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The Rome Statute as Evidence of Customary International Law

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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).