

INTERNATIONAL CUSTOMARY LAW IN THE JURISPRUDENCE OF THE ICTY AND THE ICTR

JOANNA KONDERLA*

INTRODUCTION

Judicial decisions of the international tribunals have always been treated as a subsidiary source of law. The rulings are not binding upon States, apart from the parties to particular proceedings, but their prominence is so high that many judgements are treated as a reflection of international law. It is even more so with the rules of customary international law, and courts' rulings either confirm the existence of a particular rule and its content, or influence the future practice of States and international organisations so that it becomes one.¹ As Prof Karol Wolfke wrote in his well-known book *Custom in Present International Law*: 'their informal share in the development of international customary law is undoubtedly considerable'.²

Customary international law was also an important source of law for *ad hoc* international criminal courts: for Rwanda³ (the ICTR) and former Yugoslavia⁴ (the ICTY). Both tribunals found there grounds for both jurisdiction and sentencing. The criminal tribunals were authorised to apply enumerated norms of international law, but because there were uncertainties as to the substance and the binding force of treaties at the time when the crimes were committed, the application of the rules of customary international law has to be determined 'beyond any doubt'.⁵

The object of this article is to describe how two *ad hoc* international criminal tribunals dealt with the issue of following and explaining norms of

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* Research Assistant, Institute of International Law, Faculty of Law and Administration, University of Warsaw, j.konderla@wpia.uw.edu.pl.

¹ JM Henckaerts, 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict' (2005) 87(857) *International Review of the Red Cross*, 179.

² K Wolfke, *Custom in Present International Law* (1964) 71.

³ International Tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994.

⁴ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991.

⁵ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704, 3 May 1993, 9, para 34.

customary international law. In order to do that the representative decisions and judgments of international criminal courts are cited and examined. The first part is a description of the sources of law for criminal tribunals, with emphasis on the international custom. The second consists of the analysis of the international criminal courts' approach to the two-element theory of customary international law. It is followed with an enquiry into the content of customary international law: concerning both jurisdiction and substance of customary international law. The article ends with conclusions.

I. SOURCES OF LAW FOR CRIMINAL TRIBUNALS

There are two main sources in international law: treaties and custom. According to art. 38 para 1 (b) of the Statute, the ICJ shall apply 'international custom, as evidence of a general practice accepted as law'.⁶ For centuries those international norms were only binding upon States, not individuals. That rule was contested after World War I and from that time there are more and more cases where individuals have been held legally responsible directly before international organs based on international norms. One may argue that the establishing of the described criminal courts cements that liability.

On the other hand, in most internal criminal justice systems an individual may be convicted of a crime that is known and penalised only before it was committed. The concept derives from the basic norm of *nullum crimen nulla poene sine lege*, which is of utmost importance in contemporary societies. Therefore, one of the biggest challenges before *ad hoc* criminal tribunals has been to ascertain their jurisdiction to punish individuals for particular crimes. According to Judge Meron '[i]f a criminal conviction for violating uncodified customary law is to be reconciled with this principle (...) it must be through the use of clear and well-established methods of indenting customary law. The legality principle this serves as a restraint on the tribunals' ability to be 'progressive' in their contribution to the development of the customary international law.'⁷

The criminal tribunals were authorised to judge international crimes according to their statutes and international law. That is why, in cases where conventional law was lacking or could not be applied, they referred to international customary law. On that basis, the customary status of the Geneva Conventions of 1949, its Additional Protocols or the Genocide Convention have been confirmed. It was directly stated by the ICTY: '[i]n light of the object and purpose of the Geneva Conventions, which is to guarantee the protection of certain fundamental values common to mankind in times of armed conflict, and of the customary nature of their provisions (...)'.⁸ In the same judgments the Appeal Chamber stated that:

"[i]t is indisputable that common Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian

⁶ http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf, access 15 October 2015.

⁷ T Meron, 'Revival of Customary Humanitarian Law' (2005) 99(4) American Journal of International Law 817.

