The Rome Statute as Evidence of Customary International Law

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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.