy or common plan as a separate crime. Leaders are individually responsible for the acts committed by others in the execution of a common plan because they contributed to the offences committed through their participation in the formulation or execution of that plan.[98] This interpretation is similar to complicity liability embedded in the civil law system, in which the underlying offences are required to be perpetrated. Based on this liability, leaders and organisers who were involved in the formulation of a plan to commit war crimes and crimes against humanity would also be punished. In short, the wording 'conspiracy' in the Nuremberg Charter was interpreted in two ways: as an inchoate crime and as a form of complicity.

Article 5(a) of the Tokyo Charter also referred to participation in a common plan or conspiracy as crimes against peace. The sentence that is stated in the concluding paragraph of article 6 is incorporated in the definition of crimes against humanity in article 5(c) of the Tokyo Charter. The IMTFE also held that conspiracy, as a stated crime, is restricted to crimes against

93 Yanev, 'A Janus-Faced Concept: Nuremberg's Law on Conspiracy vis-à-vis the Notion of Joint Criminal Enterprise', 419.

94 Nuremberg Charter, art 6.

95 *France et al v Göring et al*, (1948) 1 TMWC 171, p 229.

96 ibid, p 226.

97 'The Charter and Judgment of the Nuremberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General', UN Doc A/CN.4/5 (1949), pp 73-74.

98 *France et al v Göring et al*, (1948) 1 TMWC 171, pp 109, 123. This provision is not limited to conspiracy liability, but also includes complicity in general. This paragraph covers participation in a conspiracy, participation in the formulation of the conspiracy, and participation in the execution of the conspiracy.

peace,[99] and rejected the charge of participation in a conspiracy to commit conventional war crimes or murder by waging war.[100] Nevertheless, the IMTFE did not differentiate between the meaning of the two words 'conspiracy' in article 5 of the Tokyo Charter.

On the other hand, in the Subsequent Proceedings, tribunals endorsed the distinction between conspiracy as a separate crime and conspiracy as a form of complicity.[101] Control Council Law No. 10 did not contain a provision similar to the concluding paragraph of article 6 in the Nuremberg Charter. Its article II (2)(d) stipulated criminal responsibility of individuals 'connected with plans or enterprises' involving the commission of a crime. The prosecution and defences differed on the understanding of article II (2)(d). The prosecution relied on this provision to charge the defendants with conspiring to commit war crimes and crimes against humanity, as well as crimes against peace. The defences argued that conspiracy to commit war crimes and crimes against humanity were not crimes, and that article II (2)(d) deemed 'enterprise liability' a mode of liability. As Kevin Heller has noted, the tribunals in the *Medical, Justice* and *Pohl* cases simply dismissed the charge of conspiracy as a crime for lack of jurisdiction. In the *Krupp, Farben, Ministries* and *High Command* cases, indictments of conspiracy for war crimes and crimes against humanity also failed.[102] The tribunals seemed to have supported the view of the defences and interpreted the phrase 'connected with plans or enterprises' in article II (2)(d) as a form of liability.

Therefore, the function of conspiracy in the post-World War II trials is twofold. The first is to define a separate crime for a concrete plan to crimes against peace. The second function is as a mode of liability to attribute liability to defendants for their contribution to offences of crimes against peace, war crimes and crimes against humanity committed by others.[103] Conspiracy has been retained as a mode of liability for genocide in the 1990s, but it was excluded totally from the framework of the 1998 Rome Statute either as a distinct crime or as a liability because the influence of civil law lawyers.[104]

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99 *US et al v Araki et al*, Judgment, p 34 stating that 'the context of this provision clearly relates it exclusively to subparagraph (a), crimes against peace, as that is the only category in which a "common or conspiracy" is stated to be a crime.' See also *US et al v Araki et al*, Indictment (English), in Annexe No A-6, pp 57-58, count 53; UN Doc A/CN.4/5 (1949).

100 *US et al v Araki et al*, Judgment, pp 27-71. See *US et al v Araki et al*, Indictment (English), Counts 37, 38, 44, 53.

101 *US v. Brandt* [*Medical* case], (1948) 1TWC 1, p 10; *US v. Altstötter* [*Justice* case], (1948) 3 TWC 3, p 17; *US v. Pohl* [*Pohl* case], (1948) 5 TWC 195, p 201.

102 Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* 276-80.

103 Allison Danner and Jenny Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California L R* 75, 119, arguing that 'international judges fail to acknowledge that conspiracy is not only a substantive crime but also constitutes a liability theory in its own right'. Jens D. Ohlin, 'Joint Intentions to Commit International Crimes' (2011) 11 *Chicago J Intl L* 693, 702-703, arguing that 'substantial historical support for the idea that common purpose liability [i.e. JCE] and conspiracy liability are one and the same'. See also Harmen van Der Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations' (2007) 5 (1) *JICJ* 91, 96.

104 Jens D. Ohlin, 'The One or the Many' (2015) 9 *Crim Law and Philos* 285.

Conspiracy as an inchoate crime is familiar to common law lawyers, whereas conspiracy liability is more familiar to civil law lawyers.

The IMT provided little opportunity for discussion on the elements of conspiracy liability for participation in a common plan. According to the text of the concluding paragraph of article 6, conspiracy (complicity) liability requires offences committed by any persons in the execution of a common plan. Secondly, although article 6 includes no explicit reference to a shared common plan between the physical perpetrator and leaders, the drafting history of the Nuremberg Charter indicates such a requirement.[105] Thirdly, simply participation in a conspiracy initiated by others is not enough. States at the London Conference did not agree that the mere existence of an agreement/common plan is sufficient to attribute liability.[106] The IMT also did not adopt that mere agreement to a conspiracy suffices to charge the leaders.[107] In the IMT's view, when statesmen, military leaders, diplomats, and businessmen, with knowledge of the common plan, willingly co-operate and facilitate the plan initiated by original conspirators, they make themselves parties to the common plan. Therefore, conspiracy liability at the IMT requires the knowledge of the common plan and the accused's actual acts of furthering the common plan.

As shown above, case law concerning conspiracy as a distinct offence is not related to liability. At the IMT, conspiracy liability was originally designed to attribute liability to leaders and planners at the planning level. The above clarification of the conspiracy liability for the common plan at the IMT reveals that conspiracy liability is distinct from modern indirect co-perpetration liability in several aspects. First, participation in the conspiracy to commit crimes at the IMT is regarded as a form of complicity. The current idea of indirect co-perpetration liability is considered as a form of commission; therefore, these accused are deemed principals instead of accessories. This difference is a choice of the way to solve a similar issue. Second, at the IMT, defendants' contribution at the preparatory stage sufficed to attribute liability for conspiracy. However, whether indirect co-perpetration requires the accused's essential contribution to crimes at the execution stage or the preparatory stage is controversial.[108] The third and main difference is that conspiracy liability requires a shared plan between the leaders and physical executors at a vertical level, whereas indirect co-perpetration requires no such shared common purpose. In short, these cases about conspiracy liability do not assist in analysing indirect co-perpetration.

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105 Yanev, 'A Janus-Faced Concept: Nuremberg's Law on Conspiracy *vis-à-vis* the Notion of Joint Criminal Enterprise', 437-42.

106 ibid, 434-36.

107 ibid.

108 Alicia Gil Gil and Elena Maculan, 'Current Trends in the Definition of "Perpetrator" by the International Criminal Court: From the Decision on the Confirmation of Charges in the *Lubanga* Case to the *Katanga* Judgment' (2015) 28 *Leiden J Intl L* 349; *Lubanga* Decision on Confirmation of Charges, para 367; *Ongwen* Decision on Confirmation of Charges, para 44; *The Prosecutor v Al Mahdi* (Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, PTC I) ICC-01/12-01/15-84-Red (24 March 2016), para 27.

Apart from the introduction of conspiracy liability, articles 9 and 10 of the Nuremberg Charter deal with membership in a criminal organisation. The American Chief Prosecutor explained that both articles aimed to make subsequent trials of minor war criminals more expeditious.[109] The IMT clarified the characteristics of criminal organisation:

> A criminal organisation is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will […] fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations.[110]

This explanation indicates that the declaration of a criminal organisation is not collective punishment.[111] As Heller noted, the membership in a criminal organisation is a combination of conspiracy and criminal association liability.[112] In connection with conspiracy liability, the declaration of an organisation as a criminal opens the door to hold leaders of an organisation responsible for crimes committed by members of that organisation. However, such a combined reading should not go too far. This idea does not give any hint that liability would be imposed on the leader for the crime committed by an individual who is a member of the criminal organisation but lacks the knowledge of the common purpose. A shared intention, for the common design of the organisation, is required.

In the Subsequent Proceedings, tribunals considered both small and large criminal enterprises. In the *Ministries* case, the enterprise was limited to the campaign of persecution of the Catholic Church; however, in the *Justice* case, the enterprise was a nationwide government-organised system of cruelty and injustice.[113] The case law did not emphasise the membership of the executors but rather the shared common plan between the accused and the physical executor.[114] Indeed, if the size of a group was extended, the executors who were not in the same group as the accused would be included as a member of the large group. For crimes committed in the scope of the com-

109 *Trial of the Major War criminals*, published at Nuremberg, 1947, Vol I, p 144. Reich Cabinet; Leadership Corps of the Nazi Party; SS; SD; Gestapo; SA; the General Staff and High Command of the German Armed Forces.

110 *France et al v Göring et al*, (1948) 1 TMWC 171, p 256.

111 Yanev, 'A Janus-Faced Concept: Nuremberg's Law on Conspiracy *vis-à-vis* the Notion of Joint Criminal Enterprise', 427-28.

112 Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* 275.

113 *Ministries* case, (1948) 14 TWC 1, p 520; *Justice* case, (1948) 3 TWC 3, p 985.

114 For a detailed analysis, see Yanev, *Theories of Co-perpetration in International Criminal Law* 385-91, arguing that these cases include *Justice*, *RuSHA*, *Stalag Lufe III* as well as *Borkum Island* cases.

mon design of a large group, these post-World War II cases about complicity through association are a good start for ascertaining the contours of indirect co-perpetration at the leadership level. However, if the crimes committed were outside the common plan, these cases are irrelevant to the assessment of the emergence of indirect co-perpetration under customary law. Thus, it is inconclusive to argue that these cases evidence a pre-existing customary law of indirect co-perpetration with the required mental and material elements.

Much more recently, the interpretation by the IMT has been followed by national courts.[115] In 1994, the Canadian Federal Court, in *Sivakumar*, held:

> […] the starting point for complicity in an international crime was 'personal and knowing participation'. This is essentially a factual question that can be answered only on a case-by-case basis, but certain general principles are accepted.[116]

In its view, one type of complicity is complicity through association. It means that leaders may be rendered responsible for the acts of others because of their close association with the principal actors. The court held that '[t]his view of leadership within organisation constituting a possible basis for complicity in international crimes committed by the organisation is supported by Article 6 of the Charter of the International Military Tribunal'.[117]

Article 2(3)(e) the 1996 Draft Code of Crimes also confirmed this liability, which provided for liability of an individual who 'directly participates in planning or conspiring to commit such a crime which in fact occurs'.[118] This complicity liability through association might be the origin of 'indirect perpetration through an organisation', instead of 'indirect co-perpetration though jointly control over an organisation'.[119]

5.4.2.2 'Concerted actions' in Hong Kong and Australia's war crimes trials

Regulation 8(ii) of the Regulation Annexed to the British *Royal Warrant* provided that:

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115 *Naredo and Arduengo v Canada* (Minister of Employment and Immigration), (1990) 37 FTR 161; *Rudolph v Canada* (Minister of Employment and Immigration), [1992] 2 FC 653; *Moreno v Canada* (Minister of Employment and Immigration), [1994] 1 FC 298; *Ramirez v Canada* (Minister of Employment and Immigration), [1992] 2 FC 306, pp 317-18.

116 *Sivakumar v Canada* (Minister of Citizenship and Immigration), [1994] 1 FC 433.

117 ibid.

118 UN Doc A/51/10 (1996), para 50, p 21, commentary to art 2(3), § (14).

119 'Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders, April 30, 1945', in *Report of Robert H. Jackson* 31, referring to 'joint participation in a broad criminal enterprise'. For an analysis of these proposals, see Yanev, 'A Janus-Faced Concept: Nuremberg's Law on Conspiracy *vis-à-vis* the Notion of Joint Criminal Enterprise', 432-33.

> Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of them, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime.
> In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court.[120]

Writing on the Hong Kong war crimes trials and British Military trials, Nina Jørgensen found that by referring to Regulation 8(ii) prosecutors considered 'concerted action' as an evidentiary rule, rather than the notion of common plan/common intent.[121] The *British Royal Warrant* was the model for Australia's war crimes legislation. The two paragraphs in Regulation 8(ii) were repeated in Australia's 1945 *Regulations for the Trial of War Criminals*.[122] Section 9(2) of Australia's 1945 *War Crimes Act* was also similar to the first paragraph of Regulation 8(ii) with the phrase '*prima facie*' deleted. In Australia's war crimes trials, section 9(2) in some cases was interpreted to support a charge of criminal responsibility for joint participation; however, this section in other cases was interpreted as an evidentiary provision for crimes committed by a group of people.[123] At the very least, the Hong Kong war crimes trials, British Military trials and Australia's war crimes trials do not make the contemporary indirect co-perpetration more rooted and accessible.

5.4.3 Assessment and conclusions

This idea of complicity liability for participation in a conspiracy or through association is not as expansive as indirect co-perpetration whereby leaders can be held liable for crimes committed by others, who neither are members of the enterprise nor share a common purpose. In addition, cases concerning concerted actions do not support an expansive interpretation of co-perpetration to include the form of indirect co-perpetration. Post-World War II cases do not evince the emergence of indirect co-perpetration in general. In short,

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120 'Regulations for the Trial of War Criminals, Royal Warrant 0160/2498, Army Order 81/1845 (War Office, 18 June 1945)' in Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10* (Washington, DC: USGPO 1949) 254-56.

121 Nina Jørgensen, 'On Being "Concerned" in a Crime: Embryonic Joint Criminal Enterprise?' in S. Linton (ed), *Hong Kong's War Crimes Trials* (Oxford: OUP 2013) 137-67. But see Allison Danner and Jenny Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California L Rev* 75, 108; Suzannah Linton, 'Rediscovering the War Crimes Trials in Hong Kong, 1946-48' (2012) 13 *Melbourne J Intl L* 284.

122 See Appendices I and II in G. Fitzpatrick, T. McCormack and N. Morris (eds), *Australia's War Crimes Trials 1945-51* (Leiden: Brill 2016) 810-23.

123 Gideon Boas and Lisa Lee, 'Command Responsibility and Other Grounds of Criminal Responsibility' in G. Fitzpatrick *et al* (eds), *Australia's War Crimes Trials 1945-51*, 160; Jørgensen, 'On Being "Concerned" in a Crime: Embryonic Joint Criminal Enterprise?', 137-67.

indirect co-perpetration has not generally been accepted as a customary rule before the adoption of the Rome Statute. For lack of a pre-existing customary rule, article 25(3)(a) of the Rome Statute was not declaratory of customary law concerning indirect co-perpetration.

5.5 Indirect co-perpetration: is article 25(3)(a) declaratory of custom?

This section examines whether indirect co-perpetration liability is now well accepted under customary law in contrast to its non-acceptance before the adoption of the Rome Statute. For this purpose, the consecutive subsections 5.5.1-5.5.2 first look into the jurisprudence of the two UN *ad hoc* tribunals concerning indirect co-perpetration and JCE. Subsection 5.5.1 mainly comments on the state of indirect co-perpetration under customary law through the lens of JCE liability, in particular, the formulation of *Brđanin* JCE. Case law of the two tribunals concerning indirect co-perpetration is discussed in subsection 5.5.2. Subsections 5.5.4-5.5.5 observe and evaluate case law of other international and national criminal tribunals, as well as national legislation relating to co-perpetration.

A clarification of the importance of the jurisprudence of the two *ad hoc* tribunals is necessary. The jurisprudence of the ICTY and ICTR had less influence on the substantive content of article 25(3)(a), since the ICTY's remarkable *Tadić* Appeals Chamber judgment dealing with the issue of joint criminal enterprise (JCE) liability was delivered in 1999, i.e. one year after the adoption of the 1998 Rome Statute. Yet, as shown above, the *Katanga* Appeals Chamber deemed indirect co-perpetration a form of co-perpetration. Also, some Chambers of the ICTY upheld JCE as 'a form of co-perpetration' designed to attribute liability.[124] It appears that JCE and indirect co-perpetration overlap each other in a certain context. As Elies van Sliedregt has noted, the practice of the ICTY seems to reintroduce indirect co-perpetration liability under the label of JCE.[125] Thus, the jurisprudence of the two *ad hoc* tribunals concerning JCE is important for the analysis of customary law after the adoption of the Rome Statute. These cases are analysed chronologically.

124 *Stakić* Trial Judgment, para 441; *Milutinović et al* Appeals Chamber Decision on Jurisdiction 2003 (Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction Joint Criminal Enterprise), para 13; *Kuprešić et al* Trial Judgment, paras 772, 782; *Prosecutor v Simić et al* (Judgement, Separate and Partly Opinion of Judge Per-Johan Lindholm) ICTY-95-9-T (17 October 2003), para 2.

125 Van Sliedregt, *Individual Criminal Responsibility in International Law* 162-63.

5.5.1 *Tadić* joint criminal enterprise: 1999 Appeals Chamber Judgment

This subsection clarifies and discusses the *Tadić* formulation of JCE liability. Case law of the two UN *ad hoc* tribunals has established the JCE liability.[126] In the ICTY, the *Furundžija* Trial Chamber firstly referred to JCE/common purpose liability with respect to the liability of co-perpetrators who participate in a JCE of torture.[127] The *Tadić* Appeals Chamber judgment is widely known for confirming the customary status of JCE liability applicable in the Yugoslavia tribunal. In the famous *Tadić* case, the accused Dusko Tadić was a reserve police officer who had participated in the collection and forced transfer of civilians after the control of Bosnian Serb forces in 1992. In one count, five men were killed in the execution of the removal plan. Evidence showed that members of the armed group to which Tadić belonged committed the killing, but no evidence proved that Tadić had personally killed any of them.[128]

The Appeals Chamber analysed whether the killing could give rise to criminal culpability of Tadić who participated in the execution of that common plan, and what the requirements of the accused's mental and material elements were. The Appeals Chamber held that the commission of a crime might occur through different forms of participation aiming to achieve a common design/purpose,[129] which is encompassed in the ICTY Statute.[130] The Appeals Chamber then turned to customary law to clarify the mental and material elements of JCE liability.[131] In its view, JCE liability includes three forms: the basic form (JCE I), the systematic form (JCE II), and the extended form (JCE III).[132]

The facts in the *Almelo* trial after World War II present a good example

126 *Prosecutor v Tadić* (Judgement) ICTY-94-1-A (15 July 1999) [*Tadić* Appeals Chamber Judgment], paras 185-229; *Furundžija* Appeals Chamber Judgment, paras 118-20; *Mucić et al* Appeals Chamber Judgment, paras 365-66; *Prosecutor v Brđanin & Talin* (Decision on Form of Further Amended Indictment and Prosecution Application to Amend) ICTY-99-36-PT (26 June 2001) [*Brđanin & Talin* Decision on Amended Indictment 2001]; *Prosecutor v Krstić* (Judgement) ICTY-98-33-T (2 August 2001) [*Krstić* Trial Judgment], para 601; *Prosecutor v Šainović et al* (Decision on *Dragoljub* Ojdanić's Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise) ICTY-99-37-PT (13 February 2003) [*Šainović et al* Trial Chamber Decision 2003]; *Milutinović et al* Appeals Chamber Decision on Jurisdiction 2003, para 20; *Prosecutor v Prlić et al* (Judgement) ICTY-04-74-A (29 November 2017) [*Prlić et al* Appeals Chamber Judgment] Vol II, para 591. The *Tadić* Appeals Chamber Judgment interchangeably used the term 'common purpose', 'criminal enterprise', and joint criminal enterprise to indicate the same form of participation. Later on, the term 'joint criminal enterprise' was used throughout the *Krstić* Trial Judgment.

127 *Furundžija* Trial Judgment, para 216.

128 *Tadić* Appeals Chamber Judgment, paras 178-84.

129 ibid, para 188.

130 ibid, paras 189-93. Article 7(1) of 1993 ICTY Statute provides that 'a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, p reparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime'.

131 ibid, para 194.

132 ibid, paras 196-203; *Kvočka et al* Appeals Chamber Judgment, para 198.

of JCE I.[133] In this case, three people each played a role in the killings: one fired the actual shots, another gave the order, and a third waited near the car to prevent people from coming near. All three knew what they were doing. In this scenario, except for the one who fired the shots, the other two did not fulfil all the elements of the killings for lack of physical acts. Relying on JCE I liability, the other two were also convicted of committing the killings.

A good illustration of JCE II is the cases of 'concentration camp' crimes committed by groups of persons acting pursuant to a concerted plan.[134] In the British *Belsen* case, members of military or administrative systems, such as concentration camps, physically mistreated prisoners.[135] The accused were held liable for the crimes committed by others who mistreated prisoners and detainees because the accused had intended to contribute to the crime through active participation in the enforcement of that system. The accused held a 'position of authority' in the system when the crimes were committed. JCE II in nature is a variant of JCE I.[136]

The scenario in *Tadić* illustrates JCE III. Tadić with other members participated in the execution of the removal plan, but five men were killed by other members during the execution of that plan. Based on JCE III, Tadić was also found guilty for the killing of the five men. Another example is provided by a situation where a group with a common plan shared the intention to forcibly remove members of one ethnicity from a town with the consequence that many members were shot and killed in the course of the execution of that plan.[137] The acts of killing were not envisaged in the ethnic cleansing plan. The accused as a non-physical perpetrator was also responsible for the acts of killing committed by other members of the group because the accused who participated in the group had foreseen the killing in carrying out the plan of ethnic cleaning. Other cases have also been frequently cited to illustrate JCE III.[138]

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133 *UK v Otto Sandrock and Three Others* [*Almelo* case], (1947) 1 LRTWC 35. In this case, Schweinberger gave the actual shots, while Sandrock gave the orders to kill a British prisoner and a Dutch civilian. Hegemann and Weigner played the same role to prevent people coming near. JCE I is usually called co-perpetration.

134 *Tadić* Appeals Chamber Judgment, para 202.

135 UK v Josef Kramer et al [Belsen case], (1947) 2 LRTWC 1.

136 *Tadić* Appeals Chamber Judgment, paras 203, 228.

137 *Brđanin & Talin* Decision on Amended Indictment 2001, para 25.

138 For example, the *Essen Lynching* and *Borkum Island* cases. *UK v Erich Heyer and Six Others* [*Essen Lynching* case], (1945) 1UNWCC 88 89. In the *Essen Lynching* case before British Military Court, three British pilots as prisoners of war were lynched by German civilians in the Essen-West town in 1944. A German Captain Heyer placed the three pilots under the escort of a German soldier and ordered that the solider should not interfere if German civilians harass the airmen. He also added that these prisoners ought to be shot. The order was spoken in so loud a voice that the crowd could hear and would know what was going to occur. During the escort, the crowd hit the three pilots. One pilot was killed by a shot, another was killed by throwing over the parapet of a bridge, and the third one was beat and kicked to death. Accompanying with other civilians and servicemen, Heyer was charged with a war crime and convicted. A similar situation as in *Essen Lynching* occurred in the *Borkum Island* case. Seven pilots as prisoners were killed during the march through the streets of Borkum in 1944. The prosecutor in this case developed the doctrine of common purpose, which presumed that all participants in the common purpose shared the same criminal intent to murder, whereas the defence counsel did not deny this doctrine.

As for JCE liability, two requirements have to be fulfilled: a mental element and a material element, both of which are said to be found in customary international law.[139] Three forms of JCE liability share the same material element, which requires the existence of a joint criminal enterprise consisting of a plurality of persons with a common criminal plan (design or purpose) and the participation of the accused in that enterprise.[140] As to the mental element of JCE I, the accused has to share the intent to commit the crime. JCE II requires that the accused had knowledge of the criminal nature of the system and had intended to further the common design of the system. The mental element of JCE III is that:

> […] the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.[141]

After analysing post-World War II cases and some customary indicators, the *Tadić* Appeals Chamber concluded that JCE liability was 'firmly established in customary international law'.[142]

The defences in some subsequent cases challenged the customary status of JCE liability. Appeals Chambers of the ICTY, however, declined to revisit the *Tadić* findings in this regard for lack of a cogent reason.[143] The ICTY also convicted the accused for JCE III liability in other cases: *Krstić*,[144]

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139 *Tadić* Appeals Chamber Judgment, para 194; *Šainović et al* Trial Chamber Decision 2003.

140 *Tadić* Appeals Chamber Judgment, para 227.

141 ibid, para 228 (emphasis in original).

142 ibid, para 220.

143 *Milutinović et al* Appeals Chamber Decision on Jurisdiction 2003, para 18; *Karemera et al v The Prosecutor* (Decision on Jurisdictional Appeals: Joint Criminal Enterprise) ICTR-98-44-AR72.5, ICTR-98-44-AR72.6 (12 April 2006), para 13; *Prlić et al* Trial Judgment, Vol 1, para 220; *Đorđević* Appeals Chamber Judgment, paras 48-53. For commentators' critics, see Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerp: Intersentia 2008) 597; Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: OUP 2008) 221-57; Jens D. Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise' (2007) 5 *JICJ* 69; Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility Symposium: Guilty by Association: Joint Criminal Enterprise on Trial' (2007) 5 *JICJ* 159; Elies van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide' (2007) 5 *JICJ* 184; Antonio Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise' (2007) 5 *JICJ* 109; Attila Bogdan, 'Individual Criminal Responsibility in the Execution of a "Joint Criminal Enterprise" in the Jurisprudence of the *ad hoc* International Tribunal for the Former Yugoslavia' (2006) 6 *ICLR* 63, 119; Steven Powles, 'Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?' (2004) 2 *JICJ* 606, 615-18. For a summary of critics before 2008, see Boas *et al*, *International Criminal Law Practitioner Library*: Vol 1.

144 *Krstić* Trial Judgment, para 616; *Krstić* Appeals Chamber Judgment, paras 144, 151. For an analysis of the *Krstić* case, see Harmen van der Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations' (2007) 5 *JICJ* 91, 97-98.

Babić, *Stakić*, *Martić*, *Krajišnik*, *Šainović et al*, *Đorđević*, *Popović et al*, *Stanišić & Simatović*, and the recent *Stanišić & Župljanin* cases.[145] The customary status of JCE liability is confirmed, directly or indirectly, by subsequent ICTR cases.[146] Both the STL and the SCSL also supported JCE liability.[147] JCE liability

145 *Furundžija* Appeals Chamber Judgment, paras 118-20; *Brđanin & Talin* Decision on Amended Indictment 2001, paras 28-30; *Krstić* Trial Judgment, para 601; *Prosecutor v Kvočka et al* (Judgement) ICTY-98-30/1-T (2 November 2001) [*Kvočka et al* Trial Judgment], paras 265, 289; *Šainović et al* Trial Chamber Decision 2003, pp 6-7; *Milutinović et al* Appeals Chamber Decision on Jurisdiction 2003, paras 18-20, 41; *Krnojelac* Appeals Chamber Judgment, paras 28-32; *Prosecutor v Vasiljević* (Judgement) ICTY-98-32-A (25 February 2004), paras 99, 101; *Krstić* Appeals Chamber Judgment, para 151; *Prosecutor v Šešelj* (Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment) ICTY-03-67/PT (26 May 2004), paras 52; *Prosecutor v Babić* (Sentencing Judgement) ICYT-03-72-S (29 June 2004), para 33; *Brđanin* Trial Judgment, para 258; *Blagojević & Jokić* Trial Judgment, paras 695-703; *Kvočka et al* Appeals Chamber Judgment, para 83; *Prosecutor v Prlić et al* (Decision to Dismiss the Preliminary Objections Against the Tribunal's Jurisdiction) ICTY-04-74-PT (26 September 2005), paras 16-17; *Limaj et al* Trial Judgment, paras 511-12; *Stakić* Appeals Chamber Judgment, para 87; *Prosecutor v Brđanin* (Judgement) ICTY-99-36-A (1 April 2007) [*Brđanin* Appeals Chamber Judgment], para 405; *Prosecutor v Tolimir* (Decision on preliminary motions on the indictment pursuant to Rule 72 of the Rules) ICTY-05-88/2-PT (14 December 2007), para 53; *Prosecutor v Haradinaj et al* (Judgement) ICTY-04-84-T (3 April 2008), paras 135, 137-79; *Prosecutor v Milutinović et al* (Judgement) ICTY-05-87-T (26 February 2009) [*Milutinović et al* Trial Judgment], Vol 3, para 9; *Martić* Appeals Chamber Judgment, para 80; *Krajišnik* Appeals Chamber Judgment, paras 215-18; *Prosecutor v Karadžić* (Decision on prosecution's motion appealing trial chamber's decision on JCE III foreseeability) ICTY-95-5/18-AR72.4 (25 June 2009), para 19; *Prosecutor v Haradinaj et al* (Retrial Judgement) ICTY-04-84*bis*-T (29 November 2012) [*Haradinaj et al* Retrial Judgment], paras 618, 621; *Prlić et al* Trial Judgment, Vol 1, para 210; *Šainović et al* Appeals Chamber Judgment, para 1157; *Đorđević* Appeals Chamber Judgment, para 81; *Popović et al* Appeals Chamber Judgment, paras 1672, 1674; *Prosecutor v Tolimir* (Judgement) ICTY-05-88/2-A (8 April 2015), para 281; *Prosecutor v Stanišić & Simatović* (Judgement) ICTY-03-91-A (9 December 2015), para 77; *Stanišić & Župljanin* Appeals Chamber Judgment, para 599.

146 *The Prosecutor v Karemera et al* (Decision on the Preliminary Motions by the Defence of Edouard Karemera *et al*, Challenging Jurisdiction in Relation to Joint Criminal Enterprise) ICTR-98-44-T (11 May 2004), para 38; *Karemera et al v The Prosecutor* (Decision on Jurisdictional Appeals: Joint Criminal Enterprise) ICTR-98-44-AR72.5, ICTR-98-44-AR72.6 (12 April 2006), paras 14-17; *Karemera et al v The Prosecutor* (Decision on Interlocutory Appeal of Edouard Karemera *et al* against Oral Decision of 23 August 2010) ICTR-98-44-AR50 (24 September 2010), para 16; *Rwamakuba v The Prosecutor* (Decision on Interlocutory Appeal on Joint Criminal Enterprise to the Crimes of Genocide) ICTR-98-44-AR72.4 (22 October 2004), paras 10, 17; *The Prosecutor v Uwinkindi* (Decision on Defence Appeal against the Decision Denying Motion Alleging Defects in the Indictment) ICTR-01-75-AR72 (C) (16 November 2011), paras 11-12; *Mugenzi & Mugiraneza v The Prosecutor* (Judgement) ICTR-99-50-A (4 February 2013), fn 290; *Nizeyimana v The Prosecutor* (Judgement) ICTR-00-55C-A (29 September 2014), para 325; *Ngirabatware v The Prosecutor* (Judgement) MICT-12-29-A (18 December 2014) [*Ngirabatware* Appeals Chamber Judgment], para 249; *Karemera & Ngirumptse* Appeals Chamber Judgment, para 623.

147 Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11/01/1 (16 February 2011) [STL 2011 Decision], paras 237, 244-49; *Prosecutor v Brima et al* (Judgment, A Ch) SCSL-2004-16-A (22 February 2008), paras 66-87; *Prosecutor v Sesay et al* (Judgment, A Ch) SCSL-2004-15-A (26 October 2009), paras 98-110.

has been crystallised into an international liability theory and has frequently been endorsed as a firmly established norm under customary law,[148] despite controversy about the customary status of JCE III.[149]

Two points of JCE liability deserve attention. Firstly, cases of JCE I/II may also be illustrations of traditional civil law co-perpetration liability at the executive level. Judge Schomburg claimed that JCE I is similar to co-perpetration in article 25(3)(a) of the Rome Statute.[150] Judge Lindholm also said that JCE I was 'nothing more than a new label affixed to a since long well-known concept or doctrine in most jurisdictions as well as in international criminal law, namely co-perpetration'.[151] Secondly, the expression of 'joint criminal enterprise' can also be found in the UK's common law doctrine of joint enterprise (venture).[152] The UK joint enterprise doctrine requires the existence of a plurality of persons comprising the accused, regardless of whether they shared a common purpose.[153] In the context of an accused act with an implicit or explicit agreement, the *Tadić* JCE I is similar to two categories of the UK joint enterprise, in which the accused jointly with the executor commits a single crime or the accused assists or encourages the executor to commit a crime. *Tadić* JCE III is also similar to one derivation of the joint enterprise liability or parasitic accessory liability, in which the accused and the executor participated in one crime but the executor committed a second crime in carrying out the offence of the first crime.[154] The *Tadić* Appeals Chamber appears to have relied on the UK joint enterprise liability to depict JCE I (co-perpetration) and JCE II, as well as JCE III.[155]

148 Van Sliedregt, *Individual Criminal Responsibility in International Law* 9; *Furundžija* Trial Judgment, para 216; *Tadić* Appeals Chamber Judgment, paras 185-229.

149 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 566-67. More detailed will be seen below.

150 *Gacumbitsi v The Prosecutor* (Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide) ICTR-01-64-A (7 July 2006), para 25; *Prosecutor v Simić et al* (Judgement, Separate and Partly Opinion of Judge Per-Johan Lindholm) ICTY-95-9-T (17 October 2003), para 2; Cassese *et al* (eds), *Cassese's International Criminal Law* 175.

151 *Simić et al* Trial Judgment (Separate and Partly Opinion of Judge Per-Johan Lindholm), para 2.

152 UK, House of Commons Justice Committee, 'Report on Joint Enterprise, Eleventh Report of Session 2010-12' (11 January 2012); UK, House of Commons Justice Committee, 'Report on Joint Enterprise, Fourth Report of Session 2014-15' (10 December 2014); *Gacumbitsi v The Prosecutor* (Separate Opinion of Judge Shahabuddeen) ICTR-01-64-A (7 July 2006), para 40; David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (14th edn, Oxford: OUP 2015) 239-61; Andrew Simester *et al*, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (5th edn, Hart 2013) 232-49.

153 UK, 'CPS Guidance On: Joint Enterprise Charging Decisions', December 2012, paras 4-11.

154 *R v Chan Wing-siu* [1985] 1 AC 168, [1984] UKPC 27 (21 June 1984), p 8; John Smith, 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 *LQR* 453.

155 *Tadić* Appeals Chamber Judgment, paras 201, 203.

The *Tadić* Appeals Chamber, however, was not confronted with a comparable situation as the ICC was in the *Katanga* & *Ngudjolo* case. As shown above, the *Tadić* formulation of JCE, as a description of civil law and common law liability regimes, provides that a member of an enterprise without physical involvement is held legally liable for a crime contemplated and physically committed by other members of the enterprise. Based on this formulation, if the individuals share the common design related to a crime and participate in the commission of that crime, members who participated in the enterprise would be liable for the offences committed by their co-perpetrators.[156] By contrast, indirect co-perpetration requires no shared agreement between the accused and the physical perpetrators, nor the same membership of the physical perpetrator as the accused. Therefore, cases based on the *Tadić* formulation of JCE are not relevant for the analysis of the customary status of indirect co-perpetration at the leadership level.

5.5.2 Indirect (co-)perpetration in the UN *ad hoc* tribunals

Scenarios similar to that in the *Katanga* & *Ngudjolo* case occurred in subsequent ICTY and ICTR cases. This subsection surveys the practice of the two *ad hoc* tribunals with respect to indirect co-perpetration.

