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Publication date

2003

Document Version

Final published version

Published in

International criminal law developments in the case law of the ICTY

[Link to publication](#)

Citation for published version (APA):

Nollkaemper, A. (2003). Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY. In G. Boas, & W. A. Schabas (Eds.), *International criminal law developments in the case law of the ICTY* (pp. 277-296). (International humanitarian law series; No. 6). Martinus Nijhoff.

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Decisions of national courts as sources of international law:

An analysis of the practice of the ICTY

André Nollkaemper*

1. Introduction

The ICTY has made extensive use of national case law in interpreting and applying its Statute and Rules and, in the course of doing so, in determining points of general international law. It has done so in heterogeneous ways. Sometimes it has used national case law to identify the contents of customary international law. On other occasions, it has referred to national case law in its analyses of general principles of (international) law. And on yet other occasions it has endowed national decisions with an apparent (quasi-)independent authority that cannot be reduced to a constituent element of either customary international law or a general principle of (international) law.

The practice of the Tribunal reflects the situation in other areas of international law. Illustrative is the weight that has been attached to the Judgment of the House of Lords in the *Pinochet* case.¹ This judgement has been extensively cited in pleadings for the ICJ,² national courts³ and legal scholarship.⁴ While some have referred to it to support a rule of customary law, others have considered it as precedents in a way that cannot be explained in terms of the formation of customary law. It appears that national decisions can be used in a variety of ways in the process of law-making and law determination.

* The author thanks Marija Davidovic for her research for this article.

¹ *Regina/ Bartle and the Commissioner of Police for the Metropolis and others - ex Parte Pinochet*, House of Lords, 24 April 1999, ILM 38 (1999).

² For instance, the case was relied in by Belgium in its oral pleadings in the *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), No. 121, ICJ, Judgment, 14 February 2002.

³ The case was discussed in the decisions on the prosecution of Bouterse in the Netherlands by the Court of Appeals of Amsterdam, 3 March 2000 (*Nederlandse Jurisprudentie* 2000, 266) and the Supreme Court of the Netherlands, 18 September 2001 (not yet reproduced).

⁴ At the time of writing the catalogue of the Peace Palace lists over 40 articles on the case.

Except for a notable 1929 article by Hersch Lauterpacht⁵ and few discussions in more recent scholarship,⁶ the question of how decisions of national courts can be construed in terms of the sources of international law has received only limited scholarly attention. The proliferation of national decisions on matters of international law and the increasing accessibility of these decisions, makes it imperative to study more closely the role of national decisions in international law-making.

This article offers a contribution to that objective by examining how the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY or Tribunal) has used decisions of national courts in its construction of rules of international law. It proceeds as follows. Sections 2 - 4 explore how the Tribunal has used national decisions as elements in the construction of, respectively, treaties, customary law and general principles of (international) law. Section 5 reviews whether the use by the Tribunal of national case-law as independent authorities in the determination of international law. Section 6 contains the conclusions.

Two qualifications of the scope of the article are in order. First, the article is concerned with the use of national case law in the determination of rules of international law. It does not discuss legal determinations that are exclusively relevant to the individual case in which they are applied.⁷ Second, the units of analysis of the article are judicial decisions. However, it is to be taken into account that in several cases no sharp boundaries can be drawn between judicial decisions and the underlying national

⁵ Hersch Lauterpacht, "Decisions of National Courts as a Source of International Law", (1929) *British Yearbook of International Law*, vol. 10, p. 65.

⁶ In particular R.Y. Jennings, "The Judiciary, International and National, and the Development of International Law", (1996) *International and Comparative Law Quarterly*, vol. 45, p. 1; reproduced in *International Law Reports*, vol. 102, p. ix.

