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RESEARCH ARTICLE

The Identification of Customary Rules in International Criminal Law

Yudan Tan*

This paper aims to examine whether a different methodology has emerged to identify customary rules in the field of international criminal law. For this purpose, this paper briefly touches upon debates regarding customary law as a source and an interpretative aid of international criminal law. It then critically studies the identification methodology of customary law to seek whether a new approach deviating from the classic two-element (State practice and *opinio juris*) approach is emerging in academia. It also recapitulates some cases of international criminal tribunals to ascertain whether these tribunals have formed a distinct method for custom identification. Finally, it explores the unique characteristics and difficulties in identifying customary rules in international criminal law. It concludes that a different method has not been developed in academia or adopted by tribunals in practice to identify customary rules in international criminal law. The two-element approach still serves as guidance for custom-identification in general, but a flexible application of it is acceptable in specific cases. International practitioners should be cautious in the identification of customary rules in international criminal law, so as to prosecute and punish suspects of international crimes without endangering the principle of legality.

Keywords: State practice; opinio juris; custom; identification; international criminal law

I. Introduction

Customary international law is important for practitioners in international and national courts. Parallel with the movement for the codification of international law, custom and treaties may co-exist on the same subject matter.[1] In this circumstance, a rule that exists in each of these two sources may overlap or conflict with each other or may have identical content, whereas the two sources do not supplant each other and have separate methods of application.[2] In addition, customary law continues to govern the area not stipulated by treaty law.[3]

This paper aims to examine the method for ascertainment of customary rules in the field of international criminal law. When we ask the question of how to identify customary law, 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 formed; while the latter concerns the content of a customary rule.[4] The classic approach to identifying custom is to seek sufficient evidence of State practice and *opinio juris* (two-element approach). The recent work of the International Law Commission (ILC) has also adopted the two-element approach, namely 'a general practice' and 'accepted as law' in the identification of customary international law.[5] It should be noted that, due to an inherent dilemma concerning the

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1 Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law*, vol 1 (9th edn, Longman 1996) §§24–32.

2 *Military and paramilitary Activities in and against Nicaragua* (*Nicaragua v USA*) (Merits) [1986] ICJ Rep 14, 93–96 paras 175–79 (*Military and paramilitary Activities*).

3 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, preamble.

4 Maurice Mendelson, 'The Formation of Customary International Law' (1998) 272 Recueil des Cours de l'Académie de Droit 155, 284; Herbert LA Hart, *The Concept of Law* (2nd edn, CUP 1994); Noora Arajärvi, 'Between Lex Lata and Lex Ferenda? Customary International (Criminal) Law and the Principle of Legality' (2011) 15 Tilburg Law Review 181, 170–72; Christian Tams, 'Meta-Custom and the Court: A Study in Judicial Law-making' (2015) 14 The Law and Practice of International Courts and Tribunals 51.

5 UNGA 'Text of the draft conclusions on identification of customary international law' in 'Report of the International Law Commission' UN GAOR 73rd session Supp No 10, UN Doc A/73/10 (Advance) (2018) para 65, Conclusion 2.

evidence of practice and *opinio juris*,[6] some commentators have proposed other theories, including variations of the two-element approach,[7] and one-element approach.[8] As to customary rules in international criminal law, scholars have also proposed a 'core right' approach, which is a form of one-element approach.[9] International criminal law indeed presents some peculiarities as opposed to other branches of international law. Its objects are individuals, criminal law principles play a role, and it is a regime inspired by both civil and common law criminal systems.[10] An issue arises here as to whether a different custom-identification method has emerged in this field, departing from the two-element approach.

To ascertain the custom-identification method, Article 38 of the Statute of the International Court of Justice (ICJ) remains a good starting point.[11] Concerning the identification method of customary law, there exists no treaty, customary rule or general principle. According to Article 38, 'judicial decisions and the teachings of the most highly qualified publicists of the various nations' are subsidiary sources.[12] Academic writings and judicial decisions, in this context, would be the main sources to analyse the method used to identify the existence of a customary rule. This paper looks into the theories and case law of international and internationalised criminal tribunals to answer the question of whether a distinct methodology has emerged for the identification of customary rules in international criminal law.

This paper consists of six sections including this introduction and conclusion. Section II comments on the role of customary law in international criminal law. Section III briefly discusses the classic theory and critically evaluates the 'core right' approach. The jurisprudence of international and internationalised criminal tribunals is analysed in Section IV to observe the custom-identification approach employed by these tribunals.[13] Section V attempts to explain that the custom-identification of international criminal rules is unique in various aspects, leading the assessment of evidence of the two elements to be complicated. The paper concludes that in identifying customary rules in international criminal law, a different methodology that deviates from the two-element approach has not come into existence, whereas a flexible formula of the two-element approach is acceptable.

II. The Role of Customary Law in International Criminal Law

Before examining the method of custom-identification, it is necessary to comment on the role of customary law in international criminal law. The idea of customary law as a source of international criminal law has been contested. Rules derived from customary law are quite imprecise and vague.[14] Its ambiguity seems to be inconsistent with the principle of legality requiring specificity and legal certainty.[15]

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[6] Generally, a State's practices are accompanied with its intent, while the intent is difficult to know. If no corresponding pronouncement of that State is available, it seems that the only evidence of *opinio juris* is inferred from State practice; whereas if no action but merely abstract statements exist, it seems that the evidence of State practice is also deducted from *opinio juris*.

[7] Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 1999).

[8] For example, the practice-based approach, Akehurst, Müllerson, and Mendelson are advocates of this view. Mendelson (n 4); Michael Akehurst, 'Custom as a Source of International Law' (1976) 47 British Yearbook of International Law 53; Rein Müllerson, 'On the Nature and Scope of Customary International Law' (1997) 2 Austrian Review of International and European Law 341; Committee on Formation of Customary (General) International Law, 'Final Report of the Committee, Statement of Principles Applicable to the Formation of General Customary International Law' in International Law Association Report of the Sixty-Ninth Conference (London 2000) (International Law Association, London 2000) (Formation of General Customary International Law) 741–42. Mendelson claims that subjective and objective elements of State practice are two sides of a coin. *Opinio juris* is not an element for the formation of customary international law, but a part of subjective element of State practice. The International Law Association adopted this standpoint in its 2000 resolution. An alternative is the *opinio juris*-based approach, see Roberto Ago, 'Legal Science and International Law' (1956) 90 Recueil des Cours de l'Académie de Droit 85; Brian Lepard, *Customary International Law: A New Theory with Practical Applications* (CUP 2010) 98–100.

[9] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1991) 9, 94; Theodor Meron, 'International Law in the Age of Human Rights' (2003) 301 Recueil des cours 9, 378, 384–86.

[10] Yeghishe Kirakosyan, 'Finding Custom: The ICJ and the International Criminal Courts and Tribunals Compared' in Carsten Stahn and Larissa van den Herik (eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff 2012) 149–61.

[11] Statute of the International Court of Justice (signed 26 June 1945, adopted 1 December 1949) 33 UNTS 993 (the Statute of the ICJ); Humphrey Waldock, 'General Course on Public International Law' (1962) 106 Recueil des Cours de l'Académie de Droit 41; Tams (n 4).

[12] The Statute of the ICJ, arts 38 (1)(d) and 59.

[13] William Bishop, 'General Course of Public International Law' (1965) 115 Recueil des Cours de l'Académie de Droit 147, 152–53; Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982); Christian Tams and James Sloan, *The Development of International Law by the International Court of Justice* (CUP 2013).

[14] Judge Abdul Koroma, 'Foreword' in Jean-Marie Henckaerts and Louise Doswald-beck (eds), *Customary International Humanitarian Law*, vol 1, Rules (ICRC and CUP 2005) xiii.

[15] For discussions about the principle of legality, see Mohamed Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?' (2004) 2 Journal of International Criminal Justice 1007–10; Shahram Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing' (2009) 99 Journal of Crimi-

A different view, however, is more persuasive. The principle of legality requires that prosecution and punishment be based upon clear provisions of international law at the time the crime was committed.[16] A strict principle of legality contains four derivations: specificity and certainty; non-retroactivity (*lex praevia*); the ban on analogy (*lex stricta*); and favouring the suspected or accused person (*in dubio pro reo*).[17] 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 offences committed before the law that criminalised these conducts came into force as a crime. The rules of the ban on analogy as well as favouring the accused are explicitly enshrined in Article 22(2) of the 1998 Rome Statute of the International Criminal Court (Rome Statute).[18] It stipulates that:

> '[t]he 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'.

It should first be noted that the difference between treaties and custom in legal certainty is a matter of degree. If the ambiguous attribute of custom would deny its source status, treaties would also be excluded as a source of international criminal law, which is unacceptable. Secondly, international jurisprudence and researchers have upheld that this principle has not been violated if the requirements of foreseeability and accessibility are satisfied.[19] The principle of legality itself serves to limit the interpretation of applicable law, including customary law, instead of excluding custom as a source of international criminal law.

Customary law either as a source of law or as an aid to interpreting written rules is not merely a theory in the field of international criminal law. The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) does not stipulate its applicable law. The UN Secretary-General, however, noted that this tribunal should only apply 'rules of international humanitarian law that are beyond any doubt part of customary law'.[20] The drafters' purpose was to limit the ICTY's jurisdiction over crimes existent under customary law so as to avoid violating the principle of legality.[21] In practice, the Appeals Chamber of the ICTY in the *Tadić* Interlocutory Appeal on Jurisdiction tried to establish a customary rule criminalising serious violations in non-international armed conflicts as war crimes.[22] In another case, the defendant disputed the existence of joint criminal enterprise (JCE) in customary law based on decisions of the Extraordinary Chambers in the Courts of Cambodia.[23] The Trial Chamber of the ICTY rejected this argument and concluded that the *Tadić* Appeal Judgment established the customary status of JCE.[24] Subsequent ICTY cases further enhance the view that customary rules are sources of international criminal law.[25]

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nal Law and Criminology 857; Arajärvi (n 4); Kirakosyan (n 10) 149–61; Shane Darcy, *Judges, Law and War*: *the Judicial Development of International Humanitarian Law* (CUP 2014) 62–69.