5.5.2.1 Co-perpetratorship in Stakić: 2003 Trial Chamber judgment and 2006 Appeals Chamber judgment

The Trial Chamber of the ICTY in the *Stakić* case relied on 'co-perpetratorship' liability to convict the accused.[157] In this case, the accused Stakić was a civilian leader of the Prijedor Municipal Crisis Staff in Bosnia and Herzegovina. Murder, extermination and other atrocities were committed against non-Serbs in Prijedor by members of Crisis Staffs, the police and the army acting in coordination to achieve the goal of establishing a Serb controlled territory. The prosecution charged *Stakić* on the basis of participation in a joint criminal enterprise. The defence argued that participation in a JCE was limited to participating directly, or being present at the commission of the crime, or acting in furtherance of a system.[158]

The Trial Chamber first argued that 'joint criminal enterprise is only one of several possible interpretations of the term "commission"' and that other definitions of co-perpetration should be considered.[159] The Trial Chamber defined the term 'commission' as that 'the accused participated, physically or otherwise directly or indirectly, in the material elements of the crime

156 *Milutinović et al* Appeals Chamber Decision on Jurisdiction 2003, paras 25-56.
157 *Stakić* Trial Judgment, para 468.
158 ibid, paras 429.
159 ibid, paras 438.

charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others'.[160]

In addition, the Chamber shared the view that:

> For co-perpetration it suffices that there was an explicit agreement or silent consent to reach a common goal by coordinated co-operation and joint control over the criminal conduct. […] [T]he accused must also have acted in the awareness of the substantial likelihood that punishable conduct would occur as a consequence of coordinated co-operation based on the same degree of control over the execution of common acts. Furthermore, the accused must be aware that his own role is essential for the achievement of the common goal.[161]

The Trial Chamber found that Stakić shared joint control over these offences with his co-perpetrators (associates) who were in charge of the Crisis Staff, the police and the army. In its view, Stakić and his co-perpetrators acted with a mutual awareness that crimes would occur in the course of achieving the common goal. The accused Stakić, as a (co-)perpetrator behind the direct perpetrators was held liable for the crimes committed by his co-perpetrators.[162] According to Judge Schomburg, the presiding judge in this case, 'co-perpetratorship' was a part of customary law.[163]

Neither the accused nor the prosecutor appealed the decision on this liability issue. The *Stakić* Appeals Chamber, however, intervened in examining this liability to avoid uncertainty and to ensure respect for the consistency and coherence in the application of law. Based on the factual findings of the trial judgment, the Appeals Chamber relied on JCE liability to convict Stakić.[164] The Appeals Chamber expressly rejected indirect (co-)perpetration liability because it did not form part of customary law.[165]

Scholars differ on the understanding of *Stakić's* co-perpetratorship liability. Some commentators argued for a limited reading of the co-perpetratorship in *Stakić*.[166] In their view, the prosecutor and the Trial Chamber in this case did not aim to construe co-perpetratorship to impose liability on Stakić for crimes 'committed by/attributable to' his co-perpetrators, who used physical executors to commit the crimes. Due to this restrictive definition, *Stakić's* co-perpetratorship is different from indirect co-perpetration, in which the accused's co-perpetrators used these physical executors. The ICTY's rejection of the restricted customary status of co-perpetratorship liability in the *Stakić* Appeals Chamber judgment, therefore, does not affect further prosecution based on indirect co-perpetration.[167] Another view seems

160 ibid, para 439 (citations omitted).
161 ibid, paras 440, 442.
162 ibid, paras 468-98, 629.
163 *Simić et al* Appeals Chamber Judgment (Dissenting Opinion of Judge Schomburg), paras 9-23 and fn 20.
164 *Stakić* Appeals Chamber Judgment, paras 61-98, 104.
165 ibid, paras 59, 62.
166 Boas *et al*, *International Criminal Law Practitioner Library*: Vol 1,121-22.
167 ibid, arguing that indirect co-perpetration may be well supported under customary law.

to be more persuasive. This view claims that a broad reading of co-perpetratorship was confirmed in *Stakić*.[168] The *Stakić* Trial judgment and its factual analysis implicitly confirmed the finding that an accused might be held liable as 'the perpetrator behind the perpetrator' for the crimes attributable to his/her co-perpetrators.

This broad understanding is similar to the ICC's idea of indirect co-perpetration. As shown above, the Trial Chamber in *Stakić* recognised a broad interpretation of co-perpetration to attribute liability to the accused for their 'indirect' perpetration 'through acts jointly with others', although the mental elements of this co-perpetratorship are different from that of indirect co-perpetration. In addition, in light of the *Stakić* Appeals Chamber judgment, the ICTY prosecution amended several indictments.[169] For instance, the prosecution amended its indictment in *Popović et al* by replacing 'direct and/or indirect co-perpetration' with JCE liability. The Trial Chamber allowed its amendment.[170] These amendments at least support the view that JCE, in effect, was used as a substitute for indirect co-perpetration for the crime committed by physical executors, who were outside the enterprise as the accused and were used by the accused's fellow co-perpetrators. Indeed, in rejecting the customary status of co-perpetratorship, it is unclear whether the *Stakić* Appeals Chamber bore in mind a narrow or broad understanding of co-perpetratorship for lack of its reasoning on this point. At the very least, the *Stakić* Appeals Chamber did not recognise liability labelled 'co-perpetratorship' or 'indirect co-perpetration' but use the term 'JCE'.

5.5.2.2 Indirect co-perpetration: 2006 Milutinović et al Trial Chamber decision

The *Stakić* Appeals Chamber did not give any reasons for its finding on the customary status of indirect co-perpetration as the *Milutinović et al* Trial Chamber did. In the *Milutinović et al* case, those accused were either civilian or military commanders of FRY and Serbia. Deportations, murders and other offences were committed by members of the forces of FRY and Serbia in the course of the expulsion of the Kosovo Albanian populations. In the indictment, where the physical perpetrators were not participants in the JCE, the accused were charged based on indirect co-perpetration, as an alternative form of liability, for their 'joint control over the criminal conduct of forces of the FRY and Serbia'. The mental element of indirect co-perpetration was

168 Cassese *et al* (eds), *Cassese's International Criminal Law* 179.

169 *Prosecutor v Gotovina et al* (Decision on Prosecution's Consolidated Motion to Amend the Indictment and Joinder) ICTY-03-73-PT, ICTY-01-45-PT (14 July 2006), paras 25-26; *Prosecutor v Prlić et al* (Decision on Petković's Appeal on Jurisdiction) ICTY-04-74-AR72.3 (23 April 2008), para 21. For more analysis of these cases, see Boas *et al*, *International Criminal Law Practitioner Library*: Vol 1, 104-23.

170 *Prosecutor v Popović et al* (Decision on Motions Challenging the Indictment pursuant to Rule 72 of the Rules) ICTY-05-88-PT (31 May 2006) [*Popović et al* Trial Chamber Decision], paras 17, 22.

identical to that of co-perpetratorship in the *Stakić* trial judgment.[171] Indirect co-perpetration in this way allows the prosecution to attribute liability to the accused for indirect commission of crimes through persons who do not form part of the accused's group.

One of the accused, Ojdanić, challenged the 'indirect co-perpetration' form of responsibility for its lack of basis in the ICTY Statute or in customary international law. He argued that 'there is insufficient *opinio juris* in respect of indirect co-perpetration'.[172] Also, the accused submitted that indirect co-perpetration is not enshrined in article 25(3)(a) of the Rome Statute. State practice did not exist in 1992 to substantiate the existence of indirect co-perpetration under customary law.[173] The prosecution relied on the *Stakić* Trial judgment to support its indictment of indirect co-perpetration and claimed that 'indirect co-perpetration is part of customary international law or a general principle of law'.[174]

The Trial Chamber in the *Milutinović et al* case examined whether a customary rule of indirect co-perpetration defining individual responsibility existed at the relevant time.[175] The Chamber first narrowed down the question for examination. The Chamber said that

> [It] will not perform an exhaustive investigation of all the available sources in order to ascertain what forms of responsibility exist in customary international law that might arguably be given the label 'indirect co-perpetration' […]. Instead, the Chamber will limit its analysis to the more focused questions of whether a form of responsibility with the physical and mental elements alleged […] existed under customary international law, […].[176]

According to the Chamber, the 'awareness of the substantial likelihood that crimes would occur', which describes the mental element of indirect co-perpetration, is similar to the mental element for planning or ordering liability. In its view, the *Stakić* Trial judgment in defining this formulation of the mental element may have relied on the jurisprudence on planning liability rather than customary law.[177] In addition, although judicial authorities in several legal systems of the world have recognised indirect perpetration and co-perpetration, 'indirect co-perpetration' liability had not been established as part of customary law at the material times.[178] The Chamber dismissed that indirect co-perpetration with the specific mental element existed under customary law. As in *Stakić*, liability was imposed on the basis of JCE.

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171 P*rosecutor v Milutinovic et al* (Prosecution's Notice of Filing Amended Joinder Indictment and Motion to Amend the Indictment with Annexes) ICTY-05-87-PT (16 August 2005), paras 18-23; *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006, para 11.

172 *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006, para 28.

173 ibid, para 29.

174 ibid, paras 30-31.

175 ibid, paras 25.

176 ibid, para 26.

177 ibid, para 38.

178 ibid, para 39.

5.5.2.3 Co-perpetratorship: 2006 Gacumbitsi Appeals Chamber judgment

In interpreting the term 'commission', the majority of the Appeals Chamber in two later cases of the ICTR, i.e., the *Gacumbitsi* and *Seromba* cases, accepted a broad interpretation of co-perpetration.[179] The accused in the two cases were described either as indirect perpetrators or as co-perpetrators.[180] In *Gacumbitsi*, the Appeals Chamber held that the accused supervised and directed refugees to carry out killings as an 'integral part of the massacre plan'. The accused's supervision and direction constituted 'committing' genocide for his 'direct participation in the *actus reus* of the crime' (co-perpetratorship).[181] The same reasoning was applied in *Seromba* to charge the commission of extermination.[182]

Judge Schomburg in his separate opinion in *Gacumbitsi* cited a series of national provisions, case law and scholarly works to argue that 'international criminal law has accepted co-perpetratorship and indirect perpetratorship (perpetration by means) as a form of "committing"'.[183] Article 25(3)(a) of the Rome Statute was also cited to support a conviction based on both indirect perpetration and co-perpetration. Judge Schomburg in another case further expressed his position that co-perpetration and indirect perpetration are firmly entrenched in customary international law.[184] In *Gacumbitsi*, Judge Güney in his dissenting opinion argued that the majority of the Appeals Chamber departed from case law of JCE liability and adopted a novel approach of 'direct participation in the material elements of the crime' without providing an analysis of whether this form is recognised in customary international law.[185] Judge Shahabuddeen, however, contended that '[s]ince several states adhere to one theory [JCE] while several other states adhere to the other theory [co-perpetration], it is possible that the required State prac-

179 *Gacumbitsi* Appeals Chamber Judgment, paras 59-61; *Seromba* Appeals Chamber Judgment, paras 161, 171-172, rendering the decision by citing the *Gacumbitsi* judgment. For discussions on the two cases, see Robert C. Clarke, 'Together Again? Customary Law and Control over the Crime' (2015) 26 *CLF* 457, 490; Flavia Z. Giustiniani' Stretching the Boundaries of Commission Liability: The ICTR Appeal Judgment in *Seromba*' (2008) 6 *JICJ* 783.

180 *Gacumbitsi* Appeals Chamber Judgment (Separate Opinion of Judge Schomburg), para 28.

181 *Gacumbitsi* Appeals Chamber Judgment, para 60.

182 *The Prosecutor v Seromba* (Judgement) ICTR-01-66-A (12 March 2008), paras 161-63, 171-72, 189-90.

183 *Gacumbitsi* Appeals Chamber Judgment (Separate Opinion of Judge Schomburg), paras 2-28.

184 *Simić et al* Appeals Chamber Judgment (Dissenting Opinion of Judge Schomburg), paras 9-23 and fn 20.

185 *Gacumbitsi* Appeals Chamber Judgment (Partially dissenting opinion of Judge Güney), paras 2-8; *Seromba* Appeals Chamber Judgment (Dissenting Opinion of Judge Liu), paras 7, 9, 15, 18.

tice and *opinio juris* do not exist so as to make either theory part of customary international law'.[186]

The ICTR followed *Gacumbitsi* and *Seromba* in subsequent cases.[187] In the *Simić et al* case, Judge Lindholm supported charging the accused on the basis of co-perpetration.[188] The Appeals Chamber in *Simić et al*, however, relied on JCE liability to convict the accused.[189]

5.5.2.4 Observations and summary

Case law demonstrates that indirect (co-)perpetration liability was less widely accepted by the ICTY and the ICTR in their convictions. Rare cases of two *ad hoc* tribunals support its customary status, and some decisions have stated that indirect co-perpetration does not exist under customary law.[190] The Trial Chamber in the *Milutinović et al* case did not ascertain or reject the form of liability labelled 'indirect co-perpetration' under customary law in general, but rejected indirect co-perpetration with the specific mental element.[191] In addition, rejecting this liability does not mean that the accused in these cases were not liable. Instead, the *ad hoc* tribunals employed JCE liability to convict. The tribunals rejected the use of the term 'indirect co-perpetration' for lack of customary basis, rather than the way of imposing liability on the accused in these scenarios. This way of solving issues in these decisions indicates that indirect co-perpetration and JCE deal with similar situations. In these cases, the ICTY's formulation of JCE, in effect, is a substitute for the construction of indirect co-perpetration in general.

In conclusion, indirect co-perpetration with these 'specific mental elements' was not recognised as a customary rule by the ICTY. These cases ascertaining or rejecting the customary status of indirect co-perpetration confirm the way of attributing liability to the accused for the crimes committed by non-members of his/her group who were indirectly used by the accused's co-perpetrators. The ICTY labelled this mode of liability with different elements as JCE rather than indirect co-perpetration.

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186 *Gacumbitsi* Appeals Chamber Judgment (Separate Opinion of Judge Shahabuddeen), para 51; Mohamed Shahabuddeen, 'Judicial Creativity and Joint Criminal Enterprise' in S. Darcy and J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: OUP 2010) 184-203.

187 *Kalimanzira v The Prosecutor* (Judgement) ICTR-05-88-A (20 October 2010), paras 218-19; *Rukundo v The Prosecutor* (Judgement) ICTR-2001-70-A (20 October 2010), paras 15-16, 38; *Prosecutor v Munyakazi* (Judgment) ICTR-97-36A-A (28 September 2011), paras 135-36.

188 S*imić et al* Trial Judgment (Separate and Partly Opinion of Judge Per-Johan Lindholm), para 2.

189 *Simić et al* Appeals Chamber Judgment, para 62.

190 ibid, para 40; *Stakić* Appeals Chamber Judgment, para 622; *Prosecutor v Gotovina et al* (Decision on Prosecution's Consolidated Motion to Amend the Indictment and Joinder) ICTY-03-73-PT, ICTY-01-45-PT (14 July 2006), para 26.

191 *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006, para 39.

5.5.3 Brđanin joint criminal enterprise liability

This section examines indirect co-perpetration through the lens of the *Brđanin* JCE liability. In *Brđanin*, the accused was President of a 'War Presidency' of the Autonomous Region of Krajina (ARK) in Bosnia and Herzegovina. Based on JCE (I and III), Radoslav Brđanin was charged for the acts of deportation, forcible transfer of civilians and persecution committed by members of the police, the army and Serb paramilitary forces, which were used by the ARK Crisis Staff to implement a Strategy Plan of creating a separate Bosnian Serb state. Where physical executors (members of the army and Serb paramilitary forces) outside the enterprise (ARK) committed the crimes, the Trial and Appeals Chambers in *Brđanin* clarified the formulation of JCE in two different ways.

5.5.3.1 JCE: 2004 Brđanin Trial Judgment and subsequent constructions

The issues of *Brđanin* JCE may be analysed in three related aspects: (i) what is the size of the enterprise, small or large-scale; (ii) must the physical executors be members of the same enterprise as the accused; and (iii) is an agreement required between the accused and the physical executor?

The *Brđanin* Trial Chamber first considered that JCE liability does not apply to a large-scale enterprise, where the physical executors and Brđanin are far from each other.[192] After analysing the evidence, the Trial Chamber found that an enterprise between Brđanin and the physical executors outside the enterprise (ARK) could not be established.[193] In addition, in its view, the prosecution failed to prove that: (i) all physical executors were members of the same JCE as Brđanin, and (ii) there was a mutual understanding or agreement between the accused and physical executors to commit a specific crime in furtherance of the common purpose.[194] The Chamber concluded that JCE was not an appropriate mode of liability to describe the responsibility of the accused and held the accused liable for aiding and abetting the crimes.[195]

This trial judgment is an attempt to limit the application of JCE liability. Its reasoning implies that the size of the enterprise is small, that physical executors must be a part of the same JCE as the accused, and that an agreement is required between the accused and physical executors. The *Brđanin* Trial Chamber rendered the judgment out of the concern that 'it is inappropriate to impose liability on an accused where the link between the accused and those who physically perpetrated the crimes for which the accused is

192 *Prosecutor v Brđanin* (Judgement) ICTY-99-36-T (1 September 2004) [*Brđanin* Trial Judgment], para 355.

193 ibid, paras 346-47.

194 ibid, paras 341-42, 344, 351-54. See also *Krnojelac* Trial Judgment, para 84; *Brđanin & Talin* Decision on Amended Indictment 2001, para 44; *Furundžija* Appeals Chamber Judgment, paras 120-21. *Krnojelac* Appeals Chamber Judgment, paras 84-97 supporting a common purpose, but rejecting a required proof of agreement.

195 *Brđanin* Trial Judgment, paras 355-56, 367-69.

charged is too tenuous'.[196] The agreement requirement ensures a close link between the accused and physical executors, thus, excluding the accused's responsibility for the crimes that occurred independently to achieve the common plan but are attributable to other JCE members.[197] In the Chamber's view, an accused is not liable for the crime directly executed by individuals outside the enterprise under the liability of JCE.

After the delivery of the *Brđanin* Trial Judgment, several indictments and decisions of the ICTY dismissed the ideas implied in the decision.[198] Firstly, it is argued that the size of the enterprise is irrelevant in relation to the applicability of JCE liability. In some circumstances, 'crimes committed by other participants in a large-scale enterprise will not be foreseeable to an accused'.[199] Nevertheless, JCE III applies to both small and large-scale enterprises in customary international law, only if the mental element of foreseeability has been satisfied.[200]

In addition, the notion of membership and shared agreement viewpoint were gradually dismissed.[201] The two issues occurred in the *Milutinović et al* and *Popović et al* cases. In *Milutinović et al*, aside from indirect co-perpetration as an alternative form of responsibility as analysed above, the accused were also indicted for 'participation in a joint criminal enterprise as a co-perpetrator' for the crimes committed by physical executors who were non-participants of the JCE but were used by the participants in the JCE to implement the common plan. An accused challenged the jurisdiction of the ICTY and argued that:

> neither the Statute nor customary international law recognise[s] the proposition that an accused may be held responsible for his participation in a joint criminal enterprise ('JCE') where one or more of the JCE participants use persons outside the JCE to physically perpetrate the crime or crimes which constitute the JCE's common criminal purpose.[202]

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196 ibid, para 418.

197 Boas *et al*, *International Criminal Law Practitioner Library*: Vol 1, 84-88. For an analysis of jurisprudence supporting the limitation approach prior to this Trial Chamber decision: at 89-95.

198 *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006 (Separate Opinion of Judge Iain Bonomy); *Krajišnik* Trial Judgment.

199 *Karemera et al v The Prosecutor* (Decision on Jurisdictional Appeals: Joint Criminal Enterprise) ICTR-98-44-AR72.5, ICTR-98-44-AR72.6 (12 April 2006) [*Karemera et al* Appeals Chamber Decision on Jurisdiction 2006], para 17.

200 *Rwamakuba v The Prosecutor* (Decision on Interlocutory Appeal on Joint Criminal Enterprise to the Crimes of Genocide) ICTR-98-44-AR72.4 (22 October 2004), para 25; *Karemera et al* Appeals Chamber Decision on Jurisdiction 2006, paras 12, 16-17; *The Prosecutor v Karemera et al* (Decision on Defence Motion Challenging the Jurisdiction of the Tribunal – Joint Criminal Enterprise Rules 72 and 73 of the Rules of Procedure and Evidence) ICTR-98-44-R72 (5 August 2005), paras 7, 15-16; *Krajišnik* Trial Judgment, para 876; *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006, para 22.

201 *Prosecutor v Haradinaj et al* (Amended Indictment) ICTY-04-84-PT (25 October 2006), paras 20-21; *Prosecutor v Haradinaj et al*, (Revised Second Amended Indictment) ICTY-04-84-PT (11 Jan 2007) [*Haradinaj et al* Revised Second Amended Indictment], para 29; *Krajišnik* Trial Judgment, para 883.

202 *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006, para 3.

The Trial Chamber simply noted that: 'the concept of JCE does not extend to circumstances in which the commission of a crime is said to have been effected through the hands of others whose *mens rea* is not explored and determined, and who are not shown to be participants in the JCE'.[203] The Chamber did not decide whether JCE liability applied in this context because these issues were not related to the tribunal's jurisdiction but to the contours of JCE liability, which were matters to be addressed at trial.[204]

Judge Bonomy in his separate concurring opinion argued that membership of the physical executors in the same JCE as the accused was not necessary for the attribution of liability. Fellow members of the accused may 'order' or 'induce' non-members to commit crimes.[205] After reviewing other ICTY's jurisprudence, Judge Bonomy concluded that:

> it is not inconsistent with the jurisprudence of the Tribunal for a participant in a JCE to be found guilty of commission where the crime is perpetrated by a person or persons who simply act as an instrument of the JCE, and who are not shown to be participants in the JCE.[206]

Judge Bonomy analysed post-World War II cases and general principles of criminal law and posited that where evidence established a close and direct link between the accused the physical perpetrators, physical perpetrators' mental state for the crime was not material for the interpretation of JCE liability.[207] It appears that he also disagreed with the viewpoint of a requirement of 'shared agreement' between the accused and the physical executors. The Trial Chamber in *Krajišnik* also rejected the requirements of membership and a shared agreement.[208]

In the *Popović et al* case, the prosecution proposed replacing 'direct and/or indirect co-perpetration' with that of 'JCE with common purpose' in the indictment.[209] According to the prosecution, 'JCE with common purpose' did not require the physical executors in the same JCE. The Trial Chamber allowed this amendment and missed the opportunity to discuss the membership and agreement issues, in particular, whether a shared agreement is

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203 ibid, para 23.

204 ibid, paras 23-24. The majority of the *Popović et al* Trial Chamber followed the *Milutinović et al* approach to dismissing the request on the issue of the physical perpetrator in the JCE, see *Popović et al* Trial Chamber Decision, paras 20-22. For an analysis of this case, see Mauro Gatenacci, 'The Principle of Legality' in F. Lattanzi and W.A. Schabas (eds), 2 *Essays on the Rome Statute of the International Criminal Court* (Editrice il Sirente 1999) 85-89, 91-93.

205 *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006 (Separate Opinion of Judge Iain Bonomy), paras 3-13.

206 ibid, para 13.

207 ibid, paras 14-30.

208 *Krajišnik* Trial Judgment, paras 883-84, 1082, 1085. For an analysis of this decision, see Boas *et al*, *International Criminal Law Practitioner Library*: Vol 1, 100-03.

209 *Popović et al* Trial Chamber Decision, para 11.

necessary between the accused and the non-member physical executors.[210] The Appeals Chamber in *Brđanin* rejected the two requirements.

5.5.3.2 *The Brđanin formulation of JCE: 2007 Brđanin Appeals Chamber Judgment*

The *Brđanin* Trial Judgment was appealed. The prosecutor claimed that an enterprise might exist only at a leadership level. Also, no basis supported a conclusion that physical executors must be members of the JCE, and that no requirement of agreement existed under customary law.[211] The defence submitted that the prosecutor's arguments would create new law instead of applying existing customary law.[212] Considering jurisprudence of the post-World War II tribunals and the ICTY, the *Brđanin* Appeals Chamber dismissed the Trial Chamber's findings on the size, membership and agreement issues of JCE.[213]

The Appeals Chamber held: first, that an enterprise is not static and JCE liability applies to a large-scale enterprise, including region-wide JCEs.[214] Second, to establish a link between the accused and the crime, the decisive matter is whether a member of the JCE used the physical executors to further the common purpose, even if that member is not the accused and that the crime needs to be attributable to the accused's fellow member. The existence of such a link is a case-by-case issue. Accordingly, physical executors may be non-members of an enterprise.[215]

Third, an agreement to commit a specific crime is not required between the accused and the (non)-member physical executors. According to the Appeals Chamber, if the physical executor is a JCE member, an agreement requirement is superfluous for JCE I because that member has already shared the common purpose. However, if the physical executor is a non-member of the JCE, the accused and his/her fellow members must share an intent to further that crime. In the latter situation, the key issue is whether 'the crime forms part of the common purpose', which is an evidential matter rather than a legal requirement.[216] In addition, the mental element of JCE III is that the accused has foreseen the commission of the offence. The Appeals Chamber dismissed an agreement between the non-physical executor and

210 ibid, para 21.
211 *Brđanin* Appeals Chamber Judgment, paras 367-70, 377-82.
212 ibid, paras 371-73, 383-84.
213 ibid, paras 393-404, 411, 418-19, referring to Judge Bonomy's Separate opinion in the *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006, *Krstić* Trial Judgment and the *Rwamakuba* Appeals Chamber Judgment.
214 ibid, paras 420-25; *Krajišnik* Trial Judgment, para 876; *Kvočka et al* Trial Judgment, para 307.
215 ibid, paras 367, 410-15, 430.
216 ibid, paras 415-19.

the accused. Judge Van den Wyngaert in her declaration also took a view similar to that of the majority on these issues.[217]

To hold the accused liable for the crime, the *Brđanin* Appeals Chamber held that:

> [The accused] has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission. Pursuant to the jurisprudence, which reflects standards enshrined in customary international law when ascertaining the contours of the doctrine of joint criminal enterprise, he is appropriately held liable not only for his own contribution, but also for those actions of his fellow JCE members that further the crime (first category of JCE) or that are foreseeable consequences of the carrying out of this crime, if he has acted with *dolus eventualis* (third category of JCE). It is not decisive whether these fellow JCE members carried out the *actus reus* of the crimes themselves or used principal perpetrators who did not share the common objective.[218]

In the *Brđanin* case, the centre of the three aspects of JCE seems to be the dismissal of an agreement between the accused and the physical executor. The *Brđanin* formulation of JCE appears to deconstruct the basis of JCE liability: common purpose or joint intention.[219] Dissenting opinions were expressed on this *Brđanin* formulation of JCE. Judge Meron declined to rely on the expansive employment of JCE liability to hold the accused liable for a crime attributable to another JCE member.[220] Judge Shahabuddeen also disagreed with the majority on the membership issue and restricted the application of JCE. In his view, an agreement between the accused and the physical executor is required, while an individual would be considered as a member of the JCE if s/he 'acquiesces in the JCE and perpetrates the crime within its common purpose'.[221] In this logic, the physical executor would be considered as a member in a large-size JCE if the enterprise were sufficiently large.[222] These controversies also indicate the difficulty in attributing liability to an accused at the leadership level, who has no personal contact with these perpetrators and victims, for a crime committed by physical executors at the executive level.

5.4.3.3 Observations and summary

The *Brđanin* formulation of JCE shows a trend of expanding the application of JCE liability at the ICTY. It should be noted that the factual scenarios in the *Brđanin* case were different from the circumstance in the *Tadić* case. In the *Tadić* case, the accused was a reserve police officer and Tadić's enterprise

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217 *Brđanin* Appeals Chamber Judgment (Declaration of Judge Van den Wyngaert), para 1.
218 *Brđanin* Appeals Chamber Judgment, para 431.
219 Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability'.
220 *Brđanin* Appeals Chamber Judgment (Separate Opinion of Judge Meron), paras 6-8.
221 *Brđanin* Appeals Chamber Judgment (Partly Dissenting Opinion of Judge Shahabuddeen), paras 2-18.
222 ibid, paras 2, 4.

comprised a small group of active participants. By contrast, Brđanin was a political figure at the leadership level, Brđanin's alleged enterprise co-participants at the leadership level were also not physically involved in the crimes, and the lower-ranking physical executors (members of the army and Serb paramilitary forces) were not participants in his enterprise. If the physical executors did belong to the same enterprise as the accused, it is presumed that they shared the common purpose of the enterprise.[223] If the physical executors are non-members of the accused's enterprise, but have reached an agreement with the accused to commit a crime in furthering a common plan of the accused's enterprise, this construction of JCE remains within the scope of *Tadić* JCE.

The *Brđanin* formulation of JCE, however, went further. *Brđanin* JCE removed the membership requirement, which in nature is a dismissal of a preliminary agreement between the accused and the physical executor. In addition, a common purpose is not required when the person is a non-member of the accused's enterprise. By virtue of *Brđanin* JCE, an accused is held liable for crimes committed by non-members of the same JCE, who were merely 'used' by the accused's fellow member of the JCE and shared no common purpose with the accused to commit the crimes. The essential link of this liability is that the accused's fellow members in the JCE acted with a common plan when using the physical executors as tools. In this way, *Brđanin* JCE is employed to impute liability to the accused at the leadership level of that enterprise for the crimes committed by these non-member physical executors.

The *Brđanin* formulation of JCE opens the door to hold leaders liable. *Brđanin* JCE enables convictions of all other members at intermediate and low levels of the enterprise. It also provides a way to prosecute masterminds who are far from the physical executors and the crime. *Brđanin* JCE has been called 'leadership level' JCE, which is a new form of liability.[224] As shown above, *Brđanin* JCE holds the leader of an enterprise without physical involvements to be legally responsible for a crime perpetrated by persons who were used by the accused's fellow members. Also, the accused's fellow members are not limited to those who committed the crime directly and physically by themselves. It suffices that the fellow members indirectly 'used' others to commit the crime in accordance with the common plan. Furthermore, the crimes committed may either form part of or exceed the common plan; however, the physical executor need not be a member of the accused's enterprise, nor share an understanding with the accused. The ICTY viewed the *Brđanin* JCE as a reflection of customary international law.[225]

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223 For discussions of the membership, see Cliff Farhang, 'Point of No Return: Joint Criminal Enterprise in Brđanin' (2010) 23 *Leiden J Intl L* 137, 153.

224 Héctor Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart Publishing 2009) 182-84, 202-07, 227; Van Sliedregt, *Individual Criminal Responsibility in International Law* 136, 157.

225 *Brđanin* Appeals Chamber Judgment, para 431.

Subsequent case law of the ICTY and the ICTR has endorsed *Brđanin* JCE and further clarified its construction.[226] In *Đorđević*, the defendant submitted that in the leadership cases *Brđanin* JCE was not clearly established in customary international law when the physical executors are not members of the JCE.[227] Also, it was argued that *Brđanin* JCE was 'indirect co-perpetration by another name'.[228] The Appeals Chamber rejected the first argument because there is no cogent reason for it to depart from its consistent jurisprudence.[229] The second argument was also dismissed. The Appeals Chamber did not clarify the meaning of 'use' in the formulation of *Brđanin* JCE but held that it is not equivalent to 'the use of a tool'. Other chambers, however, tried to identify how the accused members 'used the forces' to which these physical executors belonged.[230] The Appeals Chambers in the *Martić* case employed the approach of 'control over the armed force' to identify the essential link of 'acted with common purpose' to establish *Brđanin* JCE liability.[231] Relying on the 'control over armed force' approach, the Chamber

226 For confirming the physical perpetrators as non-JCE members, see *Brđanin* Appeals Chamber Judgment, para 367; *Prosecutor v Haradinaj et al* (Third Amended Indictment) ICTY-04-84-PT (7 September 2007), paras 25-29; *Prosecutor v Limaj et al* (Judgement) ICTY-03-66-A (27 September 2007) [*Limaj et al* Appeals Chamber Judgment], para 120; *Martić* Appeals Chamber Judgment, paras 168-169; *Prosecutor v Krajišnik* (Judgement) ICTY-00-39-A (17 March 2009) [*Krajišnik* Appeals Chamber Judgment], paras 664-665; *Prosecutor v Gotovina & Markač* (Judgement) ICTY-06-90-A (16 November 2012), para 89; *Haradinaj et al* Retrial Judgment, para 618; *Prlić et al* Appeals Chamber Judgment, Vol 1, paras 218-19; *Đorđević* Appeals Chamber Judgment, paras 72, 165; *Karemera &Ngirumptse v The Prosecutor* (Partially Dissenting Opinion of Judge Tuzmukhamedov), para 14; *Ngirabatware* Appeals Chamber Judgment, para 325. For endorsing the dismissal of an agreement requirement, see *Kvočka et al* Appeals Chamber Judgment, para 168; *Limaj et al* Appeals Chamber Judgment, para 120; *Martić* Appeals Chamber Judgment, paras 171-72, 195; *Krajišnik* Appeals Chamber Judgment, paras 225-26, 235-36; *Haradinaj et al* Retrial Judgment, para 621; *Prosecutor v Karadžić* (Judgement) ICTY-95-5/18-AR98*bis*.1 (11 July 2013), para 79; *Prosecutor v Stanišić & Simatović* (Judgement) ICTY-03-69-T (20 May 2013), para 1259; *Prlić et al* Trial Judgment, Vol 1, paras 202-05, 210, 220; *Šainović et al* Appeals Chamber Judgment, paras 1256-60; *Đorđević* Appeals Chamber Judgment, para 165; *Prosecutor v Popović et al* (Judgement) ICTY-05-88-A (30 January 2015) [*Popović et al* Appeals Chamber Judgment], para 1050; *Prosecutor v Stanišić & Župljanin* (Judgement) ICTY-08-91-A (6 March 2016) [*Stanišić & Župljanin* Appeals Chamber Judgment], para 119; *Prosecutor v Mladić* (Judgment) ICTY-09-92-T (22 November 2017), para 3561; *Prlić et al* Appeals Chamber Judgment, Vol II, paras 584-91; *Karemera & Ngirumptse v The Prosecutor* (Judgment) ICTR-98-44-A (29 September 2014) [*Karemera & Ngirumptse* Appeals Chamber Judgment], para 605.

227 *Prosecutor v Đorđević* (Vlastimir Đorđević's Appeal Brief) ICTY-05-87/1-A (15 August 2011), para 75. The *Justice*, *RuSHA* and *Einsatzgruppen* cases are inadequate basis to sustain JCE liability in leadership cases.

228 *Đorđević* Appeals Chamber Judgment, para 61 and fn 194.

229 ibid, paras 59-72.

230 *Brđanin* Appeals Chamber Judgment, paras 412-13, 418; *Martić* Appeals Chamber Judgment, paras 168-69; *Krajišnik* Appeals Chamber Judgment, paras 225-26; ibid, paras 63, 165.

231 *Martić* Appeals Chamber Judgment, paras 169, 187; *Stakić* Appeals Chamber Judgment, paras 59, 62-63, 79-85; *Đorđević* Appeals Chamber Judgment, paras 69, 165.

concluded that Milan Martić's fellow members acted with the common purpose when they used the members of another armed force to carry out the crimes.[232] The *Brđanin* formulation of JCE also tends to cover using 'the armed forces' or 'organisation' as a way of 'use'. Despite a missing reference to the notion of indirect perpetration (through an organisation), the ICTY in some cases, in effect, combined the *Tadić* JCE with indirect perpetration to attribute liability to the accused at the leadership level.[233]

The *Brđanin* formulation of JCE seems to cover a scenario similar to what occurred in the *Katanga* & *Ndjudjl*o case.[234] At the ICTY, *Brđanin* JCE dates from 2007. In 2008, the Pre-Trial Chamber of the ICC in *Katanga* & *Ndjudjl*o introduced indirect co-perpetration. The Chamber held that indirect co-perpetration is encompassed in the Rome Statute. One reason why the Pre-Trial Chamber in this case did not clarify why it employed 'indirect co-perpetration' rather than the expression of '*Brđanin* JCE', which is said to be enshrined under customary law, to depict liability for 'joint commission of a crime through one or more persons', might be that the Chamber was aiming at legal consistency.[235] In a preceding decision, the *Lubanga* Pre-Trial Chamber employed the 'widely recognised' theory of 'control over the act' in interpreting perpetration.[236] The *Lubanga* Pre-Trial Chamber deemed JCE a liability derived from a purely subjective approach, which requires a shared intent and neglects objective factors relating to the commission of the crime.[237] Therefore, the Pre-Trial Chamber in *Katanga* & *Ndjudjl*o adhered to the control theory and did not employ subjective-oriented *Brđanin* JCE liability to address the scenario.

The ICTY and the ICC have developed the concepts of *Brđanin* JCE and indirect co-perpetration. The *Brđanin* JCE is reminiscent of the rejected rulings of the ICTY on co-perpetratorship and indirect co-perpetration. The *Stakić* Appeals Chamber rejected the use of the term 'indirect co-perpetration' for its lack of customary status with specific elements but employed JCE liability to hold the accused responsible. The construction of the *Brđanin* JCE seems to revive the rejected indirect co-perpetration, although under the label of JCE, for crimes physically committed by an individual who is out-

232 *Milutinović et al* Trial Judgment, Vol 3.

233 Yanev, *Theories of Co-perpetration in International Criminal Law* 353-57.

234 Chantal Meloni, 'Fragmentation of the Notion of Co-perpetration in International Criminal Law' in C. Stahn and L. Van den Herik (eds), *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff 2012) 498-99.

235 *Katanga & Ndjudjl*o Decision on Confirmation of Charges, para 486.

236 *Lubanga* Decision on Confirmation of Charges, para 330. For a discussion on the claim of 'widely recognised', see Jens D. Ohlin, 'Co-Perpetration: German *Dogmatik* or German Invasion?' in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford: OUP 2015) 517, 523-24.