⁸ *Prosecutor v Delalić, Mucić also known as "Pavo", Delić, Landžo also known as "Zenga"* (Judgement) IT-96-21-A (20 February 2001) para 113.

principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based. These principles, the object of which is the respect for the dignity of the human person, *developed as a result of centuries of warfare and had already become customary law* at the time of the adoption of the Geneva Conventions because they reflect the most universally recognised humanitarian principles”.⁹

The above follows the reasoning line from the *Tadić* case, that norms arising from the Geneva Conventions constitute customary international law, and because of that their application by the ICTY does not violate the principle of *nullum crimen sine lege*.¹⁰

Also, the ICTR confirmed that ‘[t]he Genocide Convention is undeniably considered part of customary international law, as can be seen in the opinion of the International Court of Justice on the provisions of the Genocide Convention, and as was recalled by the United Nations Secretary-General in his Report on the establishment of the International Criminal Tribunal for the former Yugoslavia.’¹¹

Although none of the tribunals is bound by the precedent doctrine, as in the common law system, the certainty of criminal law encourages the consistency in its jurisprudence. The previous rulings are, however, treated as a secondary source. Therefore, even if chambers are not obligated to follow the decisions of others, in many cases they made reference to the already given decisions and refrained from describing the whole process which led to the conclusions. Only the decisions of the appeals chamber should be followed.

The above was confirmed by jurisprudence, as the ICTY explicitly said that the tribunal is not bound by previous doctrine, but ‘must apply customary international law as it stood at the time of the offences.’¹² In another case, it was explained that the departure from the established line of reasoning should be done in the interests of justice in cases ‘where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per in curiam*, that is a judicial decision that has been ‘wrongly decided, usually because the judge or judges were ill-informed about the applicable law.’¹³

Apart from its own decisions, the criminal tribunals referred to the decisions of the International Military Tribunals of Nuremberg and Tokyo. Although their jurisprudence might have had only an evidentiary value for existing norms, in their decisions the ICTY and the ICTR took into account their conclusions which at the time were either declaratory or ‘which had been gradually transformed into customary international law.’¹⁴ However, as it was held by the ICTR that ‘sometimes the jurisprudence of the International

⁹ *Delalić* (n 8) para 143 (emphasis added).

¹⁰ *Prosecutor v Dusko Tadić a/k/a “Dule”* (Judgement) IT-94-1-T (7 May 1997) para 577.

¹¹ *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T (2 September 1998) para 495; see also: *Prosecutor v Kayishema and Ruzindana* (Judgement) ICTR-95-1-T (21 May 1999), para 88.

¹² *Tadić* (1997) (n 11) para 654.

¹³ *Prosecutor v Dordević* (Appeal Judgement) IT-05-87/1-A (27 January 2014) para 24; *Prosecutor v Aleksovski*, (Judgement) IT-95-14/1-A (24 March 2000) para 108.

¹⁴ *Prosecutor v Kupreskić* (Judgement) IT-95-16-T (January 2000) para 541.

Military Tribunals do not adequately reflect the international customary law applicable before the *ad hoc* Tribunals.¹⁵ It was, however, considered by scholars that the comparison to after World War II cases has to be done with caution, as they are not always comparable.¹⁶

Moreover, to support the view of the customary character of particular norms, the courts referred to: prosecutions before national courts,¹⁷ national military manuals,¹⁸ national legislation,¹⁹ state declarations,²⁰ historical review of the past conflicts and behaviour of the international community in the past,²¹ action of the ICRC²² and its study on Customary International Humanitarian Law²³ and resolutions adopted by the United Nations organs.²⁴ One more remark could be added that it was observed that the criminal tribunals resorted to customary international law mostly in the first period of its works. Later on, more arise from the other sources.²⁵

II. THE TWO-ELEMENT THEORY OF CUSTOMARY INTERNATIONAL LAW

According to the traditional approach, customary international law consists of two elements: State practice and *opinion juris sive necessitatis*. The first is also known as the objective element – as all could observe actions of state or group of states, whereas the latter is of subjective character as it encompasses the inner belief of state that it behaves in certain way because of legal obligation. The criminal courts, at least in theory, adhere to such a two element theory of international customary law.