⁷ For example, case-law pertaining to sentencing practice in the FRY may be taken into account under Article 24 of the Statute (providing that in determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia). In *Prosecutor v. Krnojelac* (IT-97-25), Judgment, 15 March 2002, par. 505, the Tribunal states that what is required in considering sentencing practice as an aid in determining the sentence to be imposed must go beyond merely reciting the relevant criminal code provisions of the former Yugoslavia and that the general sentencing practice of the former Yugoslavia must be considered. This will include consideration of case-law. This type of practice is not considered in this article.

legislation. Indeed the Tribunal itself has not always clearly differentiated between national case-law and national law.⁸

2. Decisions of national courts as element in the interpretation of treaties

A first way to construe the relevance of national case-law in the international legal order is to use case-law in the interpretation of treaties. The Tribunal has held that in order to avoid violating the principle *nullum crimen sine lege*, it should either apply rules of customary law or rules (see below, section 3) or treaties binding on the parties.⁹ If the Tribunal resorts to the second option, and has to engage in treaty interpretation, it may in the course thereof consider national case-law.

In the *Jelisić* case, the Tribunal interpreted the Genocide Convention. It stated that

It interprets the Convention's terms in accordance with the general rules of interpretation of treaties set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. In addition to the normal meaning of its provisions, the Trial Chamber also considered the object and purpose of the Convention and could also refer to the preparatory work and circumstances associated with the Convention's coming into being. The Trial Chamber also took account of subsequent practice grounded upon the Convention. Special significance was attached to the Judgements rendered by the Tribunal for Rwanda, in particular to the *Akayesu* and *Kayishema* cases which constitute to date the only existing international case-law on the issue. The practice of States, notably through

⁸ The Appeals Chamber considered in the *Prosecutor v. Kupreskic et al* (IT-95-16), Appeal Judgment, 23 October 2001, par. 46, a mix of case-law and national law in determining the rule on admissibility of new evidence in appeal cases. In *Prosecutor v. Erdemovic* (IT-96-22), Judgment, 7 October 1997, Judge McDonald and Judge Vorah considered in their Joint Separate Opinion a mix of national law and national case-law in determining general principle of law pertaining to the defense of duress.

⁹ *Prosecutor v. Tadic*, (IT-94-1), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 143: "Before both the Trial Chamber and the Appeals Chamber, Defence and Prosecution have argued the application of certain agreements entered into by the conflicting parties. It is therefore fitting for this Chamber to pronounce on this. It should be emphasised again 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. (Report of the Secretary-General, at para. 34.) It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law. This analysis of the jurisdiction of the International Tribunal is borne out by the statements made in the Security Council at the time the Statute was adopted. As already mentioned above (paras. 75 and 88), representatives of the United States, the United Kingdom and France all agreed that Article 3 of the Statute did not exclude application of international agreements binding on the parties. (Provisional Verbatim Record, of the U.N.SCOR, 3217th Meeting., at 11, 15, 19, U.N. Doc. S/PV.3217 (25 May 1993).)"

their national courts, and the work of international authorities in this field have also been taken into account.¹⁰

Similarly, in the *Krstic* case, the Tribunal interpreted the Genocide Convention pursuant to the rules of interpretation laid down in Articles 31 and 32 of the Vienna Convention. In addition to the ordinary meaning of the terms in its provisions, the object and purpose of the Convention, the preparatory work and the circumstances which gave rise to the Convention, and recent international practice, the Trial Chamber “also looked for national guidance in the legislation and practice of States, *especially their judicial interpretations and decisions*”.¹¹

This analysis is somewhat awkward, as in both cases the Tribunal indicated that it used the convention as customary law, rather than as treaty law. Therefore it is not clear why it had to resort to articles 31 and 32 of the Vienna Convention on the Law of Treaties. Nonetheless, the cases are relevant since, given the fact that the Tribunal *assumed* it had to apply the Vienna Convention, it considered national case-law to be relevant in the interpretation of treaties.