237 *Lubanga* Decision on Confirmation of Charges, para 329.

side the enterprise.[238] Van Sliedregt writes that '[i]ndirect (co-) perpetration seems to have recently gained recognition in ICTY case law, albeit in the context of JCE liability.'[239] William Schabas also notes that the two approaches seem to 'lead to much the same result in [their] ability to facilitate convictions'.[240] As Lachezar Yanev's research has shown, if the standard that the physical executors are deemed 'tools' is accepted, *Brđanin* JCE at the leadership level as a combination of JCE and indirect perpetration would allow to brand the JCE members as indirect co-perpetrators of the crimes committed by the non-members of the enterprise.[241] Barbara Goy points out that, compared to the *Brđanin* JCE of the ICTY, indirect co-perpetration at the ICC has 'more onerous objective requirements, and different subjective requirements'.[242]

With regard to the liability of an accused at the leadership level, the material elements of the two notions share some similarities: (i) a common plan between the accused and the co-perpetrators; (ii) a level of contribution to the commission of the crime; (iii) physical executors who may not belong to the same enterprise as the accused or to the organisation under direct control of the accused;[243] and (iv) no requirement of an agreement between the accused and the physical executors.[244] Differences also exist between the two notions. Indirect co-perpetration is constrained by 'the control over the act' doctrine and the 'essential contribution' requirements as opposed to *Brđanin* JCE. Indirect co-perpetration requires the joint control over the organisation and the accused's *condition sine qua non* contribution to the commission of the crime.[245] In contrast, *Brđanin* JCE requires the co-perpetrators 'acting with common purpose' and a significant contribution. The similarities and differences in the elements merit further detailed discussions but go beyond the focus of this research.[246]

The differences above indicate that the jurisprudence of the UN *ad hoc* tribunals concerning *Brđanin* JCE plays less of a role in interpreting indirect co-perpetration than at the ICC. In addition, the quarrels seem to be about

238 *Haradinaj et al* Revised Second Amended Indictment, paras 25, 29; Van Sliedregt, *Individual Criminal Responsibility in International Law* 158-63.
239 Van Sliedregt, ibid, 93.
240 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 568.
241 Yanev, *Theories of Co-perpetration in International Criminal Law* 390.
242 Barbara Goy, 'Individual Criminal Responsibility before the International Criminal Court: A Comparison with the *ad hoc* Tribunals' (2012) 12 *ICLR* 1, 49-50.
243 *Brđanin* Appeals Chamber Judgment, para 413.
244 Van Sliedregt, *Individual Criminal Responsibility in International Law* 170-71.
245 *Lubanga* Decision on Confirmation of Charges, paras 342, 347.
246 Barbara Goy, 'Individual Criminal Responsibility before the International Criminal Court: A Comparison with the *ad hoc* Tribunals' (2012) 12 *ICLR* 1, 26-50; Yanev, *Theories of Co-perpetration in International Criminal Law*, chapters 3 and 5.

detailed elements rather than a different way of attributing liability. Commentators debated whether the link between the accused and the physical executor in *Brđanin* JCE is too loose, and proposed alternative theories and qualifications to fill a linkage gap in dealing with the *Brđanin* scenario, such as functional perpetration (perpetration by means) theory.[247] This functional perpetration idea is closely linked to indirect co-perpetration at the ICC. Furthermore, the convergences demonstrate that both liabilities allow establishing a link to charge the accused at the leadership level for crimes committed by an individual who was not in the same enterprise or organisation but used by the accused's fellow member. The two notions deal with a similar factual scenario: a crime was committed by physical executors at the executive level who were used by the accused's co-perpetrators at the leadership level to carry out a common plan of an enterprise/organisation, and these executors were non-members of the enterprise/organisation to which the accused belongs. Ohlin points out that they may function in a similar way to convict the accused for the crimes committed by the physical executors.[248]

In conclusion, case law of the ICTY relating to *Brđanin* JCE evidences a departure from the *Tadić* JCE but serves a similar function of indirect co-perpetration in the context where a leader is far from the physical executors. After the delivery of the *Brđanin* Appeals Chamber judgment, an expansive JCE liability for international crimes has developed to deal with the scenario covered by indirect co-perpetration, although with different objective and subjective elements. To establish a link between the accused and the crime in this scenario, *Brđanin* JCE and indirect co-perpetration would attribute the liability to the accused for a crime committed by or imputed to his/her fellow member of the enterprise at the leadership level through a non-JCE member perpetrator at the executive level. The ICC jurisprudence and decisions of two *ad hoc* tribunals that combined *Tadić* JCE and indirect perpetration seem to support this unique mode of liability, indirect co-perpetration, in general, but not this mode of liability with specific elements. Yet, rare practice and *opinio juris* of States acknowledge such a liability as will be seen below.

5.5.4 Modes of liability: national legislation and cases

International crimes are punishable in different ways on a national level.[249] A war crime in a State might be covered by a special law, but a crime against

247 For discussions on alternatives for dealing with the circumstance, see Yanev, *Theories of Co-perpetration in International Criminal Law* 328-94; Van der Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations'; Katrina Gustafson, 'The Requirement of an "Express Agreement" for Joint Criminal Enterprise Liability: A Critique of *Brđanin*' (2007) 5 *JICJ* 134; Cassese *et al* (eds), *Cassese's International Criminal Law* 169.

248 Jens D. Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability' (2012) 25 *Leiden J Intl L* 771.

249 A. Eser *et al* (eds), *National Prosecution of International Crimes*, Vols 1-7 (Freiburg im Breisgau: Ed. Iuscrim 2003-2006).

humanity might be punishable as an ordinary criminal offence enumerated in a criminal code; and the crime of genocide might be covered by special provisions in a criminal code.[250] Likewise, the liability provisions in a national criminal code might apply to international crimes that were set out in the code and a special law. For example, Australia's *War Crimes Act* 1945, as amended in 2010, provides that 'Chapter 2 of the Criminal Code [concerning the general principles of criminal responsibility] applies to all offences [of war crimes] against this Act'.[251] Due to different ways of national prosecution for international crimes, the applicable laws in attributing liability are mainly covered by special implementation laws, penal codes and military manuals. This subsection focuses on the practice of States concerning complicity for joint commission or common purpose. For this purpose, it analyses attribution of liability for a crime committed by several persons in available national law (criminal codes and case law) and special implementation legislation of States to show whether indirect co-perpetration is well accepted.

5.5.4.1 National criminal codes and implementation legislation

Two considerations should be kept in mind in analysing the customary status of liabilities relying on national criminal codes. Some States Parties have only implemented international crimes in their criminal codes or special laws.[252] Additionally, several penal laws of non-party States of the Rome Statute only deal with ordinary criminal offences. These national laws are not valuable for the identification of a customary rule in this regard.

At the national level, there are different kinds of national provisions that may be relevant to indirect co-perpetration. Firstly, some national laws provide liability for joint commission with or without prior agreement.[253] These States provide a provision similar or identical to the following paragraph that:

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250 In some States, their Penal Codes cover all the three crimes, for example, Croatia, Costa Rica, Czech Republic, Estonia, Finland, Georgia, Hungary, Lesotho and Panama, Poland, Romania, Serbia and Spain, see National Implementing Legislation Database. In US and Israel, crimes against humanity are deemed ordinary criminal offence, while genocide is regulated as a special criminal offence.

251 Australia, War Crimes Act 1945, amended 2010, § 3A; Australia, Geneva Conventions Act 1957, amended 2016, § 6A.

252 See National Implementing Legislation Database.

253 Afghanistan, Penal Code 1976, art 39(2), art 49; Australia, Criminal Code Act 1995, § 11.2A; Bangladesh, Penal Code 1860, amended 1973, arts 34-35, 37; Botswana, Penal Code 1964, amended 2005, § 22; Brunei Darussalam, Penal Code 1951, revised edition 2001, §§ 34-35, 37; Canada, Criminal Code 1985, amended 2017, § 21(2); Cook Islands, Criminal Act 1969, § 68(2); Cyprus, Criminal Code 1959, § 21; Ethiopia, Criminal Code 2005, art 38; Fiji, Crimes Decree 2009, § 46; India, Penal Code 1860, amended 2013, §§ 34-35, 37; Kenya, Criminal Code 1930, amended 2010, § 21; Kiribati, Criminal Code 1965, amended 1977, art 22; Lesotho, Penal Code Act 2010, § 26; Malaysia, Penal Code 1936, amended 2014, §§ 34-35, 37; Myanmar, Penal Code 1861, amended 2016, §§ 34-35, 37; Malawi, Penal Code 1930, § 22; Nauru, Criminal Code 1899, amended 2011, § 8; New

> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.[254]

These rules concerning joint commission with shared purpose are limited to joint commission of the crimes at the execution stage. They are similar to *Tadić* JCE (common purpose) liability, but distinct from indirect co-perpetration or *Brđanin* JCE at the leadership level. Therefore, they do not indicate the way to attribute liability as depicted by indirect co-perpetration.

Secondly, a large amount of national legislation supports the liability of co-perpetration[255] and indirect perpetration.[256] Judge Schomburg argued that both co-perpetration and indirect perpetration were accepted as modes of

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Zealand, Criminal Code 1961, amended 2013, § 66(2); Nigeria, Criminal Code Act 1916, amended 1990, § 8; Pakistan, Penal Code 1860, amended 2017, §§ 34-35; Philippines, Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity 2009, § 8(a)(3); Papua New Guinea, Criminal Code Act 1974, § 8; Samoa, Crimes Act 2013, § 33(2); Seychelles, Penal Code 1955, amended 2014, § 23; Singapore, Penal Code 1871, amended 2015, §§ 34-35, 37; Solomon Islands, Penal Code 1996, amended 2016, § 22; Sri Lanka, Penal Code 1883, amended 2006, §§ 32-33,35; Sudan, Criminal Act 1991, § 21; Tanzania, Code of Criminal Law 1945, amended 2007, § 23; Tuvalu, Penal Code 2008, § 22; Uganda, Penal Code Act 1950, revised edition 1998, § 20; UK, Penal Code 1990, amended 2014, § 20; Ukraine, Criminal Code 2001, amended 2010, art 28(2); Vanuatu, Penal Code 1981, amended 2016, § 31; Zambia, Penal Code Act 1931, amended 2011, § 22.

254 Identical provisions in Botswana, Penal Code 1964, amended 2005, § 22; Cyprus, Criminal Code 1959, § 21; Kenya, Criminal Code 1930, amended 2010, § 21; Kiribati, Criminal Code 1965, amended 1977, art 22; Nauru, Criminal Code 1899, amended 2011, § 8; New Zealand, Criminal Code 1961, amended 2013, § 66(2); Nigeria, Criminal Code Act 1916, amended 1990, § 8; Papua New Guinea, Criminal Code Act 1974, § 8; Samoa, Crimes Act 2013, § 33(2); Solomon Islands, Penal Code 1963, amended 1990, § 22; Seychelles, Penal Code 1955, amended 2014, § 23; Tanzania, Code of Criminal Law 1945, amended 2007, § 23; Uganda, The Penal Code Act, revised edition 1998, § 20; UK, Penal Code 1990, amended 2014, § 20; Zambia, Penal Code Act 1931, amended 2011, § 22.

255 More than 90 State legislation provide provisions of co-perpetration. See Afghanistan, Penal Code 1976, art 38(1); Afghanistan, Law on Combat against Terrorist Offences 2008, art 18; Armenia, Criminal Code 2003, amended 2013, art 41(2); Andorra, Penal Code 2005, amended 2008, art 21; Austria, Criminal Code 1974, amended 2015, § 12; Azerbaijan, Criminal Code 1999, amended 2003, arts 32.2, 33.2; Bahamas, Penal Code 1924, amended 2014, art 14(2); Bolivia, Criminal Code and Criminal Procedural Code 1997, amended 2010, art 20; Bosnia and Herzegovina, Criminal Code 2003, amended 2016, art 31; Burundi, Penal Code 2009, art 37(1); Belarus, Penal Code of 9 July 1999, amended 2012, art 16(1), 17; Cabo Verde, Penal Code 2003, art 25; Cambodia, Provisions relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period 1991, art 27; Cameroon, Penal Code 1967, amended 2016, art 96; Chile, Criminal Code 2011, art 15(3); China, Criminal Law 1997, amended 2015, art 25; Colombia, Penal Code 2000, art 29(2); Democratic Republic of the Congo, Criminal Code 1940, amended 2004, art 21(1); Costa Rica, Penal Code 1970, art 45; Côte d'Ivoire, Penal Code 1981, amended 1995, arts 26, 29; Croatia, Criminal Code 1998, amended 2011, art 36(2); Cuba, Penal Code 1987, amended 1997, art 18(2)(ch); Czech Republic, Criminal Code 2009, amended 2011, § 23; Ecuador, Penal Code 1997, amended 2013, art 42; El Salvador, Penal Code 1997, amended 2010, art 33; Estonia, Criminal Code 2002, amended 2017, § 21(2); Eritrea, Penal Code 2015, art 37(3); Finland, Criminal Code 1889, amended

2015, Chapter 5, § 3; Georgia, Criminal Code of 1999, amended 2016, arts 22, 25(2), 27(2); Germany, Criminal Code 1871, amended 2016, art 25(2); Ghana, Criminal Code 1960, art 13(2); Greece, Penal Code 1950, amended 2003, art 45; Grenada, Criminal Code 1987,amended 1993, § 14(2); Guatemala, Penal Code 1973, arts 36; Guinea, Criminal Code 1998, art 52; Haiti, Penal Code 1995, art 44; Honduras, Penal Code 1983, amended 2008, art 32; Hungary, Criminal Code 1978, amended 2012, § 13(3); Iraq, Statute of the Iraqi Special Tribunal 2005, art 15(2)(a); Iraq, Penal Code 1969, paragraph 47(2); Iran, The Islamic Penal Code 2013, art 125; Israel, Penal Code 1977, amended 1990, § 29(b); Italy, Criminal Code 1930, amended 2017, art 113; Japan, Criminal Code 1907, amended 2006, art 60; Kazakhstan, Criminal Code 1997, amended 2004, art 29(2); Kyrgyzstan, Criminal Code 1997, amended 2006, art 30(3); Latvia, Criminal Law 1998, amended 2013, § 19; Liechtenstein, Criminal Code 1988, amended 2013, § 12; Lithuania, Criminal Code 2000, amended 2015, art 24(3); Luxembourg, Criminal Code 1879, amended 2016, art 66(1); Maldives, Penal Code 1968, amended 2004, § 10; Malta, Criminal Code 1854, amended 2016, § 45; Macedonia, Criminal Code 1996, amended 2009, art 22; Mexico, Criminal Code 1931, amended 2013, art 13(3); Moldova, Criminal Code 2002, amended 2009, art 44; Mongolia, Criminal Code 2002, art 36.2; Montenegro, Criminal Code 2003, amended 2012, art 23(2); Morocco, Penal Code 1962, amended 2016, art 128; Netherlands, Criminal Code 1881, amended 2012, § 47(1)(1); Nicaragua, Penal Code 1974, art 24.3; Panama, Penal Code 2007, art 44; Paraguay, Penal Code 1997, art 29(2); Peru, Penal Code 1991, amended 2010, art 23; Poland, Criminal Code 1997, amended 2016, art 18 § 1; Portugal, Criminal Code 2006, amended 2015, art 26; Republic of Korea, Criminal Act 1953, amended 2005, art 30; Romania, Criminal Code,2009, amended 2012, art 46; Rwanda, Penal Code 1977, amended 2012, art 90; Philippines, the Revised Penal Code 2012, art 17(3); Russian Federation, Criminal Code 1996, amended 2012, arts 33(2), 34(2); Serbia, Criminal Code 2005, amended 2014, art 33; Singapore, Penal Code 1871, amended 2015, § 37; Sao Tome and Principe, Penal Code 2012, art 26(c); Spain, Criminal Code 1995, amended 2015, art 28; Slovakia, Criminal Code 2005, amended 2009, § 20; Slovenia, Criminal Code 2008, amended 2009, § 20(2); Somalia, Penal Code 1963, art 72; Thailand, Penal Code 1956, amended April 2016, § 83; Timor-Leste, Penal Code 2009, art 30(2); Turkmenistan, Penal Code 1997, amended 2013, art 33(2); Turkey, Penal Code 2016, art 37(1); Tajikistan, Criminal Code 1998, arts 36(2), 37(2); Ukraine, Criminal Code 2001, amended 2010, arts 28(1)-(2); Uruguay, Criminal Code 1933, amended 2010, art 61; Uzbekistan, Criminal Code 1994, amended 2012, art 27; Vietnam, Penal Code 1999, art 20(3); Yemen, Republican Decree for Law No 12 for the Year 1994 Concerning Crimes and Penalties, art 21.

256 More than 70 State legislation provide indirect perpetration. See Andorra, Penal Code 2005, amended 2008, art 21; Austria, Criminal Code 1974, amended 2015, § 12; Azerbaijan, Criminal Code 1999, amended 2003, art 32.2; Bahamas, Penal Code 1924, amended 2014, arts 14(1), (4); Belize, Criminal Code, Revised Edition 2000, § 11(4); Bolivia, Criminal Code and Criminal Procedural Code 1997, amended 2010, art 20; Burundi, Penal Code 2009, art 20; Cabo Verde, Penal Code 2003, art 25; Chile, Criminal Code 2011, art 15(3); China, Criminal Law 1997, amended 2015, art 25; Colombia, Penal Code 2000, art 29(1); Cook Islands, The Geneva Conventions and Additional Protocols Act (2002); Democratic Republic of the Congo, Criminal Code 1940, amended 2004, art 21(3); Costa Rica, Penal Code 1970, art 45; Côte d'Ivoire, Penal Code 1981, amended 1995, art 25; Croatia, Criminal Code 1998, amended 2011, art 36(1); Cuba, Penal Code 1987, amended 1997, art 18(2)(d); Czech Republic, Criminal Code 2009, amended 2011, § 22(2); Djibouti, Penal Code 1995, art 23(3); Ecuador, Penal Code 1997, amended 2013, art 42; El Salvador, Penal Code 1997, amended 2010, art 34; Estonia, Criminal Code 2002, amended 2017, § 21(1); Ethiopia, Criminal Code 2005, art 32(1)(c); Eritrea, Penal Code 2015, art 37(1)(c); Finland, Criminal Code 1889, amended 2015, Chapter 5, § 4; France, Penal Code 1994, amended 2016, § 121-7; Ghana, Criminal Code 1960, art 13(1); Georgia, Criminal Code of 1999, amended 2016, art 22; Germany, Criminal Code 1871, amended 2016, art 25(1); Guatemala, Penal Code 1973, art 36; Honduras, Penal Code 1983, amended 2008, art 32; Hungary, Criminal Code 1978, amended 2012, § 13(2); Iran, The Islamic Penal Code 2013, art 128; Iraq, Statute of the Iraqi Special Tribunal 2005, art 15(2)(a); Italy,

liability in customary international law.[257] Even if Judge Schomburg's viewpoint is valid, it cannot be concluded that indirect co-perpetration as a merger of the two notions is a rule of customary law.[258] An empirical inductive overview of these provisions in penal laws of States shows that they do not demonstrate an expansive understanding of (co-)perpetration or indirect perpetration to cover the form of 'joint commission through an organisation'.[259]

A special form of liability for offences of conspiracy and criminal association should be noted. The liability for criminal association stipulates that leaders/organisers of a criminal organisation (group/community/association/society) are liable for all crimes committed by members of the group

Criminal Code 1930, amended 2017, art 112; Israel, Penal Code 1977, amended 1990, § 29(c); Kyrgyzstan, Criminal Code 1997, amended 2006, art 30(3); Liberia, Criminal Code 1976, § 3.1(a); Latvia, Criminal Law 1998, amended 2013, § 17; Liechtenstein, Criminal Code 1988, amended 2013, § 12; Lithuania, Criminal Code 2000, amended 2015, art 24(3); Luxembourg, Criminal Code 1879, amended 2016, art 66(3); Maldives, Penal Code 1968, amended 2004, § 14; Malta, Criminal Code 1854, amended 2016, § 47(b); Mexico, Criminal Code 1931, amended 2013, art 13(4); Moldova, Criminal Code a 2002, amended 2009, art 42(2); Montenegro, Criminal Code 2003, amended 2012, art 23(1); Netherlands, Criminal Code 1881, amended 2012, § 47(1)(1); Nicaragua, Penal Code 1974, art 24.2; Panama, Penal Code 2007, art 43; Paraguay, Penal Code 1997, art 29(1); Peru, Penal Code 1991, amended 2010, art 23; Poland, Criminal Code 1997, amended 2016, art 18, § 1; Portugal, Criminal Code 2006, amended 2015, art 26; Rwanda, Law Setting up Gacaca Jurisdictions (2001), art 51; Slovenia, Criminal Code 2008, amended 2009, § 20(1); Spain, Criminal Code 1995, amended 2015, art 28; Sri Lanka's Geneva Conventions Act (2006), §§ 2-3; Sao Tome and Principe, Penal Code 2012, art 26(a); Somalia, Penal Code 1963, art 73; Tajikistan, Criminal Code 1998, art 36(2); Turkmenistan, Penal Code 1997, amended 2013, art 33(2); Turkey, Penal Code 2016, art 37(2); Timor-Leste, Penal Code 2009, art 30(1); Togo, Criminal Code 1992, amended 2012, art 247; Ukraine, Criminal Code 2001, amended 2010, art 27(2); Uruguay, Criminal Code 1933, amended 2010, art 60(2); Uzbekistan, Criminal Code 1994, amended 2012, art 28(2); US, Criminal Justice Code 1967, § 46.3207; Venezuela, Penal Procedure Code 2009, art 124; Yemen, Republican Decree for Law No 12 for the Year 1994 Concerning Crimes and Penalties, art 21.

257 *Gacumbitsi* Appeals Chamber Judgment (Separate Opinion of Judge Schomburg), para 21; *Simić et al* Appeals Chamber Judgment (Dissenting Opinion of Judge Schomburg), para 14 and fn 20. Judge Schomburg also proposed the control over the act theory to interpret perpetration. For critics of the control doctrine, see Lachezar D. Yanev and Tijs Kooijmans, 'Divided Minds in the Lubanga Trial Judgment: A Case against the Joint Control Theory' (2013) 13 *ICLR* 789, 808, arguing that 'the labels of these liabilities in national law is one thing, while whether these criminal systems have applied the 'joint control' theory to interpret co-perpetration liability is a different issue'.

258 See also Yanev, *Theories of Co-perpetration in International Criminal Law* 390, 490 arguing that combining JCE with indirect perpetration is theoretically possible, but there is a fundamental problem. In his view, the latter form of liability is not recognised as customary international law. In addition, he argued that 'it is erroneous and misleading to refer to the presence of the phraseology "co-perpetration" in the penal code of a given state as evidence that it adopts the joint control theory'.

259 For a review of the domestic approach to co-perpetration liability, see Yanev, *Theories of Co-perpetration in International Criminal Law* 497-513.

if the crimes committed were embraced by the intention of the accused.[260] For instance, the Criminal Code of Uzbekistan explicitly provides that: '[h]eads for crime, as well as members of a criminal group organised by the previous concert, organised criminal group, or criminal community shall be subject to liability for all crimes, of which preparation or commission they participated'.[261] After analysing 43 legal systems worldwide, researchers of the Max-Planck-Institute project *General Legal Principles of International Criminal Law on the Criminal Liability of Leaders of Criminal Groups and Networks* concluded:

> A result of this comparison of the various rules of complicity is that structurally differing concepts of the doctrine of complicity yield results that are, to a large extent, functionally equivalent. […] the classification of the organiser of a network who directs the activities from the background as the primarily responsible offender of a crime does not fail due to the fact that the person who directly commits the crime, a 'little cog in the big wheel', has no knowledge of the crime's overriding goals or of its specific character and magnitude. In contrast, the various legal systems treat very differently the issue of the attributability […] to hierarchically superior participants of actions by individual group members that are not (expressly) encompassed by the common crime plan.[262]

These national provisions also indicate that 'clear differences exist as far as the issue of minimum requirements regarding the *mens rea* of those who themselves remain inactive is concerned'. These laws and other legislation evidence a liability similar to the expansive interpretation of 'indirect perpetration through an organisation',[263] rather than indirect co-perpetration.

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260 Armenia, Criminal Code 2003, amended 2013, arts 38(3), 41(4)-(5); Albania, Criminal Code 1995, amended 2013, arts 27-28; Azerbaijan, Criminal Code 1999, amended 2003, art 34.6; Kazakhstan, Criminal Code 1997, amended 2004, art 29(3); Latvia, Criminal Law 1998, amended 2013, § 21(2); Belarus, Penal Code of 9 July 1999, amended 2012, arts 18(2), 19(4); Bosnia and Herzegovina, Criminal Code 2003, amended 2016, art 342(3); Canada, Criminal Code 1985, amended 2017, §§ 467.1, 467.13; China, Criminal Law 1997, amended 2015, art 26; Georgia, Criminal Code of 1999, amended 2016, art 27(4); Honduras, Penal Code 1983, amended 2008, art 34(1); Iran, The Islamic Penal Code 2013, art 130; Kazakhstan, Criminal Code 1997, amended 2014, art 31(4); Kyrgyzstan, Criminal Code 1997, amended 2006, art 34(1); Lithuania, Criminal Code 2000, amended 2015, art 26(4); Moldova, Criminal Code 2002, amended 2009, art 47(4); Mongolia, Criminal Code 2002, art 37.2; Slovenia, Criminal Code 2008, amended 2009, art 41(3); Tajikistan, Criminal Code 1998, art 39(6); Russian Federation, Criminal Code 1996, amended 2012, arts 35(5); Ukraine, Criminal Code 2001, amended 2010, art 30(1); Uzbekistan, Criminal Code 1994, amended 2012, art 30.

261 Uzbekistan, Criminal Code 1994, arts 29-30; Kazakhstan, Criminal Code 1997, amended 2014, art 31(3).

262 'General Legal Principles of International Criminal Law on the Criminal Liability of Leaders of Criminal Groups and Networks', Project Coordination: Ulrich Sieber, Hans-Georg Koch and Jan Michael Simon, available at: https://www.mpicc.de/en/forschung/forschungsarbeit/strafrecht/participation.html [accessed 15 January 2018].

263 Thomas Weigend, 'Perpetration through an Organisation: The Unexpected Career of a German Legal Concept' (2011) 9 *JICJ* 91, 106. Weigend argues that 'there is certainly nothing that even remotely suggests that the concept of perpetration though an organisation is a form of criminal liability recognised as customary international law'.

These provisions do not demonstrate a consensus on the liability of a head of the organisation for crimes that neither are committed by members of the organisation nor fall within the scope of the common plan.

Some national legislation provides that: '[a] crime is considered committed by a criminal association, if it was committed [...] by a member (members) of the association [...], as well as, committal of a crime by a person not considered a member of the association, by instruction of the criminal association'.[264] The Criminal Code of Uzbekistan provides a similar rule and also stipulates that '[c]riminal community shall be a previous association of at least two groups for criminal activity'.[265] Combining the liability of the leaders for offences committed by a criminal association with this notion of criminal community, these provisions evince support for the construction of indirect co-perpetration (or *Brđanin* JCE I). The head of one group would be held liable for the crime committed by a person of another group. Nevertheless, these provisions do not extend to crimes that fall outside the scope of the common plan. These few instances are also not sufficient to support a rule of indirect co-perpetration liability under customary law.

Another liability for the offences of conspiracy exists in national legislation.[266] One example is the US 2010 *Manual for Military Commissions*, which provides that

> Any person […] who conspires to commit one or more substantive offences triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished. […] Each conspirator is liable for all offences committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.[267]

These provisions on conspiracy offer a different solution to crimes committed in an organised way at the offence level, instead of at the liability level. Article 5 of the UN Convention against Transnational Organised Crime also provides for the offence of 'participation in an organised criminal group', which stipulates that the action of the heads of a criminal organisation, who plan, coordinate and manage the commission of the crimes committed, is criminalised.[268] The head of the organisation, therefore, would be held lia-

264 Armenia, Criminal Code 2003, amended 2013, art 41(4); Azerbaijan, Criminal Code 1999, amended 2003, art 34.5; Moldova, Criminal Code 2002, amended 2009, art 47(2); Tajikistan, Criminal Code 1998, art 39(5); Uzbekistan, Criminal Code 1994, arts 29-30.

265 Uzbekistan, Criminal Code 1994, arts 29-30; Kazakhstan, Criminal Code 1997, amended 2014, art 31(3).

266 Belize, Criminal Code 2000, § 24(1).

267 US, Manual for Military Commissions of 2010, Part IV Crimes and Elements, § 950v (29), IV 23-24. See also US, Military Commissions Act of 2006, 10 USC 948a, § 6(b)(1)(A); *US v Harman* (Judgment, US Army Court of Criminal Appeals) Army 20050597 (30 June 2008); Australia, War Crimes Act 1945, amended 2001, § 6(1)(k).

268 United Nations Convention against Transnational Organised Crime, 15 November 2000, 29 September 2003, 2225 UNTS 209.

ble for the crimes committed based on direct perpetration through his/her plan or coordinated actions. This provision indicates an attitude to expand the scope of responsible persons through an extensive criminalisation of offences. By contrast, the ICC tends to expand that scope through an expansive interpretation of liability because the Rome Statute does not generally criminalise all plans or coordinated actions. The practice of States in implementing this Convention against Transnational Organised Crime does not further contribute to the development of indirect co-perpetration liability at the international level.

There are more distinctions than similarities in national laws concerning liability. Some national criminal laws provide a distinction between principals (perpetrators) and accessories (accomplices), while some others do not distinguish principals from accessories.[269] The former is generally classified as a differentiation system, while the latter is called a unitary system.[270] In the unitary system, liability is attributed to an accused through criminalising actions of plan and encouragement as well as execution as the commission of offences. In the differentiation system, divergent approaches exist to hold an individual liable for a crime committed by others, for example, joint criminal enterprise and complicity through association, as well as aiding and abetting liability. The above analysis of national laws indicates that without the employment of indirect co-perpetration, the accused would also not go unpunished. Taking these various regimes and approaches into consideration, it appears that indirect co-perpetration liability would not frequently be used in prosecuting international crimes.

Indeed, military manuals of States do not help much in assessing the customary status of indirect co-perpetration.[271] States Parties' special implementation legislation also does not evince the acceptance of indirect co-perpetration. Some implementation legislation of the Geneva Conventions and the 1948 Genocide Convention follows the mode of liability either in article 7 of the ICTY Statute or in that provided in the Genocide Convention.[272]

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269 Kai Ambos, 'Is the Development of a Common Substantive Criminal Law for Europe Possible? Some Preliminary Reflections' (2005) 12 *MJECL* 173, 182-86.

270 Van Sliedregt, *Individual Criminal Responsibility in International Law* 65-67.

271 For sources of military manuals concerning individual criminal responsibility, see JM. Henckaerts and L. Doswald-beck (eds), *Customary International Humanitarian Law*, Vol II: Practice (New York: CUP 2005), practice concerning Rules 102 and 151. Some military manuals refer to individual criminal responsibility as that provided in art 7 of the ICTY Statute. See Australia, LOAC Manual 2006, § 13.39; Canada, LOAC Manual 2001, § 1610; Netherlands, Military Manual 2005, §§ 1147-48; Sierra Leone, Instructor Manual 2007, p 65; UK, LOAC Manual 2004, § 16.35; US, Field Manual 2004, § 500.

272 ICTY Mode: Australia, Geneva Conventions Act 1957, amended 2002, § 7(1); Burundi, Law on Genocide, Crimes against Humanity and War Crimes 2003, art 5; Ireland, Geneva Conventions Act 1962, amended 1998, § 4; Rwanda, Law on Repressing the Crime of Genocide, Crimes against Humanity and War Crimes 2003, art 17; UK, Geneva Conventions Act 1957, amended 1995, § 1(1).

Some implementation legislation merely repeats the text in article 25(3)(a) of the Rome Statute,[273] while other laws only implement the rule in article 25(3)(d) of the Rome Statute.[274] In short, a large number of national laws and implementation legislation concerning joint commission, co-perpetration and indirect perpetration, as well as unique forms of liability in various jurisdictions, are not valuable evidence to show the acceptance of indirect co-perpetration under customary law.

5.5.4.2 National case law

National case law is an important source for the assessment of State practice. It appears that scarce national case law employs indirect co-perpetration in prosecuting international crimes.

Canadian courts endorsed the view of complicity through association in dealing with the issue of refugee protection. The Canadian courts argued that 'the broadest modes of commission recognised under current international criminal law are most relevant to our complicity analysis, namely, common purpose liability under art. 25(3)(d) of the Rome Statute and joint criminal enterprise developed in the *ad hoc* tribunals' jurisprudence'.[275] In the *Peters* case, the Canadian Immigration and Refugee Protection Board clarified the liability of complicity through a shared common purpose.[276] In its view, complicity liability may arise either from facilitating the organisation's mission by aiding and abetting or from 'the existence of a shared common purpose and knowledge that all parties in question may have of the

273 Philippines, Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity 2009, § 8(a)(3).

274 ibid, § 8(a)(3); Mauritius, International Criminal Court Act 2011, § 4(2)(b); Iraq, Statute of the Iraqi Special Tribunal 2005, art 15(2)(d); Sri Lanka, Geneva Conventions Act 2006, § 2(1); UK, Geneva Conventions Act 1957, amended 1995, § 1(1).

275 *Ezokola v Canada* (Minister of Citizenship and Immigration), [2013] 2 SCR 678, 2013 SCC 40, paras 52-67.

276 *Peters v Canada* (Minister of Citizenship and Immigration) (Record of an Admissibility Hearing under the Immigration and Refugee Protection Act, Immigration and Refugee Protection Board) 0003-B2-02557 (29 January 2013), '[i]n complicity resulting from membership in an organisation, it is important to know […] the nature and type of the organisation to which the person belongs, [as] there are three types of organisations, brutal, non-brutal, and/or hybrid. Briefly, a brutal organisation is one whose main purpose, or activity, is to be involved in human rights abuses. Non-brutal organisations are those originally established for legitimate purposes and functions, but which would quite frequently get involved in human rights abuses, such as regular armed forces, militias, political parties. Hybrid organisations are those organisations which have [different] units some of which are involved in crimes against humanity, others [are] not. To attach responsibility through peripheral participation in the crimes of non-brutal organisations, that is complicity arising from the actions of a participant, a person could either aid […], or [abet] the perpetration of those crimes or may be complicit in the perpetration of those crimes through a shared common purpose'.

purpose of the organisation'.[277] Also, the Canadian Supreme Court in the *Ezokola* case openly stated:

> While individuals may be complicit in international crimes without a link to a *particular crime*, there must be a link between the individuals and the *criminal purpose* of the group [...]. [T]his link is established where there are serious reasons for considering that an individual has voluntarily made a significant and knowing contribution to a group's crime or criminal purpose.[278]

With reference to the *Brđanin* Appeals Chamber judgment, the Canadian Supreme Court adhered to *Brđanin* JCE liability. Therefore, if no shared common purpose exists between the accused and the executors, 'a significant and knowing contribution' will suffice to hold the accused liable by virtue of complicity through association. The Canadian case law cited above shows that an accused at the leadership level would be responsible for crimes committed by that executor. However, depending on the facts of each case, the accused would be liable based on aiding and abetting liability or complicity through the shared common purpose/association. The Canadian courts did not rely on article 25(3)(a) of the Rome Statute to broaden the forms of perpetration or use the label of indirect co-perpetration.

According to the UK Crown Prosecution Service, the common law doctrine of joint enterprise:

> can apply where two or more persons are involved in an offence or offences. The parties to a joint enterprise may be principals (P) or secondary parties (accessories/accomplices) (D).[279]

When a joint enterprise is pre-planned, a category of the UK joint enterprise is similar to the *Tadić* JCE. However, as analysed above, cases supporting *Tadić* JCE do not show the practice of *Brđanin* JCE in attributing liability to the person at the leadership level. Additionally, if there is no shared purpose, the accused who was convicted based on joint enterprise has to 'act' in concert, or the accused ought to be acquitted. Cases from the UK concerning joint enterprise, therefore, are not valuable evidence for the assessment of indirect co-perpetration under customary law. On the other hand, the UK in recent decisions re-set a threshold of the mental element of JCE III by arguing that it was 'illegitimate' 'to treat foresight as an inevitable yardstick of common purpose'. [280] According to the English courts, 'the correct approach is to treat it [foresight] as evidence of intent.' [281] The accused must have an 'intention' rather than 'foresight' for the crime that was not agreed upon but committed

277 *Ramirez v Canada* (Minister of Employment and Immigration), [1992] 2 FC 306, p 318; *Sivakumar v Canada* (Minister of Citizenship and Immigration), [1994] 1 FC 433.