It was clearly stated in *Hadžihasanovic* that ‘to hold that a principle was part of customary international law, it has to be satisfied that State practice recognized the principle on the basis of supporting *opinio juris*.’²⁶ In *Rwamakuba* the ICTR confirmed that ‘[n]orms of customary international

¹⁵ *Rwamakuba v Prosecutor* (Decision on the Interlocutory Appeal Regarding Application on Joint Criminal Enterprise) ICTR-98-44-AR72.4 (22 October 2004) para 15.

¹⁶ B Schlütter, *Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia* (2010) 199.

¹⁷ *Prosecutor v Dusko Tadić a/k/a “Dule”*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 130.

¹⁸ *Tadić* (n 17) para 131.

¹⁹ *Tadić* (n 17) para 132.

²⁰ *Tadić* (n 17) para 121-122, see also para 83: the reflection of the ICTY to voice of USA as *amicus curiae* ‘no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinion juris* of States’.

²¹ *Tadić* (n 17) para 97.

²² *Tadić* (n 17) para 108-109.

²³ *Prosecutor v Stakić* (Judgement) IT-97-24-A (22 March 2006) para 296-297.

²⁴ *Tadić* (n 17) para 133.

²⁵ R Kolb, ‘The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on Their Jurisdiction and on International Crimes’ (2014) 84 *The British Yearbook of International Law* 178.

²⁶ *Prosecutor v Hadžihasanovic, Alagic and Kubura* (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) IT-01-47-AR72 (16 July 2003) para 12.

law are characterised by two familiar components of States practice and *opinion juris*.²⁷ Whereas, in *Delalić*, the ICTY summarised that ‘[t]he evidence of the existence of such customary law – State practice and *opinio juris* – may, in some situations, be extremely difficult to ascertain (...).’²⁸

Rarely do the tribunals specify which of the presented sources, in their opinion, are the reflection of the practice and which of *opinion juris*.²⁹ Moreover, the most frequently invoked source are judgements of international tribunals, which decided what is already established practice and may be treated as custom, and what is still just an attempt to introduce it as such.³⁰

If one was to decide which of this evidence is most reliable in the eyes of the tribunals, one could point to the official pronouncements of States, military manuals and judicial decisions, as was observed by the ICTY:

“When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field (...) In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions”.³¹

The important conclusion that may be made from such an approach is that, for the tribunals, the official statements and presented attitude are more important than practice, as States do not always act according to their own pronouncements.³² It may seem as an aberration from the notion of uniform and long-lasting practice, but actions are often contrary to what the State or individual know as a law.

Moreover, after the 17th of July 1998 and adoption of the Rome Statute, the tribunals see it as a source of the *opinion juris* of States. For instance, while considering the crime of genocide the ICTY said that ‘although that document post-dates the acts involved here, it has proved helpful in assessing the state of the customary international law which the Chamber itself derived from other sources.’³³ Later it adds that all States that took part in the Rome Conference could have shown their opinion and therefore ‘[f]rom this perspective, the documents is a useful key to the *opinion juris* of the States.’³⁴ Nevertheless, it should be underlined that the views expressed by the States during the conference were given in the particular situation concerning adoption of provisions *pro future*, not

²⁷ *Rwamakuba* (n 15) para 14.

²⁸ *Prosecutor v Delalić, Mucić also known as “Pavo”, Delić, Landžo also known as “Zenga”* (Judgement) IT-96-21-T (16 November 1998) para 302.

²⁹ M Wood, *First report on formation and evidence of customary international law* (17 May 2013) UN Doc A/CN.4/663, para 71.