The Tribunal apparently used national case-law as ‘subsequent practice in the application of the treaty which establishes the agreement of the parties of its provisions’, as provided for in article 31(3)(b) of the Vienna Convention. This construction is not entirely unproblematic. Article 31(3)(b) only allows for use of subsequent practice which ‘establishes the agreement of the parties of its provisions’. In exceptional cases, widespread and uniform unilateral practices of States may be interpreted as an agreement pertaining to the interpretation of a particular provision of a treaty. While it appears uncommon, there is no *a priori* reason to exclude that such practice consists of the practice of national courts. However, in case of a multilateral convention such as the Genocide Convention, the threshold in terms of the number of States that engage in a subsequent practice, as well as the uniformity of that practice, should be high. At present, there does not exist a sufficiently widespread national judicial practice on the application of the Genocide Convention to come close to what would be required in order to establish an agreement of the parties. In the *Krstic* case, the Tribunal cited in the process of interpretation of the Genocide

¹⁰ *Prosecutor v. Jelusic*, (IT-95-10), Judgment, 14 December 1999, par. 61 (emphasis added).

Convention six national cases: three decisions of a German court, two of the Polish Supreme Court and one of the United States Military Tribunal in Nuremberg.¹² This clearly is not enough practice to identify agreement as to the interpretation of the Convention.

The Tribunal appeared to recognize that six cases in themselves cannot determine the interpretation of the treaty. It used the judicial decisions to supplement other sources, such as the ordinary meaning of the terms in its provisions, the object and purpose of the Convention, the preparatory work, and reports of the ILC, General Assembly Resolutions, and international legal practice. If national case-law is used in this manner, one need not object, even though technically such use of national case-law cannot be construed in terms of Article 31(3)(b) of the Vienna Convention.

3. Decisions of national courts as elements in the formation of customary international law

A second way to construe the legal relevance of decisions of national courts is to qualify them in terms of customary international law. As noted above, the purpose of the drafters of the Statute of the ICTY was that the Tribunal should apply, in addition to treaties binding on the parties, rules of customary law, in order to avoid violating the principle *nullum crimen sine lege*.¹³ On many occasions the Tribunal has had to determine and interpret customary law and, as part of that exercise, has referred to national case-law.

In its Judgment in the *Erdemovic* case, the Appeals Chamber extensively discussed to what extent national case-law provided support for a rule of customary law regarding the availability or the non-availability of duress as a defence to a charge of killing innocent human beings. On the weight of the evidences before it, the Appeals Chamber found that insufficient evidence existed for such a rule.¹⁴

¹¹ *Prosecutor v. Kristic*, (IT-98-33), Judgment, 2 August 2001, par. 541 (emphasis added).

¹² *Ibid.*, paras. 575, 579 and 589.

¹³ *Prosecutor v. Tadic*, *supra* note 9, par. 143. Also: *Prosecutor v. Jelusic*, (IT-95-10), Judgment, 14 December 1999, par. 61, *supra* note 10 (stating that, in accordance with the principle *nullum crimen sine lege*, the Trial Chamber means to examine the legal ingredients of the crime of genocide taking into account only those which beyond all doubt form part of customary international law).

¹⁴ *Prosecutor v. Erdemovic*, *supra* note 8, par. 55.

However, it did not dispute that, if the case-law would have been more uniform and consistent, a rule of customary law could have been based on that case-law.

This use of national case-law as element in the identification of customary law is in line with the general understanding of the formation of customary international law. The Permanent Court of International Justice considered national judicial acts as ‘facts which express the will and constitute the activities of States’.¹⁵ It expressly considered national case law in terms of its contribution to customary law in the *Lotus* case.¹⁶ In modern international law scholarship there exists no doubt that national case-law can be an element in the formation of customary international law.¹⁷ Large parts of customary law, in particular in the field of jurisdiction and immunities, have been developed in the practice of national courts.

In principle, national case-law can both qualify as State practice or as *opinio iuris*.¹⁸ Although the Tribunal has on occasion taken a cautious position,¹⁹ there is no doubt that case-law, as acts of the State,

¹⁵ Permanent Court of International Justice in the *Case of Certain German Interests in Polish Upper Silesia*: “From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures”, *Prosecutor v. Delalic et al.*, (IT-96-21), Judgment, 20 February 2001, par. 76..