278 *Ezokola v Canada* (Minister of Citizenship and Immigration), [2013] 2 SCR 678, para 8 (emphasis in original).

279 UK, 'CPS Guidance On: Joint Enterprise Charging Decisions', December 2012, para 5.

280 *Jogee and Ruddock v R* (Judgment from the Court of Appeal of Jamaica) [2016] UKPC 7, [2016] UKSC 8, [2016] 2 WLR 681 (18 February 2016), para. 87.

281 ibid.

by physical executors. This change shows a more restrictive attitude of the UK towards the expansion of responsible persons by virtue of joint enterprise.

The Australia Administrative Appeals Tribunal has also dealt with some cases concerning international crimes attributable to refugee applicants who did not directly or physically commit offences of war crimes or crimes against humanity.[282] In the *SAH* case, the accused was a member and an administrative officer of the Iraqi Army when war crimes and crimes against humanity were committed. The Australia Administrative Appeals Tribunal held that: 'under the Rome Statute, a person need not have directly committed the act him or herself.' The Tribunal recognised that to bear criminal responsibility, a person must have 'aided, abetted or otherwise assisted' in the commission by persons acting with a common purpose.[283] The Australia Administrative Appeals Tribunal, however, did not rely on an interpretation of article 25(3)(a) of the Rome Statute to hold the accused liable.[284] In interpreting article 25(3)(d), the Tribunal noted that, apart from the mental and material elements of the crime, 'there must be a *shared common purpose*, as between the perpetrator and the accomplice, to engage in conduct which constitutes a crime'.[285] Therefore, currently, the Australian tribunals still adhere to the narrow interpretation of *Tadić* JCE, instead of adopting *Brđanin* JCE (indirect co-perpetration).

In the DRC *Barnaba Yonga Tshopena* case, the accused was considered the supreme leader of the Ngiti combatants of this political-military movement. The Military Garrison Court held that 'in this capacity, together with other commanders of this political-military movement, he organised, planned or encouraged in any way the successive attacks.'[286] In fact, in the DRC, military, police and political leaders used their power to initiate the crimes committed by physical executors. They were liable because they were the ones

282 Australia, War Crimes Act 1945, amended 2010, § 9(1); *AXOIB v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs), [2002] AATA 365, para 33. For other cases after World War II, see D. Blumenthal and T. McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (The Hague: Martinus Nijhoff Publishers 2008).

283 *SAH v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs), [2002] AATA 263, paras 58-59.

284 See *SAL v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs), [2002] AATA 1164, para 85; *VAG v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs), [2002] AATA1332, para 66; *SHCB v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs) [2003] FCAFC 308, para 13; *SZCWP v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs), [2006] FCAFC 9, para 107; *WBR v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs), [2006] AATA 754, para 28.

285 *WBR v Australia*, ibid.

286 *Garrison Military Auditor, Public Prosecutor's Office and civil parties v Barnaba Yonga Tshopena* (Judgment, Military Garrison Court of Ituri-Bunia, DRC) RP No 071/09, 009/010 and 074/010, RMP No 885/EAM/08, RMP No 1141/LZA/010, RMP No 1219/LZA/010 and RMP No 1238/LZA/010 (9 July 2010), para 132.

who conceived the crime.[287] This case does not support attributing liability to the accused for the crimes committed by the executors who were not affected by the accused's power. Liability of indirect co-perpetration is not rooted in this approach to attribution of liability.

In the *Fujimori* case, Peru's Supreme Court of Justice examined whether former Peruvian president Alberto Fujimori was liable for crimes against humanity carried out by State officials.[288] The prosecution argued that the crimes committed could be attributed to the ex-president 'by recourse to the mode of criminal liability of perpetration-by-means'. The court held that the liability of perpetration-by-means through control over an organised apparatus of power is 'a form of commission which, however, is transferred from an order issued at the highest strategic level to the concrete execution of the ordered act by a proxy'.[289] This case only supports the interpretation of indirect perpetration through an organisation, which has been supported by several civil law criminal systems as mentioned above.[290] Other cases supporting this form of indirect perpetration[291] also do not support indirect co-perpetration.[292]

National practice relating to individual criminal responsibility for war crimes, as shown in Rules 102 and 151 of the 2005 ICRC *Study*, does not show a trend of accepting indirect co-perpetration liability.[293] In fact, the majority of national cases concerning co-perpetration and indirect perpetration about ordinary crimes are not relevant for the analysis of custom. The analysis of case law above concerning complicity through association, aiding, abetting or assisting, complicity through a shared common purpose, and joint enterprise, as well as indirect perpetration, shows that few national cases support indirect co-perpetration, especially where the crimes committed are outside the common plan of the organisation.

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287 DRC, 'Training manual by the Prosecutor at the Military High Court for magistrates on techniques for investigating sexual crimes, adopted as part of the Programme on Investigating Sexual Crimes of the Democratic Republic of the Congo, Military Justice seminar', 2008, pp 8-9.

288 Kai Ambos, 'The *Fujimori* Judgment, A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organised Power Apparatus' (2011) 9 *JICJ* 137.

289 *Prosecutor v Alberto Fujimori* (Judgment, Supreme Court of Justice, Special Criminal Chamber, Peru) A.V 19-2001 (7 April 2009), para 744.

290 ibid.

291 For an analysis of indirect perpetration through organisation, see Francisco Muñoz-Conde and Héctor Olásolo, 'The Application of the Notion of Indirect Perpetration through Organised Structures of Power in Latin America and Spain' (2011) 9 *JICJ* 113, 114; Olásolo, *Essays on International Criminal Justice* 102-42.

292 *Simić et al* Appeals Chamber Judgment (Dissenting Opinion of Judge Schomburg), fn 32.

293 Available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule102 [accessed 20 January 2018].

5.5.5 Other international tribunals and special national tribunals: instruments and cases

Differences also exist in instruments in other international and national tribunals specially designed for the prosecution of international crimes. Article 15(2) of the 2003 Statute of the Iraqi Special Tribunal is similar to article 25(3) of the Rome Statute. It provides that:

> […] a person shall be criminally responsible if that person: A. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that this person is criminally responsible; […].[294]

The text of article 15 appears to leave no room for the tribunal to interpret a mode of liability for crimes 'by contribution via another individual'. The Iraqi Special Tribunal was created to prosecute international crimes committed in Iraqi from July 1968 to May 2003.[295]

In practice, the Iraqi Special Tribunal in the *Al-Dujail* decision systematically interpreted article 15(2), which addressed that:

> […] the actor, despite his role and legal-official description, is reckoned in-charge in perpetrating one of the crimes which falls under the court's jurisdiction, whether the offender […] committed the crime by personal attribution, contribution or via another individual, even if the latter was not criminally responsible (for any reason), enticed, urged, assisted, instigated, or helped in whatsoever mean, to facilitate the execution of the crime, provided its tools, instigated or contributed with other individuals, aiming a joint criminal contribution conditioned by premeditation and effectively granting […].[296]

In its view, 'the legislator goes to the equilibrium of all factors contributing to create the crime's result'. All actors, therefore, would be charged for 'perpetrating' the crime, regardless of the degree of contribution to the crime.[297] This interpretation indicates that an accused would be held liable for committing the crime via another person. On the other hand, the tribunal would not attribute crimes 'jointly committed via another individual' to an accused through indirect co-perpetration, or an expansive interpretation of co-perpetration, because the accused would also be held liable as an offender based on the other way of contribution. It seems that the Iraqi High Tribunal did not follow the ICC's approach of indirect co-perpetration.

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294 Statute of the Iraqi Special Tribunal, 43 ILM 231 (2004), art 15(2)(A). See also Iraq, Law of the Iraqi Higher Criminal Court, Law No. (10) 2005, art 15(2)(A).

295 Statute of the Iraqi Special Tribunal, ibid, art 1(b).

296 *The Public Prosecutor in the High Iraqi Court et al v Saddam Hussein Al-Majeed et al* (Verdict, Second Criminal Court, Iraqi High Tribunal)1/CSecond/2006 (24 June 2007), p 8. Saddam Hussein Al-Majeed, the former president of the Iraqi, and other five former high officials were charged with murder constituting crimes against humanity committed in 1982.

297 ibid, pp 128-31.

In addition, the text of section 14(3)(a) of the Special Panels for Serious Crimes within the District Court of Dili in East Timor is identical to article 25(3)(a) of the Rome Statute.[298] The Special Panels adopted diverse approaches in interpreting section 14(3)(a). The Special Panels in some cases cited the *Tadić* Appeals Chamber judgment and employed joint criminal enterprise to interpret liability for commission jointly with another under section 14(3)(a).[299] For instance, Salvador Soares was held 'responsible for committing the crime of murder as a crime against humanity pursuant to a joint criminal enterprise to murder the pro-independence supporters'.[300] Additionally, the Special Panels simply relied on the literal reading of the phrase 'jointly with another' for incurring co-perpetration liability of physical executors.[301] These different approaches at a minimum do not show an expansive interpretation of co-perpetration to include indirect co-perpetration. In fact, in the Special Panels in East Timor, the accused were mostly mid-to-low-level militants who participated in the killing of civilians. These cases would be less helpful for the construction of indirect co-perpetration to hold the high-level leaders responsible.

Other international instruments and case law also do not tend to support indirect co-perpetration. Bangladesh's International Crimes (Tribunal) Act 1973, as amended in 2009, provides that conspiracy to commit and complicity in the commission of international crimes are criminalised.[302] The Bangladesh tribunals criminalise the act of conspiracy and complicity, instead of attributing liability to the accused for the crimes committed by other executors. A leader is liable for the crime of conspiracy directly committed by him/herself. This *Act* with a broad scope of criminalised offences leaves no room for the development of indirect co-perpetration liability. Also, although the Extraordinary Chambers in the Courts of Cambodia (ECCC) aims to try senior leaders, the Law on the Establishment of the ECCC provides no general rule on liability as to different crimes falling under the jurisdiction of the court.[303] In practice, the two UN *ad hoc* tribunals' *Tadić* JCE

298 East Timor, Regulation for Special Panels for Serious Crimes 2000, § 14.3.

299 *Prosecutor v Jose Cardoso* (Judgment, District Court of Dili) SPSC-4c/2001 (5 April 2003), paras 367-71; *Prosecutor v Salvador Soares* (Judgment, District Court of Dili) SPSC-7a/2002 (9 December 2003) [*Salvador Soares* Judgment], paras 187-89. For decisions of joint criminal enterprise under section 14(3)(d), see *Prosecutor v Sisto Barros and Cesar Mendonca* (Judgment, District Court of Dili) SPSC-1/2004 (12 May 2005), paras 123-24, 134.

300 *Salvador Soares* Judgment, para 189.

301 *Prosecutor v João Sarmento* (Judgment, District Court of Dili) SPSC-18a/2001 (12 August 2003), paras 81-82; *Prosecutor v Domingos Mendonca* (Judgment and Dissenting Opinion, District Court of Dili) SPSC-18b/2001 (12 October 2003), paras 110-02; *The Prosecutor v de Carvalho* (Judgment, District Court of Dili) SPSC-10/2001 (18 March 2004), para 61.

302 Bangladesh, The International Crimes (Tribunals) Act 1973, amended 2009, §§ 3(2)(g)-(h), 4(1).

303 Law on the Establishment of the ECCC, 27 October 2004, arts 1-2, 4-8.

doctrine played a vital role in the cases of the ECCC.[304] Furthermore, article 3 of the Statute of the Special Tribunal for Lebanon (STL) and article 6(1) of the Statute of SCSL[305] provide rules similar to those in article 7(1) of the ICTY Statute concerning liability.[306] However, the STL denied the customary status of perpetration by means.[307]

5.5.6 Assessment and conclusions

After the adoption of the Rome Statute, the two UN *ad hoc* tribunals adopted the JCE approach. The ICTY and the ICTR first developed and clarified the liability of *Tadić* JCE. The tribunals in their subsequent cases rejected the liability of co-perpetratorship and indirect co-perpetration but introduced the liability of *Brđanin* JCE. *Brđanin* JCE has been adhered to by subsequent cases of the two tribunals. *Brđanin* JCE has also been accepted as a part of customary law by the two UN *ad hoc* tribunals, whereas it is highly criticised in academia. The ICC appears to interpret article 25(3)(a) as achieving a function similar to *Brđanin* JCE by using the notion of indirect co-perpetration. It should be emphasised that legal elements of *Brđanin* JCE are different from those of indirect co-perpetration required at the ICC.

This section shows that case law of the two tribunals supporting *Tadić* JCE is irrelevant to the analysis of indirect co-perpetration. Jurisprudence based on the *Brđanin* formulation of JCE, which combined *Tadić* JCE with indirect perpetration, generally supports indirect co-perpetration imposing liability on the accused at the leadership level. National laws and implementation legislation share more divergence than convergence, and there is little support for indirect co-perpetration. Instruments and cases of other international and national tribunals share the same feature. According to Cherif Bassiouni: 'it can hardly be said that the choice [in the Rome Statute] reflected a method of comparative legal analysis that is required to ascertain the existence of a general principle in the major legal systems of the world, reflecting the families of legal systems'.[308]

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304 Lachezar D. Yanev, 'The Theory of Joint Criminal Enterprise at the ECCC: A Difficult Relationship' in S. Meisenberg and I. Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia* (The Hague: TMC Asser Press 2016) 203-54.

305 Statute of the SCSL, art 6(1).

306 Statute of the Special Tribunal for Lebanon (Statute of the STL), attached to the Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon annexed to UN Security Council Resolution 1757, 30 May 2007, art 3(1). See also Rwanda, Law Setting up Gacaca Jurisdictions 2001, art 51.

307 Michael Scharf, 'Introductory Note to the Decision of the Appeals Chamber of the Special Tribunal for Lebanon on the Definition of Terrorism and Modes of Participation' (2011) 50 ILM 509, 601; STL 2011 Decision, paras 255-56.

308 Bassiouni, *Introduction to International Criminal Law* 286; M. Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 *Cornell Intl LJ* 443, 454.

These few instances of practice, as well as the ICC's adherence to indirect co-perpetration, would be helpful in the development of a similar to attribute liability under customary law. Nevertheless, it is difficult to conclude that the liability of indirect co-perpetration is widely recognised by States at the present time. Therefore, it is inconclusive to argue that these instances suffice to evince a firmly established customary rule, in particular, with all these elements set out by the ICC. Indirect co-perpetration is not part of the corpus of customary law. Article 25(3)(a) of the Rome Statute, thus, is not declaratory of customary law concerning indirect co-perpetration.

5.6 Concluding remarks

The way to assign liability to leaders, who are far from the scene of offences committed by physical executors, is a demanding issue in international criminal law. This Chapter focuses on article 25(3)(a) of the Rome Statute and indirect co-perpetration liability under customary law. The above analysis shows that article 25(3)(a) contains three forms of perpetration: direct perpetration, indirect perpetration, and co-perpetration. The notion of indirect co-perpetration is not subsumed in article 25(3)(a). Nevertheless, through an interpretation of article 25(3)(a) and by relying on the idea of joint control over an organisation, the ICC introduced indirect co-perpetration to deal with a situation in which the identity of the physical executor is unclear. Indirect co-perpetration is deemed a form of commission, and its legal elements derive from the elements of indirect perpetration and co-perpetration. This practice should not be ignored.

After analysing the post-World War II instruments and subsequent trials, this Chapter concludes that only few cases support indirect co-perpetration. Indirect co-perpetration was not firmly established in international criminal law before the adoption of the Rome Statute. If the crime committed falls within the scope of the common plan among the leaders, the newly developed indirect co-perpetration is very similar to part of *Brđanin* JCE I, but with different standards of mental and material elements. After analysing the cases of international and national tribunals, as well as national laws, the conclusion that a customary rule concerning indirect co-perpetration or an extensive construction of co-perpetration with the specific elements is emerging at the international level cannot be sustained. In conclusion, even assuming article 25(3)(a) of the Rome Statute covers indirect co-perpetration, article 25(3)(a) neither was declaratory nor is declaratory of a customary rule on indirect co-perpetration.

6 An Exception to Personal Immunity for International Crimes: Article 27(2) and Custom

6.1 Introductory remarks

This Chapter analyses the relationship between article 27(2) of the Rome Statute and customary international law on the issue of an exception to personal immunity for the commission of international crimes. Article 27(2) of the Rome Statute clearly provides that international immunities cannot bar the ICC from exercising its jurisdiction.[1] Some commentators have argued that 'the non-availability of international immunity rights *ratione materiae et personae* with respect to persons, as articulated in article 27(2), is declaratory of customary international law'.[2] In contrast, the African Union (AU) commented that under customary law sitting heads of State are granted immunities before an international court.[3] Meanwhile, the ICJ in its 2002 *Arrest Warrant* case said that it could not 'conclude that any such an exception exists in customary international law in regard to national courts'.[4] A question would arise whether a customary rule exists claiming non-availability of personal immunity for committing international crimes.

The central issue here is whether article 27(2) of the Rome Statute was and is declaratory of a customary rule about non-availability of personal immunity. The sub-questions are whether: (1) article 27(2) was declaratory of a pre-existing or emerging customary rule permitting an exception to per-

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1 1998 Rome Statute, art 27.

2 Claus Kreß and Kimberly Prost, 'Article 98' in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2125; *The Prosecutor v Al Bashir* (Request by Professor Claus Kreß with the assistance of Erin Pobjie for leave to submit observations on the merits of the legal questions presented in 'The Hashemite Kingdom of Jordan's appeal against the "Decision under Article 87(7) of the Rome Statute"') ICC-02/05-01/09-346 (30 April 2018), para 5; Paola Gaeta and Patryk I. Labuda, 'Trying Sitting Heads of State: The African Union versus the ICC in the Al Bashir and Kenyatta Cases' in C.C. Jalloh and I. Bantekas (eds), *The International Criminal Court and Africa* (Oxford: OUP 2017) 149.

3 Extraordinary Session of Assembly of the African Union, 'Decision on Africa's Relationship with the International Criminal Court (ICC)', Ext/Assembly/AU/Dec.1 (October 2013), §§ 9-10; *The Prosecutor v Al Bashir* (The African Union's Submission in the Hashemite Kingdom of Jordan's Appeal Against the Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir) ICC-02/05-01/09-370 (16 July 2018) [African Union's Submission], para 10.

4 *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*), Judgment, [2002] ICJ Rep 3 [2002 *Arrest Warrant* case of the ICJ], 24, para 58.

sonal immunity at the time when the Rome Statute was adopted; and (2) article 27(2) is declaratory of a customary rule leading to a denial of personal immunity for committing international crimes.

For this purpose, section 6.2 briefly addresses the regime of immunity in international law and examines challenges to this legal system. The text of article 27(2) of the Statute is discussed in section 6.3, which stipulates an exception to the customary rule respecting personal immunity of senior officials. The preparatory works of article 27 and other texts relating to immunity are also analysed in this section. It appears that article 27(2) was not declaratory of a 'pre-existing customary rule' permitting an exception to personal immunity from arrest. Section 6.4 examines the practice of personal immunity before the adoption of the Rome Statute and argues that a customary rule of no personal immunity from arrest was not established or emerging. Lastly, section 6.5 observes positions and practice after the adoption of the Rome Statute to evaluate whether the practice enshrined in the text of article 27(2) has been sufficiently developed and accepted as a modified (new) customary rule. The evidence examined in this section includes the jurisprudence of international criminal tribunals, national legislation and cases, as well as the resolutions of the UN Security Council and the International Law Commission's work. Section 6.5 argues that it is now immature for a rule as set out in article 27(2) to emerge under customary law, providing an exception to personal immunity from arrest for the commission of international crimes. Chapter 6 concludes that article 27(2) of the Rome Statute neither was of a declaratory nature nor is declaratory of a customary rule providing an exception to absolute personal immunity from arrest for committing international crimes.

6.2 Immunity under international law

This section first briefly examines the well-developed regime of immunity under international law and then explains challenges to immunities for the commission of international crimes.

6.2.1 Regime of immunity in international law

State immunity is generally considered as a doctrine of customary international law.[5] It derives from the principle of sovereignty and equality that '*par in parem imperium non habet*'.[6] In the 1812 *Exchange v McFaddon*, the US Chief Justice Marshall explained that:

5 Xiaodong Yang, *State Immunity in International Law* (New York: CUP 2012) 34.

6 Bartolus de Saxoferrato, *Tractatus de regimine civitatis* (1354), cited in Peter-Tobias Stoll, 'State Immunity' in R. Wolfrum (ed) (2011) *MPEPIL*, para 4. *Contra* Yang, ibid, 44-58.

> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.[7]

Thus, States and their property are exempted from the local jurisdiction of another State.[8]

In the modern era, the ruler of a State differs from a State entity under international law. In order to ensure the function of foreign States, such as serving diplomats and other officials abroad for specific missions, individuals are also entitled to immunity from the jurisdiction of receiving States.[9] These persons enjoy either diplomatic immunity or head of State immunity. Diplomatic immunity derives from the function, while the immunity of a sitting head of State also comes from its status.[10] As Arthur Watts has written, heads of State enjoy immunity for their functional need as well as the 'considerations that they are the personification of their States' in international relations.[11]

The immunity a person enjoys is divided into two categories: functional immunity (immunity *ratione materiae*) relating to acts of agents of State, and personal immunity (immunity *ratione personae*) attaching to particular office-holders. Functional immunity means that all State officials enjoy immunity for their acts of State in connection with the exercise of their official functions, and receiving States must respect their immunity from local jurisdiction. Personal immunity indicates that sitting senior officials are immune from legal proceedings of foreign courts for their acts in office, including their actions on behalf of the State and private acts.[12] Although personal immunity is controversial for high-ranking diplomats, generally senior State officials, namely, foreign ministers, heads of governments and heads of State enjoy it.[13]

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7 *Schooner Exchange v McFaddon*, 11 U.S. 116 (1812), p 137. See also *Al-Adsani v UK* (Judgment) ECtHR Application No. 35763/97 (21 November 2001), 123 ILR 24, para 54, it is about immunity in civil proceedings.

8 Stoll, 'State Immunity', paras 4-12.

9 Chanaka Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organisations' in M. Evans (ed), *International Law* (Oxford: OUP 2010) 381-82.

10 Stoll, 'State Immunity', para 79.

11 For the notion of heads of State, see Arthur Watts, 'Heads of State' in R. Wolfrum (ed) (2010) *MPEPIL*, paras 1-4.

12 *Prosecutor v Blaškić* (Judgement on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997) ICTY-95-14-AR108*bis* (29 October 1997), para 38; Andrea Bianchi, 'Immunity versus Human Rights: The Pinochet Case' (1999) 10 *EJIL* 237, 262-65.

13 'Report of the International Law Commission', GAOR 63rd Session Supp No 10, UN Doc A/63/10 (2008), para 307; Arthur Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 *Recueil des cours* 100, Chapter III; 2002 *Arrest Warrant* case of the ICJ, 20, para 51. For further discussions, see Malcolm Shaw, *International Law* (8th edn, Cambridge: CUP 2017) 1211-13.

Compared with functional immunity, personal immunity covers a narrower range of actors, but a wider range of acts. Personal immunity is practically absolute in criminal cases. In addition, functional immunity never ceases for shielded people, while personal immunity exists as long as the person is in office and lapses when the person leaves office. Serving foreign ministers, heads of governments and heads of State abroad enjoy both functional and personal immunities. Sitting presidents, therefore, can invoke both immunities to challenge criminal proceedings of other States for their official and private acts carried out before or during their period of office. If a president were out of office, s/he cannot enjoy personal immunity but may still invoke functional immunity for his/her official acts during his/her period of office.

Some of these ideas are restated in international instruments, such as the Vienna Convention on Diplomatic Relations,[14] the UN Convention on Special Missions[15] and the UN Convention on Jurisdictional Immunities of States and Their Property.[16] The rule of personal immunity of senior officials is generally recognised in customary international law, although it has not been stipulated in a multilateral treaty.[17] The international immunity is a veil

14 Vienna Convention on Diplomatic Relations, 18 April 1961, 24 April 1964, 500 UNTS 95, arts 39(2) and 29.

15 Convention on Special Missions, 8 December 1969, 21 June 1985, 1400 UNTS 23, arts 21 and 29.

16 United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted on 2 December 2004, but has not yet entered into force.

17 Jurisdictional Immunities of the State Judgment, 122, para 53; *Case concerning Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v France*), Judgment, [2008] ICJ Rep 177 [Questions of Mutual Assistance Judgment], 236, 238, paras 170, 174; 2002 *Arrest Warrant* case of the ICJ, 11, 21, paras 20-21, 52; *Al-Adsani v UK* (Judgment), para 54; Asad Kiyani, 'Al-Bashir & the ICC: The Problem of Head of State Immunity' (2013) 12 *Chinese J Intl L* 467, 472-74; 'Second report on immunity of State officials from foreign criminal jurisdiction, by Roman Anatolevich Kolodkin, Special Rapporteur', UN Doc A/CN.4/631 (2011), paras 90-93, 'preliminary report', UN Doc A/CN.4/601, paras 30-31; Xiumei Wang, 'The Immunity of State Officials from Foreign Criminal Jurisdiction' (2010) 30 *Journal of Xi'an Jiaotong University* (*Social Sciences*) 67, 69; Roozbeh Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates' (2010) 21 *EJIL* 173, 189; Daniel Singerman, 'It's Still Good to Be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity' (2007) 21 *Emory Intl L Rev* 413; Kerry O'Neill, 'A New Customary Law of Head of State Immunity?: Hirohito and Pinochet' (2002) 38 *Stanford J Intl L* 289; Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', 36-37; Paola Gaeta, 'Official Capacity and Immunities' in A. Cassese *et al* (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP 2002) 979; Bianchi, 'Immunity versus Human Rights: The Pinochet Case'; Marian Nash Leich, 'Contemporary Practice of the United States Relating to International Law' (1983) 77 *AJIL* 298, 306. For more discussions in recent literatures, see Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford: OUP 2008); Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Leiden: Brill 2015) 304-07. But see 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert), paras 8-39.

protecting officials for their acts from the jurisdiction of other States, rather than their domestic authority.[18] If home States decide to initiate proceedings against these people at their national courts, no question of international immunity will arise at all. In addition, local legal proceedings would be permitted when appropriate authorities have expressly waived these immunities.[19]

6.2.2 Challenges to immunity for committing international crimes

Recently, challenges to immunities have arisen. This subsection analyses challenges to immunities and theories to invalidate immunities.

6.2.2.1 Challenges to immunity

Alongside the development of international criminal law and the prosecution of international crimes, there has been controversy about the scope and the applicability of absolute immunity.[20] If senior officials are alleged to have committed core international crimes, such as war crimes, crimes against humanity and genocide, do they continue to enjoy immunity from arrest and detention? One argument is that it would be too great an interference with other States and the conduct of international relations of sitting senior officials to be subject to other States' jurisdiction.[21] By contrast, Antonio Cassese explained that:

> In the present international community respect for human rights and the demand that justice be done wherever human rights have been seriously and massively put in jeopardy, override the principle of respect for state sovereignty. The new thrust towards protection of human dignity has shattered the shield that traditionally protected state agents.[22]

The ILC in a commentary to the 1996 *Draft Code of Crimes* observed that:

> It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security.[23]

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18 Bianchi, 'Immunity versus Human Rights: The Pinochet Case'.

19 Vienna Convention on Diplomatic Relations, art 33. Although State officials are immune for their official actions on behalf of a State, a State, to which the wrongful official acts are attributable, might be held liable for such behaviour.

20 Bianchi, 'Immunity versus Human Rights: The Pinochet Case'; UN Doc A/CN.4/631 (2011), paras 90-93.

21 *R v Bartle, Evans and Another and the Commissioner of Police for the Metropolis and Other, Ex Parte Pinochet* (Judgment) [2000] 1 AC 147 (24 March 1999), [1999] UKHL 17, 38 ILM 581 (1999) [*R v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999)], *Lord Millett*, p 644.

22 Cassese *et al* (eds), *Cassese's International Criminal Law* 246.

23 UN A/51/10 (1996), para 50, pp 26-27, commentary to art 7, § (1).

Some scholars have also argued that the person who initiates and plans these crimes should be prosecuted,[24] whereas the immunity of senior officials against criminal prosecution seems to be inconsistent with the goal to end impunity. In these circumstances, different proposals have been advanced to remove immunities for the commission of international crimes.[25]

These challenges are not merely theories. An evaluation of these challenges may occur in certain contexts. For example, the issue of immunity arose when Belgium planned to exercise universal jurisdiction over a foreign minister of Congo for alleged international crimes.[26] Serving senior officials immunities seem to prevent the exercise of universal jurisdiction to narrow the impunity gap.[27] In addition, debates about personal immunity may also arise when a head of a non-party State to the Rome Statute is involved in ICC proceedings. In 2005, the UN Security Council through its Resolution 1593, referred the Darfur, Sudan Situation to the ICC.[28] The ICC issued two arrest warrants for Al Bashir, a sitting president of Sudan, for alleged war crimes, crimes against humanity and genocide during the Darfur conflict.[29] The execution of the two warrants is still pending. If Al Bashir were arrested and surrendered to the Court by a State Party, this rare situation might give rise to the question whether that State violated the customary rule respecting personal immunity from arrest enjoyed by a sitting head of a non-party State. These considerations and challenges call for an analysis of proposals that disregard international immunities in specific situations.[30]

24 2002 *Arrest Warrant* case of the ICJ (Joint Separate opinion of Judges Higgins, Kooijmans and Buergenthal), para 8.

25 Andrew Clapham, *Brierly's the Law of Nations* (7th edn, Oxford: OUP 2012) 273-77.

26 2002 *Arrest Warrant* case of the ICJ.

27 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert), paras 16-19.

28 UN Doc S/RES/1593 (2005).

29 *The Prosecutor v Al Bashir* (Warrant of Arrest for Omar Hassan Ahmad Al Bashir, PTC I) ICC-02/05-01/09-1 (4 March 2009) [First Warrant of Arrest for *Al Bashir*], para 41; *First Warrant of Arrest* Decision for *Al Bashir*, para 45; *The Prosecutor v Al Bashir* (Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', A Ch) ICC-02/05-01/09-73 (3 February 2010); *The Prosecutor Al Bashir* (Second Decision on the Prosecution's Application for a Warrant of Arrest, PTC I) ICC-02/05-01/09-94 (12 July 2010); *The Prosecutor v Al Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, PTC I) ICC-02/05-01/09-95 (12 July 2010).

30 For other scenarios, see Triffterer and Burchard, 'Article 27', 1042.

6.2.2.2 Theories to repudiate immunities

There are some theories on lifting international immunities. One view argues that former senior officials cannot invoke functional immunity as a challenge in criminal proceedings before a competent court.[31] There are various rationales for abrogating functional immunity from a customary rule perspective. Firstly, one view claims that international crimes are not within the ambit of governmental functions but are private acts falling outside immunity protection.[32] Based on this private acts argument, functional immunity cannot be invoked for committing international crimes.[33] Other commentators argue that functional immunity cannot be circumvented through the idea of private acts. In their view, an exception exists to the customary rule of respecting functional immunity for the commission of international crimes (for example, war crimes, crimes against humanity and genocide).[34] Cassese neither supported the private acts argument nor adopted the idea of an exception.[35] He argued that if there is a new rule of customary law for committing international crimes, offences of international crimes are not immune from jurisdiction by invoking functional immunity. The idea of an exception indicates the modification of the traditional customary rule respecting absolute personal immunity, while Cassese's viewpoint demands the establishment of a new customary rule. The exceptional idea and the new rule view, in effect, are similar to each other.

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31 2002 *Arrest Warrant* case of the ICJ, 25-26, para 61; Kreß and Prost, 'Article 98', 2126-27.

32 *R v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999), Lord Browne-Wilkinson, p 595, Lord Hutton, p 638. See also Rosanne van Alebeek, 'National Courts, International Crimes and the Functional Immunity of State Officials' (2015) 59 *Netherlands Intl L Rev* 5, 18-19; 'Report of the International Law Commission', UN Doc A/46/10 (1991), pp 12, 15, 18 and 22; 2002 *Arrest Warrant* case of the ICJ, 25-26, para 61. *Contra* 2002 *Arrest Warrant* case of the ICJ (Joint Separate opinion of Judges Higgins, Kooijmans and Buergenthal) pp 63-90; 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert), para 36; Claus Kreß, 'Reflections on the *Iudicare* Limb of the Grave Breaches Regime' (2009) 7 *JICJ* 789, 803-04.

33 For criticism of this view, see Andrea Gattini, 'War Crimes and State Immunity in the *Ferrini* Decision' (2005) *JICJ* 224, 234 and fn 41.

34 *R v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999), Lord Hope of Craighead, p 626, Lord Saville of Newdigate, p 643, Lord Millett, p 651, Lord Phillips of Worth Matravers, p 661; 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert), para 36; 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge Al-Khasaweh), para 6; *Jones v Ministry of Interior for the Kingdom of Saudi Arabia et al* (Opinions of the Lords of Appeal for Judgement in the Cause), [2006] UKHL 26, [2006] 2 WLR 1424, [2007] 1 AC 270 (14 June 2006), [*Jones v Saudi Arabia and et al*, [2006] UKHL 26], Lord Hoffmann, para 85; Antonio Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case' (2002) 13 *EJIL* 853, 866-69.

35 Cassese *et al* (eds), *Cassese's International Criminal Law* 247-48; Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', 864, 870-75.

Although no consensus exists among scholars on the approach to lifting functional immunity, it is less controversial that State officials cannot invoke functional immunity in criminal proceedings of foreign States for alleged international crimes.[36] The issue of 'Immunity of State officials from foreign criminal jurisdiction' is on the ILC's agenda. Draft article 7 of the Fifth Report under the title of 'crimes in respect of which immunity does not apply' provides exceptions to functional immunity in relations to some crimes.[37] A large majority of the Commission has voted in favour of this draft article.[38]

It remains debatable whether a sitting senior official continues to enjoy personal immunity when the person is suspected of committing an international crime. If the official still enjoys personal immunity, local authorities of another State cannot exercise jurisdiction. The ICC and academics have developed several theories to deal with the tension between impunity and personal immunity, for example, waiver of immunity through signing treaties or UN Security Council resolutions, and a new customary rule of

36 Darryl Robinson, 'Immunities' in R. Cryer *et al* (eds), *An Introduction to International Criminal Law and Procedure* 540-65; Clapham, *Brierly's the Law of Nations* 276-77; Otto Triffterer and Christoph Burchard, 'Article 27' in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (3rd edn, Munich: Hart/Beck 2016) 1052; Kreß and Prost, 'Article 98', 2127; Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 *AJIL* 407, 413; Gaeta, 'Official Capacity and Immunities', 981-83; Kreß, 'Reflections on the *Iudicare* Limb of the Grave Breaches Regime', 803-05; Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 156-91, 307-08; Cassese *et al* (eds), *Cassese's International Criminal Law* 240-47. *Prosecutor v Milošević* (Decision on Preliminary Motions) ICTY-02-54-PT (8 November 2001); *Prosecutor v Krstić* (Judgement) ICTY-98-33-A (1 July 2003) [*Krstić* Appeals Chamber Judgment], para 26; *Mario Luiz Lozano v the General Prosecutor for the Italian Republic* (Sentence, Supreme Court of Cassation) 31171/2008, ILDC 1085 (IT 2008), paras 6-7; *Re Hilao and ors v Estate of Ferdinand Marcos* (Interlocutory Appeal Decision), 25F 3d 1467 (9th Cir 1994), para 28; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (Opinions of the Lords of Appeal for Judgement in the Cause), [1998]3 WLR 1456, [1998] UKHL 41 (25 November 1998) [*R v Ex Parte Pinochet et al* (No 1), [1998]3 WLR 1456]; *R v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999), Lord Browne-Wilkinson, p 595, Lord Millett, p 652; Institute of International Law, Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, Vancouver 2001/II (IIL Vancouver Resolution), art 13 (2). But see James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford: OUP 2012) 500; UN Doc A/CN.4/631 (2011), para 33 and fn 75.

37 'Fifth report on immunity of State officials from foreign criminal jurisdiction, by Special Rapporteur, Concepción Escobar Hernández', UN Doc A/CN.4/701 (2016), para 220.

38 UN Doc A/72/10 (2017), para 74, pp164-65. Eight members from Algeria, China, France, German, India, the Russia Federation, the UK, and the US voted against draft article 7 about the exception to functional immunity.

non-availability of personal immunity.[39] The issue of whether violations of *jus cogens* can repudiate personal immunity in criminal proceedings also deserves discussion but digresses from the focus of this Chapter.[40]

This Chapter qualifies personal immunity enjoyed by senior serving officials: heads of State, heads of government or ministers of foreign affairs. The premise of this Chapter is that competent authorities must respect personal immunity of sitting senior officials under customary law unless appropriate authorities collectively agree to remove it or separately waive it through a treaty or an explicit declaration.[41] This Chapter examines the relationship between article 27(2) of the Rome Statute and custom concerning personal immunity for committing international crimes. For this purpose, the next section examines the text of article 27(2) of the Rome Statute.