[16] Jean-Marie Henckaerts and Louise Doswald-beck (eds), *Customary International Humanitarian Law*, vol I, Rules (ICRC and CUP 2005) Rule 101. For an analysis of this principle at the ICC, see Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (CUP 2014) 186–218.

[17] Antonio Cassese and others, *Cassese's International Criminal Law* (3rd edn, OUP 2013) 27–36.

[18] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).

[19] *The Prosecutor v Rutaganda* (Judgement and Sentence) ICTR-96-3-T (6 December 1999) (*Rutaganda* Trial Judgment); *Prosecutor v Mucić et al.* (Judgement) ICTY-96-21-A (20 February 2001) (*Čelebići* Appeal Judgment) para 173; *Prosecutor v Milutinović et al.* (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise) ICTY-99-37-AR72 (21 May 2003) paras 37–38; *Prosecutor v Hadžihasanović et al.* (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) ICTY-01-47-AR72 (16 July 2003)(*Hadžihasanović et al.* Interlocutory Appeal Decision) paras 32–36; *Nahimana et al. v The Prosecutor* (Judgement) ICTR-99-52-A (28 November 2007) (*Nahimana* Appeal Judgment), partly dissenting opinion of Judge Shahabuddeen para 19. See also Larrisa van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Martinus Nijhoff 2005) 213–14; Arajärvi (n 4); Shahabuddeen (n 15) 1011–13; Darcy (n 15); Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (3rd edn, CUP 2014) 17–19.

[20] UNGA 'Report of the Secretary-General pursuant to paragraph 2 of SC Resolution 808 (1993)' (3 May 1993) UN Doc S/25704 para 34; *Rutaganda* Trial Judgment (n 19) para 86.

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

[22] *Tadić* Interlocutory Appeal Decision (n 21) paras 97–137.

[23] *Prosecutor v Prlić et al.* (Judgement) ICTY-04-74-T (29 May 2013) paras 206–07.

[24] ibid. para 210.

[25] *Prosecutor v Erdemović* (Judgement) ICTY-96-22-A (7 October 1997) para 44; *Prosecutor v Tadić* (Judgement) ICTY-94-1-A (15 July 1999)(*Tadić* Appeal Judgment) paras 220, 270; *Prosecutor v Kunarac et al.* (Judgement) ICTY-96-23 and ICTY-96-23/1-A (12 June 2002) paras 98–101; *Prosecutor v Galić* (Judgement) ICTY-98-29-T (5 December 2003), Separate and Partially Dissenting Opinion of Judge Nieto-Navia paras 108–13; *Prosecutor v Šainović et al.* (Appeal Judgement) ICTY-05-87-A (23 January 2014) paras 1626–50.

The jurisprudence of other international and internationalised tribunals also supports this viewpoint,[26] although their founding instruments do not directly and explicitly mention customary rules.[27] Customary law has been used to address the challenge to the jurisdiction at the IMT and the Special Court for Sierra Leone (SCSL).[28] In the *Nahimana* case at the International Criminal Tribunal for Rwanda (ICTR),[29] one defendant appealed against a sentence of 35 years imprisonment by arguing that Article 77 of the Rome Statute provides for 30 years as a maximum possible sentence.[30] The Appeals Chamber rejected this argument. One reason for the Appeals Chamber's decision is that the appellant failed to prove that Article 77 of the Rome Statute was a customary rule in force in 1994.[31] In brief, practitioners could invoke customary rules to argue for or against a rule before these international and internationalised criminal tribunals.

The ICC's applicable law is stipulated in Article 21 of the Rome Statute.[32] Article 21(1)(b) provides that the ICC shall apply '[i]n the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflicts'. As Schabas noted, by differentiating the language used in Article 21(1)(b) from the phrase 'general principles of law derived from national laws' in Article 21(1)(c), this expression 'the principles and rules of international law' includes customary law.[33] Other scholars and international authorities also upheld this idea.[34] Under Articles 21(1) of the Statute, customary law is the secondary source of applicable law for the ICC as after the written rules included within the Rome Statute, Elements of Crimes, and the Rules of Procedure and Evidence.[35] For example, as the Pre-Trial Chamber of the ICC in *Katanga* and *Ngudjolo* stated:

> 'since the Rome Statute expressly provides for this specific mode of liability [co-perpetration through another person (indirect co-perpetration)], the question as to whether customary law admits or discards the ''joint commission through another person'' is not relevant for this Court'.[36]

The Pre-Trial Chamber in *Ruto* confirmed this view by arguing that customary law should be of limited applicability within the case because indirect co-perpetration is encompassed by Article 25(3)(a) of the Rome Statute.[37] Additionaly, the reference to 'a crime within the jurisdiction of the Court' in Article 22(1) prevents the ICC from prosecuting crimes that were merely based on customary law but not defined in the Statute.[38] The emphasis on 'in accordance with this Statute' in Article 25(2) also indicates that the ICC is limited in its ability to hold an accused responsible merely based on a mode of liability that is recognised in customary

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[26] *Prosecutor v Šainović et al.* (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) ICTY-95-14-AR108*bis* (29 October 1997) para 64; *Prosecutor v Barayagwiza* (Decision on Prosecutor's Request for Review or Reconsideration) ICTR-97-19-AR72 (31 March 2000) para 40; *Kajelijeli v Prosecutor* (Judgment) ICTR-98-44A-A (23 May 2005) para 209.

[27] *Judgment of the Nuremberg International Military Tribunal* 1946 (1947) 41 American Journal of International Law 172; William A Schabas, 'Customary Law or Judge-Made Law: Judicial Creativity at the UN Criminal Tribunals' in José Doria and others (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (*1930–2000*) (Brill 2009) 77–101.

[28] Schabas (n 27) 79; UNSC Res 1315 (14 August 2000) UN Doc S/RES/1315.

[29] UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

[30] *Nahimana* Appeal Judgment (n 19) para 1061.

[31] ibid. paras 1067–68.

[32] ibid.

[33] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 383–85. Different views exist, some commentators hold that it is unclear what the expression 'principles and rule of international law' means, see Alain Pellet, 'Applicable Law' in Antonio Cassese and others, (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol II (CUP 2002) 1070–73; Ian Brownlie, *Principles of Public International Law* (2nd edn, CUP 2008) 19; Gilbert Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2009) 295–96.

[34] Cassese and others (n 17) 9–13; Vladimir-Djuro Degan, 'On the Sources of International Criminal Law' (2005) 4 Chinese Journal of International Law 45, 52; Pellet (n 33); Margaret M deGuzman, 'art 21–Applicable Law' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2nd edn, Beck/Hart 2008) 707–08; Bitti (n 33).

[35] Rome Statute, arts 9, 21; Joseph Powderly, 'The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function: Reflections on Sources of Law and Interpretative Technique' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Brill 2015) 453.

[36] *The Prosecutor v Katanga and Ngudjolo* (Decision on the confirmation of charges, Pre-Trial Chamber I) ICC-01/04-01/07-717 (30 September 2008) (*Katanga and Ngudjolo* Confirmation of Charges Decision) paras 506–08.

[37] *Prosecutor v Ruto et al.* (Decision on the Confirmation of Charges Pursuant to Article 61 (7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II) ICC-01/09-01/11-373 (23 January 2012) para 289.

[38] Rome Statute, art 22(1) (*Nullum crimen sine lege*) reads: '[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court'. Schabas (n 33) 543; Bitti (n 33).

law but goes beyond the scope of the Statute.[39] Considering these provisions of the Rome Statute, logically, customary law is becoming less significant than before at the ICC.

Customary law, however, still plays a role in the ICC framework. As noted above, customary law is considered as a secondary source;[40] in case of a legal gap, customary law may be referred to as an aid to interpreting the ICC's written rules.[41] The ICC has applied Article 21(1)(b)[42] and sometimes expressly confirmed customary law. In interpreting the qualifiers of 'widespread' and 'systematic' for the crimes against humanity, the Pre-Trial Chamber in the *Katanga* and *Ngudjolo* case cited ICTY and ICTR cases to confirm its interpretation of 'widespread or systematic'.[43] But in interpreting the term 'attack' as a war crime under Article 8 of the Rome Statute, the Trial Chamber in the *Al Mahdi* case did not consider the jurisprudence of the ICTY. In its view, these cases offer no guidance concerning the customary nature of the direction of attacks against civilian objects as a war crime.[44]

The *Ntaganda* case deserves further attention. In clarifying a status requirement for victims of the war crime of rape and sexual slavery, the Trial Chamber in *Ntaganda* first concluded that the Rome Statute did not provide a status requirement and then turned to consider whether customary law requires such a limitation of status for victims.[45] The Prosecutor argued that introducing an additional element by relying on the expression 'established framework of international law' in Article 8 of the Statute would allow customary law to be applied even in the absence of a gap in the Statute.[46] To ensure consistency of Article 8 with international humanitarian law, the Appeals Chamber of the ICC rejected her argument and concluded that this expression allows the ICC to apply customary international law regardless of whether any lacuna exists.[47] In short, as for war crimes, an additional restrictive element in customary law may be applied by the ICC even if no legal gap exists.

In the drafting process of the Rome Statute, the ILC contemplated the inclusion of crimes under customary law.[48] In addition, according to Article 11(2), 13(b) and 24(1) of the Statute, the ICC may retroactively apply the Rome Statute to exercise jurisdiction over situations that occurred after its entry into force but before a State's ratification of the Statute or declaration of acceptance. In two contexts, individuals would be bound by customary law rather than the Statute.[49] Firstly, Article 12(3) of the Statute permits non-States Parties' retroactive acceptance of the ICC's jurisdiction by lodging a declaration with the Registrar. For example, through declarations in 2014 and 2015, Ukraine accepted the ICC's jurisdiction over alleged crimes committed from November 2013 onwards.[50] The Palestine and Côte d'Ivoire Situations share the same feature.

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[39] Rome Statute, art 25(2) reads: '[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute'; *The Prosecutor v Ngudjolo* (Judgment pursuant to Article 74 of the Statute-Concurring Opinion of Judge Christine Van den Wyngaert) ICC-01/04-02/12-4 (18 December 2012) para 9.

[40] Rome Statute, arts 9 and 21(1)(a).