¹⁶ *SS "Lotus" case*, PCIJ, Series A, No 10 (1927), pp. 23, 26, 28-29. The ICJ considered national case-law in terms of customary law in *Congo-Belgium*, *supra* n. 2, par 58 (‘The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity’). See also the Separate Opinion by Kooijmans *cs*: Separate opinion of Judges Higgins, Kooijmans and Buergenthal, par. 22-24 (considering case-law as part of state practice concerning universal jurisdiction).

¹⁷ Jennings, Watts (eds.), *Oppenheim's International Law*, 9th ed., London: Longman, 1992, p. 41; ILA, Statement of Principles Applicable to the Formation of General Customary International Law, principle 9, reproduced in ILA, *Report of the Sixty-Ninth Conference* (2000). Older ideas to the effect that state practice consists only of the practice of those organs capable of entering into binding relations on behalf of the state (related the view that that customary law was tacit treaty law) now are generally rejected. The same holds for the view that municipal court cases were only evidence of custom, not a force creating custom.

¹⁸ These are the necessary conditions for customary law; see *North Sea Continental Shelf Cases*, (1969) ICJ Rep 3 par. 72-74.

¹⁹ Joint Separate Opinion of Judge McDonald and Judge Vohra in the *Erdomovic* case, *supra* note 8, considering that ‘to the extent that state practice on the question of duress as a defence to murder may be evidenced by the opinions on this question in decisions of national military tribunals’ (par. 50, emphasis added).

can be a form of State practice.²⁰ As such, it will need to conform to the normal requirements for the formation of customary law. Under established principles of international law, State practice can only lead to the formation of customary international law if it is sufficiently consistent.²¹ This requirement also may affect the assessment of the relevance of national case-law for the formation of customary international law. In the *Lotus* case, the PCIJ noted that judgments of municipal courts pertaining to the alleged rule of international law regarding the exclusive competence of flag State over its ships were conflicting. In view of this, the PCIJ observed that it was hardly possible to see in the national case law an indication of the existence of a rule of international law contended for by the French government.²² A similarly cautious approach was taken by the Appeals Chamber in the *Erdemovic* case, that, after reviewing national case-law on the question whether duress is a defence to murder, concluded that State practice (consisting mostly of national case-law) was far from consistent and that no rule of customary law could be based on that practice.²³

The Tribunal has indicated on several occasions that it considered practice of national courts in particular relevant if the courts applied international law, rather than national law. In the *Tadic* case, the Trial Chamber considered the legal relevance of the decision in the *Barbie* case and held that

While instructive, it should be noted that the court in the *Barbie* case was applying national legislation that declared crimes against humanity not subject to statutory limitation²⁴

In the *Furundzija* case, the Trial Chamber held that:

the law applied was domestic, thus rendering the pronouncements of the British courts less helpful in establishing rules of international law on this issue.²⁵

²⁰ ILA, Statement of Principles Applicable to the Formation of General Customary International Law, principle 9; Lauterpacht, *supra* note 5, pp. 84 ff.

²¹ *Fisheries* case, ICJ Rep. 1950, p. 116, at 131; *Asylum* case, ICJ Rep. 1951, p. 266 at 277.

²² *SS "Lotus"* case, *supra* note 16, p. 29; see also Georg Schwarzenberger, *International Law, I, International Law as Applied by International Courts and Tribunals*, London: Stevens, 1945, p. 18.

²³ *Erdemovic* case, *supra* note 8, par. 50.

²⁴ *Tadic* case, (IT-94-1), Opinion and Judgment, 7 May 1997, par. 642.