39 *Al Bashir Malawi* Cooperation Decision 2011, para 43; *Al Bashir Chad* Cooperation Decision 2011; *The Prosecutor v. Al Bashir* (Transcript, AC) ICC-02/05-01/09-T-4-ENG, ICC-02/05-01/09-T-5-ENG, ICC-02/05-01/09-T-6-ENG (10-12 September 2018); Dov Jacobs, 'The Frog That Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation' in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford: OUP 2015) 281-304. For a waiver-based approach, see Akande, 'International Law Immunities and the International Criminal Court'; Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) 7 *JICJ* 333; Cedric Ryngaert and Michiel Blommestijn, 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity' (2010) 5 *ZIS* 428, 435-38; *The Prosecutor v Al Bashir* (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, PTC II) ICC-02/05-01/09-195 (9 April 2014) [*Al Bashir DRC* Cooperation Decision 2014]. Custom-based approach, see Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *JICJ* 315, 320; Jordan Paust, 'Genocide in Rwanda, State Responsibility to Prosecute or Extradite, and Nonimmunity for Heads of State and Other Public Officials' (2011) 34 *Houston J Intl L* 57, 71-84; Kreß and Prost, 'Article 98', 2125, 2128-39; Watts, 'Heads of State', paras 10-11; Claus Kreß, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute' in M. Bergsmo and Y. Ling (eds), *State Sovereignty and International Criminal Law*, 223; Triffterer and Burchard, 'Article 27', 1041-42, 1053-54.

40 For discussions, see *Al-Adsani v UK* (Judgment) ECtHR Application No. 35763/97 (21 November 2001) 123 ILR 24, para 54; *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Rwanda*), Jurisdiction and Admissibility, Judgment, [2006] ICJ Rep 6, 32, para 64; *Jones v Saudi Arabia and et al*, [2006] UKHL 26; *Jurisdictional Immunities of the State Judgment*, 140-41, paras 93, 95; Bingbing Jia, 'Immunity for State Officials from Foreign Jurisdiction for International Crimes' in M. Bergsmo and Y. Ling (eds), *State Sovereignty and International Criminal Law*, 88-92.

41 Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*; 2002 *Arrest Warrant* case of the ICJ, 20-21, paras 51-52.

6.3 Personal immunity: article 27(2) of the Rome Statute

Article 27 of the Rome Statute under the title of 'the irrelevance of official capacity' stipulates that:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

This section analyses different understandings of article 27 to survey whether article 27(2) departs from or restates a customary rule. This section first reviews the interpretation of article 27(2) in connection with article 27(1) and then observes the scope of personal immunity embedded in article 27(2). Last, it examines the structure of the Rome Statute about immunity.

6.3.1 Understanding of articles 27(1) and (2): personal immunity

A plain reading of article 27(2) shows that 'immunities under international law' do not 'bar the ICC from exercising its jurisdiction' over the person who enjoys such immunities. This reading means that personal immunities attaching to an individual in international law are irrelevant to the ICC's jurisdiction for alleged crimes falling within its jurisdiction. By comparison with article 27(1), further clarification of the purport of article 27(2) is necessary to clarify which provision covers the issue of personal immunity in international law.

Different views exist among scholars about the interpretation of the two paragraphs in article 27. Some commentators argue that article 27(1) includes both the principle of individual criminal responsibility and the principle of no immunity for international crimes.[42] Others consider that article 27(1) demonstrates the consent of States Parties to remove either personal or functional immunity of their representatives, while article 27(2) affirms the absence of immunities in ICC proceedings.[43] Both viewpoints, however, do not reflect the drafters' intention. The text of article 27(1) echoes the principle of individual criminal responsibility. This principle has repeatedly been provided, in article 7 of the Nuremberg Charter,[44] article 6 of the

42 Clapham, *Brierly's the Law of Nations* 274 and fn 162.

43 Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 248-50; Cassese *et al* (eds), *Cassese's International Criminal Law* 240-47, 318-19.

44 Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, (1951) 82 UNTS 284 [Nuremberg Charter].

Tokyo Charter,[45] the judgments of the IMT and the IMTFE, Principle III of 1950 ILC Nuremberg Principles, articles 7(2) and 6(2) of the Statutes of the ICTY and the ICTR, and article 7 of the ILC's 1996 Draft Code of Crimes.[46] These rules concern official capacity as a substantive defence for individual responsibility as opposed to State responsibility.

In contrast to article 27(1), no predecessor of article 27(2) existed in these instruments mentioned above.[47] It seems that article 27(2) was initially inserted to avoid immunities prejudicing the principle of individual criminal responsibility before the ICC as set out in article 27(1). During the Preparatory Committee's first two sessions, some States expressed concerns about the 'question of diplomatic or other immunity from arrest and other procedural measures taken by or on behalf of the Court'.[48] The Preparatory Committee compiled two proposals on this issue.[49] The first proposal provided that '[i]n the course of investigation or procedures performed by, or at request of the Court, no person may make a plea of immunity from jurisdiction irrespective of whether on the basis of international or national law'. The second proposal stated that '[t]he special procedural rules, the immunities and the protection attached to the official capacity of the accused and established by internal law or by international conventions or treaties may not be used as a defence before the Court'.[50]

Later on, this paragraph was rephrased as '[a]ny immunities or special procedural rules […] may not be relied upon to prevent the Court from exercising its jurisdiction in relation to that person'. In a footnote to this paragraph, the Preparatory Committee pointed out that it 'would be required in connection with procedure as well as international judicial cooperation'.[51] This paragraph with the text of the footnote was repeated in subsequent Drafts, while the phrase 'procedure as well as' was deleted in a later footnote.[52] The examination of the preparatory works indicates that article 27(2) was inserted to remove immunities in national and international law as a potential substantive defence to individual liability, but it was finally included to remove immunities or other procedural bars of State officials.

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45 Tokyo Charter, 4 Bevans 21.

46 UN Doc A/51/10(1996), para 50, p 27, commentary to art 7, § (4)-(5).

47 UN Doc A/49/10 (1994), pp 20-73.

48 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc A/51/22 (1996), Vol I, para 85.

49 ibid.

50 ibid.

51 'Decision taken by the Preparatory Committee at its Session held from 11 to 21 February 1997' (12 March 1997), UN Doc A/AC.249/1997/L.5, p 22 and fn 14.

52 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen' (4 February 1998), Netherlands, UN Doc A/AC.249/1998/L.13, pp 54-55 and fn 86; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (14 April 1998), UN Doc A/CONF.183/2, pp 31-32 fn 77.

In discussing article 27(1), the drafters also mentioned 'immunity'.[53] However, it is unclear what mode of immunity the drafters had in mind: immunity in national or in international law.[54] Since functional immunity amounts to a substantive defence to liability, the immunities under international law might be considered.[55] The drafters may have considered the removal of functional immunity for the violation of international law.[56] This viewpoint explains why some scholars support an interpretation whereby article 27(1) includes immunity in international law.[57] In addition, one may note that the ILC considered the issue of personal immunity in its commentary on the 1996 *Draft Code of Crimes*. Article 7 of the *Draft Code of Crimes* concerning 'official position and responsibility' provides that 'the official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment'. The ILC observed that

> Article 7 is intended to prevent an individual who has committed a crime against the peace and security of mankind from invoking his official position as a circumstance absolving him from responsibility or conferring any immunity upon him, […]. […] As further recognised by the Nurnberg Tribunal in its Judgment, the author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.[58]

Based on this interpretation, one may conclude that the absence of personal immunity is contemplated by article 27(1) of the Rome Statute, while article 27(2) merely confirms the non-availability of personal immunity.

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53 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 595.

54 Schabas, *An Introduction to the International Criminal Court* 244.

55 Jacobs, 'The Frog That Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation'; Cassese *et al* (eds), *Cassese's International Criminal Law* 240-47, 318-19; Princeton Project on Universal Jurisdiction, 'The Princeton Principles on Universal Jurisdiction' (2001), pp 48-49.

56 The *Prosecutor v Kenyatta* (Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, TC V (b)) ICC-01/09-02/11-830 (18 October 2013), paras 66, 70, 98; Eve La Haye, 'Article 49-Penal Sanctions' in ICRC (ed), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge: CUP 2016), para 2877.

57 Clapham, *Brierly's the Law of Nations* 274 and fn 162; Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 248-50; Cassese *et al* (eds), *Cassese's International Criminal Law* 240-47, 318-19.

58 UN Doc A/51/10(1996), para 50, p 27, commentary to art 7, § (6) (citations omitted). For a similar view, see *Ruto & Sang* Acquittal Decision 2016 (Reasons of Judge Eboe-Osuji), paras 263, 286-87.

Yet, the ILC's commentary does not strongly support this conclusion for two main reasons. Firstly, the IMT judgment does not indicate that the absence of procedural immunity is also embedded in article 7 of the Nuremberg Charter, or in article 27(1) of the Rome Statute. The doctrine of State consent, indicating Germany's waiver of personal immunity, played a role in establishing the IMT as well as its prosecution, which will be clarified in detail below in section 6.4.2. Secondly, the ILC proposed disregarding procedural immunities in 'appropriate judicial proceedings', for example, 'before an international criminal court' for committing international crimes.[59] This idea of the absence of personal immunity is expressly articulated in article 27(2) of the Rome Statute. Relying upon the preparatory works of the Rome Statute, it is more persuasive to conclude that article 27(2) instead of article 27(1) directly affects personal immunity.[60]

Further explanations of the relationship between individual criminal responsibility and the jurisdiction of the ICC provide another perspective to understand the two paragraphs of article 27. As pointed out by Judge Liu, '[w]hile […] a head of state cannot escape criminal responsibility and that this can be considered a rule of customary international law, it does not mean that person no longer has immunity from the jurisdiction of the ICC'.[61] The existence of jurisdiction is the precondition for the exercise of jurisdiction, while the existence of jurisdiction does not mean that jurisdiction would be exercised. Although Judge Liu aimed to distinguish the existence of jurisdiction from its exercise, this statement is also true with respect to a distinction between substantive criminal responsibility and procedural defences.[62]

Simply put, it is undeniable that sitting senior officials shall be criminally responsible for conducts, regardless of their official capacity.[63] The recognition of individual criminal responsibility is also a prerequisite for the acknowledgement of an exception to personal immunity. However, recognising individual criminal responsibility does not mean that immunity is automatically lifted before a court and an individual would be arrested and

59 ibid, fn 69: 'Judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or procedural immunity based on his official position to avoid prosecution and punishment.'

60 Kreß and Prost, 'Article 98', 2125; Jacobs, 'The Frog That Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation'; Gaeta, 'Official Capacity and Immunities', 978; Akande, 'International Law Immunities and the International Criminal Court', 419-20; Salvatore Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Gaddafi* Case before the French Cour de Cassation' (2001) 12 *EJIL* 595.

61 Daqun Liu, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?' in M. Bergsmo and Y. Ling (eds), *State Sovereignty and International Criminal Law* 64.

62 *Krstić* Appeals Chamber Judgment (Dissenting Opinion of Judge Shahabuddeen), paras 7-9.

63 Jacobs, 'The Frog That Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation'.

prosecuted by disregarding a procedural defence (personal immunity) to exercise jurisdiction. The Rapporteur of the ILC on the subject of 'Immunity of State officials from foreign criminal jurisdiction' has clarified that immunity from criminal jurisdiction 'is procedural and not substantive in nature' and it means 'immunity from criminal process or from criminal procedure measures and not from the substantive law of the foreign State'. [64] A competent local jurisdiction cannot arrest or detain a person unless personal immunity is waived or removed by appropriate authorities or through a treaty[65] or by a Security Council resolution.[66] The immunities, in effect, prevent a tribunal from exercising jurisdiction to determine liability for crimes.[67] Article 27(2) indirectly confirms the idea that a person enjoying functional immunity and acting in an official capacity cannot invoke immunities to oppose individual responsibility or to reduce punishment. Meanwhile, the text of article 27(2) mainly serves a function in removing procedural immunity before the ICC.[68] The distinction between article 27(1) (irrelevance of official capacity to individual responsibility) and article 27(2) (irrelevance of personal immunity to the exercise of jurisdiction) should be kept in mind.[69]

To sum up, article 27 covers two different issues. Article 27(1) addresses the removal of a substantive defence to individual criminal responsibility, while article 27(2) concerns immunities as procedural barriers to the ICC's exercise of jurisdiction.[70] The drafting history of article 27 confirms this distinction. Article 27(1) endorses the principle of individual criminal responsibility for international crimes and dismissed immunity derived from

64 'Preliminary Report on immunity of State officials from foreign criminal jurisdiction, by Special Rapporteur Roman Anatolevich Kolodkin', UN Doc A/CN.4/601 (2008), para 102 (f) and (g).

65 Cassese *et al* (eds), *Cassese's International Criminal Law* 321-22; 2002 *Arrest Warrant* case of the ICJ, 24-26, paras 59-61.

66 *R v Ex Parte Pinochet et al* (No 1), [1998]3 WLR 1456, Dissenting opinion of Lord Slynn of Hadley, p 1474; R *v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999), Dissenting opinion of Lord Goff of Chieveley, p 599.

67 Jacobs, 'The Frog That Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation'; Liu, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?'.

68 2002 *Arrest Warrant* case of the ICJ, 24-25, paras 58-60.

69 Camilla Lind, 'Article 27' in M. Klamberg (ed), *The Commentary on the Law of the International Criminal Court* (Brussels: Torkel Opsahl Academic EPublisher 2017), confusing the two paragraphs.

70 Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', 863; Akande, 'International Law Immunities and the International Criminal Court'; Jacobs, 'The Frog That Wanted to Be an Ox: The ICC's Approach to Immunities and Cooperation'; William A. Schabas, 'The Special Tribunal for Lebanon: Is a 'Tribunal of an International Character' equivalent to an 'International Criminal Court'?' (2008) 21 *Leiden J Intl L* 513, 526; Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 596-600; Cassese *et al* (eds), *Cassese's International Criminal Law* 240-47, 318-22; the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, EX.CL/846 (XXV), Annex 5, 1 July 2014 and STC/Legal/Min/7 (I) Rev 1, 15 May 2014, arts 46A*bis* (Immunities) and 46B (individual criminal responsibility).

national law and international law, at most, including functional immunity.[71] The text of article 27(2) addresses the idea of non-availability of personal immunity.

6.3.2 Scope of personal immunity in article 27(2)

Another issue concerns the scope of personal immunity in article 27(2). As the text of article 27(2) suggests, possible invocation of personal immunity is *de facto* rejected at the ICC. By ratifying the Rome Statute, States Parties agreed to end absolute personal immunity before the ICC ('vertical personal immunity').[72] One issue that arises here is whether article 27(2) also includes a derogation from the customary rule of 'personal immunity from arrest' between or among States Parties ('horizontal personal immunity').

The first view is that personal immunity under article 27(2) is limited to vertical personal immunity. It means that no personal immunity may be invoked in the ICC's preliminary proceedings of investigation and its issuance of arrest warrants, as well as prosecution once the person concerned is before the ICC. The horizontal personal immunity from arrest by a State Party is therefore untouched in article 27(2).[73] The second opinion argues that personal immunity under article 27(2) contains both vertical personal immunity before the ICC and horizontal personal immunity from arrest amongst States Parties. Supporters interpret the immunities in a general sense, including any immunities for the purpose of ICC proceedings.[74]

The Pre-Trial Chamber of the ICC in its case law has never supported the first restrictive interpretation of personal immunity in article 27(2). For the effectiveness of ICC proceedings, States Parties vertically waived their immunities before the ICC, and they also waived the horizontal personal immunity from arrest before the jurisdiction of other States Parties in pro-

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71 *Krstić* Appeals Chamber Judgment (Dissenting Opinion of Judge Shahabuddeen), paras 7-9.

72 Akande, 'International Law Immunities and the International Criminal Court', 424.

73 Helmut Kreicker, *Völkerrechtliche Exemtionen Grundlagen und Grenzen Völkerrechtlicher Immunitäten Und Ihre Wirkungen Im Strafrecht* (International Law Exemptions: Fundamentals and Limitations of International Immunities and their Effects in Criminal Law), Vol II (Berlin: Max Planck Institute 2007) 1391, cited in Kreß and Prost, 'Article 98', 2125 and fn 43; Gaeta and Labuda, 'Trying Sitting Heads of State: The African Union versus the ICC in the *Al Bashir* and *Kenyatta* Cases', 147-48; *The Prosecutor v Al Bashir* (The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir") ICC-02/05-01/09-326 (12 March 2018) [Jordan's Appeal], paras 15-21; *The Prosecutor v Al Bashir* (The League of Arab States' Observations on the Hashemite Kingdom of Jordan's appeal against the "Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir") ICC-02/05-01/09-367 (16 July 2018), para 26.

74 Triffterer and Burchard, 'Article 27', 1053; Kreß and Prost, 'Article 98', 2125; Bruce Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law (Oxford: OUP 2004) 144.

ceedings governed by the Rome Statute. The Pre-Trial Chamber has generally upheld the second interpretation.[75] In its recent decisions, the ICC has supported the two-fold function of immunity in article 27(2). In its view, article 27(2) serves two functions:

> […] (i) it prevents States Parties from raising any immunity belonging to it under international law as a ground for refusing arrest and surrender of a person sought by the Court (vertical effect); and (ii) it prevents States Parties from invoking any immunity belonging to them when cooperation in the arrest and surrender of a person to the Court is provided by another State Party (horizontal effect).[76]

The vertical effect means that States Parties cannot invoke the personal immunity of their senior officials (from investigation, arrest, indictment and prosecution) in proceedings before the ICC.[77] The horizontal effect indicates that a State Party also cannot invoke personal immunity from arrest enjoyed by officials of other States Parties.[78] The Chambers held that article 27(2) 'excludes immunity from arrest'.[79] Indeed, the ICC has no means to arrest a suspect, and it has to rely on States to do so. The Pre-Trial Chamber has implicitly held that a non-party State can continue to invoke personal immunity from arrest enjoyed by its sitting senior officials in international law to challenge the exercise of jurisdiction by other States. When it comes to heads of a non-party State, in the ICC's wording, 'the irrelevance of immunities […] as enshrined in article 27(2) of the Statute has no effect on their rights under international law'.[80] In addition, the Pre-Trial Chamber of the ICC has restricted the removal of horizontal personal immunity from 'arrest' amongst States Parties for the purpose of ICC proceedings, thus leaving horizontal personal immunities from 'arrest/indictment/prosecution' in national proceedings intact. In other words, article 27(2) does not cover the

75 *Al Bashir DRC* Cooperation Decision 2014, para 26.

76 *Al Bashir Jordan* Cooperation Decision 2017, para 33; *Al Bashir South Africa* Cooperation Decision 2017, paras 76-80.

77 *Al Bashir South Africa* Cooperation Decision 2017, paras 77-78.

78 ibid, paras 79-80. See also *The Prosecutor v Al Bashir* (Request by Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, Stahn and Vasiliev for Leave to Submit Observations) ICC-02/05-01/09-337 (26 April 2018), paras 2, 6; *The Prosecutor v Al Bashir* (Request by Max du Plessis, Sarah Nouwen and Elizabeth Wilmshurst for leave to submit observations on the legal questions presented in 'The Hashemite Kingdom of Jordan's appeal against the "Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir"') ICC-02/05-01/09-338 (27 April 2018), paras 4-5.

79 *Al Bashir South Africa* Cooperation Decision 2017, paras 74-75; *Al Bashir Jordan* Cooperation Decision 2017, para 33.

80 ibid, para 82; Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 600; Liu, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?'; Manisuli Ssenyonjo, 'II. The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan' (2010) 59 *ICLQ* 205, 210; R.H. Steinberg (ed), *Contemporary Issues Facing the International Criminal Court* (The Hague: Brill | Nijhoff 2016) 73-137.

latter personal immunities attaching to serving senior officials in traditional customary law before local jurisdictions of other States, including party and non-party States. Heads of States continue to enjoy personal immunity from another State's national criminal proceedings for committing international crimes.

To conclude, article 27(2) of the Rome Statute covers personal immunity from arrest between States Parties as well as (vertical) personal immunity between a State Party and the ICC. This provision covers the issue of non-availability of personal immunity from arrest by local authorities of States Parties for the ICC proceedings. Article 27(2) evidences a departure from the pre-existing traditional customary rule respecting personal immunity between States. An examination of article 98(1) of the Rome Statute, as well as article 19 of the *Relationship Agreement* between the ICC and the UN, further confirms this finding.

6.3.3 Structure of the Rome Statute and article 19 of the Relationship Agreement

A brief elaboration of article 98(1) of the Rome Statute is required on the issue of 'cooperation with respect to waiver of immunity'. Article 98(1) reads:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

Article 98(1) addresses the ICC's act and how a requested State cooperates with the ICC's requests for surrender or assistance. It is not the place here to address the procedural aspects of the request for surrender or assistance and the obligations to cooperate.[81] Article 98(1) does mention the terms 'immunity' and 'waiver of the immunity' under 'international law'. The phrase 'international law' means that immunity derived from national law is excluded, while personal immunity and diplomatic immunity of property under customary law are included. A plain reading of article 98(1) shows that this provision covers 'waiver of immunity' by a third State. This rule applies when waiver of a third State's diplomatic immunity of property and personal immunity is required.

Article 98(1) was included without sufficient time for a thorough discussion during the 1998 Rome Conference.[82] The preparatory works do not aid in understanding the meaning of 'third State'. This has become clear in

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81 Dov Jacobs, 'Commentary' in A. Klip and G. Sluiter (eds), *Annotated Leading Cases of the International Criminal Court*: *2005-2007*, Vol 23 (Antwerp: Intersentia 2010) 113-21; Dire Tladi, 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities and Article 98' (2013) 11 *JICJ* 199, 205-18.

82 Hans-Peter Kaul and Claus Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises' (1999) 2 *YIHL* 143, 164.

the context of the *Al Bashir* case, in which Sudan is a non-party State. Some States repeatedly cited article 98(1) to justify refusal to cooperate. Although a State Party is not empowered by article 98(1) to determine unilaterally whether its cooperation is inconsistent with international law, these States' practice implies that these States support an interpretation of 'third State' by including non-party States. Consequently, the usage of the wording 'waiver' signifies that senior officials of a non-party State continue to enjoy personal immunity under traditional international law. Article 98(1) itself, therefore, gives strength to the existence of the traditional customary rule respecting personal immunity.[83] Articles 27(2) and 98(1) further indicate the recognition of the drafters that they did not intend to override but did intend to respect personal immunity from arrest in traditional customary law.[84] By accepting the two articles, States Parties did not aim to create a new general rule of non-availability of personal immunity from arrest in article 27(2). Heads of non-party States continue to enjoy personal immunity from arrest before other States under customary law.[85]

This interpretation is also supported in the negotiations of article 19 of the Relationship Agreement between the Court and the UN. Belgium wanted to confirm that there existed a customary rule of no immunity for international crimes and proposed a provision to deny personal immunity of UN officials for war crimes, crimes against humanity and genocide. Its proposal stated that '[p]aragraph 1 of this article [article 19] shall be without prejudice to the relevant norms of international law, particularly […] article 27 of the Statute, in respect of the crimes that come under the jurisdiction of the Court'.[86] Belgium's proposal, however, was rejected by the UN representative. The final version of article 19 of the Agreement confirms that UN officials are entitled to immunities, and the UN should agree to 'waive' immunity. Article 19 reads:

> […] the United Nations undertakes to cooperate fully with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities in accordance with the Convention on the Privileges and Immunities of the United Nations and the relevant rules of international law.[87]

Had the text of article 27(2) reflected a customary rule denying personal immunity for committing international crimes, there would be no need for such a provision under article 19.[88]

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83 James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford: OUP 2012) 501.

84 Liu, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?', 66.

85 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 600.

86 'Proposal submitted by Belgium Concerning document PCNICC/2000/WGICC-UN/L.1', PCNICC/2000/WGICC-UN/DP.18.

87 Negotiated Relationship Agreement between the International Criminal Court and the United Nations, art 19.

88 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 601.

As mentioned above, the form of article 27(2) indicates a departure from a pre-existing customary rule respecting personal immunity from arrest. The structure of the Rome Statute further gives strength to this conclusion. The clause in article 27(2) is a treaty exception to the traditional customary rule respecting personal immunity.[89]

6.3.4 Assessment and conclusions

Article 27(2) concerns immunities as procedural barriers to the jurisdiction of the ICC. This provision serves a two-fold function about personal immunity. The text of article 27(2) rejects a possible invocation of personal immunity from arrest by a State Party to challenge another State Party for the effectiveness of the ICC proceedings. It evinces an exception to or a departure from traditional customary law. This exclusion of application of customary law through a treaty is acceptable.[90] The preparatory works show that its drafters indirectly recognised the existence of traditional customary law.[91] They did not aim to modify the pre-existing customary rule respecting personal immunity with an exception, or to create a new customary rule of non-availability of personal immunity between States for committing international crimes. The drafters employed the waiver approach through article 27(2) of the Statute to remove personal immunity from arrest between States Parties for the purpose of ICC proceedings. Article 98(1) of the Statute and article 19 of the *Relationship Agreement* also support such finding.

To sum up, after an examination of the text, its form and its preparatory works as well as the structure of the Rome Statute, it is appropriate to conclude that article 27(2) was an exception to the pre-existing customary rule respecting personal immunity from arrest in 1998. This clause with an exception was not of a norm-making nature because such an intent cannot be identified. The above examination does not evince whether article 27(2) was declaratory of a customary rule of non-availability of personal immunity for core international crimes (in criminal proceedings) in 1998.

Article 27(2) in its plain meaning stipulates that personal immunity in international law enjoyed by a senior official of a State Party cannot bar prosecution against that person by the ICC, once it has adjudicatory juris-

89 See also *The Prosecutor v Al Bashir* (Request by Prof. Flavia Lattanzi for leave to submit observations on the merits of the legal questions presented in "The Hashemite Kingdom of Jordan's appeal against the 'Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender" [of] Omar Al-Bashir) ICC-02/05-01/09-341 (30 April 2018), para 3.

90 *Jones v Saudi Arabia and et al*, [2006] UKHL 26, Lord Bingham of Cornhill, para 33; Cassese *et al* (eds), *Cassese's International Criminal Law* 154; Jia, 'Immunity for State Officials from Foreign Jurisdiction for International Crimes', 86-87.

91 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 600-01; Liu, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?', 66; Ssenyonjo, 'II. The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan', 210-11.

diction.[92] Relying on a literal reading, some commentators argue that 'the non-availability of international immunity rights *ratione* […] *personae* with respect to persons, as articulated in article 27(2), is declaratory of customary international law'.[93] They claim that article 27(2) implies a rule that no vertical personal immunity can be invoked before an international court, which is 'direct enforcement of the *jus puniendi* of the international community'.[94] This new customary rule with an exception is based on the distinction between national and international proceedings.[95] This argument is relevant at the ICC for the issuance of arrest warrants against a sitting senior official of a non-party State as well as in subsequent proceedings. In addition, supporters also propose extending the scope of the elimination of personal immunity from 'punish' to 'arrest' of senior officials before national authorities. If the ICC issues arrest warrants, this expanded view enables a State Party to justify its arrest of a sitting senior official of another State, including a non-party State, for committing international crimes.[96]

The SCSL once upheld an interpretation that personal immunity under customary law can be disregarded before an 'international' court. The SCSL addressed some reasons for the distinction between national courts and international courts. Firstly, 'these tribunals are not organs of a State, but derive their mandate from the international community'.[97] Secondly, 'States have considered the collective judgment of the international community to provide a vital safeguard against the potential destabilizing effect of unilateral judgment in that area'.[98]

The reasons, however, are not sound. Firstly, the argument that international tribunals are a direct enforcement of the right to punish on behalf of the international community is rather ambiguous due to the vagueness of the concept of 'international community'. Secondly, in traditional international law, personal immunity is of a procedural nature and is mainly designed to protect 'international relations' between or among States, instead of the relations between a State and an international tribunal. The above construction of a new customary rule of denying personal immunity is mainly based on the nature of the proceedings. The new extended theory that there is a customary exception to personal immunity in certain international proceedings for international crimes implicitly shows that traditional

92 2002 *Arrest Warrant* case of the ICJ, 24-25, paras 58-60; Schabas, *The International Criminal Court: A Commentary on the Rome Statute.*

93 Kreß and Prost, 'Article 98', 2125.

94 Pedretti, *Immunity of Heads of State and State Officials for International Crimes*; Kreß and Prost, 'Article 98', 2128-33; Gaeta and Labuda, 'Trying Sitting Heads of State: The African Union versus the ICC in the *Al Bashir* and *Kenyatta* Cases', 146-47; Triffterer and Burchard, 'Article 27', 1041-42.

95 See Pedretti, ibid; Kreß and Prost, ibid, 2132-33; Gaeta and Labuda, ibid.

96 *Al Bashir Malawi* Cooperation Decision 2011, para 42.

97 *Prosecutor v Charles Taylor* (Decision on Immunity from Jurisdiction, A Ch) SCSL-2003-l-AR72 (E) (31 May 2004) [2004 *Charles Taylor* Jurisdiction Decision], para 51.

98 ibid.

personal immunity from arrest in national proceedings is also invalidated due to the international nature of the proceedings. Without a change of the traditional customary rule regarding personal immunity, this new customary rule is impractical.

Thirdly, the nature of certain 'international' proceedings for international crimes cannot account for the unavailability of personal immunity. States may collectively do what they are not allowed to do individually without risk of violation, such as the member States of the UN Security Council establishing the ICTY and the ICTR to exercise jurisdiction over sitting senior officials of former Yugoslavia and Rwanda.[99] Apart from the power of the UN Security Council, States in most cases are not allowed to do collectively what they individually have no power to do, for example, to remove personal immunity of senior officials of a State by establishing an international criminal tribunal without receiving the consent or a waiver of immunity by that State.[100] The principle of sovereign equality is not the only basis for personal immunity that also aims to protect international relations without interfering with high ranking representatives. We may agree that four States can establish an international criminal tribunal through a treaty to try international crimes and waive personal immunity of their own senior officials. This nature of the international proceedings in the tribunal, however, does not affect personal immunity of the fifth non-party State. The view that senior officials of the fifth non-party State enjoy no personal immunity before this tribunal is unaccepted.[101] Thus, the idea of invalidating personal immunity for international crimes on the basis of the nature of the international proceedings is not convincing.

A new theory of a customary rule with an exception to absolute personal immunity in international proceedings would not simplify the practice between States, but somewhat complicates the practice and the regime of immunity. The new theory does not sufficiently address why individuals cannot invoke personal immunity from arrest before a national court when an international tribunal issues the arrest warrant, whereas they can still invoke personal immunity from arrest before another national court when a national court issues the warrant for committing international crimes. If a modified (new) customary international rule concerning personal immunity is emerging, better construction of its content should rely on the nature of the crimes under international law. In other words, 'the practice that sitting senior officials are subject to the jurisdiction of other States for committing international crimes is universally upheld as a modified customary rule,

99 Schabas, 'The Special Tribunal for Lebanon: Is a 'Tribunal of an International Character' equivalent to an 'International Criminal Court'?', 527-28.

100 Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 295.

101 Micaela Frulli, 'Piercing the Veil of Head-of-State Immunity: The Taylor Trial and beyond' in C.C. Jalloh (ed), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (2013) 327; Christian Tomuschat, 'Obligations Arising for States without or against Their Will' (1993) 241 *Recueil des cours* 195, 269.

regardless of whether such proceedings are brought before national or international courts'.[102] Once a customary rule provides an exception to personal immunity for committing international crimes, personal immunities would not be procedural bars for the exercise of jurisdiction over these officials in international criminal tribunals.[103]

Finally, yet equally important, some tribunals have rejected the construction that relies on the nature of the court. The Appeals Chamber of the ICTY in *Blaškić* recognised that functional immunity does not disappear simply because the tribunal is international.[104] In the *Krstić* case, Judge Shahabuddeen in his dissenting opinion claimed that 'there is no substance in the suggested automaticity of the disappearance of the immunity just because of the establishment of international criminal courts'.[105] Both cases refer to functional immunity from testifying based on an order issued by the ICTY, but their findings are equally true as to personal immunity. No tendency seems to indicate that immunity of senior officials would be abrogated simply due to the international nature of the court, as will be seen below.[106] The nature of crimes is the main concern in the following analysis with respect to an exception to 'personal immunity from arrest' encompassed in article 27(2), whereas evidence concerning the international nature of the court is assessed when necessary.

6.4 Non-availability of personal immunity for international crimes: was article 27(2) declaratory of custom?

The main issue in this section is whether article 27(2) was declaratory of a customary rule about non-availability of personal immunity from arrest for committing international crimes before 1998. This section looks into the 1919 Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (1919 Report of the Commission on Responsibilities), the 1919 Treaty of Versailles, article 7 of the Nuremberg Charter as well as other post-World War II practice to show that article 27(2) was not declaratory of such a customary rule in 1998.

102 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert), para 31.

103 Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', 864. He may also support a customary rule that declines personal immunity by virtue of 'international crimes' rather than 'international courts'.

104 *Prosecutor v Blaškić* (Decision on the Objection of the Republic of Croatia to the Issue of *subpoena duces tecum*) ICTY-95-14-PT (18 July 1997), paras 38-45.

105 *Krstić* Appeals Chamber Judgment (Dissenting Opinion of Judge Shahabuddeen), para 11.

106 Akande, 'International Law Immunities and the International Criminal Court'.

6.4.1 1919 Report of the Commission on Responsibilities and Treaty of Versailles

The Commission on Responsibilities in its 1919 Report said that it desired:

> […] to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a state. But this privilege, where it is recognised, is one of practical expedience [sic] in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.[107]

This paragraph, however, cannot stand as supporting evidence for non-availability of personal immunity. The first two sentences are not relevant to procedural immunity but rather to substantive responsibility.[108] The view in the last two sentences is also contestable. Although immunities under international law are not only of practical expediency in municipal law but also a customary rule in contemporary international law, it is true that international immunities do not aim to prevent people from being prosecuted in their own country. The last sentence simply stresses the difference between immunities under national and international law, which is irrelevant to the issue of personal immunity.

The following paragraphs of the Commission on Responsibilities' 1919 Report should not be disregarded. The Report further stated that '[w]e have […] proposed the establishment of a high tribunal […] and included the possibility of the trial before that tribunal of a former head of a state with the consent of that state itself secured by articles in the Treaty of Peace'.[109] What the Commission finally proposed was not the removal of immunity enjoyed by a sitting head of State without consent, but rather a removal of immunity of 'a former head of State [the Kaiser of Germany] with the consent of that State'. The Commission on Responsibilities' 1919 Report indirectly confirmed the functional immunity of former heads of States, far from disregarding personal immunity of a head of a State.

According to article 227 of the 1919 Treaty of Versailles, the former German Kaiser William II was indicted for prosecution before a special tribunal. The indictment was achieved through Germany's waiver of immunity by

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107 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference' reprinted in (1920) 14 *AJIL* 95 [Report of the Commission on Responsibilities], 116; *Al Bashir Malawi* Cooperation Decision 2011, para 23.

108 Princeton Project on Universal Jurisdiction, 'The Princeton Principles on Universal Jurisdiction' (2001), Principle 5 and its commentary, pp 48-51; 2002 *Arrest Warrant* case of the ICJ, 24, para 58.

109 Report of the Commission on Responsibilities, 116.

signing the Treaty of Versailles, despite the fact that Germany may have had little choice.[110] More details about this indictment are significant. William II was a former head of State who did not enjoy personal immunity. Practices of prosecution of former heads of States exist, but the consent of their States should not be ignored. Even for a former head of State who has been deposed and whose monarchy no longer exists, he still enjoyed functional immunity, not to mention personal immunity, if he was in office.

The Commission on Responsibilities proposed a text on responsibility in article III of its draft provisions for the special tribunal, which was a predecessor of article 7 of the Nuremberg Charter and article 27(1) of the Rome Statute. Article III provided that 'all persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of states, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution'. The US delegate reserved for this article.[111] The US objected to the idea of individual responsibility of a sitting head of State in international law because 'no precedents are to be found in the modern practice of nations'. The US also referred to the *Schooner Exchange v McFaddon* case and argued that 'proceedings against [a head of a State] might be wise or unwise, but in any event they would be against an individual out of office and not against a [person in his position] and thus in effect against the state'.[112] This statement shows that even the principle of individual responsibility for a head of State such as article 27(1) of the Rome Statute provides had not yet been generally recognised at that time. It is not persuasive to argue that States would begin to acknowledge a rule of non-availability of personal immunity of a sitting head of State before such a 'high tribunal'. These sources support the view that in 1919 customary law continued to recognise personal immunity of heads of State, even before international tribunals.