[41] Elements of Crimes, Introduction to art 8; The *Prosecutor v Lubanga* (Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to art 19 (2) (a) of the Statute of 3 October 2006, Appeals Chamber) ICC-01/04-01/06-772 (14 December 2006) para 34.

[42] Powderly (n 35) 428–31.

[43] *Katanga and Ngudjolo* Confirmation of Charges Decision (n 36) para 412.

[44] *The Prosecutor v Al Bashir* (Judgment and Sentence, Trial Chamber VIII) ICC-01/12-01/15-171 (27 September 2016) para 16; William A Schabas, 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit' (2017) Case Western Reserve Journal of International Law 75, 78–79, fn 16.

[45] *The Prosecutor v Ntaganda* (Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, Trial Chamber VI) ICC-01/04-02/06-1707 (10 January 2017) (*Ntaganda* Trial Decision) paras 40–44, 46–47.

[46] *The Prosecutor v Bosco Ntaganda* (Judgment on the appeal of Mr Ntaganda against the 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9', Appeals Chamber) ICC-01/04-02/06-1962 (15 June 2017) (*Ntaganda* Appeal Judgment) para 36.

[47] ibid. 53–55.

[48] UNGA 'Topical summary of the discussion held in the Sixth Committee of the General Assembly during its 47th session' (25 January 1992) UN Doc A/CN.4/446, 54, 63–65; ILC, 'Observations of Governments on the report of the Working Group on a draft statute for an international criminal court' (1994) UN Doc A/CN.4/458 and Add. 1–8. Delegates expressed concerns about decisions of international criminal tribunals on the basis of customary law. They are UK, Tunisia, Sri Lanka, Nordica Countries and Malta. Other delegations addressed opposing opinions. They are US, New Zealand, Japan, Hungary, Germany, Cyprus, and Switzerland. The ILC 1994 Draft, arts 20 (c) and 20(e); ILC, 'Report of the International Law Commission on the work of its 46th session' (2 May to 22 July 1994) UN Doc A/49/10, 38, 39, 10. The ILC commented that 'there exists a category of war crimes in customary international law'.

[49] Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case' (2002) 13 European Journal of International Law 853, 875; Marko Milanović, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' (2011) 9 Journal of International Criminal Justice 25, 51–52; Marko Milanović, 'Aggression and Legality: Custom in Kampala' (2012) 10 Journal of International Criminal Justice 165.

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

Secondly, Article 13(b) of the Statute empowers the UN Security Council to refer a situation to the ICC concerning a State not party to the Rome Statute. The ICC situations in Darfur and Libya referred by the Security Council are good examples.[51] In the two contexts, how can the ICC retroactively exercise jurisdiction over these situations without violating the principle of legality prohibiting retroactive prosecution? As Broomhall wrote, '[t]he only legitimate basis for establishing the criminal responsibility of individuals [at the ICC] would presumably – in the absence of relevant national criminal prohibitions at the time of the alleged conduct – be that of customary international law'.[52] In the two contexts, customary law as a source of law does matter at the ICC. The ICC should clarify whether an offence in the Statute is a reflection of customary law at the material time.

The ICC was confronted with this circumstance in the Darfur Situation. In the *Al Bashir* case, Pre-Trial Chamber I tried to identify whether the rule in Article 27(2) reflects a new customary rule providing an exception to absolute personal immunity.[53] By contrast, the ICC missed the opportunity to do so in *Côte d'Ivoire* Situation. Given the fact that Côte d'Ivoire first accepted the jurisdiction of the ICC in 2003 and ratified the Rome Statute in 2013, it seems that the ICC should have engaged in discussing this issue when the Prosecution requested to broaden the scope of the investigation to cover alleged crimes committed from September 2002 onwards. Pre-Trial Chamber III directly applied the Rome Statute to expand the ICC's temporal jurisdiction without contemplating this issue.[54] Other situations and cases sharing the risk of retroactive application of the law reserve this issue for another day. In short, customary law continues to play a role in the ICC.

The examination above demonstrated that customary law is either a source or an interpretative aid of international criminal law. Customary law is and continues to be part of the applicable law of international and internationalised criminal tribunals.[55]

III. Theories to Identify Customary International Law

This section examines academic theories to determine whether scholars have reached a consensus to create a different method of customary identification within international criminal law.

A. Identification of Customary International Law: the Classic Theory

In determining how a certain practice becomes a customary rule, the prevailing view is the presence of both subjective and objective elements.[56] 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. State practice and *opinio juris* (*opinio juris sive necessitates*, the belief of law or necessity) are used mostly as the substitute of the objective element and the subjective element, respectively.

A large number of international scholars endorsed this two-element approach.[57] The *Restatment of Foreign Relations Law of the United States* also supported this idea.[58] Likewise, the International Committee of the

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[51] UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593; UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.

[52] Bruce Broomhall, 'Article 22' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2nd edn, Beck/Hart 2008) 713, 720.

[53] *The Prosecutor v Omar Al Bashir* (Decision on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I) ICC-02/05-01/09-139 (12 December 2011) (*Al Bashir* Malawi Cooperation Decision); *The Prosecutor v Al Bashir* (Decision Pursuant to Article 87 (7) of the Rome Statute on the Refusal the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I) ICC-02/05-01/09-140-tENG (13 December 2011).

[54] *Situation in the Republic of Côte d'Ivoire* (Decision on the "Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010", Pre-Trial Chamber III) ICC-02/11-36 (22 February 2012) paras 36–37.

[55] Andrew Guzman and Timothy Meyer, 'Customary International Law in the 21st Century' in Russel Miller and Rebecca Bratspies (eds), *Progress in International law* (Martinus Nijhoff 2008) 197–218; M Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, CUP 2013); Darcy (n 15); Cassese and others (n 17); Mohammed Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection* (CUP 2012) 52.

[56] Tullio Treves, 'Customary International Law' in Rüdiger Wolfrum (ed) (2006) Max Planck Encyclopedia of Public International Law paras 7–8. For discussions on other theories for the custom-formation, see Birgit Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Brill 2010) 1–68.

[57] Jennings and Watts (n 1) §10; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, CUP 2012) 23–27; Andrew Clapham, *Brierly's the Law of Nations* (7th edn, OUP 2012) 57–63; Malcolm Shaw, *International Law* (6th edn, CUP 2008) 72–93; Oscar Schachter, 'International Law in Theory and Practice: General Course in Public International Law' (1982) 178 Recueil des Cours de l'Académie de Droit 32; Stephen Donaghue, 'Normative Habits, Genuine Beliefs and Evolving Law: Nicaragua and the Theory of Customary International Law' (1995) 16 Australian Year Book of International Law 327; Formation of General Customary International Law (n 8).

[58] American Law Institute, 'Restatment of Foreign Relations Law of the United States' (Third, 1986), 102, Comment b.

Red Cross has employed this approach in its study on *Customary International Humanitarian Law*.[59] In 2012, the ILC included the topic 'Formation and Evidence of Customary International Law' in its agenda and appointed Sir Michael Wood as Special Rapporteur for this topic.[60] The title of this topic was later changed into 'Identification of Customary International Law'. Wood submitted five reports to the ILC with proposed conclusions.[61] Except for the use of the terms 'a general practice' and 'accepted as law' instead of 'State practice' and '*opinio juris*', Wood also proposed the two-element approach. The Commission members welcomed this approach, and in 2018 the ILC adopted a set of 16 draft conclusions on 'Identification of Customary International Law'.[62] Its conclusion 2 under the title of 'two constituent elements' clearly 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*)'.[63]

It should be noted that the two-element approach remains the object of controversies among scholars supporting it.[64] This is in part because no consensus exists among international scholars as to what *opinio juris* consists of. Under the belief-theory, *opinio juris* is the belief of a State that the practice in question is a binding rule of international law.[65] This view is highly criticised for its circularity. Under the acceptance-theory, *opinio juris* means individual consent of a State. A State recognises that all States have a legal right to act in accordance with the practice.[66] This idea has been the dominant theory until now. Recently, Dahlman claims that the strong acceptance-theory should not stand, because each individual State's consent conflicts with the reality of international law.[67] In the alternative, he argues for a weak acceptance-theory that a large number of States approved a practice for all States to be bound as customary international law.[68] In his view, *opinio juris* functions as a filter preventing 'an unwanted general practice from becoming customary law'.[69]

In addition to the divergence regarding the subjective element, there is also no strict standard that determines the weight of evidence required of each of the two elements. If the weight of evidence of one element is too slight, can we say that a rule would not be established and identified by relying on sufficient evidence of the other element? In 1950, Hudson put up criteria for the two elements but did not touch upon this issue in his working paper.[70] Kirgis' sliding-scale idea gives an illustration of this issue.[71] In his opinion, the evolution of customary international law must be examined on a sliding scale: one end is *opinio juris*, and the other end is State practice. The formation of a customary rule should be analysed on a case-by-case basis depending on different rules and acts.[72] This sliding-scale approach indicates that it is not possible for State practice to be zero percent and *opinio juris* to be one hundred percent, and *vice versa*. According to the idea of this sliding scale, more attention is paid to evidence of *opinio juris* than State practice for a moral-oriented rule.[73] Roberts also argued that State practice is becoming less important for rules with moral content.[74]

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[59] Henckaerts and Doswald-beck (eds) (n 16) 33.

[60] UN Doc A/CN.4/SR.3132, p 16; ILC, 'Report of the International Law Commission on the Work of its 64th Session' (7 May -1 June, 2 July- 3 August 2012) UN Doc A/67/10 para 167.

[61] See the Note, the first, second, third, fourth and fifth reports to the ILC, by Sir Michael Wood, Special Rapporteur, ILC, 'A Note by the Special Rapporteur', UN Doc A/CN.4/653 (2012); ILC, 'First Report on Identification of Customary International Law to the 65th Session of the ILC',UN Doc A/CN.4/663 (2013); ILC, 'Second Report on Identification of Customary International Law to the 66th Session of the ILC', UN Doc A/CN.4/672 (2014); ILC, 'Third Report on Identification of Customary International Law to the 67th Session of the ILC', UN Doc A/CN.4/682 (2015); ILC, 'Fourth Report on Identification of Customary International Law to the 68th Session of the ILC', UN Doc A/CN.4/695 and Add.1 (2016); ILC, 'Fifth Report on Identification of Customary International Law to the 70th Session of the ILC', UN Doc A/CN.4/717 (2018).