³⁰ B Schlütter (n 16) 195.

³¹ *Tadić* (1995) (n 17) para 99.

³² A Cassese, *International Criminal Law* (2003).

³³ *Prosecutor v Krstić* (Decision) IT-98-330-T (2 August 2001) para 541.

³⁴ *Krstić* (n 33) para 541..

necessarily as the confirmation of the existing state of customary international law.

The tribunals present, rather, the traditional approach to customary international law. However, it does not mean that the tribunals always seek to confirm the validity of the customary norms by giving examples of State practice and/or *opinion juris*. Quite the contrary, in some cases they only state that certain conduct arises from customary law, without specifying the concrete situation. For instance in *Kupreskić*, it was indicated that '[i]n the light of the way States and courts have implemented it, this Clause [Martens] clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.'³⁵ The tribunal has not seen the need to find evidence for the existence of such a norm in the particular behaviour of States.

From tribunals' reasoning, it may be concluded that when there are equivalent norms in treaties and customary law it is sufficient to explain the similarities. The ICTR in the Mubasa case noted that provisions of Protocol II bound Rwanda both as a treaty law and international custom.³⁶ Therefore, the ICTR in this particular case as well in others, avoided prolonged deliberation in proving both elements of the customary norms. Such an approach of blending the sources of international law allowed tribunals to simplify and shorten the legal analysis.³⁷

Also inaction or lack of objection was, for tribunals, an indicator of the reflection of *opinion juris*. In *Kupreskić* the ICTY said that '[a]rticle 57 Additional Protocol I was now the part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the protocol.'³⁸

While examining the mutual interplay between custom and treaty, the tribunal has referred to Baxter paradox noting that, at times, it may be exceedingly difficult to ascertain both elements of custom - State practice and *opinion juris*, especially if earlier there had been a multilateral treaty adopted by the majority of the international community. It is because it is almost impossible to separate the State practice arising from the treaty norm from the customary obligations. To ascertain the existence of practice one would have to look at the practice of States that had not signed a particular treaty.³⁹

The best summary could be the own words of the ICTY that '[t]he International Tribunal is an *ad hoc* international court, established with a specific, limited jurisdiction. It is *sui generis*, with its own appellate structure.

³⁵ *Kupreskić* (n 14) para 527.

³⁶ *Prosecutor v Musema* (Judgment) ICTR-96-13-A (27 January 2000), para 242.

³⁷ R Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on Their Jurisdiction and on International Crimes (2000-2004)' (2004) 75 *The British Yearbook of International Law* 273.

³⁸ JM Henckaerts, 3 *Customary Humanitarian International Law* (2005), 342 para 49.

³⁹ *Delalić* (n 28) para 302.

(...)The international community can only come to grips with the hydra-headed elusiveness of human conduct through a reasonable as well as a purposive interpretation of the existing provisions of international customary law.⁴⁰ Therefore, one of the important aims of that tribunal is to ascertain and follow international customary norms in order to prosecute.

III. JURISDICTION OF THE CRIMINAL TRIBUNALS

The principal aim of the international criminal courts were:

“to try crimes not of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. (...). There can therefore be no objection to an international tribunal, properly constituted, trying these crimes on behalf of the international community”.⁴¹

Moreover, the important issue that was recognised by the ICTR is that it is not enough to determine that certain provisions of humanitarian law are part of customary international law, but that they are binding upon individuals. Therefore, along with the provisions of statutes providing individual criminal responsibility,

“it must also be shown that an individual committing serious violations of these customary norms incurs, as a matter of custom, individual criminal responsibility thereby. Otherwise, it might be argued that these instruments only state norms applicable to States and Parties to a conflict, and that they do not create crimes for which individuals may be tried”.⁴²

Until the establishing of tribunals, the general conclusion was that the States themselves punished such crimes under national legislations, so the perpetrators should be aware of that possibility. Also, there were many gaps left by the post-World War II jurisprudence. In order to perform their function, the best option of criminal tribunals was to fill these gaps by declaring some norms customary, even without further inquiry, which would have proven awkward.⁴³