6.4.2 Article 7 of the Nuremberg Charter and article 6 of the Tokyo Charter

Article 7 of the Nuremberg Charter provides that '[t]he official position of Defendants, whether as heads of State, or responsible officials in Government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.' The text of article 6 of the Tokyo Charter is a bit different from that of article 7. Article 6 adds that 'official position and the fact that an accused acted pursuant to order of his government or of a superior may be considered in mitigation of punishment if the Tribunal determines'. Articles 6 and 7 of the two Charters are often deemed supporting evidence for a customary rule of non-availability of personal immunity.

110 *Contra Ruto & Sang* Acquittal Decision 2016 (Reasons of Judge Eboe-Osuji) ICC-01/09-01/11-2027-Red-Corr (5 April 2016), para 261.
111 Report of the Commission on Responsibilities, 127-53.
112 ibid, 135-36.

Both articles were initially designed to distinguish individual criminal responsibility from State responsibility for committing international crimes, instead of coping with personal immunity.[113] At the London Conference, the US made Draft Proposals for the later London Agreement.[114] An Annex regarding modes of liability and defences stated that '[a]ny defence based upon the fact that the accused is or was the head or purported head or other principal official of a State is legally inadmissible and will not be entertained'.[115] The Soviet Union also proposed a draft.[116] Its draft contained a 'statute of the international military tribunal'. Article 28 of this Soviet draft proposed that '[t]he official position of persons guilty of war crimes, their position as heads of States or as heads of various departments shall not be considered as freeing them from or in mitigation of their responsibility'.[117] Amalgamating the American and Soviet texts, a draft text of the later Nuremberg Charter submitted to the London Conference provided that '[t]he official position of defendants, whether as heads of State or responsible officials in various Departments, shall not be considered as freeing them from responsibility or mitigating punishment'.[118] Except for a minor change, this provision was retained substantially in article 7 of the Nuremberg Charter.

The examination of the draft proposals demonstrates that article 7 of the Nuremberg Charter was designed to remove a potential defence for acting on behalf of the State to free an individual from responsibility. The IMT adopted such an interpretation of article 7 of the Nuremberg Charter. With reference to article 7, the IMT judgment wrote:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. […] The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. […] He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorising action moves outside its competence under international law.[119]

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113 Schabas, *Genocide in International Law*, *The Crime of Crimes* 369-71; 'Formulation of Nuremberg Principles, Report by Jean Spiropoulos, Special Rapporteur', UN Doc A/CN.4/22 (1950), p 192.

114 'American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945'; 'Revision of American Draft of Proposed Agreement, June 14, 1945'; and 'Revised Draft of Agreement and Memorandum Submitted by American Delegation, June 30, 1945', in *Report of Robert H. Jackson*, *United States Representative to the International Conference on Military Trials: London*, *1945* (Washington, DC: USGPO 1949) [*Report of Robert H. Jackson*].

115 'Revised Draft of Agreement and Memorandum Submitted by American Delegation, June 30, 1945', in *Report of Robert H. Jackson* 124, 180-81.

116 'Draft of Agreement Presented by the Soviet Delegation, July 2, 1945'; 'Draft Showing Soviet and American Proposals (in Parallel Columns)', in *Report of Robert H. Jackson* 180.

117 UN Doc A/CN.4/22 (1950), p 183.

118 'Draft of Agreement and Charter, Reported by the Drafting Subcommittee, July 11, 1945', in *Report of Robert H. Jackson* 194; UN Doc A/CN.4/22 (1950), pp 182-87.

119 *France et al v Göring et al*, (1948) 1 TMWC 171, p 223.

Individuals cannot hide behind the veil of acting on behalf of a State. Article 7 pierced the veil of immunity in national law and functional immunity in international law. Article 6 of the Tokyo Charter itself shared the same function as article 7.

The drafting history and the IMT's construction of article 7 of the Nuremberg Charter show that both articles 6 and 7 of the Tokyo and Nuremberg Charters respectively, which are similar to article 27(1) of the Rome Statute, pertain to substantive defences of official position. The two provisions do not answer whether personal immunities were automatically lifted before the two tribunals for committing international crimes.

6.4.3 Post-World War II practice

After World War II, no evidence shows that the IMT and the IMTFE prosecuted sitting senior State officials 'without consent'. Hitler, as a leader of Nazi Germany, committed suicide. The Japanese Emperor Hirohito was not prosecuted for political reasons.[120] The highest indicted state officials in IMTFE were former prime ministers. Göring was prosecuted for war crimes and crimes against humanity. When Göring was prosecuted, he was a president of the Reichstag, a legislative body of Germany, rather than a senior official enjoying personal immunity. The IMT also prosecuted and sentenced Dönitz, who succeeded Hitler as the head of State, for war crimes and war of aggression.[121] Dönitz himself did not raise an objection to the prosecution by virtue of personal immunity.

Also, article 1 of the London Agreement provided that '[t]here shall be established after consultation with the Control Council for Germany an International Military Tribunal'.[122] The Control Council for Germany had the capacity as local sovereign of Germany authority at that time, although it was created by the Allied powers acting as a *de facto* legislator.[123] The phrase 'consultation with the Control Council for Germany' implies that Germany consented to remove the personal immunity of senior officials before the IMT. Besides, one may note that in rejecting the assertion of Hiroshi Ōshima, the Japanese ambassador to Germany, the IMTFE held that 'this [diplomatic] immunity has no relation to crimes against international law charged before a tribunal having jurisdiction'.[124] This statement also does not directly show the irrelevance of personal immunity of senior officials for international crimes but rather is related to the IMTFE's jurisdiction and Ōshima's diplomatic immunity. Accordingly, the practice of post-World War II confirms

120 Gaeta, 'Official Capacity and Immunities', 981 and fn 18; Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 252; Triffterer and Burchard, 'Article 27', 1044; O'Neill, 'A New Customary Law of Head of State Immunity?: Hirohito and Pinochet'.

121 *France et al v Göring et al*, (1948) 1 TMWC 171.

122 Nuremberg Charter.

123 *Justice* case, (1948) 3 TWC 3, pp 964-65.

124 *US et al v Araki et al*, Judgment, p 1189.

individual responsibility of senior officials, instead of supporting a denial of personal immunity of senior officials.

6.4.4 1946 GA Resolution and 1950 Nuremberg Principle III

Other sources frequently referred to in this context are 1946 UN General Assembly Resolution 95(I),[125] and Principle III of the ILC's 'Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal' (1950 ILC Nuremberg Principles).[126] The legal status of the two documents should be noted. The 1946 Resolution 95(I) did not attach or refer to a consolidated text of the Nuremberg principles, and the General Assembly never adopted the 1950 ILC Nuremberg Principles. The irrelevance of official capacity under article 7 of the Nuremberg Charter was recognised by the General Assembly in 1946 Resolution 95(I).[127] Principle III of the 1950 ILC Nuremberg Principles was also based on article 7 of the Nuremberg Charter,[128] which provided that 'the fact that a person who committed an act which constitutes a crime under international law acted as head of State or responsible government official did not relieve him from responsibility under international law'.[129] As noted above, both documents do not deal with personal immunity as a procedural bar, but rather the issue of acting on behalf of a State as a defence to individual responsibility.

6.4.5 Assessment and conclusions

Article IV of the 1948 Genocide Convention also merits brief discussion.[130] Article IV reads that '[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals'. William Schabas comments that the drafters of the Convention in that article only provide responsibility for genocide, instead of depriving senior officials of immunity who are in office.[131] In contrast, commentators and ICC Judge Perrin De Brichambaut have argued that personal immunities were 'removed' or 'waived' by States Parties to the Genocide Convention.[132] In their view, per-

125 UN Doc A/RES/95 (I).

126 'Formulation of the Nuremberg Principles', in 'Report of the International Law Commission covering its second session, 5 June – 29 July 1950', UN Doc A/CN.4/34 (1950), pp 374-78; 'Formulation of the Nuremberg Principles', GA Res 488 (V) (1950), UN Doc A/RES/488 (V), para (1).

127 UN Doc A/RES/95 (I).

128 'UN Doc A/CN.4/34 (1950), p 375, para 104.

129 ibid.

130 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 12 January 1951, 78 UNTS 277.

131 Schabas, *Genocide in International Law*, *The Crime of Crimes* 54-55, 369-71.

132 *Al Bashir South Africa* Cooperation Decision 2017 (Minority Opinion of Judge Marc Perrin De Brichambaut), paras 8, 30.

sonal immunities were not attached to senior officials in accordance with article IV.[133] This argument implicitly recognises the rule of respecting personal immunities.

The above authorities provide no similar wording to that provided in article 27(2). Immunities constitute no bar for the exercise of jurisdiction in the IMT and the IMTFE, while personal immunities were not expressly removed in their founding instruments. This factual situation does not lead to the conclusion that a rule of non-availability of personal immunity existed for these crimes. In fact, most individuals involved in the proceedings were not sitting senior officials. The issue of personal immunity did not arise before the two tribunals. The evaluation of these sources demonstrates that they are all echoed in article 27(1) of the Rome Statute. Similarly, article 7 of the 1996 ILC Draft Code of Crimes and article 7(2) of the 1993 ICTY Statute, as well as article 6(2) of the 1994 ICTR Statute share the same feature. All these instruments are irrelevant to personal immunity but confirm either a rule of functional immunity by removing that immunity with 'consent' or a rule of individual criminal responsibility in international law. Relying on the authorities referred to above, commentators supporting an exception to immunity seem to conflate the issue of no defence for official acts with the issue of no exception to personal immunity. In establishing these tribunals to exercise jurisdiction over international crimes, these States did not intend to abrogate personal immunity in traditional customary law.

The observations demonstrate a lack of support for an emerging customary rule before 1998 recognising non-availability of personal immunity from arrest for committing international crimes. No sufficient practice or *opinio juris* exists to support a pre-existing or an emerging customary rule that there was no personal immunity in national or international proceedings for committing international crimes. The construction of article IV of the Genocide Convention does not undermine this finding. This section concludes that article 27(2) was not declaratory of a customary rule of non-availability of personal immunity from arrest for committing international crimes before adoption of the Rome Statute.

6.5 Non-availability of personal immunity for committing international crimes: is article 27(2) declaratory of custom?

By lifting personal immunity from arrest for international crimes, article 27(2) of the Rome Statute provides an exception to the existing customary rule respecting personal immunity. The traditional customary rule is

133 Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', 350-51; Göran Sluiter, 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case' (2010) 8 *JICJ* 365,378; *Al Bashir South Africa* Cooperation Decision 2017 (Minority Opinion of Judge Marc Perrin De Brichambaut), paras 21-37 and fn 16.

modified unless sufficient evidence of State practice and *opinio juris* support an exception to absolute personal immunity for committing international crimes.[134] This section examines practice and new trends after 1998 to answer whether article 27(2) is declaratory of a modified (new) customary rule with respect to personal immunity to date.

6.5.1 Immunity for international crimes: national and international cases

After adoption of the Rome Statute in 1998, some national and international decisions seem to show a denial of immunity for international crimes.

6.5.1.1 1999 Pinochet case (the UK) and 2001 Gaddafi case (France)

The 1999 *Pinochet* (*No 3*) case was the first challenge to immunity for torture before the UK's House of Lords.[135] When Augusto Pinochet, the former Head of State of Chile, was visiting the UK for medical treatment in 1998, Spain requested the UK to extradite him for charges of torture in the Spanish Court. The UK issued two warrants for his arrest. The High Court quashed one of the warrants because Pinochet was immune from prosecution as a former head of State.[136] During the appeal before the House of Lords, the majority agreed that Pinochet enjoyed no functional immunity for acts of torture as defined in the 1984 Convention against Torture.[137] Despite different grounds for the dismissal of immunity, the *Pinochet* case represents a change of direction for the issue of immunity.[138] This case, however, dealt with functional immunity of former senior officials rather than personal immunities of sitting senior officials. The majority of the House of Lords supported the view that incumbent senior State officials still enjoy personal immunity before national courts, even if they committed torture.[139] In 2004, a UK district court rejected an application for an arrest warrant for then sitting President of Zimbabwe Robert Mugabe for alleged torture.[140] The judge held that:

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134 Robinson, 'Immunities', 562-64.

135 *R v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999).

136 Bianchi, 'Immunity versus Human Rights: The Pinochet Case'.

137 *R v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999), Lord Browne-Wilkinson, p 595, Lord Hope of Craighead, p 626, Lord Saville of Newdigate, p 643; Lord Millett, p 651. A majority of six to one with Lord Goff of Chieveley dissenting in respect of the immunity issue. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 26 June 1987, 1465 UNTS 85.

138 For an analysis of this case, see Andrea Gattini, '*Pinochet* Cases' in R. Wolfrum (ed) (2007) *MPEPIL*, paras 13-18.

139 *R v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999), p 644.

140 *Application for a Warrant for the Arrest of Robert Mugabe*, First instance, 14 January 2004, ILDC 96 (UK 2004).

> Whilst international law evolves over a period of time international customary law which is embodied in our Common Law currently provides absolute immunity to any Head of State. […] Robert Mugabe is President and Head of State of Zimbabwe and is entitled whilst he is Head of State to that immunity. He is not liable to any form of arrest or detention […].[141]

French courts held a slightly different view on the matter of personal immunity. In the 2001 *Gaddafi* case, the Court of Cassation of France examined whether Gaddafi as a serving head of State was immune from the national court of France for complicity in acts of terrorism.[142] In the beginning, the Court of Appeal ruled that since the end of World War II the principle of immunity admits some exceptions for acts outside the realm of the duties of a head of State. In addition, considering the gravity of the crime, Gaddafi could not enjoy immunity from jurisdiction.[143] The Prosecutor appealed on the interpretation of personal immunity. The Prosecutor argued that a sitting head of State enjoys absolute immunity from jurisdiction and no exception could be made, no matter how grave the crime charged. The Court of Cassation of France overturned the Court of Appeal's ruling. The Court of Cassation in its judgment held that 'in international law, the reported crime [acts of terrorism], regardless of its gravity, does not provide exceptions to the principle of the immunity from jurisdiction of foreign heads of State in office, the indictment division failed to consider the above-mentioned principle'.[144]

The Court of Cassation implicitly upheld that 'exceptions to the principle of the immunity of jurisdiction of a sitting head of State' before a national court exist, but these exceptions 'in international law' do not include 'the reported crime', acts of terrorism.[145] Nevertheless, it is unclear what exceptions the Court had considered, treaty derogations from custom for committing international crimes or the gravity of core international crimes. The *Gaddafi* case, therefore, does not directly support the contention that core international crimes provide exceptions to absolute personal immunity before an international tribunal.

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141 ibid, paras 5, 7.

142 *Advocate General v Gaddafi* (Appeal Judgment, Court of Cassation, France) 00-87215 (13 March 2001), ILDC 774 (FR 2001); Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Gaddafi Case before the French Cour de Cassation'.

143 *General Prosecutor v Gaddafi*, ibid, para 1; Thomas Marguerite, 'General Prosecutor *v* Gaddafi' in A. Nollkaemper and A. Reinisch (eds), *Oxford Reports on International Law in Domestic Courts* (28 October 2008), Facts, F4, F5,

144 *General Prosecutor v Gaddafi*, ibid, paras 1, 10.

145 Yann Kerbrat and Thomas Marguerite, '*General Prosecutor v Gaddafi*' in A. Nollkaemper and A. Reinisch (eds), *Oxford Reports on International Law in Domestic Courts*, Analysis, A6.

6.5.1.2 The ICJ: 2002 Arrest Warrant case (Belgium v Congo)

Both the *Pinochet* and *Gaddafi* cases were cited by Belgium in the 2002 *Arrest Warrant* or *Yerodia* case before the ICJ.[146] In the *Arrest Warrant* case, Belgium issued an international arrest warrant for the incumbent Minister for Foreign Affairs of Congo, Mr Yerodia Ndombasi, for alleged war crimes and crimes against humanity. Congo contended that Belgium violated rules of international law including the rule of respect for diplomatic immunity.[147] Belgium argued that the immunities attaching to incumbent ministers of foreign affairs could not be invoked to protect them when they are suspected of having committed war crimes or crimes against humanity.[148] Based on a distinction between the immunity for ordinary crimes and the immunity for international crimes, Belgium argued that 'an exception to the immunity rule was accepted in the case of serious crimes under international law'. Congo insisted that 'under international law as it currently stands, there is no basis for asserting that there is any exception to the principles of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law'.[149]

The majority of the ICJ rejected Belgium's arguments about personal immunity.[150] The ICJ held that no exception to personal immunity exists under customary law before the jurisdiction of other States, regardless of the nature of the crime. The ICJ found that:

> It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[151]

This finding was affirmed in a subsequent case before the ICJ.[152] The ICJ also cited articles 6 and 7 of the Tokyo and Nuremberg Charters, articles 6(2) and 7(2) of the ICTR and ICTY Statutes as well as article 27 of the Rome Statute. The ICJ concluded that 'these rules do not enable it to conclude that any such an exception exists in customary international law in regard to national courts'.[153] The ICJ affirmed the immunity of foreign ministers for commit-

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146 2002 *Arrest Warrant* case of the ICJ (Counter Memorial of the Kingdom of Belgium), 28 September 2001, paras 3.5.92-3.5.93.

147 2002 *Arrest Warrant* case of the ICJ, 8, para 12.

148 2002 *Arrest Warrant* case of the ICJ (Counter Memorial of the Kingdom of Belgium), para 0.26 (d).

149 2002 *Arrest Warrant* case of the ICJ, 24, para 57.

150 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert).

151 2002 *Arrest Warrant* case of the ICJ, 24, para 58.

152 *Questions of Mutual Assistance* Judgment.

153 2002 *Arrest Warrant* case of the ICJ, 24, para 58.

ting international crimes as a customary rule. Without a doubt, its conclusion also extends to heads of State and heads of government.[154]

Furthermore, a statement in paragraph 61 of the judgment of the *Arrest Warrant case* is significant. It stated that:

> […] an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in article 27, paragraph 2, that […].[155]

This statement seems to open a door for non-availability of personal immunity before 'international tribunals'.[156] This statement should be understood systemically, and other reasoning of the ICJ should not be overlooked. The ICJ first noted that 'jurisdiction does not imply absence of immunity'.[157] It then clarified that immunity from jurisdiction does not automatically mean impunity for crimes committed, 'irrespective of their gravity'. In its wording, '[j]urisdictional immunity may well bar prosecution for a certain period or for certain offences'.[158] Consequently, the ICJ described in paragraph 61some plausible circumstances in which immunity does not bar criminal prosecution. The first three ways are prosecution by their own countries, waiver of immunity and prosecution of former state officials. For the first three alternatives: personal immunity in international law is never a bar for prosecution by the State to which the suspect belongs; the waiver of immunity ceases personal immunity as a bar; and the prosecution of former officials means that the prosecution is outside a 'certain period'.

The fourth alternative, as cited above, is the prosecution of an incumbent minister for foreign affairs for international crimes by international criminal tribunals, if they have jurisdiction.[159] In the fourth alternative, the ICJ referred to three examples of the ICTY, the ICTR and the ICC. The ICJ noted that the UN Security Council established the former two tribunals, while the procedural bar to the ICC was deprived by virtue of article 27(2) of the Rome

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154 Cassese *et al* (eds), *Cassese's International Criminal Law* 320; Kreicker, *Völkerrechtliche Exemtionen Grundlagen Und Grenzen Völkerrechtlicher Immunitäten Und Ihre Wirkungen Im Strafrecht*, cited in Kreß and Prost, 'Article 98', 2128 and fn 58; 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert), paras 16-19.

155 2002 *Arrest Warrant* case of the ICJ, 25, para 61.

156 Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities', 334.

157 2002 *Arrest Warrant* case of the ICJ, 24-25, para 59.

158 ibid, 25, para 60.

159 ibid, 25-26, para 61. For comments on the ICJ's view concerning the prosecution of former State officials, see 2002 *Arrest Warrant* case of the ICJ (Joint Separate opinion of Judges Higgins, Kooijmans and Buergenthal), para 85; Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', 867-74.

Statute. The ICJ, however, did not clarify why personal immunity may not be a bar to criminal proceedings 'before certain international criminal courts, where they have jurisdiction': denied automatically for the nature of the international proceedings of the court or the nature of the crimes, waived by signing a treaty, or deprived by the UN Security Council.

By virtue of its reasoning, the ICJ may agree that personal immunity is not a bar before the two *ad hoc* tribunals due to the removal of immunity by the Security Council.[160] The ICJ may also support the view that States Parties cannot invoke personal immunity before the ICC pursuant to article 27(2). However, the ICJ stated that 'although various international conventions […] requiring [States] to extend their criminal jurisdiction, such extension […] in no way affects immunities under customary international law'.[161] It seems that the ICJ in the *Arrest Warrant* case would disagree with the idea that the horizontal personal immunity from arrest under customary law is disregarded as long as the arrest warrant was issued by a competent 'international' court. Judge Van den Wyngaert in her dissenting opinion also did not argue for a distinction of immunity based on the nature of the court.[162] The ICJ did not aim to disregard personal immunity from arrest based on the 'international' nature of the court.

To sum up, the ICJ provided certain avenues for States to narrow the impunity gap arising from an invocation of personal immunity. Meanwhile, by rejecting Belgium's arguments, personal immunity from arrest in customary law was acknowledged by the ICJ for committing crimes, regardless of their gravity.

6.5.1.3 The SCSL and the ICTY: Charles Taylor and Milošević

Some cases of international criminal tribunals show a trend of eroding the customary rule respecting personal immunity, notably the *Charles Taylor* case at the Special Court for Sierra Leone (SCSL),[163] the *Slobodan Milošević* case at the ICTY,[164] and several ICC decisions in the *Al Bashir* case.[165] The following paragraphs focus on the *Charles Taylor* and *Milošević* cases.

In the *Charles Taylor* case, an indictment and an arrest warrant were issued when Charles Taylor was the sitting President of Liberia. The issue before the Appeals Chamber of the SCSL was whether he was entitled to immunity from the court's jurisdiction.[166] The Appeals Chamber considered the international nature of the SCSL[167] and emphasised the ICJ's finding in

160 See section 6.5.3.
161 2002 *Arrest Warrant* case of the ICJ, 24-25, para 59.
162 ibid, Dissenting Opinion of Judge *ad hoc* Van den Wyngaert, paras 8-39.
163 2004 *Charles Taylor* Jurisdiction Decision.
164 *Milosević* Decision on Preliminary Motions, paras 28-33.
165 *Al Bashir Malawi* Cooperation Decision 2011; *Al Bashir Chad* Cooperation Decision 2011; *Al Bashir DRC* Cooperation Decision 2014.
166 2004 *Charles Taylor* Jurisdiction Decision, para 20.
167 ibid, paras 41-42.

the *Arrest Warrant* case that personal immunity could not prevent Taylor from being subject to international proceedings.[168] The Appeals Chamber drew a distinction between international and national courts on the issue of personal immunity. The Chamber concluded that 'the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court'.[169] The *Charles Taylor* decision seems to indicate removal of personal immunity of a sitting head of State for committing international crimes.[170]

The Appeals Chamber's reasoning is, however, not sound.[171] Firstly, article 6(2) of the Statute of the SCSL substantially used the same wording as article 7(2) of the ICTY Statute and article 27(1) of the Rome Statute. In fact, the SCSL was not established by the Security Council acting under Chapter VII of the UN Charter, but through the Agreement between the UN and Sierra Leone. Secondly, the *Charles Taylor* decision relied heavily on the last alternative in paragraph 61 of the ICJ's *Arrest Warrant* case to uphold an emerging trend of no personal immunity before 'international criminal tribunals'.[172] As mentioned above, the last alternative cannot be exclusively construed as depriving personal immunity for the nature of international proceedings. The waiver-exception and the power of the Security Council are also grounds for the non-availability of personal immunity before an international tribunal. That passage, therefore, does not directly support the non-availability of personal immunity for committing international crimes before international courts. Thirdly, the Chamber also referred to the opinion of Lord Millett in the *Pinochet* (No 3) case.[173] Lord Millett's idea was that in the future the rank of a person accused of committing international crimes affords no defence, which evidences the irrelevance of official capacity as a defence. Lord Millett also wrote that:

> Immunity *ratione personae* is a status immunity. […] If he [Pinochet] were [a serving head of State], he could not be extradited. It would be an intolerable affront to the Republic of Chile to arrest him or detain him. […] The nature of the charge is irrelevant; his immunity [*ratione personae*] is personal and absolute.[174]

The Appeals Chamber of the SCSL also cited other sources to support its argument. It indeed mixed the issue of individual responsibility with the issue of personal immunity.[175] In brief, the reasoning in the *Charles Taylor*

168 ibid, para 52.
169 ibid, paras 51-52.
170 ibid.
171 But see Kreß and Prost, 'Article 98', 2136. For an analysis of the international nature of a court, see Schabas, 'The Special Tribunal for Lebanon: Is a 'Tribunal of an International Character' equivalent to an 'International Criminal Court'?', 523.
172 2004 *Charles Taylor* Jurisdiction Decision, para 50.
173 *R v Ex Parte Pinochet et al* (No 3), 38 ILM 581 (1999), Lord Millett, p 652.
174 ibid, Lord Millett, pp 644, 651 (italics added).
175 2004 *Charles Taylor* Jurisdiction Decision, paras 44-49.

decision does not support a new rule of non-availability of personal immunity for committing international crimes.

In the *Milošević* case, the ICTY prosecuted Slobodan Milošević, a sitting head of State of the Federal Republic of Yugoslavia (FRY). Milošević challenged the jurisdiction of the ICTY and the illegal surrender of the FRY based on his status as president.[176] The Trial Chamber dismissed this motion because in its view article 7(2) of the Statute of ICTY reflected a customary international rule.[177] The Trial Chamber also oversimplified the issue by conflating a defence of official capacity with the issue of immunity. Also, one fact in this case should not be overlooked. The fact that the FRY voluntarily surrendered Milošević to the ICTY shows that personal immunity was not a problematic issue for the prosecution of Milošević before the ICTY, because his home State had waived his immunity – at least implicitly. This *Milošević* case, therefore, also does not support a rule of non-availability of personal immunity under customary law.[178]

6.5.1.4 Pre-Trial Chambers of the ICC: Al Bashir cooperation decisions

Al Bashir is a sitting head of State that is not a party to the Rome Statute. Debates have occurred in the ICC's Darfur Situation as to Al Bashir's personal immunity.[179] The Darfur Situation was referred to the ICC by the Security Council.[180] It is undeniable that the ICC can exercise jurisdiction over the alleged crimes. However, Al Bashir as a head of State enjoys personal immunity embedded under customary law, leading to his protection from investigation, arrest, indictment and prosecution by foreign authorities.[181] A question arises whether Al Bashir can invoke personal immunities from arrest before the ICC and national authorities of States Parties.

The legality of the ICC's issuance of warrants concerns the issue of personal immunity. In the *First Warrant of Arrest* Decision, Pre-Trial Chamber I of the ICC concluded that Al Bashir did not enjoy personal immunity before the ICC because article 27(2) applies to a non-party State.[182] The Chamber relied on the treaty provision to remove his personal immunity without explaining why this provision prevails over existing customary law respect-

176 *Prosecutor v Milošević* (Preliminary Protective Motion) ICTY-99-37-PT (9 August 2001), p 5; *Milošević* Decision on Preliminary Motions, paras 26-34.

177 *Milošević* Decision on Preliminary Motions, paras 28, 34.

178 The *Milošević* case in connection with the position of the Security Council is analysed in detail in section 6.5.3.

179 1998 Rome Statute, art 27; Luigi Condorelli and Santiago Villalpando, 'Can the Security Council Extend the ICC's Jurisdiction?' in A. Cassese *et al* (eds), *The Rome Statute of the International Criminal Court: A Commentary* 634; First Warrant of Arrest for *Al Bashir*.

180 UN Doc S/RES/1593 (2005).

181 Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*; Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 57-100.

182 *First Warrant of Arrest* Decision for *Al Bashir*, para 41.

ing personal immunity. It remained silent on whether article 27(2) is a declaration of customary law recognising an exception to personal immunity. The *First Warrant of Arrest* Decision, therefore, may not be relevant for ascertaining a customary rule with an exception to personal immunity.[183]

In analysing the reasoning behind this decision, Paola Gaeta argues that article 27(2) may apply to senior officials of non-party States by virtue of its customary nature.[184] In her view, no personal immunity before the ICC exists since article 27(2) is a reflection of customary law acknowledging non-availability of personal immunity. Her idea seems to have been partly followed by subsequent decisions of the ICC. Pursuant to article 87(7) of the Rome Statute, the ICC has made several decisions for failure to comply with the cooperation requests for the arrest and surrender of Al Bashir.[185] Some of these decisions are closely related to the present issue of personal immunity under customary law.[186]

Malawi decision: personal immunity before the ICC

In 2011, Pre-Trial Chamber I of the ICC in the *Malawi* decision held that in international law no personal immunity can be invoked to oppose a prosecution by an international court.[187] It also concluded that in international proceedings there is a customary exception to absolute personal immunity

183 For observations of the Chamber's four reasons, see Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 322-25; Kreß, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute', 241-42.

184 Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 322-25. See also *The Prosecutor v Al Bashir* (Request by Professor Paola Gaeta for leave to submit observations on the merits of the legal questions presented in the Hashemite Kingdom of Jordan's appeal against the "Decision under Article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir" of 12 March 2018) ICC-02/05-01/09-349 (30 April 2018), para 1.

185 As of 31 December 2017, there are 13 States Parties' non-cooperation decisions in the *Al Bashir* case. 2010 Kenya Cooperation Decision, ICC-02/05-01/09-107; 2010 Chad Cooperation Decision, ICC-02/05-01/09-109; 2011 Djibouti Cooperation Decision, ICC-02/05-01/09-129; *Al Bashir* Malawi Cooperation Decision 2011; *Al Bashir Chad* Cooperation Decision 2011; *Al Bashir Chad* Cooperation Decision 2013; *Al Bashir Nigeria* Cooperation Decision 2013, ICC-02/05-01/09-159; *Al Bashir DRC* Cooperation Decision 2014 ; *Al Bashir Sudan* Cooperation Decision 2015, ICC-02/05-01/09-227; *Al Bashir Djibouti* Cooperation Decision 2016, ICC-02/05-01/09-266; *Al Bashir Uganda* Cooperation Decision 2016, ICC-02/05-01/09-267; *The Prosecutor v Al Bashir* (Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, PTC II) ICC-02/05-01/09-302 (6 July 2017) [*Al Bashir South Africa* Cooperation Decision 2017]; *The Prosecutor v Al Bashir* (Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, PTC II) ICC-02/05-01/09-309 (11 December 2017) [*Al Bashir Jordan* Cooperation Decision 2017].

186 Watts, 'Heads of State', paras 10-11; Kreß and Prost, 'Article 98', 2128-39; *Al Bashir Malawi* Cooperation Decision 2011, para 43; *Al Bashir Chad* Cooperation Decision 2011. For a critical analysis of the *Malawi* and *Chad* decisions, see Tladi, 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities and Article 98', 204-05.

187 *Al Bashir Malawi* Cooperation Decision 2011, para 36.

from arrest recognised in traditional customary law.[188] The following paragraphs focus on the 2011 *Malawi* Decision.

In the *Malawi* Decision, two issues merit discussion. The first issue is whether Omar Al Bashir enjoys personal immunity from arrest and prosecution before the ICC. Malawi argued that article 27 of the Rome Statute does not apply to Sudan, and Al Bashir as a sitting head of non-party State to the Statute enjoyed immunity from arrest and prosecution in accordance with principles of international law.[189] Pre-Trial Chamber I agreed that the acceptance of article 27(2) implies no immunity, but it rejected the idea that 'with respect to non-party State to the Rome Statute, international law provides immunity to Heads of State in proceedings'.[190] The Chamber concluded that 'the principle in international law is that immunity […] cannot be invoked to oppose a prosecution by an international court'.[191]

It is disputable whether Pre-Trial Chamber I reasonably justified its conclusions. First and foremost, the provisions and instruments (i.e., the 1919 Report of the Commission on Responsibilities, articles 7 and 6 of the Nuremberg and Tokyo Charters, the judgments of the IMT and IMTFE, Principle III of Nuremberg Principles, articles 7(2) and 6(2) of the Statutes of the ICTY and the ICTR, as well as article 7 of the Draft Code of Crimes) referred to in this case are related to the issue of individual responsibility rather than the issue of personal immunity. Most examples here, as mentioned above, are evidence of a substantial defence. Schabas commented that '[n]ot only was the reference rather inexact, when the report [of the Commission on Responsibilities] is read as a whole it is actually rather more supportive of the position opposite to that taken by the Pre-Trial Chamber'.[192] The Pre-Trial Chamber conflated the substantive defences with the procedural personal immunities. A defence of official capacity, belonging to an individual, is distinct from the invocation of personal immunity of a head of State, only waived by a State.[193] These sources are not relevant to the ongoing debate about non-availability of personal immunity at the ICC.[194]

In addition, it seems that the Pre-Trial Chamber also misunderstood the reasoning of the ICJ in the *Arrest Warrant* case. The Chamber held that the ICJ's judgment confirmed a customary international rule respecting personal immunity. It explained that the ICJ simply affirmed immunity under customary law 'before national courts of foreign States'. In its view, it adhered to the ICJ's reasoning with respect to personal immunity before international criminal tribunals.[195] Thus, similar to the SCSL in *Charles Taylor*, this Pre-Trial Chamber of the ICC upheld an exception to personal immunity by

188 ibid, para 43.
189 ibid, paras 13, 18.
190 ibid, para 18.
191 ibid, para 36.
192 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 602.
193 UN Doc A/CN.4/631 (2011), para 19.
194 Kiyani, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', 487-500.
195 *Al Bashir Malawi* Cooperation Decision 2011, paras 33-34.

differentiating between international courts and national courts, instead of resorting to Belgium's argument in distinguishing the nature of the crimes. The ICC Pre-Trial Chamber's interpretation of the ICJ's *Arrest Warrant* case went too far.

To support its contention, the Pre-Trial Chamber also cited the *Milošević* case and the *Charles Taylor* case. The Chamber held that international tribunals are 'totally independent of states and subject to strict rules of impartiality'.[196] It added that 'the rationale for foreign state officials being entitled to raise personal immunity before national courts is that otherwise, national authorities might use prosecutions to unduly impede or limit a foreign state's ability to engage in international action'. By referring to the impartiality of international courts and the risk of abusing State authorities by national courts, the Chamber aimed to establish a new customary rule recognising no personal immunity before international courts for international crimes. However, this argument is less supported for non-availability of personal immunity before international courts. The impartiality and independence of international courts does not justify automatically invalidating personal immunity enjoyed by senior officials of a State, although they may be stimuli for States to waive immunities before these courts. The reasoning based on the potential abuse of State authority and the impartiality of international courts does not provide sound legal grounds for modification of a customary rule before international tribunals.[197]

Malawi decision: personal immunity from arrest by national authorities

The second issue in the *Malawi* Decision remains whether such a customary rule, of no personal immunity before international courts, extends to an arrest and surrender where international courts seek an arrest. This issue relates to horizontal personal immunity from arrest at the national level. The Chamber held that a modified customary international rule is formed denying absolute personal immunity from arrest. The Chamber provided four reasons. Firstly, the Chamber held that personal immunity does not constitute an admissible plea in international proceedings. Secondly, the Chamber referred to several cases of the ICC and the ICTY in holding that 'initiating international prosecutions against Heads of State have gained widespread recognition as accepted practice'.[198] Thirdly, the Chamber held that about two-thirds of all UN member States have ratified the Rome Statute evidence a significant erosion of personal immunity before the ICC. Lastly, in its view, the relinquishing of personal immunity is required for the ICC's exercise of jurisdiction.[199] The Chamber concluded that 'the international community's

196 ibid, para 34; Cassese *et al* (eds), *Cassese's International Criminal Law* 312.
197 Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 321.
198 *Al Bashir Malawi* Cooperation Decision 2011, para 39.
199 ibid, paras 38-41.

commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass'.[200]

The first consideration relies on the conclusion of the first issue that article 27(2) is a reflection of customary international law for the absence of personal immunity in international proceedings. Its second argument simply referred to the fact of prosecution, leaving aside the legal basis for prosecution untouched. The first two considerations are not relevant to the issue of personal immunity from arrest. The third ground that about two-thirds of the States are parties to the Statute showing a denial of personal immunity from arrest among these States, does not automatically imply a general and consistent rule under customary law. As examined above, the voluntary waiver requirement implies that States Parties respect personal immunity in custom. The last argument is appealing but not sufficient to prove that personal immunity from arrest enjoyed by senior officials of non-party States is removed. Based on irrelevant evidence and flawed arguments, Pre-Trial Chamber I concluded that current customary international rule recognises 'an exception to the traditional customary rule on absolute personal immunity before international proceedings seeking arrest for the commission of international crimes'.[201] In short, most sources mentioned in the *Malawi* Decision are irrelevant, and some decisions are rendered with flawed arguments. Its reasoning does not lead to its conclusion.