[62] UN Doc A/73/10 (Advance) (2018) paras 58, 60, 65–66.

[63] ibid. para 65, Conclusion 2.

[64] Formation of General Customary International Law (n 8).

[65] Shaw (n 57) 75.

[66] Waldock (n 11) 41; Schachter (n 57) 36.

[67] Christian Dahlman, 'The Function of *Opinio Juris* in Customary International Law' (2012) 81 Nordic Journal of International Law 327, 334.

[68] ibid. 336.

[69] ibid. 338–39.

[70] UN Doc A/CN.4/SER.A/1950/Add.1, 26.

[71] Frederic Kirgis, 'Custom on a Sliding Scale' (1987) 81 American Journal of International Law 146.

[72] ibid.

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

[74] Roberts (n 73) 764.

Wood, in his second report to the ILC, confirmed that evidence of each element might be given different weight depending on the 'contexts'.[75]

B. Identification of Customary Law in International Criminal Law: Another Theory?

As Schlütter observed, considering the high moral character of norms derived from international humanitarian law, such as the 'elementary consideration of humanity' contained in the Martens Clause, some scholars propose other approaches for the custom-formation and custom-identification.[76] Some commentators have proposed an *opinio juris*-based one element approach. Meron suggested the 'core right' approach for the custom-formation in international humanitarian law and international human rights law.[77] In his view, the content of customary law in the two fields would be inferred from the 'core values' of the international community. He also noted that 'Whether a violation of international criminal law triggered a broad condemnation by the international community is important for the establishment of customary norm'.[78] Some authors in international criminal law, for example, Pocar and Cassese, also support this approach if the rules belong to the 'canon of norms which can be held to represent the "core values" of the international community'.[79]

It is true that in the field of international criminal law, the record of national investigations and prosecutions of international crimes is less satisfying. Evidence of State practice is more rarely obtainable compared to evidence of *opinio juris*. Nevertheless, it would be going too far to adopt this one-element 'core right' approach because it leaves room for powerful States to manipulate the law.[80] The 'core right' approach might also conflict with the strict principle of legality prohibiting analogy. Hart contended that international law differs from morality, and that the issues of international law are not about the moral issues of right or wrong and good or evil.[81] Koskenniemi also claims that 'elementary considerations of humanity'[82] do not fit into customary international law.[83] As Koskenniemi wrote:

> 'The social conception of law is in a dilemma: it cannot construe the normative sense of past behaviour in a bilateral relationship on the parties' real, psychological intent because such intent can neither be known nor authoritatively opposed to the State's own deviating view thereof. But it cannot base it on a non-psychological principle, either, because such principle will immediately look like a natural principle, based on non-verifiable and contested value preferences'.[84]

This implies that the question of what a rule should be, reflecting the demanding values of protecting victims and prosecuting perpetrators, does not equate with the question of what a customary rule is in international criminal law. The identification of customary rules in international criminal law should not deviate from the two-element approach.

C. Summary and Observations

This section has shown that the majority of commentators supported the classic approach in general, although divergences exist among scholars regarding the content of the subjective element, that is *opinio juris*. Legal writers have proposed a flexible formulation of the two-element approach as to the weight of

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[75] UN Doc A/CN.4/672 (2014) para 3; Robert Kolb, 'Selected Problems in the Theory of Customary International Law' (2003) 50 Netherlands International Law Review 119, 128.

[76] Schlütter (n 56); Noora Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (Routledge 2014).

[77] Meron (1991) (n 9) 94; Meron (2003) (n 9) 9, 378, 384–86.

[78] Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 American Journal of International Law 239.

[79] Schlütter (n 56) 44.

[80] For more discussions, see Schlütter (n 56); Robert Heinsch, 'Methodology of Law-Making: Customary International Law and New Military Technologies' in Dan Saxon (ed), *International Humanitarian Law and the Changing Technology of War* (Martinus Nijhoff 2013) 17–42.

[81] Hart (n 4).

[82] Matthew Zagor, 'Elementary Considerations of Humanity' in Karine Bannelier and others (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (Routledge 2012).

[83] For discussions about the 'elementary considerations of humanity' and the 'Martens Clause', see Waldock (n 11) 63; Meron (1991) (n 9); Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) 94 American Journal of International Law 78; Antonio Cassese, 'The Martens Clause: Half a Loaf or simply Pie in the Sky?' (2000) 11 European Journal of International Law 187.

[84] Martti Koskenniemi, 'The Normative Force of Habit: International Custom and Social Theory' (1990) 1 Finnish Yearbook of International Law 77, 79.

evidence of each of the two elements. Until now, the one-element approach of 'core right' has not been widely accepted in academia. It seems that the classic two-element approach still applies in the identification of customary rules in international criminal law.

IV. Identification of Customary Rules of International Criminal Law by International Criminal Tribunals

This section endeavours to observe the identification approach employed by international and internationalised criminal tribunals. For this purpose, this section examines cases of these tribunals to discuss how the tribunals identified the existence of customary law in general and how they assessed the evidence of the two elements. It appears that the tribunals formally adopt the two-element method, while they reclassify evidence of the two elements in a flexible way.[85]

A. The Two-Element Method: Formal 'Confirmation' or 'Silence'

It appears that international criminal tribunals have not expressly abandoned the two-element approach. In the well-known *Tadić* decision on jurisdiction, the ICTY Appeals Chamber argued that '[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife'.[86] This decision has been criticised for its humanity-based reasoning.[87] In fact, in ascertaining individual criminal responsibility in non-international armed conflicts, the Appeals Chamber also assessed evidence to show a 'clear and unequivocal recognition of the norm [and] state practice indicating an intention to criminalise the norm'.[88] The Chamber confirmed the classic method for customary identification by placing a greater reliance on *opinio juris* and less reliance on State practice.[89]

In addition, in the Interlocutory Appeal of the *Hadžihasanović et al.* case, the ICTY Appeals Chamber examined the issue of a superior's responsibility before and after his assumption of command.[90] The majority of the Appeals Chamber referred to Article 28 of the Rome Statute and Article 86 of 1977 Additional Protocol I to the 1949 Geneva Conventions as indications of *opinio juris* on this issue. The Chamber also considered the 1996 ILC Report and Article 6 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind (ILC Draft Code of Crimes) as indicative evidence.[91] The Appellant argued that there was no national legislation or military code as evidence of State practice.[92] The Appeals Chamber took this argument as conclusive. The Chamber found that 'no practice can be found, nor is there any evidence of *opinio juris* that would sustain' the customary international law that a superior is responsible for crimes committed before he or she assumed command over the subordinate.[93] Likewise, in *Rwamakuba*, the ICTR Appeals Chamber referred to '[n]orms of customary international law characterised by the two familiar components of State practice and *opinio juris*'.[94] Many cases have followed this view.[95] In *Prosecutor v Fofana et al.*, the Appeals Chamber of the SCSL concluded that the requirement of 'extensive' and 'virtually uniform' practice was not satisfied by citing the ICJ's *North Sea Continental Shelf* cases that endorsed the traditional two-element formula.[96]

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[85] *Prosecutor v Mucić et al.* (Judgement) ICTY-96-21-T (16 November 1998) para 256, fn 283 (*Čelebići* Trial Judgment); *Prosecutor v Simić et al.*, (Decision on Prosecutor's Motion for a Ruling concerning the Testimony of a Witness) ICTY-95-9-PT (27 July 1999) para 74 (*Simić* Decision); *Prosecutor v Simić* (Sentence) ICTY-95-9-2-S (17 October 2002) (*Simić* Sentence); *Prosecutor v Fofana & Kondewa* (Judgment) SCSL-2004-14-A (28 May 2008) (*Fofana* Appeal Judgment) paras 405–06; *Prosecutor v Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) SCSL-2004-14-AR72 (E) (31 May 2004) (*Norman* Jurisdiction Decision) para 17.

[86] *Tadić* Interlocutory Appeal Decision (n 21) para 119.

[87] *Tadić* Interlocutory Appeal Decision (n 21) Separate Opinion of Judge Li on the Defence of Interlocutory Appeal on Jurisdiction paras 11–12; Claus Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2001) 30 Israel Yearbook on Human Rights 5; Allison Danner, 'When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War' (2006) 59 Vanderbilt Law Review 1. See also Eve La Haye, *War Crimes in Internal Armed Conflicts* (CUP 2008).

[88] *Tadić* Interlocutory Appeal Decision (n 21) paras 128–34.

[89] ibid; *Prosecutor v Kupreškić* (Judgement) ICTY-95-16-T (14 January 2000) para 527.

[90] *Hadžihasanović et al.* Interlocutory Appeal Decision (n 19) paras 37, 40.

[91] ibid. paras 46–49.

[92] ibid. paras 42, 45.

[93] ibid. paras 44–51.

[94] *Rwamakuba v The Prosecutor* (Decision on Joint Criminal Enterprise to the Crimes of Genocide) ICTR-98-44-AR72.4 (22 October 2004) para 14.

[95] *Gacumbitsi v The Prosecutor* (Separate Opinion of Judge Shahabuddeen) ICTR-2001-64-A (7 July 2006) para 51.

[96] *Fofana* Appeal Judgment (n 85) paras 405–06.