Furthermore, the tribunals turned to the rules of customary law when prosecuting accused officials. In that scope the tribunals acknowledged the norm denying State officials who commit serious international crimes functional immunity. In *Furundžija*, the ICTY concluded that individuals are personally responsible, even if they are heads of State or government ministers, and a similar rule is expressly articulated in Article 7 (2) of its Statute and article 6 (2) of the Statute of the ICTR.⁴⁴ Also, in *Blaškić* the ICTY affirmed that ‘[t]he general rule under discussion is well established in

⁴⁰ *Delalić* (n 28) para 170.

⁴¹ *Tadić* (1995) (n 17) para 42.

⁴² *Akayesu* (n 11) para 608.

⁴³ R Kolb, ‘Selected Problems in the Theory of Customary International Law’ (2003) 50 *Netherlands International Law Review* 125.

⁴⁴ *Prosecutor v Furundžija*, (Judgment) IT-95-17/1-T (10 December 1998) para 140.

international law and is based on the sovereign equality of States (*par in parem non habet imperium*). The few exceptions relate to one particular consequence of the rule. [...] These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.⁴⁵

Nevertheless, from the procedural point of view, the international criminal courts did not have clear rules how to proceed and thus tended to lean on national procedures. For example, the ICTY, when evaluating the statement of a witness of a sexual assault, concluded that ‘there is no ground for concluding that this requirement of corroboration is any part of customary international law and should be required by this International Tribunal.’⁴⁶ The tribunal has come to such conclusions after comparing the practice and criminal procedure statutes of national courts, which allows judges the freedom of evaluation of evidence. It is an example that shows how norms widely recognised by national judicial system were used to prosecute on the international level.

It should be noted that the tribunals have tried to adhere to the norm of *nullum crimen sine lege*. so that individuals were punished only for crimes that were recognised at the time they were committed. In *Delalić* it was thus summarised: ‘The majority of the Appeals Chamber did indeed recognise *that a change in the customary law scope of the ‘grave breaches regime’ in this direction may be occurring*. This Trial Chamber is also of the view that the possibility that customary law has developed the provisions of the Geneva Conventions since 1949 to constitute an extension of the system of “grave breaches” to internal armed conflicts should be recognised.’⁴⁷ The change was then recognised, but on the day of the trial, not that of committing the crime. The above judgments are the outcome of what Judge Meron describe as a ‘blend’ of two approaches: ‘methodological conservatism’ and ‘outcome conservatism’.⁴⁸ According to his opinion it is ‘the use of only firmly established, traditional methods to identify applicable customary norms’ and application of basic principle *in dubio pro reo*.⁴⁹

While summarizing the above part, it is worth noting that after many discussions, both tribunals concluded that there is no pre-established hierarchy and all crimes tried under its jurisdiction are serious violations of international humanitarian law.⁵⁰

⁴⁵ *Prosecutor v Blaškić*, (Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) IT-95-14 (29 October 1997) para 41.

⁴⁶ *Tadić* (1995) (n 17) para 539.

⁴⁷ *Delalić* (n 28) para 202 (emphasis added).

⁴⁸ T Meron (n 7) 822-23.

⁴⁹ T Meron (n 7) 822-23.

⁵⁰ B Hola, C Bijleveld and A Smeulers, ‘Consistency of International Sentencing: ICTY and ICTR Case Study’ (2012) 9 European Journal of Criminology 539; see also: *Prosecutor v. Milosević*, (Pre-trial Judgement) IT-98-29/1-T (12 December 2007), para 989.

IV. THE SUBSTANTIVE LAW OF THE INTERNATIONAL CUSTOMARY LAW AS USED BY CRIMINAL TRIBUNALS⁵¹

‘Once it is satisfied that a certain act or set of acts is indeed criminal under customary international law, the Trial Chamber must satisfy itself that this offence with which the accused is charged was defined with sufficient clarity *under customary international law* for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible.’⁵² Only by complying with those conditions might it be said that the tribunals applied and preserved the *nullum crime sine lege* rule.