Other decisions of the ICC

The ICC's jurisdiction is a preliminary question for further practical issues regarding individual criminal responsibility and cooperation among States. Three questions should not be confused: (1) can the ICC exercise jurisdiction over senior officials benefiting from personal immunity; (2) is the ICC empowered to issue an arrest warrant against that person; and (3) is a State Party as a host State obliged to arrest and surrender that person? The Pre-Trial Chamber disregarded personal immunity from arrest before national authorities of other States by concluding that Malawi is obliged to arrest Al Bashir. An identically-composed Pre-Trial Chamber I reached the same conclusions in the 2011 Chad Decision.[202]

Trial Chamber V (A) in the *Kenyatta* case in 2013 followed the rulings of the *Malawi* Decision.[203] In this case, Kenyatta as President of the Republic of Kenya since 2013 was charged with crimes against humanity.[204] In 2014, he appeared before the ICC for a 'status conference'. Since Kenya is a party to the Rome Statute, personal immunity was not an issue before the Chamber. The Chamber also relied on the evidence referred to in the *Malawi* Decision.

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200 ibid, para 42.
201 ibid, para 43.
202 *Al Bashir Chad* Cooperation Decision 2011.
203 *Muthaura et al* Decision on Confirmation of Charges.
204 *The Prosecutor v Kenyatta* (Transcript, TC V) ICC-01/09-02/11-T-22-ENG (14 February 2013), p 6, lines 4-11.

The Chamber confirmed the ruling of the *Malawi* Decision and suggested that personal immunity is denied before international judicial bodies under customary law.[205] The *Kenyatta* case does not firmly evince the customary law of non-availability of personal immunity.

Subsequent decisions of the ICC do not adhere to the conclusions in the *Malawi* Decision.[206] In the 2014 *DRC* decision, Pre-Trial Chamber II stated that under international law, a sitting head of State enjoys personal immunities from criminal jurisdiction and inviolability before national courts of foreign States even when suspected of having committed the crimes that fall within the jurisdiction of the ICC.[207] Pre-Trial Chamber II added that as provided in article 27(2) of the Rome Statute, 'there is an exception to personal immunities of Heads of State for prosecution before an international criminal jurisdiction'.[208] This statement indirectly recognised the customary rule respecting personal immunity. Alternatively, the Pre-Trial Chamber held that the Security Council implicitly waived the immunity of Al Bashir.[209] The word 'waiver' enhances the contention that the Chamber acknowledged personal immunity under current international law. Other ICC non-cooperation decisions followed the same approach to show that the immunity has been removed.[210] These ICC non-cooperation decisions did not reject a general customary rule respecting personal immunity for international crimes but indirectly affirmed the idea of the non-existence of a new customary rule. In its recent *South Africa* and *Jordan* decisions, the Pre-Trial Chambers of the ICC endorsed that an incumbent head of a State still enjoys personal immunity under customary law. They agreed with lifting immunity on the basis that this was a consequence of the Security Council resolution.[211]

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205 The *Prosecutor v Kenyatta* (Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, TC V(b)) ICC-01/09-02/11-830 (18 October 2013), para 32. For further reading, see Leila N. Sadat and Benjamin Cohen, 'Impunity through Immunity: The Kenya Situation and the International Criminal Court' in E.A. Ankumah (ed), *The International Criminal Court and Africa: One Decade On* (Antwerp: Intersentia 2016) 101.

206 *Al Bashir Chad* Cooperation Decision 2013, para 21; *Al Bashir Nigeria* Cooperation Decision 2013.

207 *Al Bashir DRC* Cooperation Decision 2014, para 25.

208 ibid.

209 ibid, para 29.

210 *The Prosecutor v Al Bashir* (Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the States Parties to the Rome Statute) ICC-02/05-01/09-266 (11 July 2016), para 11; *The Prosecutor v Al Bashir* (Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute) ICC-02/05-01/09-267 (11 July 2016), para 11.

211 *Al Bashir South Africa* Cooperation Decision 2017, para 68; *Al Bashir South Africa* Cooperation Decision 2017 (Minority Opinion of Judge Marc Perrin De Brichambaut) ICC-02/05-01/09-302-Anx (6 July 2017); *Al Bashir Jordan* Cooperation Decision 2017, para 27.

Judge Eboe-Osuji in his separate opinion in *Kenyatta* Decision declared that 'customary international law does not recognise immunity for a head of state against prosecution before an international tribunal'.[212] In the 2016 *Ruto & Sang* acquittal decision, Judge Eboe-Osuji reviewed history and argued that 'article 27 is quite simply a codification of customary international law'.[213] His crucial and contestable requirement for the non-availability of personal immunity is also the international character of the court. Judge Eboe-Osuji seems to assume that traditional customary law, in general, does not apply to head of a State facing prosecution before international tribunals. As analysed above, post-World War II practice does not show an independent status of vertical personal immunity, but a dependent status of it based on the consent of States. The viewpoint of Judge Eboe-Osuji is less supported.

In sum, most of the ICC's *Al Bashir* non-cooperation decisions did not claim non-availability of personal immunity for international crimes under customary law but recognise the existence of personal immunity from arrest at the national level. The case law of the ICC does not persuade that a customary rule has been established to lift personal immunity for committing international crimes.

6.5.2 National reactions to personal immunity for committing international crimes

Following the adoption of the Rome Statute, and decisions in the *Pinochet* case, the *Arrest Warrant* case and the *Al Bashir* case, States Parties to the Rome Statute and non-party States responded in different ways to issue of immunity. Recent national cases and legislation seem to show that States did not intend to erode the customary rule respecting personal immunity or to modify the rule with an exception for committing international crimes.

6.5.2.1 National laws

A few States specifically regulate personal immunity from criminal proceedings in international law in their national legislation.[214] This subsection surveys States Parties' legislation concerning international crimes and their implementing laws of the Rome Statute to show that national laws have

212 *The Prosecutor v Kenyatta* (Separate further opinion of Judge Eboe-Osuji) ICC-01/09-02/11-830-Anx3-Corr (18 October 2013), para 32.

213 *Ruto & Sang* Acquittal Decision 2016 (Reasons of Judge Eboe-Osuji), paras 238-94.

214 UN Doc A/CN.4/701, paras 43-46, Privileges and Immunities of Foreign States, International Organisations with Headquarters or Offices in Spain and International Conferences and Meetings held in Spain. Spain, Organic Act 2015, art 22; Hungary, Criminal Code 1978, as amended 2012, art 4(5); Ireland, Criminal Code 1997, art 2(2); Latvia, Criminal Code 1998, as amended 2013, art 2(2); Lithuania, Criminal Code 2000, as amended 2015, art 4(4).

either echoed or reaffirmed the finding that customary law respects personal immunity, regardless of the nature of the crimes committed.

Belgium

Belgium was the most active and leading State denying personal immunity for sitting heads of State for committing international crimes. Its national law seems to shows a contrary direction after the 2002 *Arrest Warrant* case.[215] Belgium's Act of 16 June 1993 allowed its courts to prosecute persons for genocide, war crimes and crimes against humanity based on universal jurisdiction, even *in absentia*.[216] After the adoption of the Rome Statute, article 5(3) of the 1993 *Act* was amended in 1999.[217] It provided that '[t]he immunity attributed to the official capacity of a person, does not prevent the application of the present Act.'[218] Based on this amended Act, Belgian courts accepted judicial complaints against some senior leaders of States, including Israeli Prime Minister Ariel Sharon, Cuban President Fidel Castro, the US former President George H.W. Bush and Vice President Richard Cheney, as well as former Chadian president Hissène Habré.[219]

In contrast to its court, the Belgian Ministry of Foreign Affairs was less advanced for the concern about political abuse of the law by prosecuting senior officials.[220] Since the entry into force of the Rome Statute, Belgium has modified the respective Act twice with respect to the issue of immunity under article 5(3).[221] Article 5(3) of the 1993 Act as amended by the Law of April 2003 reads: 'International immunity derived from a person's official capacity does not prevent the application of the present law except under those limits established under international law'.[222] Belgium's Code of Criminal Procedure[223] as modified by the Law of August 2003 confirmed that '[i]n accordance with international law, sitting foreign heads of state, heads of government and ministers of foreign affairs, whose immunity is

215 2002 *Arrest Warrant* case of the ICJ (Dissenting Opinion of Judge Oda), para 5.

216 Act of 16 June 1993 concerning the punishment of Grave Breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 18 June 1977, art 7.

217 The Act of 16 June 1993, as modified by the Act of 10 February 1999 concerning the punishment of grave breaches of international humanitarian law, 38 ILM 921 (1999).

218 ibid, art 5 (3).

219 Malvina Halberstam, 'Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics Faculty Issue' (2003) 25 *Cardozo L R* 247.

220 Halberstam, 'Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics Faculty Issue', 250-51.

221 Law Amending the law of 16 June 1993 concerning the Prohibition of Grave Breaches of International Humanitarian Law and Article 144 *ter* of the Judicial Code), 23 April 2003, 42 ILM 749 (2003) [Law of 23 April 2003], art 4; art 13 of the Law of 5 August 2003 on Serious Violations of International Humanitarian Law [Law of 5 August 2003].

222 See Law of 23 April 2003, art 4 reads: 'Article 5, para 3 of the same law, modified by the law of February 10, 1999, is replaced by the following provision'.

223 Loi contenant le Titre préliminaire du Code de Procédure Pénale (Law containing the Preliminary Title of the Code of Criminal Procedure), 25 April 1878, updated version 22 October 2015.

recognised by international law, are immune from criminal prosecution'.[224] Accordingly, the provision that removed immunity for committing international crimes has been substantially repealed.[225]

The Netherlands

The implementing legislation in the Netherlands interpreted international law regarding personal immunity.[226] The 2003 Dutch International Crimes Act criminalised genocide, crimes against humanity and war crimes in conformity with the Rome Statute. The Act provides that 'foreign heads of state, heads of government and ministers of foreign affairs, *as long as* they are in office, and other persons in so far as their immunity is recognised under customary international law' are exempt from prosecution for international crimes.[227] The 2011 Netherlands Government Advisory Committee held that functional immunity should yield to the prosecution of international crimes. However, the Advisory Committee did not suggest that personal immunity would also cease to apply for the prosecution of international crimes. The Advisory Committee argued that 'the underlying reason for this [personal] immunity is to facilitate the smooth conduct of international relations'.[228] It even recommended amending the Dutch Disposal of Criminal Complaints (Offences under the International Crimes Act) Instructions with a more extended scope of persons who enjoy immunities recognised by customary law.[229]

Other legislation

A number of States Parties have not substantially implemented the rule of the Rome Statute in their national law. Several States' implementing laws implicitly support that in case of unsatisfactory consultation with the ICC,

224 Article 1*er* of the Code of Criminal Procedure, inserted by art 13 of Law of 5 August 2003. 'Conformément au droit international, les poursuites sont exclues à l'égard: des chefs d'Etat, chefs de gouvernement et ministres des Affaires étrangères étrangers, pendant la période où ils exercent leur fonction, ainsi que des autres personnes dont l'immunité est reconnue par le droit international'.

225 Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 112-14. For similar provisions, see Latvia, Criminal Code 1998, as amended 2013, art 2(2); Hungary, Criminal Code 1978, as amended 2012, art 4(5), providing that they 'respect for international rules regarding immunity in exercising universal jurisdiction' over international crimes.

226 270 Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act), 19 June 2003.

227 Netherlands, International Crimes Act 2003, art 16(a).

228 'Immunity for Foreign State Official: Advisory Report by the Netherlands Government Advisory Committee on Issues of Public International Law' (2011) 58 *Netherlands Intl L Rev* 461.

229 'Prosecution under this Act is excluded in respect of foreign heads of state, heads of government and ministers of foreign affairs as long as they are in office, and in respect of other persons insofar as their immunity is recognised by customary international law. The latter category includes diplomats accredited to the Netherlands and members of official missions'.

personal immunity under customary law could bar the request of the ICC for arrest.[230] In contrast, some States have stated that personal immunity is not a bar for the request of the ICC to arrest and surrender. The 1999 Extradition Act of Canada provides that '[d]espite any other law, no person who is the subject of a request for surrender by the International Criminal Court or by any international criminal tribunal that is established by resolution of the Security Council of the United Nations, may claim immunity under common law or by statute'.[231]

Kenya's implementing provisions stipulated that '[t]he existence of any immunity or special procedural rule attaching to the official capacity of any person is not a ground for refusing the execution of a request for surrender made by the ICC'.[232] Similar provisions were enshrined in the implementing laws of France, Germany, New Zealand, Norway, Switzerland and Trinidad and Tobago as well as Uganda.[233] In their view, immunity cannot be invoked for non-compliance with an ICC request. The implementing laws were closely connected with article 98(1) of the Statute. All these provisions indicate the attitude that these States can or cannot reject the request to cooperate with the ICC when there is no waiver of immunity or necessary consent. However, the provisions do not address the issue of personal immunity in custom. Without further observation, it is inappropriate to conclude that these rules evidence the belief of national legislators that an exception to personal immunity is an accepted practice in international law. For example, Kenya in 2014 proposed amending article 27 of the Rome Statute by adding a new paragraph to 'pause' prosecution of 'sitting' senior officials.[234] Although the proposal was unsuccessful, this instance demonstrates that Kenya, in fact, supports the ICC prosecuting sitting senior officials only after leaving office.

Few national laws intend to invalidate personal immunity. The respective Croatian law stipulates that 'immunities and privileges shall not apply

230 For national laws, see Austria, Cooperation with the International Criminal Court 2002, § 9.1.3; Australia, International Criminal Court Act 2002, art 12(4); Argentina, Act Implementing the Rome Statute of the International Criminal Court 2001, arts 40 and 41; Liechtenstein, Act on Cooperation with the International Criminal Court and other International Tribunals 2004, arts 10.1(c) and 10.3.

231 Canada, Extradition Act 1999, § 6.1.

232 Kenya, International Crimes Act 2008, revised 2012, art 27(1)(a); Uganda, International Criminal Court Act 2010, arts 251(a) and (b).

233 France, Code of Criminal Procedure 2002, art 627.8; Germany, Law on Cooperation with the International Criminal Court 2002, art 1, para 70; Kenya, Act on International Crimes 2008, art 27; New Zealand, International Crimes and International Criminal Court Act 2000, reprinted 2012, art 31.1; Norway, Act 2001 concerning Implementation of the Statute of the International Criminal Court of 17 July 1998 (Rome Statute) in Norwegian law, art 2; Switzerland, Federal Law on Cooperation with the International Criminal Court 2001, art 6; Trinidad and Tobago, International Criminal Court Act 2006, art 31(1)(a); Uganda, International Criminal Court Act 2010, arts 251(a) and (b).

234 The ICC ASP, 'Report of the Working Group on Amendments', ICC-ASP/13/31, 7 December 2014, para 12. Proposal of amendments by Kenya to the Statute, C.N.1026.2013.TREATIES-XVIII.10 of 14 March 2014.

in procedures involving the crimes' within the jurisdiction of the ICC.[235] The laws in Burkina Faso, Comoros, Mauritius and South Africa shared a similar feature.[236] Article 27(2) was also duplicated in the 2000 East Timor Penal Regulation to deal with international crimes from 1974 to 1999.[237]

Many national laws seem to confirm personal immunity under customary law. Some national implementing laws repeated the provision under article 27(2) that the personal immunity is not a bar for the proceeding of the ICC, for instance, the laws in Ireland, the Philippines, Samoa and the UK.[238] These implementing provisions also qualify the immunity by stressing 'a connection with a State party to the ICC Statute'. The UK Act stipulates:

> Where —
>
> (a) state or diplomatic immunity attaches to a person by reason of a connection with a state other than a state party to the ICC Statute, and
>
> (b) waiver of that immunity is obtained by the ICC in relation to a request for that person's surrender,
>
> the waiver shall be treated as extending to proceedings under this Part in connection with that request.[239]

The Philippine legislation clearly states that '[i]mmunities that may be attached to the official capacity of a person under international law may limit the application of this [Philippine] Act'.[240] These implementing provisions dismiss personal immunity of nationals of a State Party to the Rome Statute. A waiver of immunity is required with regard to a person of a State not a party to the Statute. These implementing provisions, therefore, evince the continuation of personal immunity rather than a denial of it under customary law.

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235 Croatia, Law on the Implementation of the Statute of the International Criminal Court and the Prosecution of Crimes against International Law of War and Humanitarian Law 2003, art 6.4.

236 Burkina Faso, Act on the determination of competence and procedures for application of the Rome Statute of the International Criminal Court by the jurisdictions of Burkina Faso 2009, arts 7 and 15.1; Comoros, Act concerning the application of the Rome Statute 2011, art 7.2; Mauritius: International Criminal Court Act 2001, art 4; South Africa, Act implementing the Rome Statute of the International Criminal Court 2002, art 4(2)(a)(i) and 4(3)(c).

237 East Timor, Regulation for Special Panels for Serious Crimes 2000, § 15.2.

238 Samoa, International Criminal Court Act 2007, art 32(1); UK, International Criminal Court Act 2001, art 23(1); Ireland, International Criminal Court Act 2006, § 61.1; Iceland, Act on the International Criminal Court 2003, art 20.1; Malta, Extradition Act, art 26S; Philippines, Act on Crimes against International Humanitarian Law, Genocide, and Other Crimes against Humanity 2009, § 9(b); Estonia, Code of Criminal Procedure 2004, para 492(6).

239 UK, International Criminal Court Act 2001, art 23(2).

240 Philippines, Act on Crimes against International Humanitarian Law, Genocide, and Other Crimes against Humanity 2009, § 9(b).

6.5.2.2 *Practice of States Parties*

Through the ratification of the Rome Statute, States Parties consent to waive any immunity before the ICC and before the jurisdiction of other States Parties. This implies that personal immunity is not a bar to such proceedings with the consent of States Parties. Also, some States Parties claim that personal immunity of senior non-party State officials remains under international law. This part focuses on the practice, statements as well as reactions of States to personal immunity for international crimes.

Belgium, Spain and Switzerland

Analysing the practice of States that frequently exercise universal jurisdiction over international crimes would provide hints for their attitude towards the issue of personal immunity.

Rulings of Belgian courts demonstrate the same direction as its two amendments of law do. In the 2002 *Arrest Warrant* case, Belgium's proposal was rejected by the ICJ that no immunity exists before Belgian courts for serious crimes.[241] Belgium then withdrew the arrest warrant for Yerodia declared that the case was inadmissible because of his immunity. The Belgian delegation said that the majority of complaints concerning senior leaders who enjoyed immunity were declared inadmissible.[242] In the 2003 *Sharon et al* case, the defendants appealed to the Belgian Court of Cassation about an Indictments Chamber's ruling.[243] The Court of Cassation upheld that criminal actions against Ariel Sharon were inadmissible. According to the Court of Cassation, the 'principle of customary international criminal law relative to jurisdictional immunity was not impaired by article 27(2) of the Rome Statute before national courts of a third State claiming universal jurisdiction in *absentia* over genocide'.[244] The exercise of universal jurisdiction does not imply non-entitlement to personal immunity for international crimes. In addition, Sharon's personal immunity before Belgian courts was not removed by virtue of the 1948 Genocide Convention.[245] The Court upheld that any trial against Sharon would have to wait for his departure from office. Later on, the Court of Appeals cited the *Sharon et al* case and declared that Belgium lacked jurisdiction over Fidel Castro. One reason was also that Castro as a then sitting head of State could not be tried.[246] In 2005, a Belgian judge issued an international arrest warrant for Habré for alleged

241 2002 *Arrest Warrant* case of the ICJ, 32, para 78.

242 'Summary record of meeting with the Human Rights Committee of 13 July 2004 in relation to the fourth periodic report under the International Covenant on Civil and Political Rights', UN Doc CCPR/C/SR.2199, 23 July 2004, Belgium, para 10.

243 *H.A.S. et al v Ariel Sharon, Amos Yaron et al* (Decision Related to the Indictment of Ariel Sharon, Amos Yaron and others, Court of Cassation, Belgium) Case No. P.02.1139.F/1 (12 February 2003), 42 ILM 596 (2003) [*Sharon et al* case, 42 ILM 596 (2003)].

244 ibid, 600.

245 ibid, 599.

246 *José J. Basulto et al v Fidel Castro Ruz et al* (Court of Cassation, Belgium), 29 July 2003.

international crimes.[247] As a matter of fact, Habré was a former Chadian president at that time, and Chad waived his functional immunity.[248] All these rulings further demonstrate that Belgium changed its active position on personal immunity.

Spain is also advanced in exercising universal jurisdiction.[249] Unlike Belgium's view in the *Arrest Warrant case*, Spain always stresses that an incumbent head of State who enjoys personal immunity in international law cannot be prosecuted for international crimes in Spain based on universal jurisdiction. The National High Court in its 1999 finding argued that Castro could not be prosecuted in Spain because he was an incumbent head of State. The Court also stated that this finding did not conflict with its ruling in *Pinochet* [250] because Pinochet was a former head of State.[251] The National High Court in 2005 further rejected the complaint against Castro by virtue of the immunity of a sitting head of State.[252] The Swiss Federal Criminal Court in 2012 held that the four alternatives mentioned in the ICJ's *Arrest Warrant* case highlighted the emergence of exceptions to immunity from jurisdiction for international crimes.[253] Meanwhile, the Swiss court also affirmed that an incumbent minister still enjoys personal immunity during the period in which s/he held office.[254]

African States and Other States Parties

The African Union (AU), of which 33 of the 54 member States are States Parties to the Rome Statute, collectively adopted a resolution to confirm the customary rule respecting personal immunity of senior officials before

247 See *Obligation to Prosecute or Extradite* Judgment, 432, para 21.

248 See 'L'immunité de Hissène Habré définitivement levée, Lettre de M. Koudji-Gaou à M. Fransen' (Letter from the Minister of Justice of Chad on the Immunity of Hissène Habré to Belgium), 7 October 2002.

249 Belgium, Judicial Power Organisation Act 1985, amended 1999, art 23.4. Limitations to its universal jurisdiction, see art 1 of the Organisation Act No 1/2009.

250 *Augusto Pinochet* case (Order, Criminal Chamber, National High Court (Audiencia Nacional), Spain) No 1998/22605 (5 November 1998) and No 1999/28720 (24 September 1999), cited in Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', 860 and fn 19. For further summaries of the case, see 'Order of the Criminal Chamber of the Spanish Audiencia Nacional affirming Spain's Jurisdiction, 5 November 1998 (unofficial translation)' in R. Brody and M. Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet Ugarte in Spain and Britain* (The Hague: Kluwer Law International 2000) 95-107.

251 *The Foundation for Human Rights v Fidel Castro* (Order, Criminal Chamber, National High Court, Spain) No 1999/2723 (4 March 1999), cited in Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', 860-61 and fn 21.

252 For other decisions of Spain, see *Al Bashir South Africa* Cooperation Decision 2017 (Minority Opinion of Judge Marc Perrin De Brichambaut), para 86 and fn 119.

253 *A v Public Ministry of the Confederation, B and C* (Decision, Federal Criminal Court, Switzerland) BB. 2011.140 (25 July 2012), paras 5.3.3-5.3.5.

254 ibid, para 5.4.2.

the ICC.[255] In addition, the AU in 2014 approved an amendment to the Protocol on the Statute of the African Court of Justice and Human Rights to respect immunities of serving African senior State officials for prosecution of international crimes. It provides that '[n]o charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office'.[256] In recent years, the AU in its *amicus curiae* observation reaffirmed personal immunity under customary law in national and international proceedings.[257] As mentioned before, Congo objected to the idea of the denial of personal immunity for war crimes and crimes against humanity in the *Arrest Warrant* case of the ICJ.[258] This discrepancy between treaty provisions at least shows that no consensus exists among African States Parties to the Rome Statute concerning a customary rule with an exception to personal immunity.

Furthermore, responses of States to Al Bashir's travels indicate their attitude towards the issue of denial of personal immunity. Al Bashir has frequently travelled abroad and been allowed access to 27 States in Africa, Arab countries and Asia despite warrants for his arrest.[259] Some of the States he

255 Assembly of the African Union, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)', Assembly/AU/Dec.245 (XIII) 1-3 July 2009; 'Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)', Assembly/AU/Dec.296 (XV), 25-27 July 2010; African Union Press Release, 'On the Decision of the Pre-Trial Chamber of the ICC Informing the UN Security Council and the Assembly of the States Parties to the Rome Statute About the Presence of President Omar Hassan Al-Bashir of the Sudan Territories in the Republic of Chad and the Republic of Kenya' (29 August 2010); Extraordinary Session of Assembly of the African Union, 'Decision on Africa's Relationship with the International Criminal Court (ICC)', Ext/Assembly/AU/Dec.1(Oct. 2013), §§ 9-10. See also Gaeta and Labuda, 'Trying Sitting Heads of State: The African Union versus the ICC in the *Al Bashir* and *Kenyatta* Cases', 139-41.

256 The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, arts 28A and 46A*bis*.

257 *The Prosecutor v Al Bashir* (Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to Rule 103 of the Rules of Procedure and Evidence), AC) ICC-02/05-01/09-330 (29 March 2018), para 1; African Union's Submission, paras 10-12.

258 2002 *Arrest Warrant* case of the ICJ, 12, para 25.

259 *The Prosecutor v Al Bashir* (Report of the Registry on information received regarding Omar Al Bashir's travels to States Parties and Non-States Parties from 5 October 2016 to 6 April 2017 and other efforts conducted by the Registry regarding purported visits, Registry) ICC-02/05-01/09-296 (11 April 2017); *The Prosecutor v Al Bashir* (Report of the Registrar on the Information received as regards Travel by Omar Hassan Ahmad Al Bashir to the Republic of Uganda, Registry) ICC-02/05-01/09-307 (14 November 2017). These states were Algeria, Bahrain, Chad, China, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Jordan, India, Iran, Iraq, Kenya, Kuwait, Libya, Malawi, Mauritania, Morocco, Nigeria, Qatar, Saudi Arabia, South Africa, and South Sudan, Uganda, United Arab Emirates. As of the end of November 2017, 18 of 27 States are not States Parties to the Rome Statute.

has visited are Parties to the Rome Statute.[260] Chad consistently allowed Al Bashir to visit it and refused to arrest him and surrender him to the ICC.[261] Malawi claimed that since article 27(2) of the Rome Statute does not apply to a head of non-party State to the Rome Statute, Al Bashir was immune from arrest under customary law. Jordan and the League of Arab States[262] shared the same view as Malawi.[263] These States' persistent refusal to arrest Al Bashir evidence that, in their view, personal immunity remains a rule of customary law for the prosecution of international crimes, even if an arrest warrant was issued by an international tribunal.

Recent national decisions of South Africa also merit attention. In 2015, the Southern Africa Litigation Centre (SALC) applied to examine South Africa's government decision to respect the immunity of all State representatives to the AU Summit before the High Court of South Africa. The High Court admitted that customary law is a source for an individual to enjoy immunity.[264] Additionally, the Court relied on Security Council Resolution 1593 to remove the personal immunity of Al Bashir.[265] This decision was appealed to the South African Supreme Court. All judges in the Supreme Court supported personal immunity of heads of State under customary law. Also, the Supreme Court held that according to the 2002 South African Implementation of the Rome Statute of the ICC Act, when a person is prosecuted in South Africa for genocide, war crimes and crimes against humanity, international immunities have been removed, irrespective of whether the person is a sitting head of State not a party to the Rome Statute. In interpreting its national law, it seems that the Supreme Court follows Belgium's position prior to the ICJ's *Arrest Warrant* case.[266] Two concurring judges in the Supreme Court said that this decision 'would create an intolerable anomaly' because 'South Africa was taking a step that many other nations have not yet taken'.[267] It is unknown whether South Africa would follow in the Belgium's footsteps to

260 ICC, 'Twenty-Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)' (9 June 2016), para 11; ICC, 'Twenty-Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)' (8 June 2017), para 13. These States are Chad, Kenya, Djibouti, Malawi, Nigeria, DRC, Uganda, South Africa, Jordan.

261 It is said that Al Bashir has visited Chad five times since 2010, the most recent visit was in December 2017.

262 The Arab League consists of 22 member States.

263 *Al Bashir Jordan* Cooperation Decision 2017, paras 7, 14-15; Jordan's Appeal, paras 15-21; *The Prosecutor v Al Bashir* (The League of Arab States' Observations on the Hashemite Kingdom of Jordan's appeal against the "Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir") ICC-02/05-01/09-367 (16 July 2018), para 26.

264 *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional* (27740/2015) [2015] ZAGPPHC 402, para 2.

265 ibid.

266 *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17, para 103.

267 ibid, paras 103, 122.

exercise universal jurisdiction, and even widely investigate and prosecute sitting heads of State for committing international crimes. In short, South African domestic courts do not show an active position on a new customary rule with an exception to personal immunity for committing international crimes.

According to his travel map, Al Bashir has been denied access to some States.[268] Nevertheless, the fact that some of the 9 States Parties he has visited sometimes have not hosted him is not persuasive evidence to show that these States accepted an exception to personal immunity in custom. Some States changed their plans to host him in reaction to political pressure or to avoid potential immunity disputes. Malawi, Nigeria and Uganda indeed first denied but later allowed him access.[269] Botswana, France, Malaysia and Zambia announced that if Al Bashir visited, they would comply with the Rome Statute to arrest him. Their denial of access may indicate either their support for a new customary rule or an obligation to cooperate pursuant to the Rome Statute. Accordingly, a new customary rule that provides an exception to personal immunity for committing international crimes is at least not widely acknowledged by States Parties.

6.5.2.3 Practice of non-party States

Non-party States also play a role in modifying or creating a customary rule. Non-party States are not bound by the new immunity regime set out in article 27(2). Some non-party States have never accepted the waiver of immunity enshrined in the Rome Statute.[270] The statement of the Russian Federation in the Security Council meeting implicitly confirmed Al Bashir's immunity,[271] which stated: '[t]he ICC must respect the provisions of international law relating to the immunity accorded Heads of State and other senior officials during their tenure'.[272]

Al Bashir has also travelled to other non-party States, including Egypt.[273] Egypt shared the Russian view. China also abstained from arresting him when he visited the mainland. On another occasion, the Chinese delegation expressed in the UN General Assembly that 'China does not believe that the provisions of draft article 7 [the ILC's draft article concerning exceptions to functional immunity about international crimes] qualify as codification or

268 Al Bashir Trip Map, available at: http://bashirwatch.org [accessed 20 July 2018].

269 See Al Bashir Trip Map, Turkey, Malawi (1st visit allowed, 2nd visit denied), Nigeria (1st visit denied, 2nd allowed), Uganda (1st visit denied, 2nd allowed).

270 'Report of the Security Council Mission to Djibouti (on Somalia), the Sudan, Chad, the Democratic Republic of the Congo and Côte d'Ivoire, 31 May to 10 June 2008', UN Doc S/2008/460, para 60; 'Reports of the Secretary-General on the Sudan and South Sudan', UN SCOR, 7963rd meeting, UN Doc S/PV.7963 (8 June 2017).

271 UN Doc S/PV.7963 (8 June 2017).

272 ibid.

273 They are Algeria, Bahrain, China, Egypt, Equatorial Guinea, Eritrea, Ethiopia, India, Iran, Iraq, Kuwait, Libya, Mauritania, Morocco, Qatar, Saudi Arabia, South Sudan, and the United Arab Emirates.

progressive development of customary international law'.[274] Following this logic, it is appropriate to conclude that China does not share the view that a new customary rule denying personal immunity is emerging, or current customary law provides an exception to personal immunity for committing international crimes.

Despite the US's supportive attitude towards the ICC in recent years,[275] it would be less convincing to say that the US also supports a denial of personal immunity.[276] The US 1976 Foreign Sovereign Immunities Act only allows the US to deny functional immunity in civil cases in relation to acts of torture and international crimes.[277] The US State Department also observed that 'the doctrine of head of state immunity is applied in the United States as a matter of customary international law'.[278] The US Court of Appeal in the 2012 *Samantar* case held that 'American courts have generally followed the foregoing trend, concluding that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity but still recognising that head-of-state immunity, based on status, is of an absolute nature and applies even against *jus cogens* claims'.[279] The US is also less reluctant to accept such a new customary rule.

6.5.3 The UN Security Council and its resolutions

This subsection analyses the Security Council's binding resolutions to discover its attitude towards personal immunity. Security Council Resolution 827 and Resolution 1593, which created the ICTY and referred the Darfur Situation to the ICC respectively, are examined to show whether the Security Council intended to override the traditional customary rule of personal immunity or to confirm a new customary rule.

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274 China, 'Statement by Director-General XU Hong at the 72nd Session of the UN General Assembly on Agenda Item 81: Report of the International Law Commission on the work of its 69th session' (27 October 2017). For a similar idea see GAOR 69th session, 35th plenary meeting, UN Doc A/69/PV.35 (31 October 2014), Algeria.

275 William A. Schabas, 'International War Crimes Tribunals and the United States' (2011) 35 *Diplomatic History* 769.

276 'Statement of the United States of America Delivered by David Scheffer, US Ambassador at Large for War Crimes Issues before the Sixth Committee of the UN General Assembly, Agenda Item: The International Criminal Court' (19 October 2000).

277 US, Foreign Sovereign Immunities Act 1976, 28 USC 1605A (a)(1), amended by the Torture Victim Protection Act of 1991, 28 USC 1350.

278 John Crook, 'Contemporary Practice of the United States Relating to International Law' (2006) 100 *AJIL* 219, 219-20; Daniel Singerman, 'It's Still Good to Be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity' (2007) 21 *Emory Intl L Rev* 413; Michael Tunks, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity' (2002) 52 *D Law J* 651.

279 *Yousuf and ors v Samantar*, 699 F 3d 763 (4th Cir 2012), para 35; *Ye and ors v Former President Jiang Zemin and Falun Gong Control Office* (United States Department of State (intervening) and United States Department of Justice (intervening)), 383 F 3d 620 (7th Cir 2004), para 20. *Contra* see *Belhas et al v Ya'alon* (Appeal from the US District Court for the District of Columbia), [2008] USCADC 15 (15 February 2008), pp 6-8, 13.

It should first be clarified whether the Security Council is empowered to override or derogate from customary law. Some commentators argue that the Security Council has the power to remove personal immunity through a resolution backed up by the Chapter VII authority of the UN Charter.[280] Other commentators doubt the power of the Security Council, in particular, the impact of the Security Council on the application of the ICC legal framework.[281] Schabas argues that it is necessary to note the differences between the ICC and the UN *ad hoc* tribunals on the establishing mechanism.[282] The Security Council may have the power to deprive senior officials of the UN member States of personal immunity before *ad hoc* tribunals established by it; however, its power is strictly restrained by the Rome Statute about immunities, even acting by virtue of Chapter VII of the UN Charter.[283] Serving as a trigger mechanism under the Rome Statute, the Security Council has no more power than a State Party does.[284]

UK national law, however, provides that:

> The power conferred by section 1 of the United Nations Act 1946 (c. 45) (power to give effect by Order in Council to measures not involving the use of armed force) includes power to make in relation to any proceedings such provision corresponding to the provision made by this section in relation to the proceedings, but with the omission […] of the words 'by reason of a connection with a state party to the ICC Statute' [in section 23(1)], and of [sections 23(2)-(3)], as appears to Her Majesty to be necessary or expedient in consequence of such a referral as is mentioned in article 13(b) [of the Rome Statute].[285]

This provision enables a Security Council resolution to override any immunities of State, including non-party States, 'depending upon their wording'.[286] This provision confirms the power of the Security Council to remove personal immunity of non-party States of the Rome Statute but with an emphasis on the importance of the wording. The Pre-Trial Chamber of the ICC has also

280 Dapo Akande, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 10 *JICJ* 299; Ssenyonjo, 'II. The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan', 211; Kiyani, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', 474-80; *The Prosecutor v Al Bashir* (Request by Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, Stahn and Vasiliev for Leave to Submit Observations) ICC-02/05-01/09-337 (26 April 2018), para 6. For more discussions, see *The Prosecutor v. Al Bashir* (Transcript, AC) ICC-02/05-01/09-T-4-ENG, ICC-02/05-01/09-T-5-ENG, ICC-02/05-01/09-T-6-ENG (10-12 September 2018).

281 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 604.

282 *Milošević* Decision on Preliminary Motions, paras 28-33; Schabas, ibid, 603; Liu, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?'.