Whatever the validity of these statements in the specific context in which they were made, they should not be taken as evidence that application of national law cannot lead to the development of customary law.²⁶

There are various examples of application of rules of national law that eventually have led to a formation of a rule of customary law, including national practices on human rights.²⁷

National case-law also can be qualified in terms of *opinio iuris*.²⁸ Here the distinction between application of rules of international law and application of rules of national law is more relevant. Identification of *opinio iuris* may be relatively easy when national courts apply what they consider to be rules of international law. It is to be presumed that a national court applying rules on, for instance, jurisdiction or immunities, will consider that it is applying those rules in a way that is required or permitted by international law. In case a national court applies rules of national law, qualification in terms of *opinio iuris* may be less evident. The court cannot be presumed to apply that law with a preconceived notion that the rules that it is applying are either obliged or authorized by international customary law. This was recognized in the Joint separate opinion of Judge McDonald and Judge Vohrah in the the *Erdemovic* case:

Not only is State practice on the question as to whether duress is a defence to murder far from consistent, this practice of States is not, in our view, underpinned by *opinio juris*. Again to the extent that State practice on the question of duress as a defence to murder may be evidenced by the opinions on this question in decisions of national military tribunals and national laws, we find quite unacceptable any proposition that States adopt this practice because they "feel that they are conforming to what amounts to a legal obligation" at an international level.²⁹

²⁵ *Prosecutor v. Furundzija* (IT-95-17/1), Judgment, 10 December 1998, par. 196,. Also, *Erdemovic* case, *supra* note 8, para. 52-55.

²⁶ This appears less relevant for procedural issues pertaining to the Tribunal; *see e.g.* the *Blaskic Case* (IT-95-14), 'Lasva Valley', Judgment of the Appeals Chamber on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997. .

²⁷ *See e.g.* The Status of the Universal Declaration of Human Rights in International Law, *ILA Report of the sixty-Ninth Conference* (1994), p. 142. Note also that in a number of cases national law or case-law in itself is influenced or determined by international law, cf. *Furundzija* case, *supra* note 25, para. 183 (stating that the interpretation by national legal systems of the requirement of impartiality and in particular the application of an appearance of bias test, generally corresponds to the interpretation under the European Convention).

²⁸ Hersch Lauterpacht, *The Development of International Law by the International Court*, p. 20, Cambridge: CUP, reprint, 1996 (noting that decisions of national courts within any particular state, when endowed with sufficient uniformity and authority, may be regarded as expressing the *opinio iuris* of that state).

²⁹ *Erdemovic* case, *supra* note 8, par. 50.

In particular cases, considering case law as a unit of analysis in the formation of customary law may raise problems. Courts may take a position that conflicts with that of other State organs. A decision of a court may reject or adjust a prior act by the executive or, more rarely, the legislator. The court may also take a position that differs from the arguments advanced by the State in the case concerned. The question then may arise whether it is the act of the executive or the act of the court that is relevant to the formation of custom – either in terms of State practice or *opinio iuris*.³⁰ The International Law Association has taken the position that

In the ultimate analysis, since it is the executive which has primary responsibility for the conduct of foreign relations, that organ's formal position ought usually to be accorded more weight than conflicting positions of the ... national courts.³¹

It would appear, though, that this conclusion will not apply in all circumstances. If the executive takes, for instance, the position that a State official of a foreign country enjoys immunity and the highest courts deny such immunity, it would appear that the judicial practice qualifies as the final legal position of that State.

The Tribunal has not expressly addressed these issues, and its analysis does not make clear whether, in the national case-law that it has cited, courts took a different position than other organs. This may be explained by the fact that most national case-law used by the Tribunal involved criminal cases without foreign element, in which no prior act of the government was at issue.

A critical question in the assessment of the use of national case-law in the identification of customary law is whether the selection of the case-law that has been used by the Tribunal conforms to the requirements of consistency and generality. In some cases the choice of case-law strikes the reader as arbitrary and haphazard. In the *Tadic* case, the Tribunal discussed the question whether individuals can be responsible for breach of common Article 3 of the 1949 Geneva Conventions. The Appeals Chamber argued that, despite the fact that article 3 itself is silent on the matter, under certain conditions breaches of common

³⁰ This also raises the issue of internal consistency; see ILA 2000, 733-734.

³¹ *Idem.* p. 729.

article 3 do entail individual criminal responsibility. As far as judicial practice is concerned, the Appeals Chamber supported this conclusion by reference to prosecutions before Nigerian courts.³² No other judicial practice was considered. Was there none or was it simply not known to the Tribunal?