The ICC has expressed the same view.[97] In the Malawi Cooperation Decision of the *Al Bashir* case, Pre-Trial Chamber I analysed whether sitting heads of State enjoy immunity in proceedings before international courts in international law. The Chamber held that 'initiating international prosecutions against Heads of State have gained widespread recognition as accepted practice', and that 'international community's commitment to rejecting immunity in circumstances [...] has reached a critical mass'.[98] It then concluded that 'customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes'.[99] The Pre-Trial Chamber also formally endorsed the two-element approach to reach its conclusion.[100]

In some cases, the wording of the two elements has been changed. When this occurs, the element of *opinio juris* tends to be an unnecessary requirement.[101] In *Hadžihasanović et al.*, the ICTY Trial Chamber analysed whether there was a binding obligation on States to prosecute individuals for war crimes solely under international criminal law.[102] The Chamber found that there is no written rule for this issue. With regard to customary international law, it held that:

> 'To prove the existence of a customary rule, the two constituent elements of the custom must be established, namely, the existence of sufficiently consistent practices (material element), and the conviction of States that they are bound by this uncodified practice, as they are by a rule of positive law (mental element)'.[103]

Based on national cases, the Chamber concluded that there was no consistent State practice. By *inferring* from the absence of sufficient consistent State practice, the Chamber found States were not obliged to prosecute war crimes under customary law at that time.[104] By referring to 'material element' and 'mental element' instead of 'State practice' and '*opinio juris*', this Chamber adopted the two-element approach in general. However, the Chamber did not count *opinio juris* as an independent element for its inference that no *opinio juris* existed based on an absence of sufficient practice.

Secondly, several tribunals did not refer to the identification approach. The ICC, for example, was sometimes silent on the identification approach. In *Ntaganda*, the ICC determined whether it has jurisdiction over rape and sexual slavery as war crimes under Article 8(2)(e)(vi) of the Rome Statute when the alleged perpetrators belong to the same armed force as the victims.[105] The Appeals Chamber analysed whether customary law requires an additional element of the given war crime within the context of internal armed conflict, which limits victims of these two offences to 'persons taking no active part in hostilities' or 'persons who do not take part in hostilities'.[106] The Appeals Chamber rejected the existence of a customary rule requiring this status requirement for war crimes, either in general or in specific for the offences, without addressing its custom identification approach.[107]

Other tribunals also failed to mention the two elements but relied on findings of the ICJ to confirm the existence of customary law.[108] By directly referring to the ICJ's finding in the *Genocide Convention Reservation* Advisory Opinion, the two *ad hoc* tribunals held that the 1948 Genocide Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) reflects customary law.[109] The *ad hoc* tribunals

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[97] *Al Bashir* Malawi Cooperation Decision (n 53) para 39.

[98] ibid. paras 39, 42.

[99] ibid. para 43. This finding, however, was rejected by Pre-Trial Chamber II of the ICC in the South Africa Cooperation Decision. Without a further analysis, Pre-Trial Chamber II concluded that it 'is unable to identify a rule in customary international law that would exclude immunity for heads of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court, including, specifically, this Court'. See *The Prosecutor v Al Bashir* (Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, Pre-Trial Chamber II) ICC-02/05-01/09-302 (6 June 2017) para 68.

[100] *Al Bashir* Malawi Cooperation Decision (n 53) paras 39–42.

[101] *Simić* Sentence (n 85) referred to practice and mental element, rather than State practice and *opinio juris*.

[102] *Prosecutor v Hadžihasanović & Kubura* (Judgement) ICTY-01-47-T (15 March 2006) (*Hadžihasanović & Kubura* Trial Judgment) para 252.

[103] ibid. para 254.

[104] ibid. paras 254–61.

[105] *Ntaganda* Appeal Judgment (n 46) para 1.

[106] ibid. paras 52–55; *Ntaganda* Trial Decision (n 45) paras 46–47.

[107] *Ntaganda* Appeal Judgment (n 46) paras 56–66.

[108] *Tadić* Appeal Judgment (n 25) paras 222–23; *Prosecutor v Furundžija* (Judgement) ICTY-95-17/1-T (10 December 1998) (*Furundžija* Trial Judgment) para 216; Schlütter (n 56) 121–73.

[109] *Prosecutor v Jelisić* (Judgement) ICTY-95-10-T (14 December 1999) (*Jelisić* Trial Judgment) para 60; *Rutaganda* Trial Judgment (n 19) para 46; *The Prosecutor v Alfred* (Judgement and Sentence) ICTR-96-13-T (27 January 2000) para 151; *Prosecutor v Sikirica et al.* (Judgement) ICTY-95-8-T (3 September 2001) para 55; *Prosecutor v Tolimir* (Judgment) ICTY-05-88-2-T (12 December 2012) para

reached this conclusion based on whether other tribunals had recognised these treaty provisions as reflections of customary law.[110] This method of making direct references to ICJ decisions is very convenient and might be a way to assure coherency among international tribunals. The ICJ jurisprudence, which has no binding force 'except between the parties and in respect of that particular case',[111] might contain indications of custom.[112] The ICTY, however, seems to elevate these judicial decisions to the conclusive finding of the existence of custom. As for issues of international criminal law, international criminal tribunals should be more cautious about heavy reliance upon judgments of the ICJ.

B. Evidence of Two Elements

Despite using alternative methods at times, international criminal tribunals still try to identify customary rules by seeking sufficient proof of the two elements. These tribunals, however, have avoided coherently categorising materials as evidence of State practice or *opinio juris*. For instance, in *Jelisić*, the ICTY Trial Chamber tried to examine the element of genocide in customary law.[113] The Chamber firstly examined the meaning of terms in the 1948 Genocide Convention and the preparatory works of this Convention.[114] Secondly, it inspected the subsequent practice based on the Genocide Convention;[115] thirdly, it mentioned the ILC Draft Code of Crimes.[116] The Chamber neither mentioned the role of the ILC Draft Code of Crimes nor clarified whether the Genocide Convention and its preparatory works are evidence of State practice or *opinio juris*. In addition, the Chamber even considered the jurisprudence of the ICTR as evidence of State practice. Indeed, the content of a customary rule could be ascertained from decisions of international tribunals. The ICTR's jurisprudence, however, is not a form of evidence of 'State' practice because the ICTR is not a State.

The case law of the ICTY follows this approach in identifying customary law. In *Čelebići*, the ICTY Trial Chamber contemplated the issue of command responsibility under Article 7(3) of the ICTY Statute.[117] The Chamber concluded that command responsibility, as a mode of liability for unlawful conducts of subordinates, is a well-established principle of customary international law.[118] The Trial Chamber searched for evidence of Report of the 1919 Commission on Responsibility of the Authors of the War and on Enforcement of Penalties, national legislation, post-World War II cases at military tribunals, Additional Protocol I to the 1949 Geneva Conventions and its preparatory works, and domestic military manuals. The Chamber referred to Article 28 of the Rome Statute and the ILC Draft Code of Crimes as well. [119] However, the Chamber did not elaborate whether these materials are evidence of State practice or *opinio juris*.

Even if tribunals have classified evidence in one of the two elements, the classification is not consistent. As for whether the existence of a treaty is evidence of customary international law, it has been classified as either *opinio juris* or State practice. The ICTY once held that the Rome Statute is evidence of customary law.[120] In *Furundžija*, the Trial Chamber counted the Statute as evidence of *opinio juris* to show the position of States Parties.[121] It found that:

> 'In many areas the Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States. [...] At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States'.[122]

733; Convention Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention).

[110] Richard Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965) 41 British Yearbook of International Law 275; Richard Baxter, 'Treaties and Custom' (1970) 129 Recueil des Cours de l'Académie de Droit 27, 42; Yoram Dinstein, 'The Interaction between Customary Law and Treaty' (2006) 322 Recueil des Cours de l'Académie de Droit 247, 363.

[111] The Statute of the ICJ, arts 38(1)(d) and 59.

[112] James Crawford, 'The Identification and Development of Customary International Law' (Speech delivered at Spring Conference of the ILA British Branch, London, 23 May 2014) <http://www.ila-hq.org/download.cfm/docid/BC985B09-ACEA-4356-AD31C90620705001> accessed 26 March 2018.

[113] *Jelisić* Trial Judgment (n 109) para 61.

[114] ibid.

[115] ibid.

[116] ibid.

[117] *Čelebići* Trial Judgment (n 85) para 332.

[118] ibid. paras 333–43.

[119] ibid. paras 335–42.

[120] *Prosecutor v Kunarac et al.* (Judgement) ICTY-96-23-T & ICTY-96-23/1-T (22 February 2001) para 495, fn 1210.

[121] *Furundžija* Trial Judgment (n 108) para 227.

[122] ibid; followed by *Simić* Decision (n 85) paras 56, 74.

The Appeals Chamber in *Tadić* followed this idea. In *Tadić*, the Appeals Chamber relied specifically upon Article 25(3)(d) of the Rome Statute to establish a customary rule of the joint criminal enterprise.[123] It held that:

> 'The Statute was adopted by an overwhelming majority of the States attending the Rome Conference and was substantially endorsed by the Sixth Committee of the UN General Assembly. This shows that that text is supported by a great number of States and may be taken to express the legal position, i.e. *opinio juris* of those States'.[124]

By contrast, in *Krnojelac*, the ICTY Appeals Chamber, with a reference to the *Tadić* Appeal Judgment, held that the Rome Statute is to be seen as evidence of State practice rather than *opinio juris*.[125] The Chamber stated that this 'analysis is also supported by recent State practice, as reflected in the Rome Statute'.[126] The SCSL followed the *Krnojelac* case in classifying the Rome Statute as a form of the two elements. In the *Norman* case, the SCSL examined whether the prohibition of recruiting child soldiers under the age of 15 existed as a war crime under customary law before November 1996.[127] To make this determination, the Appeals Chamber referred to the deliberations of the Rome Statute and proposals of States at the 1998 Rome Conference, and it deemed these statements 'State practice'.[128] The observation above shows that case law in international tribunals is not in a consistent fashion in respect of treaties as evidence of the two elements. The SCSL seems to differentiate State proposals concerning a treaty provision, as evidece of State practice, from the text of a treaty, as evidence of *opinio juris*.