According to the Report of the UN Secretary General ‘The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflicts as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.’⁵³

According to statute of the ICTY it has a power ‘to prosecute persons responsible for serious violations of international humanitarian law’,⁵⁴ by which the statute expressly indicates grave breaches of Geneva Conventions of 1949, violation the laws or customs of war, genocide and responsibility for crimes.⁵⁵ Whereas the ICTR ‘shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law’⁵⁶, for such crimes as genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and the Additional Protocol II.⁵⁷ What is more the Statute provides that a ‘person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime’ within the Tribunal’s jurisdiction ‘shall be individually responsible for the crime.’⁵⁸ However, it was just the base on which the tribunals build their reasoning while trying to combine the real actions to the particular crimes. Moreover, all the terms listed above have not been defined, and this was a big field for the criminal tribunals for clarification.

⁵¹ It is not the aim of this article to present in detail all norms which were considered by the tribunals as customary, but to indicate on mechanism, which were used by the tribunals to ascertain their nature.

⁵² *Prosecutor v Vasiljević*, (Judgement) IT-98-32-T (29 November 2002) para 201-2 (emphasis in original).

⁵³ UN Secretary General Report (n 5).

⁵⁴ UNSC, *Statute of the International Criminal Tribunal for the Former Yugoslavia* (as amended on 7 July 2009), UN Doc S/25704, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf, access 30 November 2015, art 1.

⁵⁵ Para 2-5.

⁵⁶ UNSC, *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), 8 November 1994, art 22.

⁵⁷ Para 2-4.

⁵⁸ UNSC, *Statute of the International Criminal Tribunal for Rwanda* – annex. UN Doc. S/RES/955 (1994), art. 6 (1).

Following that, the tribunals passed sentences for: (i) grave breaches of Geneva Conventions, violation the laws and customs of war, committing genocide and responsibility for crimes against humanity when committed in armed conflict;⁵⁹ (ii) rape and torture;⁶⁰ (iv) plunder;⁶¹ (v) persecution and enslavement;⁶² (vi) trench-digging and use of hostages and human shields, attacking cities, towns and villages, wanton destruction and plundering, destruction and damage of religious or educational institutions;⁶³ (vii) hate speech that expresses ethnic discrimination, advocacy of discrimination and incitement to violence.⁶⁴ The tribunals punish individuals who violated such norms personally, as commanders or by taking part in a joint criminal enterprise.⁶⁵ The ICTY also confirmed that it is a rule of customary international law that a crime against humanity may be committed for purely personal reasons.⁶⁶

The tribunals also analysed the question of the application of international humanitarian law to non-international conflicts. The ICTR confirmed that ‘[i]t is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3.’⁶⁷ Moreover, in the *Tadić* case the ICTY set conditions that must be satisfied to fulfil the requirements of Article 3 of the Statute to include the regime of protection established under Common Article 3 applicable to armed conflicts not of an international character, which are:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
- (iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.⁶⁸

⁵⁹ *Tadić* (1997) (n 11) para 4.

⁶⁰ *Furundžija* (n 44) para 154-57.

⁶¹ *Delalić* (n 28) para 283.

⁶² *Tadić* (1997) (n 11) para 701; *Prosecutor v. Kunarac, Kovac, and Vukovic*, (Judgement) IT-96-23/1-A (12 June 2002), para 116-124, 186.

⁶³ *Prosecutor v Kordić and Čerkez*, (Judgement) IT-95-14/2-A (17 December 2004) para 204-5.

⁶⁴ *Prosecutor v Nahimana et al.*, (Judgement) ICTR-99-52-T (3 December 2002) para 1075-76.

⁶⁵ *Hadžihasanovic* (n 26) para 11.