In the absence of access to worldwide sources on national case-law, it is not possible to assess how representative the case-law is that has been used by the Tribunal. However, given the amount of armed conflicts, and the number of (potential) transgressions of international humanitarian law, it is implausible that no other evidences of prosecutions or, more likely non- prosecutions are available. While the difficulties in obtaining world wide case-law on the matter must be recognized, it would strengthen the persuasiveness of judgments if, in a case like the *Tadic* case, the Tribunal would at least make clear what case-law it has considered and why it only refers to prosecutions before one or few courts.

As in the case of treaty-interpretation, any shortcomings in the number of available cases may be compensated by use of other evidences. In most cases, national case-law was only one of the evidences used to determine the contents of customary international law. Indeed, in the *Tadic* Case, the Appeals Chamber referred, in addition to the reference to the Nigerian prosecutions, to “many elements of international practice (which) show that States intend to criminalize serious breaches of customary rules and principles on internal conflicts”,³³ including national military manuals, and national legislation (including the law of the former Yugoslavia adopted by Bosnia and Herzegovina after its independence).³⁴ As long as alternative evidences are available, the lack of representative case-law need not be an insurmountable hurdle.

However, in other cases, the determination of a point of customary law hinges entirely on a review of limited national case-law. A noteworthy example is the discussion by the Appeals Chamber in *Tadic* of the question whether crimes against humanity can be committed for purely private reasons. The Appeals Chamber examines this as a matter of customary international law. It proceeds to do so exclusively by

³² *Tadic* case, *supra* note 9, par. 130.

³³ *Ibid.*, par. 130.

³⁴ *Ibid.*, par. 131-132.

examining case-law. It cites and discusses three decisions by the Supreme Court for the British Zone, several decisions of German courts, some decisions of the United States military tribunals under Control Council No. 10, and one case of the Canadian Supreme Court, while it considers the decision in the *Eichmann* case irrelevant.³⁵ After briefly considering the ‘spirit of international criminal law’, it then concludes that

‘the relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, “purely personal motives” do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated.’³⁶

It must be acknowledged that case-law on crimes against humanity is scarce. However, it seems doubtful whether practice of so few countries can suffice to constitute uniform and sufficiently widespread State practice. Was other practice considered irrelevant? Or did the Tribunal find that on this point no other judicial practice existed? Without it being necessary that the Tribunal conducts a true worldwide assessment of the case-law, also here it would further the weight of the analysis and the persuasiveness of the conclusion if the Tribunal would indicate why it believes that practice from so few countries and so few courts can constitute the basis for the identification of a rule of customary international law.

The absence of such analysis might lead one to conclude that the Tribunal did not use case-law as elements in the formation of customary law, but as persuasive authority to adopt a particular interpretation that in itself is based on other considerations (see further section 5).

4. Decisions of national courts as elements in the identification of general principles

A third way in which the Tribunal has construed the international legal relevance of national case-law is to use it in the identification of general principles of law. Such principles are formed on the basis of

³⁵ *Tadic* case, (IT-94-1), Judgment, 15 July 1999, paras. 256-267.

³⁶ *Ibid.*, par. 270.

principles that are common to all or most legal systems. The Tribunal has made extensive use of this source of international law.³⁷

In the *Kupreskic* case, the Trial Chamber stated:

any time the Statute does not regulate a specific matter, and the *Report of the Secretary-General* does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice. It must be assumed that the draftpersons intended the Statute to be based on international law, with the consequence that any possible *lacunae* must be filled by having recourse to that body of law.³⁸

In the *Furundzija* case, the Tribunal noted, in discussing the definition of rape under international law, that

no elements other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity (*Bestimmtheitsgrundsatz*, also referred to by the maxim "*nullum crimen sine lege stricta*"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.³⁹

The Tribunal has indicated it will only with due caution apply concepts from national law in the international legal order.⁴⁰ For instance, in the *Kupreskic* case, the Appeals Chamber relied on general principles to determine the standard of review of factual findings of the Trial Chamber. However, it decided against relying on national concepts in determining under what tests additional evidence reveals an error of fact of such magnitude as to occasion a miscarriage of justice.⁴¹

³⁷ See generally A. Cassese, "The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the ascertainment of general principles of law recognized by the community of nations", *International Law in the Post-Cold War World. Essays in Memory of Li Haopei* (Sienho Yee and Wang Tieya, eds.), London: Routledge, 2001, p. 43.