Some Chambers even established the nature of a customary rule by simply referring to few exceptional interpretations. In *Halilović*, the ICTY Trial Chamber examined whether a commander is responsible for the crimes committed by subordinates or for the failure to act under Article 7(3) of the ICTY Statute.[129] This Chamber referred to almost exactly the same materials as those in *Čelebići*. It firstly found that the post-World War II case law diverges about that issue.[130] Secondly, Additional Protocols to the 1949 Geneva Conventions did not clearly clarify the nature of command responsibility.[131] Finally, after examining the jurisprudence of the ICTY, the Chamber held that while most ICTY Chambers, including the Trial Chamber in *Čelebići*, had determined that a commander is responsible for the crimes committed by his or her subordinates under Article 7(3) of the Statute, there were, however, also a few exceptional interpretations.[132] The Trial Chamber concluded that commanders are responsible for the failure to prevent or punish crimes committed by their subordinates, which is the nature of command responsibility under customary law.[133]

It should be noticed that the exceptions referred to in *Halilović* are the *Aleksovski* judgment and the partially dissenting opinion of Judge Shahabuddeen in the *Hadžihasanović et al.* Interlocutory Appeal decision.[134] The *Krnojelac* Appeal judgment seems to be another exception, while it was not referred to in *Halilović*.[135] Turning to those cases however, shows that the Chambers in *Aleksovski* and *Krnojelac* did not consider the nature of command responsibility. In the *Hadžihasanović et al.* Interlocutory Appeal decision, Judge Shahabuddeen, in his partially dissenting opinion, also did not aim to clarify this issue. Instead, he provided an alternative interpretation of command responsibility as imposing the duty to punish, thus, a subsequent commander is liable for failing to punish crimes committed before his or her command assumption.[136]

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[123] *Furundžija* Trial Judgment (n 108) para 216; *Tadić* Appeal Judgment (n 25) paras 222–23.

[124] *Tadić* Appeal Judgment (n 25) para 223; discussions about the relationship between a multilateral treaty and customary international law see *North Sea Continental Shelf* cases (*Germany v Denmark; Germany v Netherlands*) (Judgment) [1969] ICJ Rep 3 para 63 (*North Sea Continental Shelf* cases); Baxter (1970) (n 110) 42; Dinstein (n 110) 363.

[125] *Prosecutor v Krnojelac* (Judgement) ICTY-97-25-A (17 September 2003) (*Krnojelac* Appeal Judgment) para 221, fn 358.

[126] ibid. para 221; Rome Statute, arts 7(1)(d) and 8(2)(a)(vii).

[127] *Norman* Jurisdiction Decision (n 85) para 8.

[128] ibid. para 17; also see *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*) (Judgment) [2012] ICJ Rep 422, 457 para 99 (*Obligation to Prosecute or Extradite*), treaties are regarded as international practice.

[129] *Prosecutor v Halilović* (Judgement) ICTY-01-48-T (16 November 2005) (*Halilović* Trial Judgement) paras 53–54.

[130] ibid. paras 42–48, 53.

[131] ibid. paras 49, 53.

[132] ibid. para 53; *Hadžihasanović & Kubura* Trial Judgment (n 102) para 72.

[133] *Halilović* Trial Judgment (n 129) paras 38, 55.

[134] ibid. para 53, fn 128–29. See also *Prosecutor v Aleksovski* (Judgement) ICTY-95-14/1-T (25 June 1999) para 67; *Hadžihasanović et al.* Interlocutory Appeal Decision (n 19), Partially Dissenting Opinion of Judge Schomburg para 32.

[135] *Krnojelac* Appeal Judgment (n 125) para 171.

[136] *Hadžihasanović et al.* Interlocutory Appeal Decision (n 19), Partially Dissenting Opinion of Judge Schomburg paras 1, 32; See also *Prosecutor v Orić* (Judgement) ICTY-03-68-A (3 July 2008), Partially Dissenting Opinion and Declaration of Judge Liu paras 29–33.

Therefore, the real exception in *Halilović* is the *Halilović* itself. Henceforth, ignoring the inconsistency of practice and unfavourable jurisprudence, the Chamber of *Halilović* relied on exceptional interpretations of command responsibility to conclude the nature of command responsibility under customary law.[137]

It might be true that tribunals prior to *Halilović* made mistakes in the clarification of the nature of command responsibility under customary law. If this is the case, then what appears to be the exception, *Halilović*, could be seen as a turning point and would be a valuable precedent for the development of customary law. Nevertheless, the *Halilović* Chamber neglected to identify inconsistent practice and adverse *opinio juris*, and reached a conclusion based solely on exceptional interpretations. Its reasoning is, therefore, less strongly persuasive.[138] The interpretative approach seems to avoid the two-element approach in the identification of customary law. It is unlikely that only frequent references to exceptional interpretations, without further practice and *opinio juris*, could create or modify a customary rule.

C. Summary and Observations

The observations of some cases from the international criminal tribunals indicate that there is a discrepancy between the words and deeds of tribunals in the identification of customary rules. Tribunals state that they will apply the two-element approach, while they do not distinguish evidence of State practice from that of *opinio juris* nor do they make consistent classifications of such evidence. Further, they sometimes do not investigate evidence of State practice or make a decision solely based upon *opinio juris*. The international tribunals have even established a customary rule by merely relying on few exceptional interpretations. Although tribunals do not always clarify the attributes of evidence, they give more weight to *opinio juris* than State practice in some cases. It seems that evidence of *opinio juris* is expanded and inclusive, while evidence of State practice is limited and exclusive.

To sum up, international criminal tribunals, in general, employ the two-element approach in a 'loose' or 'flexible' way to uphold or reject arguments regarding customary law. In fact, the two-element approach is also confirmed and acknowledged by other international bodies, for instance, the ICJ.[139] Its most outstanding example is the *North Sea Continental Shelf* cases.[140] The ICJ in the *Libya/Malta* case also stated that '[i]t is axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states'.[141] The ICJ's approach has also been criticised by commentators because it is inconsistent and too flexible.[142] Commenting on the ICJ's case law, Judge Tomka, former President of the ICJ, has explained:

> In fact, the Court has never abandoned its view, firmly rooted in the wording of the Statute, that customary international law is 'general practice accepted as law' […] that is […] a settled practice together with '*opinio juris*'. However, in practice, the Court has never found it necessary to undertake such an inquiry for every rule claimed to be customary in a particular case and instead has made use of the best and most expedient evidence available to determine whether a customary rule of this type exists.[143]

Judge Tomka's remarks maybe also partly explain why these international criminal tribunals sometimes have not made a detailed analysis of the two elements and inconsistently classified evidence in specific cases.

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[137] This conclusion was confirmed by the *Halilović* Appeals Chamber. See *Prosecutor v Halilović* (Judgement) ICTY-01-48-A (16 October 2007) para 63.

[138] See *Hadžihasanović & Kubura* Trial Judgment (n 102) paras 70–75; *Prosecutor v Orić* (Judgement) ICTY-03-68-T (30 June 2006) para 302; *Prosecutor v Blagojević & Jokić* (Judgement) ICTY-02-60-A (9 May 2007) para 280, holding that a superior is responsible for crimes committed (by acts or omission) by subordinates and for his or her omissions to prevent or punish.

[139] UN Doc A/CN.4/663, 27–37; *The Case of the SS 'Lotus'* (*France v Turkey*) PCIJ Rep Series A No 10, 28 (*Lotus* case); *Continental Shelf* (*Libyan Arab Jarnahiriya/Malta*) (Judgment) [1985] ICJ Rep 13, 20 para 27 (*Libya/Malta* case); Roberts (n 73) 758; Schlütter (n 56) 277; Charles Quince, *The Persistent Objector and Customary International Law* (Outskirts 2010) 31.

[140] *North Sea Continental Shelf* cases (n 124), 43–44 paras 74, 77. For other cases, see *Military and paramilitary Activities* (n 2) 97, 108 paras 183, 207; *Legality of the Threat or Use of Nuclear Weapons* (n 73); *Jurisdictional Immunities of the State* (*Germany v Italy: Greece Intervening*) (Judgment) [2012] ICJ Rep 99, 122 para 55.

[141] *Libya/Malta* case (n 139).

[142] See Schlütter (n 56) 121–73; Tams (n 4) 51–79; Theodor Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law' (1996) 90 American Journal of International Law 31; Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 European Journal of International Law 417–43, argues that the ICJ does not employ a single reasoning approach to evaluate the evidence and existence of customary rules.

[143] Peter Tomka, 'Custom and the International Court of Justice' (2013) 12 The Law & Practice of International Courts and Tribunals 195.

V. Peculiarities of Identifying Customary Rules in International Criminal Law

As shown above, international criminal tribunals applied the two-element approach to identify customary law in a flexible way. Apart from Judge Tomka's 'best and most expedient evidence' explanation, the unique features of international criminal law and the difficulties in its customary identification are also persuasive explanations for flexibility in the application of the two-element method. Some commentators have also noted that 'customary international law in the context of international criminal law means something different from customary international law in the context of traditional international law'.[144] This section aims to explore some specific features for custom-ascertainment in international criminal law, including the prohibitory nature of international criminal law, the distinction between illegal and criminal behaviour, and the difficulties in the assessment of evidence.

A. Nature: Rules of Prohibition

In international criminal law, individuals must refrain from committing international crimes. National tribunals can investigate and prosecute suspected person for committing international crimes. However, not every State will prosecute international crimes for various political or legal reasons, for example, the lack of evidence or sources, the lack of motivation or scarcity of support in national law. Evidence of physical State practice, therefore, is more rarely obtainable.

Nevertheless, the fact that frequent violations exist and States have had few successful instances in practice does not impede the formation of a customary rule.[145] The prohibition of torture, for example, is recognised under customary law despite the frequent practice of torture around the world.[146] Some substantive rules of international criminal law derive their origins from international humanitarian law and international human rights law.[147] These two regimes introduce prohibitions such as the prohibition of torture and the abolition of death penalty. Multiple acts of international criminal law share the same characteristic, for example, the underlying offences of war crimes, crimes against humanity and genocide. Similarly, the fact that there is not a strong record of national investigation and prosecutions of international crimes is not an obstacle for the formation and the identification of customary law.

B. Illegality and Criminality of Behaviour

A distinction between unlawful behaviour and criminal behaviour must be kept in mind when identifying customary rules of international crimes. International law prohibits some conduct, and violations of its rules without justifications are regarded as an infringement. However, not all prohibitory norms entail individual criminal responsibility, for instance, not all violations of a rule of international humanitarian law constitute a war crime.