283 For discussions, see Kiyani, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', 474-80.

284 *The Prosecutor v Ahmad Harun & Ali Kushayb* (Decision on the Prosecution Application under Article 58(7) of the Statute (2), PTC I) ICC-02/05-01/07-1-Corr (29 April 2007), para 16; Condorelli and Villalpando, 'Can the Security Council Extend the ICC's Jurisdiction?', 575.

285 UK, International Criminal Court Act 2001, art 23(5).

286 UK, International Criminal Court Act 2001 (Isle of Man) Order 2004, Explanatory Note.

implicitly confirmed the power of the Security Council to override immunity of a head of State under customary law.[287]

The following analysis is based on the assumption that the Security Council can override personal immunity by virtue of a resolution under Chapter VII of the UN Charter. Resolution 827 was adopted without a vote but by a general agreement of the Security Council under Chapter VII of the UN Charter.[288] Resolution 827 stated that 'all States shall cooperate fully with the Tribunal […] in accordance with the present resolution […] all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute'.[289]

The Security Council kept silent regarding the issue of immunity in its Resolution 827 and the annexed ICTY Statute. Also, the Federal Republic of Yugoslavia (FRY) did not claim that the ICTY violated personal immunity under customary law by issuing an arrest warrant and an indictment against Milošević.[290] Cassese wrote that 'the absence of any challenge to issuance of the ICTY of an arrest warrant, and the absence of any derogation provision regarding personal immunities indicate that States considered that it is unnecessary to include such a provision with regard to the exercise of jurisdiction by an international criminal court'.[291] Nevertheless, it is debatable why it is 'unnecessary' to include a provision derogating from personal immunity, such as article 27(2) of the Rome Statute. The element of 'unnecessary' could be explained for several reasons.

The first possible interpretation of 'unnecessary' might be that in the Resolution the Security Council implicitly intended to confirm a new customary rule for committing international crimes. This idea is not credible because the Security Council had no specifically targeted suspect in mind during the establishment of the ICTY. The Security Council would not have intended to confirm a customary rule eroding personal immunity for committing international crimes. The second interpretation is that the international nature of the court is sufficient to deprive personal immunity. This idea was mentioned in the *Charles Taylor* decision of the SCSL and the *Malawi* Decision of the ICC.[292] This argument is also less convincing as analysed above. Cassese would not support such a rule that is merely based on a distinction between international courts and national courts.[293] The third construction is that a

287 *Al Bashir DRC* Cooperation Decision 2014; *Al Bashir South Africa* Decision 2017.

288 UN Doc S/RES/827 (1993); James O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993) 87 *AJIL* 639.

289 UN Doc S/RES/827 (1993), para 4.

290 ICTY Press Release, 'Justice Minister of the Federal Republic of Yugoslavia gives Commitment to serve ICTY Arrest Warrant on Slobodan Milošević' (6 April 2001), J.L./P.I.S./585-e; *Prosecutor v Milošević* (Decision on Preliminary Motion) ICTY-99-37-PY (8 November 2001).

291 Cassese *et al* (eds), *Cassese's International Criminal Law* 322 and fn 26.

292 *Prosecutor v Milošević* (Decision on Preliminary Motion) ICTY-99-37-PY (8 November 2001), para 35; *Al Bashir Malawi* Cooperation Decision 2011, para 34.

293 Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', 864.

customary rule derogating from personal immunity for committing international crimes exists. Thus, it is not necessary to include this provision. Accordingly, the FRY's absence of a challenge based on Milošević's personal immunity further indicates that the FRY behaved in that way with a conviction of recognising the invalidation of personal immunity under customary law. The third interpretation is possible but not exclusive.

A more appropriate understanding might be that it is 'unnecessary' because the UN Security Council Resolution under Chapter VII of the UN Charter implicitly obliges States to waive personal immunity for the exercise of jurisdiction by the UN *ad hoc* tribunals.[294] This is an indirect legal effect of Security Council Resolution 827. According to article 25 of the UN Charter, these Security Council decisions have to be accepted and carried out by members of the UN. All States were obliged to carry out the whole Resolution 827 and the Statute through all possible measures.[295] The FRY, as a UN member as a successor to the Socialist Federal Republic of Yugoslavia, waived personal immunity enjoyed by its former head of State Milošević.[296] This interpretation indicates that the practice of non-availability of personal immunity is not sufficiently accepted to become a customary rule by the Security Council.

At the ICC, the drafters of the Rome Statute did not want States or the Security Council to pre-determine the focus of the ICC on targeted conduct and suspects. The Security Council can only refer a Situation rather than a case to the ICC.[297] The term 'immunity' was also absent from Resolution 1593 referring the Darfur Situation to the ICC. Resolution 1593 decided that:

> […] nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorised by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.[298]

294 William A. Schabas, 'Kosovo, *Prosecutor v Milošević*, Decision on preliminary motions Case no IT-99-37-PT' in *Oxford Reports on International Law*, 21 May 2010.

295 1993 ICTY Statute, art 29: 'Co-operation and judicial assistance 1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal.'

296 This argument is supported by the *Prosecutor v Blaškić* (Decision on the Objection of the Republic of Croatia to the Issue of *subpoenae duces tecum*) ICTY-95-14-PT (18 July 1997), paras 83-86, 89.

297 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc A/51/22 (1996), Vol I, para 146; Rod Rastan, 'Jurisdiction' in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford: OUP 2015) 158.

298 UN Doc S/RES/1593 (2005), para 6. Similar formulations repeated in UN Doc SC/RES/1970 (2014), para 6 and UN Doc S/2014/348 (22 May 2014), para 7.

In the 2017 *South Africa* non-cooperation decision, Judge Perrin De Brichambaut in his minority opinion thoroughly examined the interpretation of Resolution 1593 by observing its ordinary meaning, context, object and purpose, statements by members of the Security Council and other UN Security Council's resolutions, as well as the subsequent practice of relevant UN organs and affected States. He concluded that a definite answer could not be reached regarding the removal of Al Bashir's immunity by virtue of Resolution 1593.[299] When the ICC Prosecutor reported to the Security Council about the non-cooperation issue in the *Al Bashir* case, the Russian Federation openly commented that 'the obligation to cooperate, as set forth in resolution 1593 (2005), does not mean that the norms of international law governing the immunity of the [sic] Government officials of those States not party [to] the Rome Statute can be repealed, and presuming the contrary is unacceptable'.[300] This statement further confirms the view that no implied agreement exists among members of the Security Council to refuse personal immunity.[301] It is doubtful that the Security Council intended to override it and lift Al Bashir's personal immunity through Resolution 1593.

In short, Resolutions 827 and 1593 are not enough credible evidence to demonstrate the Security Council's intention to 'override' traditional customary law or to 'confirm' a modified customary rule derogating from personal immunity. The absence of personal immunity in the Resolutions was not intended to alter or to override but instead to respect personal immunity under customary law. The following paragraphs analyse the work of the ILC to show its view on an exception to absolute personal immunity.

6.5.4 The work of the International Law Commission

The ILC's recent work has expressed its attitude towards the exception to the rule of personal immunity for committing international crimes. In the ILC's work on the issue of immunity, Roman A. Kolodkin and Concepción Hernández were appointed as Special Rapporteurs.[302] The first Rapporteur Kolodkin held that the 2002 ICJ judgment in the *Arrest Warrant* case was a correct landmark decision.[303] He supported that '[i]mmunity from international criminal jurisdiction appears to be fundamentally different from immunity from national criminal jurisdiction' and '[t]he principle of sovereign equality of States […] cannot be the rationale for immunity from

299 *Al Bashir South Africa* Cooperation Decision 2017 (Minority Opinion of Judge Marc Perrin De Brichambaut), paras 64-83; *Al Bashir Jordan* Cooperation Decision 2017 (Minority Opinion of Judge Marc Perrin De Brichambaut) ICC-02/05-01/09-309-9-Anx-tENG (11 December 2017), para 3.

300 UN Doc S/PV.7963 (8 June 2017).

301 *Al Bashir DRC* Cooperation Decision 2014, para 29.

302 UN Doc A/61/10 (2006), paras 257, 386; UN Doc A/62/10 (2007), para 376. The ILC also requested the Secretariat to prepare a background study on the topic.

303 UN Doc A/63/10 (2008), para 311.

international jurisdiction'.[304] However, in his viewpoint, the ILC's topic only concerns immunity from foreign criminal jurisdiction. A principle of immunity of State officials exists, and it is uncertain whether there is a trend of asserting the existence of a new rule for the exception to immunity.[305] Some members held that this argument is outdated,[306] and that he did not take into account the new development of international law about international crimes. Kolodkin emphasised that his ultimate goal was not to 'formulate abstract proposals as to what international law might be, but to work on the basis of evidence of the existing international law in the field'. Divergent views exist in the Commission concerning the issue of exception.[307] The second and present Rapporteur Hernández has submitted five reports to the ILC.[308] Her fifth report concluded that 'it had not been possible to determine the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule'.[309] Most of the Commission has agreed that the exceptions do not apply to State officials' personal immunity to foreign criminal jurisdiction relating to international crimes.[310]

6.5.5 Assessment and conclusions

This section shows that the *Arrest Warrant* case of the ICJ gave strength to personal immunity by openly stating it as a customary rule. Decisions of the ICC and the SCSL indicate a new trend of denying personal immunity before international tribunals. It is doubtful that a derogation from personal immunities can be grounded merely on the nature of the court. Other international jurisprudence, national cases and legislation, however, send a different message. The examination also demonstrates that both States Parties and non-party States, such as Belgium, China, Malawi, Russia, South Africa, the Netherlands, the UK and the US, Arab States as well as some other African States, generally respect personal immunity of senior officials.[311] The scarcity of hard practice and the lack of supporting *opinio juris* indicate the absence of widespread recognition of the rule that personal immunity is no

304 UN Doc A/CN.4/601 (2008), para. 103.
305 ibid; UN Doc A/CN.4/631 (2011), paras 90-93.
306 Huikang Huang, 'On Immunity of State Officials from Foreign Criminal Jurisdiction' (2014) 13 *Chinese J Intl L* 1.
307 UN Doc A/63/10 (2008), paras 295-98.
308 'Fourth Report on immunity of State officials from foreign criminal jurisdiction, by Special Rapporteur Concepción Escobar Hernández', UN Doc A/CN.4/686 (2015); UN Doc A/CN.4/701 (2016).
309 UN Doc A/CN.4/701 (2016), para 240; UN Doc A/72/10 (2017), para 83, pp 166-67.
310 UN Doc A/CN.4/686 (2015), paras 136-37; UN Doc A/CN.4/701 (2016), paras 19(f) and (g); UN Doc A/70/10 (2015), para 230.
311 Committee on International Criminal Court, 'Third Report, by Professor Göran Sluiter, Co-rapporteur (Part I), Professor William A. Schabas, Co-rapporteur (Part II)' in International Law Association Report of the 73rd Conference (Rio de Janeiro 2008) (ILA, London 2008) 605-06.

longer applicable in proceedings for international crimes under customary law.[312] To date, no such customary international rule is emerging to create an exception to personal immunity for international crimes in international and national proceedings. South African authorities still contend that personal immunity for international crimes continues under customary law.[313] Contrary to the view of its government, the decision of the South African Supreme Court might be the first departure at the national level. The reaction of the international community to its practice would be valuable evidence for further assessment of personal immunity under customary law for committing international crimes. At the present time, article 27(2) of the Rome Statute is not declaratory of a customary rule of non-availability of personal immunity for committing international crimes.

6.6 Concluding remarks

Identifying a customary rule is a good attempt to solve the issue regarding personal immunity of sitting heads of State for committing international crimes. This Chapter shows that the rationale of personal immunity for sitting senior officials is not only a requisite of their function but also the status of the State in international relations. Article 27(2) of the Rome Statute with a denial of personal immunity departs from a pre-existing customary rule; besides, it also acknowledges the customary rule by providing an exception to the customary rule about personal immunity. Thus, article 27(2) confirms the existing customary law respecting personal immunity in international law at the time when the Rome Statute was adopted. In addition, an examination of evidence of the two elements of customary law shows that a modification of the pre-existing customary rule is not yet mature enough to provide an exception to absolute personal immunity for committing international crimes. To date, the customary law rule respecting personal immunity remains intact to a certain extent in international law, regardless of the nature of the crimes. In conclusion, article 27(2) was not declaratory of a modified customary international rule providing non-availability of personal immunity for international crimes when the Rome Statute was adopted in 1998. Moreover, article 27(2) is also not declaratory of such a customary rule at the present time.

312 Robinson, 'Immunities', 540-65; Akande, 'International Law Immunities and the International Criminal Court'; UN Doc A/CN.4/701 (2016), paras 235-42. But see Kreß and Prost, 'Article 98', 2139.

313 Singerman, 'It's Still Good to Be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity'; Tunks, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity'.

7 Conclusions

Treaty and custom are the two main sources of international (criminal) law. As has been noted at the beginning of this study the relationship between treaty and custom remains a controversial topic. This study aimed to analyse the nature of the 1998 Rome Statute as evidence of customary law. This study examined whether a provision of the Rome Statute was or is declaratory of customary law. For this purpose, this study first set out the methodology for the identification of customary law and clarified the term 'declaratory' that defines the relations between treaty and custom (Chapter 2). This study then focused on four provisions of the Rome Statute that are representative of crimes, modes of liability and defences. First of all, this study analysed the relationship between article 8 of the Rome Statute and customary law concerning war crimes in non-international armed conflict (Chapter 3). Second, it examined article 7 of the Rome Statute and customary law concerning crimes against humanity (Chapter 4). Third, this study looked at article 25(3)(a) of the Rome Statute and customary law for indirect co-perpetration (Chapter 5). Last, it surveyed the interplay between article 27(2) of the Rome Statute and customary law about non-availability of personal immunity for committing international crimes (Chapter 6).

Based on the methodology and terms described in Chapter 2, Chapter 7 highlights the conclusions that can be drawn from this study. Section 7.1 briefly summarises and analyses the conclusions of this study with regard to the three sub-questions formulated in Chapter 1. These sub-questions are:

1. whether a provision of the Rome Statute reflected a pre-existing customary rule at the adoption of the Rome Statute or crystallised itself into custom upon its inclusion in the Statute in 1998?
2. whether a provision of the Statute that was of a declaratory nature continues to be declaratory of a customary rule on the same subject matter?
3. whether a provision of the Statute that was not of a declaratory nature has subsequently become declaratory?

Finally, section 7.2 discusses the findings of this study.

7.1 Synthesis

There have been only few international armed conflicts[1] and few prosecutions for war crimes committed in such conflicts since World War II. It has been said that

> As at 2015, there seem to have been only 17 reported cases over the previous 60 years where domestic courts or tribunals have exercised universal jurisdiction over perpetrators of war crimes. Interestingly, the vast majority of these cases arose in the last 20 years and concerned events which took place in non-international armed conflicts.[2]

The current armed conflicts around the world, for instance, conflicts in South Sudan and Syria, are conflicts not of an international character. At the international level, the ICTR, the SCSL, and the ECCC were established for the prosecution of crimes during civil wars. Most Situations that are presented before the ICC for consideration today occurred in non-international armed conflict, for example, Burundi, Central African Republic (CAR), Côte d'Ivoire, Democratic Republic of Congo (DRC), Darfur, Kenya, Libya, Mali and Uganda Situations.[3]

Chapter 3 examined the relationship between article 8 of the Rome Statute and customary law concerning war crimes in non-international armed conflict. Chapter 3 briefly revisited the historical development of war crimes and analysed the negotiations of article 8 of the Rome Statute, and then moved on to examine the practice of prosecuting war crimes in non-international armed conflict after the adoption of the Rome Statute. The extensive research about debates, signing, ratification, amendments, national implementation legislation, international and national prosecutions as well as other specified tribunal instruments either echoed the view that article 8 is declaratory of custom with respect to war crimes in non-international armed conflict or evidenced that this rule is recognised as a part of the corpus of customary law now. The main conclusion of Chapter 3 is that war crimes for violations of Common Article 3 in non-international armed conflict were codified in article 8(2)(c) of the Rome Statute, whereas war crimes for other serious violations in non-international armed conflict were crystallised in article 8(2)(e) at the Rome Conference. Articles 8(2)(c) and (e) of the Rome

1 The UCDP/PRIO Armed Conflict Dataset, available at: https://www.prio.org/Data/Armed-Conflict/UCDP-PRIO/[accessed 12 October 2016].

2 Cameron *et al*, 'Article 3', para 880. 'Table of National Case Law on International Crimes and Universal Jurisdiction', in *Report of the Third Universal Meeting of National Committees on International Humanitarian Law*, 'Preventing and Repressing International Crimes: Towards an "Integrated" Approach Based on Domestic Practice', Vol II, Annexes, prepared by Anne-Marie La Rosa (ICRC 2014) 123-31.

3 Cameron *et al*, 'Article 3', para 530; 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (13 August 2014), UN Doc A/HRC/27/60; *Bemba* Trial Judgment; *The Prosecutor v Al Mahdi* (Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, PTC I) ICC-01/12-01/15 (24 March 2016).

Statute in general were and are declaratory of custom concerning war crimes in non-international armed conflict.

This conclusion, however, does not extend to all underlying acts of war crimes in non-international armed conflict. As commentators mentioned, article 8(2)(e) is both a step back and a step forward with respect to customary international law. Issues of sexual crimes, recruiting child soldiers and the use of chemical weapons were highly debated during the 1998 Rome Conference.[4] Further studies should keep an eye on developing customary rules about specific offences of war crimes in non-international armed conflict.

Chapter 4 focused on the relationship between article 7 of the Rome Statute and customary law concerning crimes against humanity. Crimes against humanity was a new type of international crime in the Nuremberg Charter. However, before the adoption of the Rome Statute, which provides for crimes against humanity in article 7, this crime, in general, had already been recognised as a crime under customary law. Since World War II, there are several formulations of crimes against humanity in international instruments. Divergent formulations do not affect the customary state of crimes against humanity in general but indicate different understandings of elements of the crimes.

Chapter 4 critically analyses two contextual requirements: the absence of a nexus with an armed conflict and 'policy'. Research shows that the armed conflict nexus requirement was a substantive element for the notion of crimes against humanity in the Nuremberg Charter. Later on, the link with an armed conflict disassociated itself from the notion of crimes against humanity. It remains unclear when this nexus disappeared under customary law before 1998. By excluding the armed conflict nexus, article 7 codified or, at the very least, crystallised crimes against humanity under customary law. Chapter 4 concludes that article 7(1) was and is declaratory of custom on the absence of a nexus with an armed conflict.

In addition, 'policy' is considered as a legal requirement at the ICC in accordance with article 7(2)(a). The Appeals Chamber of the ICTY in *Kunarac et al* held that policy was deemed an evidentiary factor to establish an attack. *Kunarac et al*, however, is not persuasive. An analysis of case law and definitions of crimes against humanity indicated that policy was a required legal element. Article 7(2)(a) of the Rome Statute on the issue of policy is declaratory of the pre-existing customary rule. Alternatively, even if the *Kunarac et al* Appeals Chamber's view of no policy element for crimes against humanity is valid, this judgment is not conclusive evidence for the status of customary law on the policy issue now. Sufficient evidence suggests that policy is a requirement of crimes against humanity under customary law. In conclusion, article 7(2)(a) was and is declaratory of custom with regard to the policy requirement.

4 UN Doc A/CONF.183/2/Add.1 and Corr.1.

At the Rome Conference, States were reluctant to recognise serious violations of laws and customs in non-international armed conflict as war crimes for several reasons.[5] Michael Bothe noted:

> The government side will claim that acts of repression performed during that conflict are nothing more than the maintenance of law and order as required by the legal system of that State. Thus, it will be argued, those acts were required under the law and consequently cannot be punished.[6]

Indeed, it is generally supposed that behaviour as a method to maintain the law and order is required by the national system. Some acts of repression performed during non-international armed conflicts would be at the risk of prosecution if other violations in non-international armed conflicts were included as war crimes. For instance, the use of expanding bullets is lawful in law enforcement at the national level in order, for example, to avoid unnecessary harm to citizens surrounding the scene of a bank robbery or in the course of a hostage-taking.[7] However, the Rome Statute considered the use of expanding bullets as a war crime in non-international armed conflict.[8] In connection with the ambiguous definition of non-international armed conflict, States may object to criminalising some punishable acts as war crimes in non-international armed conflict because these acts are legitimate maintenance methods in national law.[9] At the Conference, diplomats as representative of States were not willing to restrain the enforcement powers or measures of their States. These considerations explain why the threshold of non-international armed conflict was added, and why the list of punishable acts of war crimes in non-international armed conflict is somewhat shorter than that in international armed conflict under article 8.

The second reason is that the recognition of war crimes in non-international armed conflict does not seem to be in the interest of States. States were uneasy that their recognition would be deemed a recognition of belligerents' status for anti-government forces, and would justify rebels' killings of their soldiers. Without a rule of war crimes in non-international armed conflict, the State can prosecute alleged individuals of an organised armed group for

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5 Djamchid Momtaz, 'War Crimes in Non-International Armed Conflicts under the Statute of the International Criminal Court' (1999) 2 *YIHL* 177.

6 Michael Bothe, 'War Crimes in Non-International Armed Conflicts' in Y. Dinstein and M. Tabory (eds), *War Crimes in International Law* (The Hague: Martinus Nijhoff Publishers 1996) 295.

7 The Declaration of Czech Republic said: 'The prohibition to employ gases, and all analogous liquids, materials or devices, set out in article 8, paragraph 2(e)(xiv), is interpreted in line with the obligations arising from the Convention on the Prohibition of the Development, Production, stockpiling and Use of Chemical Weapons and on Their Destruction of 1993'.

8 1998 Rome Statute, art 8(2)(e)(xv) reads: '[e]mploying bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.'

9 Bothe, 'War Crimes in Non-International Armed Conflicts', 295-96.

joining rebels or killing soldiers of government armed forces at the national level, regardless of whether perpetrators/rebels respected international humanitarian law applicable in non-international armed conflict. The existence of war crimes in non-international armed conflict indicates that it is less legitimate for States to prosecute individuals who behave in compliance with rules applicable in non-international armed conflict. A rule of criminalising serious violations in non-international armed conflict as war crimes leads to less control over prosecution of rebels by national authorities. However, 'if the distinction is not made between behaviour in conformity with international humanitarian law and behaviour which is not, the value of criminal law in the repression of breaches of international humanitarian law is greatly reduced'.[10]

All these concerns show a struggle between State sovereignty and the aim to end impunity. This finding is also true for debates about the elements of crimes against humanity. Aside from the two crimes, selected provisions concerning participation in crimes and defences were also examined in this study. Government or State leaders comprise most of the cases before international criminal tribunals, in which the attribution of crimes is somewhat complicated. Meanwhile, for alleged international crimes, questions become controversial concerning the scope and the applicability of absolute personal immunity of senior State officials.

In contrast to other provisions or drafts of individual liability for international crimes,[11] article 25 of the Rome Statute provides many explicit rules of individual criminal responsibility. International criminal tribunals also used different labels, the complicity liability for participation in a common plan/conspiracy, joint criminal enterprise and indirect co-perpetration. Chapter 5 delved into the relationship between article 25(3)(a) of the Rome Statute and customary law concerning indirect co-perpetration. Three forms of perpetration are embedded in article 25(3)(a). An examination of the text and the drafting history of article 25(3)(a) indicates that this provision does not contain indirect co-perpetration as a fourth form of perpetration or a form of co-perpetration. Therefore, it is not a real issue concerning the relationship between article 25(3)(a) and custom with regard to indirect co-perpetration because a treaty provision dealing with a specific subject matter is a starting point for this research. Assuming the idea is well accepted that indirect co-perpetration as a mode of liability is embedded in article 25(3)(a), it is required to examine its customary status to date. After analysing post-World

10 ibid, 295.

11 Nuremberg Charter, art 6(2); Control Council Law No. 10, art 2(2); 1950 ILC Nuremberg Principles, Principles I, VI (a)(ii), and VII; 1948 Genocide Convention, art III; 1949 Geneva Conventions (GC: art 49 of GC I; art 50 of GC II; art 129 of GC III; and art 146 of GC IV); the 1977 Additional Protocol I, art 86; 1991 Draft Code of Crimes, arts 3(1)-(2); 1996 Draft Code of Crimes, art 2(3); 1993 ICTY Statute, art 7(1); 1994 ICTR Statute, art 6(1); Statute of the SCSL, art 6(1); Law on the Establishment of the ECCC, art 29(1); and Statute of the African Court of Justice and Human and People's Rights (not entered into force), art 28N.

War II practice, the jurisprudence of other international criminal tribunals as well as the implementation legislation, Chapter 5 concludes that evidence showing the acceptance of indirect co-perpetration liability is rare. Indirect co-perpetration serves a similar function to the ICTY's *Brđanin* JCE liability with respect to high-level leaders. Trial Chambers and the Appeals Chamber of the ICC, however, tend to assign liability to the accused under the label of indirect co-perpetration. Chapter 5 shows that indirect co-perpetration has not been sufficiently supported to qualify as a customary rule to date. Accordingly, article 25(3)(a) neither was nor is declaratory of a customary rule with respect to indirect co-perpetration.

The different applications of liability to solve the scenario like that in the ICC indicate that the law is developing in this regard. If States tend to follow the ICC's approach in dealing with international crimes, a consensus on how to attribute liability to government or State leaders might be reached in international criminal tribunals, as a *sui generis* system of this regime. However, if States adopt different ways of attributing liability to the accused based on national laws, it would be difficult for States to reach a consensus on this unique mode of liability because of different criminal justice systems. The division of criminal law systems between common law and civil law would further enhance this difficulty. The issue of whether this liability might be a customary rule depends on the approach States will adopt, the ICC-oriented approach or the national-oriented one.

Chapter 6 discussed the relationship between article 27(2) of the Rome Statute and customary law about an exception to personal immunity. Article 27(2) of the Rome Statute provides that international immunities and special procedural rules cannot bar the exercise of jurisdiction by the ICC. This study found that article 27(2) with a derogation does not indicate the refusal to respect personal immunity of senior officials of non-party States in custom, but confirms the pre-existing customary law respecting personal immunity in international law at the time when the Rome Statute was adopted. An observation of the post-World War II instruments and case law has demonstrated that traditional customary law also applies in prosecuting these international crimes. No rule existed with an exception to absolute personal immunity before the adoption of the Rome Statute. Finally, an examination of international jurisprudence, national cases as well as the attitude of the UN Security Council and the ILC shows whether an exception to absolute personal immunity for the commission of international crimes has been well recognised under customary law to date. This research concluded that there is not sufficient evidence to demonstrate a trend of an exception to personal immunity for the commission of international crimes. Thus, contemporary customary law still provides that incumbent senior officials are inviolable in international and national criminal proceedings. Chapter 6 concludes that article 27(2) neither was of a declaratory nature nor is declaratory of a customary rule respecting personal immunity. Under current international law, it seems to be unjust to retain personal immunity of senior officials, whereas it is also unjustified to invalidate it on the basis

of custom because the evidence is not sufficient to modify the pre-existing traditional customary rule.

If accountability and non-impunity mean prosecution of a person in the highest rank or on the top of the planning chain, then the introduction of indirect co-perpetration might be desirable, and personal immunity for international crimes would seem to be a barrier to achieving that goal. However, indirect co-perpetration has not been sufficiently supported to constitute a customary rule to date. In addition, the challenge to the regime of personal immunity should not be exaggerated.[12] As the ICJ suggested, even if senior officials have committed international crimes, their personal immunities remain intact under customary law. There are alternatives to prosecute sitting senior State officials in the future. A specific exception to the customary rule of personal immunity for international crimes through a treaty is acceptable.[13] If a person is deprived of personal immunity by a UN Security Council resolution, the person can no longer invoke personal immunity to challenge the jurisdiction of an UN-based tribunal.[14] State authorities concerned can waive personal immunity before national or international criminal tribunals. Another way to invalidate personal immunity is by pushing non-party States to join the Rome Statute, which requires a waiver of immunity before the ICC. It seems less necessary to retain it when all States are consistent in depriving personal immunity.

7.2 Discussions and concluding remarks

Based on the methodological framework described in Chapter 2, this study of the selected provisions of the Rome Statute as evidence of customary law found that provisions of the Statute were partly declaratory of custom when adopted in 1998, and that they are also partly declaratory of custom at the present time. Provisions concerning war crimes and crimes against humanity were reflections of custom, and they continue to be declaratory of custom. Meanwhile, provisions about indirect co-perpetration liability and non-availability of personal immunity were not of a declaratory nature at the time when the Rome Statute was adopted, and they have not passed into customary law to date. This section discusses the findings as well as a combination of the findings of this research.

As shown above, provisions of the Rome Statute about substantive crimes were and are recognised as custom in general. A mode of liability, indirect co-perpetration, was not and is not considered as a customary rule. In contrast to international crimes, it is difficult but not impossible for a mode of liability without sufficient roots in national laws to pass into customary law. The main reason may be that international crimes are mainly

12 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 594.
13 UN Doc A/63/10 (2008), para 310.
14 ibid.

derived from international law, while many modes of liability and defences originate in national laws. This reason, however, does not apply to issues concerning *sui generis* liability and personal immunity. Traditional general international law still plays a vital role with respect to personal immunity (a procedural defence). Whether a substantive customary rule exists at the relevant time is at the crossroads for the identification of customary law and the principle of legality. We should be cautious in applying customary law either as a source or as an interpretative aid to developing the scope of crimes, to extending the mode of liability, and to narrowing the scope of defences.

It is also necessary to discuss the implication of the combination of these findings. Firstly, a combination of the finding that a treaty rule 'was and is' declaratory indicates the existence of a customary rule on the same subject matter at the material time. Such a combination is found in Chapters 3 and 4 on war crimes and crimes against humanity. In the two instances, the content of customary law in the past and at present is the same on the issues concerned. It should be noted that, as Mark Villiger wrote: 'customary law is dynamic and the customary rule underlying a treaty text may change; the treaty rule may generate new customary law and the treaty text may be influenced by different approaches of interpretation'.[15] Since customary law is not static and a parallel treaty rule is not frozen, such a combination of findings generally does not demonstrate what the content of a customary rule was and is.[16]

Secondly, a combination of the findings that a treaty rule 'was not' and 'is not' of a declaratory nature does not inherently imply that no customary rule exists on the same subject-matter in the past or at present. For instance, the nature of article 27(2) of the Rome Statute as evidence of custom does not indicate that there was no customary rule on personal immunity in international law. Similarly, this combination of findings only implies the non-existence status of a rule 'underlying the treaty provision' at the critical time under customary law. The findings of articles 25(3)(a) and 27(2) as evidence of customary law reflect such a combination.

Thirdly, a combination of findings that a treaty rule 'was' but 'is not' declaratory of customary law indicates that a rule underlying the text was a pre-existing or emerging customary rule at the time when the treaty was adopted. This combination does not lead to conclusive findings on the status of customary law on the same subject matter at present. The treaty rule is not of a declaratory nature either for the reading of the treaty text has changed later on, or the content of the customary rule has been modified (extinguished) on the same subject at present, or both.

Lastly, the combination of the findings that a treaty rule 'was not' but 'is' declaratory of customary law does not automatically demonstrate the status of a customary rule on the same subject-matter in the past. There may

15 Villiger, *Customary International Law and Treaties: A Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* 227, 238.

16 Vienna Convention on the Law of Treaties, art 31(3).

be several reasons for concluding that a treaty rule was not declaratory of custom. One of them may be that no pre-existing customary law existed. The other reason may be that the treaty rule was of a norm-making character or stipulates an exception to a pre-existing customary rule. A good example of the latter is article 27(2) concerning an exception to personal immunity at the ICC. If a rule of non-availability of personal immunity for committing international crimes is generally accepted in the future, the conclusion in Chapter 6 would be that article 27(2) was not but 'is' at that moment declaratory of customary law. The latter two combinations of findings cannot be confirmed in this research with regard to the selected provisions under the present circumstances.

The 1998 Rome Statute exercises an essential impact on the content of international law in the field of international criminal law. Customary law also continues to play a role in and outside the ICC framework. As Rosalyn Higgins wrote: 'international custom is the most flexible, the most fluid, and as such, is exceedingly responsive to the changing needs of the international community'.[17]

17 Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford: OUP 1963) 1.

Samenvatting (Dutch Summary)

Het Verdrag van Rome als Bewijs van Internationaal Gewoonterecht

Verdragenrecht en gewoonterecht zijn de twee belangrijkste bronnen van internationaal strafrecht. De relatie daartussen is een controversieel onderwerp. Dit proefschrift, *The Rome Statute as Evidence of Customary International Law* (Het Verdrag van Rome als bewijs van internationaal gewoonterecht), bevat een analyse van de feitelijke en dringende vraag naar de status van het Verdrag van Rome uit 1998 inzake het Internationaal Strafhof als weerspiegeling van internationaal gewoonterecht. Het proefschrift bestaat uit zeven hoofdstukken, waaronder de inleiding en de conclusies. Hoofdstuk 2 geeft een handelbare formule van de uit twee elementen bestaande aanpak om gewoonterecht te identificeren, die meer focust op opinio iuris, en verheldert daarnaast de term 'declaratoir' die de relatie tussen verdragenrecht en gewoonterecht bepaalt. De hoofdstukken 3-6 behandelen de belangrijkste onderwerpen uit vier uitgekozen representatieve bepalingen inzake misdaden, vormen van aansprakelijkheid en verdedigingsgronden, gebaseerd op de methodologie en de bepalingen zoals die worden geschetst in hoofdstuk 2. De gekozen bepalingen zijn die opgenomen in de artikelen 8(2)(c) en (e) inzake oorlogsmisdaden in een niet-internationaal gewapend conflict, artikel 7 inzake misdaden tegen de menselijkheid, artikel 25(3)(a) betreffende indirecte aansprakelijkheid voor medeplichtigheid, en artikel 27(2) over persoonlijke immuniteit. Het proefschrift concludeert dat bepalingen uit het Verdrag van Rome deels gewoonterecht vormden toen het Verdrag in 1998 werd aangenomen, en dat zij deels indicatief zijn voor de huidige regels van gewoonterecht.

Verschillende onderzoeken hebben de regels in het Verdrag van Rome en de praktijk van het Internationaal Strafhof onderzocht en becommentarieerd. Verscheidene boeken bevatten een studie naar onderwerpen inzake misdrijven, individuele strafrechtelijke aansprakelijkheid, en verdedigingsgronden (zowel naar procedurele verdedigingsgronden als naar inhoudelijke gronden die strafrechtelijke aansprakelijkheid uitsluiten). Tegelijk is er veelvuldig onderzoek gedaan naar internationaal gewoonterecht, in het bijzonder naar de aard van internationaal gewoonterecht. Recente literatuur op het gebied van internationaal strafrecht heeft aandacht besteed aan de methoden om regels van gewoonterecht binnen internationale strafrechtelijke tribunalen te ontwikkelen, interpreteren en identificeren. De meerderheid van deze studies heeft echter de interactie tussen de inhoudelijke bepalingen in het Verdrag van Rome en internationaal gewoonterecht niet uitputtend behandeld. Los van de enkele studies die analyseren in hoeverre een bepaalde regel uit het Verdrag van Rome een al eerder bestaande regel van

gewoonterecht reflecteert of daar juist van afwijkt, is er weinig onderzoek gedaan naar de bepalingen van het Verdrag van Rome als zijnde bewijs voor het bestaan van parallelle regels van gewoonterecht en als bewijs van de progressieve ontwikkeling van gewoonterecht.

Dit proefschrift beoogt daarom te onderzoeken of en in hoeverre een regel uit het Verdrag van Rome indicatief is voor het bestaan van een regel van gewoonterecht inzake hetzelfde onderwerp, zowel in 1998 als nu. Deze studie naar de status van het Verdrag van Rome als reflectie van gewoonterecht is in praktisch opzicht zeer relevant. De analyse van de interactie tussen verdragsbepalingen en gewoonterecht is relevant voor de interpretatie en toepassing van het recht zowel binnen als buiten de context van het Internationaal Strafhof. Dit proefschrift beoogt te onderbouwen in hoeverre bepaalde regels in het Verdrag van Rome de status hebben van gewoonterecht, omdat dit relevant is voor situaties waarin staten die geen partij zijn bij het Verdrag betrokken zijn bij procedures voor het Internationaal Strafhof. Bovendien hoopt dit proefschrift juristen die internationaal strafrecht beoefenen te voorzien van nieuwe argumenten en materiaal waarmee ze het bestaan van een regel van gewoonterecht kunnen inschatten, of op waarde kunnen schatten wat de toepasbaarheid is van het Statuut van Rome op specifieke vraagstukken. Tot slot hoopt dit proefschrift bij te dragen aan het begrip van het internationaal gewoonterecht dat van toepassing is binnen het internationaal strafrecht, wat behulpzaam kan zijn voor juristen in dienst van de staat.

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In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2018 and 2019:

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