⁶⁶ *Prosecutor v Dusko Tadić* (Judgement) IT-94-1-A (5 July 1999), para 271.

⁶⁷ *Akayesu* (n 13) para 608.

⁶⁸ *Tadić* (1995) (n 17), para 87; see also: *Aleksovski* (n 13), para 20, *Prosecutor v. Bošković, Taršulovski* (Judgement) IT-04-82-T (10 July 2008), para 296.

The four abovementioned requirements have been introduced by other chambers of the ICTY⁶⁹ and so the jurisprudence in that scope was fairly unified.

Basing on different facts of the cases, the tribunals have clarified many institutions of criminal international law, referring mostly to its customary status. It was so with the conception of aiding and abetting.⁷⁰ In *Furundžija* the tribunal chamber conducted the extensive analysis of the national case law as well as its own previous judgment. It came to the conclusion that the objective element of aiding and abetting is to provide assistance to a crime by making a substantial contribution (e.g. practical assistance, encouragement, or moral support) that has a substantial effect on its perpetration, even if the assistance itself would not amount to a criminal act.⁷¹ Moreover, ‘specific direction’ is not an element of aiding and abetting liability under customary international law.⁷²

The ICTY also found that it has jurisdiction over crimes committed as joint criminal enterprises. According to the chambers the liability for this has existed in the customary international law at least since 1992.⁷³ It was confirmed by the Appeal Chamber in *Dordević* that, according to the ICTY jurisprudence, the JCE applies to all crimes within the Tribunal's jurisdiction.⁷⁴

In some respects the statutes of the tribunals go further than customary international rule, e.g. with the defence of following the order of a superior. According to the Nuremberg jurisprudence and case law following it, the courts should reject the notion of automatic exemption from criminal responsibility based on the superiors' order. However it was never fully established whether it is possible that, in certain circumstance, it might be applied (e.g. mistake to the law, duress).⁷⁵ Whereas the Statutes of both tribunals deny the superior order defence, it was openly stated in *Erdenović*, where the ICTY chamber found that ‘duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.’⁷⁶

The legacy of the ICTY is also the differentiation between deportation and forcible transfer in the customary international law. The first presumes transfer beyond State borders, whereas the latter means displacements within a State.⁷⁷ It was contested by some other trial chambers, as well as doctrine, but confirmed by the appeal chamber in the end. Nevertheless, the facts of the particular case as to whether a particular *de facto* border is sufficient to presume deportation, the case to case examination in the light of customary international law should be made.⁷⁸ In the *Statić* case, he was convicted for

⁶⁹ See JM Henckaerts (n 38) 3877-3883.

⁷⁰ *Prosecutor v Sainović et al.* (Judgement) IT-05-87-A (23 January 2014) para 1621.

⁷¹ *Furundžija* (n 46) para 269.

⁷² *Prosecutor v Popović, Beara, Nikolić, Miletić, Pandurević* (Judgement) It-05-88-A (30 January 2015) para 758.

⁷³ *Statić* (n 25) para 100-103.

⁷⁴ *Dordević* (n 15) para 81.

⁷⁵ H Satō, ‘Modes of International Criminal Justice and General Principles of Criminal Responsibility’ (2012) 4 Goettingen Journal of International Law 783.

⁷⁶ *Prosecutor v Erdemović*, (Judgment) IT-96-22-A (7 October 1997) para 19.

⁷⁷ *Krstić* (n 35), para 521; *Statić* (n 25) para 300.