In *Nahimana*, the ICTR Trial Chamber examined hate speech as an underlying act of persecution under Article 3(h) of the ICTR Statute. Relying on this provision and Article 4 of the Convention on the Elimination of all Forms of Racial Discrimination (CERD) as well as Article 20 of the International Covenant on Civil and Political Rights (ICCPR), the Chamber held that 'hate speech expressing ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination'.[148] The Trial Chamber concluded that Nahimana was guilty of persecution for his hate speech. In its view, hate speech merely advocating hatred constituted an underlying offence of persecution.[149] In the appeal, the Appeals Chamber found that hate speech alone as a violation to the right to respect for dignity constitutes an underlying discrimination.[150] According to the Appeals Chamber, 'it is not necessary that these underlying acts of persecution amount to

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[144] Schabas (n 27); Ilias Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law' (2006) 6 International Criminal Law Review 121; Larissa van den Herik, 'Using Custom to Reconceptualize Crimes Against Humanity' in Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (CUP 2010) 80–105; Carsten Stahn and Larissa van den Herik, "Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?" in Stahn and van den Herik (eds) (n 10) 21, 63.

[145] *Obligation to Prosecute or Extradite* (n 128) 457 paras 99–100.

[146] Rome Statute, art 7; see *Obligation to Prosecute or Extradite* (n 128) 457 para 99. This prohibitive nature might explain why the ICJ referred to 'international practice' other than State practice, and *opinio juris* of States to show that the prohibition of torture is part of customary international law.

[147] Cassese and others (n 17) 5.

[148] *Nahimana et al. v The Prosecutor* (Judgement) ICTR-99-52-T (3 December 2003) paras 1076, 1081–82.

[149] ibid. para 1073.

[150] *Nahimana* Appeal Judgment (n 19) para 986. However, there needs to be a link between actual violence and hate speech as a violation of the right to life.

crimes in international law'.[151] The Chamber, thererfore, did not decide whether mere hate speech is criminal under international law, but allowed it to be a basis for persecution.[152] In his dissenting opinion, Judge Meron held that mere hate speech is not criminal in customary law.[153] He clarified that:

> 'It is true that Article 4 of the CERD and Article 20 of the ICCPR require signatory states to prohibit certain forms of hate speech in their domestic laws, but do not criminalize hate speech in international law. […] In light of the reservations to the relevant provisions of the CERD and the ICCPR, the drafting history of the Genocide Convention, and the *Kordić* Trial Judgement, it is abundantly clear that there is no settled norm of customary international law that criminalizes hate speech'.[154]

In his view, there was no customary law criminalising hate speech and mere hate speech cannot constitute an underlying act of persecution. The approach of the Appeals Chamber may violate the principle of legality.[155] The analysis of this case indicates that the distinction between illegal acts and criminalised acts should not be blurred. International law only criminalises serious acts rather than any violation of international human rights law as an international crime. The unlawful nature of violation does not lead to the criminalisation of it within international criminal law.

C. Obstacles in Evidence Assessment

Apart from individual State interests, a trend exists whereby the benefit of international community is becoming a focus of international criminal law.[156] Rules concerning the protection of human beings' common interest have progressively increased. Given customary rules in this area, there are some qualifications to assess evidence of practice, in particular, national cases and legislation.

1. National Cases and Legislation as Evidence of Practice

National cases and legislation are *per se* not sources of international law because most of them do not deal with international law issues.[157] However, as Oppenheim commented, national cases in 'cumulative effect' may afford evidence for the identification of customary law.[158] National cases and legislation addressing issues of international criminal law are relevant evidence of practice.

The first task in identifying relevant evidence of State practice is quite challenging. Given the complementarity principle of the ICC, the enforcement of international criminal law mostly relies upon States.[159] According to Article 20(3) of the Rome Statute, prosecution by the ICC is prohibited if the 'conduct proscribed' has been prosecuted by another court, thus, leaving the characterisation of 'crimes' open to national courts.[160] Therefore, the same conduct may be categorised as different crimes, and different conduct may be classified with the same label. One example is wilful killing as a war crime. Every State has universally recognised that wilful killing is a crime. On the one hand, wilful killing in armed conflict may be prosecuted and punished by national courts as ordinary crimes of murder, war crimes, or crimes against humanity at the international level.[161] For example, in 1973, a United States Army Lieutenant was convicted of murder and assault for his involvement in the My Lai massacre during the Vietnam War.[162] On the other hand, intentional killing in peacetime is prohibited and criminalised as murder in national law. In suppressing its political opponents, a government might also manipulate prosecutions and wrongfully prosecute some behaviour that constitutes ordinary crimes as war crimes. A Trial Chamber of the ICTY held that 'national prosecutions of war crimes characterised as ordinary crimes were not regarded as valid responses to interna-

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[151] ibid. paras 985, 987 .

[152] ibid. para 986.

[153] *Nahimana* Appeal Judgment (n 19), Partly dissenting opinion of Judge Meron para 5.

[154] ibid. paras 5–8.

[155] ibid. paras 8, 16.

[156] Schlütter (n 56).

[157] *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.

[158] Jennings and Watts (eds) (n 1) §13, 42 and fn 6; *Prosecutor v Đorđević* (Judgement) ICTY-05-87/1-A (27 January 2014) para 44; ILC, 'Memorandum by the Secretariat', UN Doc A/CN.4/691 (2016) paras 40–49; UN Doc A/73/10(Advance) (2018) para 65, Conclusion 13.2.

[159] Rome Statute, art 17.

[160] ibid. art 20(3); Ward Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (T.M.C. Asser Press 2006) 205; *Hadžihasanović & Kubura* Trial Judgment (n 102) para 257.

[161] *Hadžihasanović & Kubura* Trial Judgment (n 102) para 256, fn 419.

[162] Ferdinandusse (n 160)19, fn 86; *US v Calley*, 46 Cmr 1131 (1973) 1138.

tional crimes in the ICTY Statute'.[163] In a nutshell, it is an arduous task to distinguish the irrelevant from the relevant evidence of practice supporting or rejecting an offence as an international crime.

Additionally, the scope and definition of international crimes in national law might not be the same as that under customary law. A good example would be the definition of terrorism in the Lebanese Criminal Code. The Appeals Chamber of the Special Tribunal for Lebanon (STL)[164] clarified that there is an emerging definition of terrorism as an international crime under customary law.[165] According to the Chamber, the elements of the crime of terrorism in the Lebanese Criminal Code are distinct from those under customary law. Customary law further requires the elements of an underlying act and the intent to commit that act.[166] The STL held that the elements of the notion of terrorism in Lebanese Criminal Code must be interpreted in accordance with international law by enshrining additional elements.[167] National courts indeed rarely examine the existence of a customary rule or try to interpret it in consonance with international law as the STL did.[168] In identifying evidence of practice, practitioners should be cautious about national decisions as evidence of customary law.

Moreover, some behaviour criminalised under international law is permitted in national law, while both rules run in parallel at the international and the national levels. For instance, the prohibition of expanding bullets in armed conflicts is recognised as a customary rule in international humanitarian law.[169] The use of expanding bullets in armed conflicts is also considered as a war crime under Article 8 of the Rome Statute. By contrast, the use of expanding bullets may be lawful in a law enforcement context at the national level.[170] The search on relevant evidence of national laws and their assessment becomes difficult because what is not justified in international law might be legitimate in national legislation. It is hard to seek sufficient evidence of national laws and cases to verify the existence of customary law. However, this idea does not mean that national cases do not matter.

National cases are sometimes hard evidence from which a customary rule is to be ascertained. It should be noted that the obligation to prosecute a crime 'as defined' under international law differs from the acknowledgement of that particular crime in international law. States may recognise international crimes in customary law, but they may be not obliged to prosecute underlying offences of these crimes solely 'as defined' in customary law.[171] As mentioned above, States may prosecute violations of war crimes as ordinary crimes. In this circumstance, these national prosecutions are valuable evidence for identifying the existence of international crimes in customary law.

The exercise of universal jurisdiction is another crucial piece of evidence for the identification of custom. In *Filártiga v. Peña-Irala*, a United States Circuit Court had to deal with a crime of torture that occurred in Paraguay.[172] In making the decision, the court examined whether the prohibition of torture had developed into a customary rule.[173] In *Butare Four*, Belgian courts brought four Rwandans to trial for war crimes.[174] This prosecution is seen as performing a gap-filling function with regard to jurisdiction because the ICTR declined to take charge of the prosecution and extradition of the accused back to Rwanda was impractical.[175] Similarly, in *Scilingo*, the Spanish Supreme Court concluded that unlawful detention and crimes of murder committed in Argentina amounted to crimes against humanity.[176] It is true that the concept of uni-

[163] *Hadžihasanović & Kubura* Trial Judgment (n 102) paras 255–56.

[164] UNSC Res 1664 (29 March 2006) UN Doc S/RES/1664.

[165] *The Prosecutor v Ayyash et al.* (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging) STL-11-01/I (Appeals Chamber) (16 February 2011).

[166] ibid. paras 42–148; Lebanese Criminal Code, art 314.

[167] ibid. paras 147–48.

[168] Jennings and Watts (eds) (n 1) §13, 41.

[169] Henckaerts and Doswald-beck (eds) (n 16), Rule 77.

[170] The Czech Republic interprets the Amendment to article 8 as that '[t] he prohibition to employ bullets which expand or flatten easily in the human body, [...] does not apply to the use of such bullets, [...] in the context of law enforcement and maintenance of public order'.

[171] Henckaerts and Doswald-beck (eds) (n 16), Rule 158, 607–10; *Hadžihasanović & Kubura* Trial Judgment (n 102) paras 253–61.

[172] *Filártiga v Peña-Irala*, 630 F 2d 876 (2nd Cir 1980) 878.

[173] ibid. 880.

[174] *Public Prosecutor v the Butare Four*, Assize Court of Brussels, Verdict of 8 June 2001. See Luc Reydams, 'Belgium's First Application of Universal Jurisdiction: the *Butare Four* Case' (2003) 1 Journal of International Criminal Justice 428.

[175] Noora Arajärvi, 'Looking Back from Nowhere: Is There a Future for Universal Jurisdiction over International Crimes?' (2011) 16 Tilburg Law Review 16–17.

[176] ibid. fn 45; Christian Tomuschat, 'Issues of Universal Jurisdiction in the *Scilingo* Case' (2005) 3 Journal of International Criminal Justice 1074.

versal jurisdiction and its requirements are controversial, and only a few national courts have successfully implemented universal jurisdiction.[177] These decisions exercising universal jurisdiction over international crimes, however, are significant evidence of State practice confirming a customary rule, especially when States concerned (Paraguay, Rwanda and Argentina) have also recognised such practice.

2. International Instruments as Evidence

International instruments are a form of evidence of *opinio juris*.[178] They should be given weight for the identification of customary rules in international criminal law. In using international instruments for this purpose, however, some words of caution are necessary. First, the definitions of crimes in international instruments may be broader or narrower than that in custom. The examples of war crimes and crimes against humanity in the ICTY and ICTR Statutes may suffice to illustrate this argument. The 1993 ICTY Statute stipulated a nexus with armed conflicts for the crimes against humanity.[179] The Appeals Chamber of the ICTY in *Tadić* argued however, that 'the requirement [...] that crimes against humanity be committed in armed conflict, did not reflect customary international law, [...] that the nexus with an armed conflict was not a new constitutive element of crimes against humanity'.[180] Additionally, in his report to the Security Council, the UN Secretary-General expressly noted that 'Article 4 of the Statute [...] for the first time criminalizes common Article 3 of the four Geneva Conventions'.[181] This statement, at least, indicates his view that the scope of war crimes in Article 4 of the ICTR Statute was broader than the custom existing in 1994. Similarly, the ICTR Statute provides a discriminatory intent in the definition of crimes against humanity, whereas the ICTR argued that 'the Security Council decided to limit the jurisdiction of the Tribunal over crimes against humanity solely to cases where they were committed on discriminatory grounds'.[182] The ICTR concluded that the 'discriminatory intent' for crimes against humanity is not a substantive element.[183]

Apart from adding new requirements, the scope of a crime in a treaty may be restricted by excluding some underlying acts; in particular, conventions that are not exhaustive codifications of existing customary law.[184] One example is the list of war crimes in non-international armed conflicts in Article 8 of the Rome Statute because it excludes some acts, such as launching an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage. Judge Schomburg of the ICTY also criticised the reference to Article 28 of the Rome Statute concerning command responsibility, as this treaty was a delicate compromise resulting from arduous negotiations.[185] The definition of genocide is another excellent example to illustrate this idea. The 1946 General Assembly Resolution[186] and the 1947 Draft Convention included political groups in their definitions of genocide,[187] although objections existed during the preparatory works as to the inclusion of such groups. States made compromises in order to adopt a treaty. The final 1948 Genocide Convention excludes the elimination of political groups from the definition of genocide.[188] Although many cases indicate that the 1948 Genocide Convention is reflective of customary law, there is a good possibility that the definition of genocide including political groups in the 1946 General Assembly Resolution mirrors the whole of customary law, whereas the 1948 Genocide Convention only codified part of customary law.[189] The drafters

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[177] Arajärvi (n 175) 5–29; LANM Barnhoorn, 'Netherlands Judicial Decisions Involving Questions of Public International Law, 1999–2000' (2001) 32 Netherlands Yearbook of International Law 233, 282–96; Schimmelpennick van der Oije and Steven Freeland, 'Universal Jurisdiction in the Netherlands–the right approach but the wrong case? Bouterse and the "December Murders"' (2001) 7 Australian Journal of Human Rights 89.

[178] UN Doc A/73/10 (Advance) (2018) para 65, Conclusion 6.2–6.3.

[179] ICTY Statute, art 5.

[180] *Tadić* Interlocutory Appeal Decision (n 21) paras 139–40.

[181] UNSG '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.

[182] ICTR Statute, art 3; *The Prosecutor v Akayesu* (Judgement) ICTR-96-4-A (1 June 2001) para 464.

[183] ibid. para 464–66; *The Prosecutor v Tharcisse Muvunyi* (Judgement and Sentence) ICTR-00-55A-T (12 September 2006) para 514.

[184] *Orić* Appeal Judgement (n 117), Separate and Partially Dissenting Opinion of Judge Schomburg para 20; *Hadžihasanović et al.* Interlocutory Appeal Decision (n 19), Partial Dissenting Opinion of Judge Shahabuddeen, Separate and Partially Dissenting Opinion of Judge David Hunt.

[185] *Orić* Appeal Judgement (n 117), Separate and Partially Dissenting Opinion of Judge Schomburg para 20.

[186] UNSC Resolution 96 (I) (11 December 1946) UN Doc S/RES/96 (I).

[187] Draft convention on the crime of genocide prepared by the Secretary-General in pursuance of the Economic and SC Resolution 47 (IV) (26 June 1947), art 1(1).

[188] Genocide Convention, art 2.

[189] *Vasiliauskas v Lithuania* App no 35343/05 (ECHR, 10 October 2015) paras 131–41, and Joint Dissenting Opinion of Judges Villiger, Power-Forde, Pinto De Albuquerque and Kūris paras 9–16; UN Doc A/CONF.183/C.1/SR.3, 100.

may have intentionally narrowed the definition of genocide. The example of the Genocide Convention also shows that preparatory works of international instruments are essential for the customary identification. Indeed, Governmental statements in international context, for example, notes, protests or claims, reactions to other States' claims, proposals or comments on drafts, are manifestations of practice.

Thirdly, it is necessary to note that in a treaty there is a difference between the obligations on States and the liabilities of individuals. In *Akayesu*, the Trial Chamber of the ICTR relied on the definition of torture in the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Torture Convention).[190] By contrast, in *Kunarac*, the Appeals Chamber of the ICTY held that the definition of torture in the Torture Convention is associated with obligations of States, which is not identical to the definition of torture as a crime against humanity.[191] The two cases show that it is necessary to identify whether a treaty, which aims to impose obligations on States, also attaches individual criminal responsibility for violations and provides clear definitions of international crimes.

Lastly, the retroactive application of international instruments should be avoided due to the risk of violating the principle of legality. Cases of the *ad hoc* Tribunals have confirmed this idea.[192] In *Orić*, Judge Liu doubted the reference to the Rome Statute because it was adopted after the ICTY and ICTR Statutes. As he points out, '[s]ince customary international law has to be assessed as of the date of commission of the offences, the fact that these texts were adopted subsequent to these dates, further limits their weight and usefulness as sources of customary international law at the time the crimes were committed'.[193]

D. Summary and Observations

This section has shown that the evidence assessment involved in custom identification tends to be problematic because of the peculiarities of international criminal law and the obstacles in the evaluation of the evidence. These peculiarities mingling with each other make the identification task more complex, which should be kept in mind in determining the existence of customary law. These features partly serve to explain why international criminal tribunals practice flexibility when identifying customary rules in international criminal law. In reality, many States do not have capacity, or do not need, to prosecute international crimes in order to contribute to the formation of this custom. This thus, results in the paucity of States' physical acts. These tribunals give more attention to verbal statements of States and evidence of *opinio juris* than the States' physical acts. The evidence of *opinio juris* is raised to a higher importance in the identification of customary law.[194] As shown above, in section III, legal writers also accept a flexible formula of the two-element approach. Sørensen has suggested a practical way 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'.[195] Waldock and other scholars affirm this refutable "presumed" acceptance idea.[196] The converse of the 'presumed' acceptance idea also exists in international criminal law. It means that once sufficient *opinio juris* of a customary rule exists, less State practice is required to be enough for the identification of that rule.[197] The opposing party bears the burden to refute the presumed existence of a customary rule. A supposed customary rule and evidence of the two elements can be put on two sides of a scale. A customary rule is emerging, or modified, only if the side with the two-element acquired enough weight to either make the other side rise or balance the scale. For the change of a pre-existing customary rule, evidence of both elements is required to ascertain the content of a customary rule, while a denial of an existing rule would also be supported with sufficient opposing evidence of two elements.

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[190] *The Prosecutor v Akayesu* (Judgement) ICTR-96-4-T (2 September 1998) paras 593–95.

[191] *Kunarac et al.* Appeal Judgment (n 25) paras 146–48.

[192] *Simić* Sentence (n 82) para 34; *The Prosecutor v Semanza* (Judgement) ICTR-97-20-T (15 May 2003) paras 342–43.

[193] *Orić* Appeal Judgement (n 117), Partially Dissenting Opinion of Judge Liu Daqun para 26.

[194] Schlütter (n 56); Cassese (n 83)188–89.

[195] Waldock (n 11) 49.

[196] Bishop (n 13) 226; Wolfgang Friedmann, 'General Course in Public International Law' (1969) 127 Recueil des Cours de l'Académie de Droit 135–36; EECC, Prisoners of War-Eritrea's Claim 17, §41, xxvi Reports of International Arbitral Awards (2009), 39. As the Eritrea-Ethiopia Claims Commission noted, a party wishing to challenge the customary nature of a provision would bear the burden of proof.

[197] Rudolf Bernhardt, 'Custom and Treaty in the Law of the Sea' (1987) 205 Recueil des Cours de l'Académie de Droit 268, 265–71.

VI. Conclusions

This paper examined the methods used to identify customary rules in international criminal law and discussed the peculiarities in the process of ascertainment. To sum up, the view that customary law is either a source or an interpretative aid of international criminal law is well accepted, and customary law continues to play a role in this field. In academia, no consensus exists to adopt a different method that deviates from the two-element approach, to identify customary rules in this field. The observation of some cases of international criminal tribunals has shown that tribunals either relied on the two-element approach or kept silent in the identification of customary law. They do not deny that practice is not necessary for the formation of customary law but evidence of *opinio juris* is given more weight in specific cases. The peculiarities of international criminal law, in particular, the obstacles for the assessment of evidence of practice partly explain their flexible custom-identification approach.

This paper concludes that a different method departing from the two-element approach has not emerged in the identification of customary rules in international criminal law. For the observed peculiarities and difficulties, a slight adaptation of the two-element approach focusing on *opinio juris* is acceptable for case-by-case identification. During the assessment of evidence of the two elements, tribunals should carefully bear in mind these peculiarities and the principle of legality, specifically the prohibition of retroactive application of the law. International criminal tribunals have not reached an agreement with absolute certainty or in detail about the method to identify specific customary rules. Further study of commonly acknowledged ideas of these international criminal tribunals is needed to offer guidance to international practitioners while leaving discretion for tribunals to assess parties' arguments.

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Competing Interests

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