⁷⁸ *Statić* (n 25) para 300.

deportation crimes by the Trial Chamber, but the Appeal Chamber held that displacements across constantly changing frontlines are not sufficient under customary international law to ground a conviction for deportation.⁷⁹

There were many uncertainties concerning the actual state of law, as was the case with the definition of torture in the customary international law. In *Delalić* the ICTY invoked three different definitions of torture in different treaties in order to state that the representative of customary law is the definition in the Torture Convention of 1984. It was done without giving specific reasons why the tribunal treat that particular norm as resembling customary law, and others as only conventional.⁸⁰ Later the tribunal in *Furundžija* also confirmed that the prohibition of torture is binding both in times of peace as well as in times of armed conflict and that that this norm is addressed to individuals, too.⁸¹

CONCLUSIONS

The above analysis has shown that the application of the customary international law follows the tribunals' notion to observe the *nullum crimen sine legem* principle. It was directly stated in the *Report of the Secretary-General* that 'the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty.'⁸² As it was, both tribunals referred to the customary norms as a source for their judgments, especially in the first few years after their establishment.

What is more, the ICTY and ICTR have not only described norms, but even when they did not apply one in particular case, their jurisprudence influenced the future practice. It could then be argued that the criminal tribunals have elevated many norms to the level of customary international law.⁸³ It was so with the tribunal's application of international humanitarian law in the internal conflict. Until the establishment of these two tribunals, the customary law position on individual criminal responsibility for serious violations of humanitarian law during internal armed conflicts, as in conventional law, were not considered to be criminal on the international plane.⁸⁴ The jurisprudence of criminal tribunals has changed that.

On the other hand, the expanded customary international law was even used by the tribunals to expand their powers and jurisdiction in cases where there were doubts as to the binding force of the treaty law. Also, it was argued

⁷⁹ *Statić* (n 25) para. 303.

⁸⁰ *Delalić* (n 30) para 452-459

⁸¹ *Furundžija* (n 46) para 140.

⁸² *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), (S/25704) para 34.

⁸³ R Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates' (2010) 21 *European Journal of International Law* 175.

⁸⁴ R Boed, 'Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda', (2002) 13 *Criminal Law Forum* 293.

that the ICTY and the ICTR have expanded its role by being more liberal with interpretation of the norms of customary nature. Another charge made against tribunals is that their analyses of international customary law have been superficial and contributed to much to the blending of norms of customary and treaty character, so that the treaty mechanism of the conventional law may deteriorate.⁸⁵

Another issue is the formation of the International Criminal Court (ICC), which may diminish the role of the customary international law as a significant source of law. Nevertheless, even though the ICC has its own catalogue of sources, the legacy of the *ad hoc* criminal tribunals should not be ignored. It is because, although tribunals do not establish law, no one would deny its role in ascertaining specific norms, especially those of customary nature. It is also true for the jurisprudence of the two described criminal tribunals, to which a contribution to the application and clarification of customary international law cannot be denied. The ICTY and ICTR have, numerous times, invoked provisions of international humanitarian law emphasising that the content of those rules are part of customary international law. That is the legacy that will still be analysed in years to come. The future judgments would have to take into account the jurisprudence of the criminal tribunals, even if to contradict the previous conclusions.

Also, it should be underlined that the extensive jurisprudence of the *ad hoc* tribunals did not resolve all doubts concerning customary international law in the scope of armed conflicts and personal liability of perpetrators. There is still the vital issue that international criminal law lacks the sufficient precision in linking prohibition of certain acts with individual responsibility and sanction for its violation.⁸⁶

At the time when Prof Karol Wolfke published his most cited book, *Custom in Present International Law*, only the judgments of Nuremberg's and Tokyo's tribunals had been given. Since them, other international criminal courts were established and passed judgments basing them on the norms of customary international law. The end of 2015 closes yet another chapter in the history of international law as the function of ICTY and the ICTR would be wholly seized by the UN International Residual Mechanism for Criminal Tribunals. No one knows what the future may bring, but '[a]ny court's role in the law-making process is likely to be accepted if it is perceived by the international community as credible, impartial and legitimate institution which reaches reasoned decisions in accordance with accepted legal principles.'⁸⁷

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⁸⁵ R Kolb (n 27) 263.

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⁸⁷ A Boyle, Ch Chinkin, *The Making of International Law* (2007) 301.

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