³⁸ *Prosecutor v. Kupreskic*, (IT-95-16), Judgment, 14 January 2000, par. 591.

³⁹ *Furundzija* case, *supra* note 25, par. 177. Also: *Kupreskic* case, *supra* note 38, para 677.

⁴⁰ Already recognized by the ICJ; see Sep. op. McNair in *International Status of South West Africa*, ICJ Reports 1950, 148-149. Cassese, *supra* note 37, p. 46.

⁴¹ *Prosecutor v. Kupreskic*, *supra* note 8, par. 75. For other cases, see: Cassese, *supra* note 37, pp. 50 ff.

Where it is decided to import principles of national law, it generally has been accepted that practice of national courts can be relevant in the identification of principles of national law. For instance, the PCIJ referred to the “principle generally accepted in the jurisprudence in international arbitration as well as by and national courts” to the effect that a party is estopped from relying on its own non-fulfilment of an international obligation.⁴² The Tribunal accepted, for instance, that national case-law can serve to support the notion of common purpose in international criminal law.⁴³

A particularly elaborate discussion of national case-law as evidence of general principles can be found in the decision of the Appeal Chamber in the *Kupreskic* case. The Appeals Chamber discussed the standard that applies with respect to the reconsideration of factual findings by the Trial Chamber. It proceeded to examine the degree of caution that is required by a court before proceeding to convict an accused person based upon the identification of a witness made under difficult circumstances.⁴⁴ That part of the analysis rests entirely on analysis of domestic criminal law systems and is included in the Judgment under the heading ‘General Principles’. The Appeals Chamber cites cases from common law countries: the United Kingdom, Canada, Australia, Malaya, and the United States. It then notes that most civil law countries allow judges considerable scope in assessing the evidence before them, but that in a number of cases courts have emphasized that, in particular when the identification of the accused rests on the credibility of a single witness, trial judges must exercise great caution in evaluating the witness’ recognition of a person. The Appeals Chamber cites cases from Germany, Austria and Sweden.⁴⁵ As to the standard it would apply when considering challenges against factual findings, the Appeals Chamber concludes that where it is satisfied that the Trial Chamber has returned a conviction on the basis of evidence that could not have been accepted by any reasonable tribunal or where the evaluation of the evidence was ‘wholly erroneous’ it will overturn the conviction since, under such circumstances, no reasonable tribunal of fact could be satisfied beyond reasonable doubt that the accused had participated in the criminal conduct’.⁴⁶

⁴² PCIJ, *Danzig Opinion*, Series B, No. 15 (1928), p. 27; Lauterpacht, *supra* note 28, p. 168; Georg Schwarzenberger, *A Manual of International Law*, 6th ed., Milton: Professional Books Ltd., 1976, pp. 27-28.

⁴³ *Tadic* case, *supra* note 35, par. 225; *Kupreskic* case, *supra* note 8, par. 680.

⁴⁴ *Kupreskic* case, *supra* note 8, par. 34.

⁴⁵ *Idem.* par. 38.

⁴⁶ *Idem.* par. 41.

The Tribunal has made clear that the threshold for identification of general principles of law is high, in the sense that it needs to be shown that the principle would be part of most, if not all, national legal systems. In the *Tadic* case, the Appeals Chamber noted:

It should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case.⁴⁷

Also in several other cases the Tribunal took a hard look and conclude that, in view of differences between legal systems, no general principle could be identified⁴⁸

Sometimes, though, the analysis is too thin. In the Sentencing Judgment in the *Erdemovic* case, the Trial Chamber stated in discussing the defence of duress, that it relies, *inter alia*, on general principles of law as expressed in ‘numerous national laws and case-law’⁴⁹ However, the supporting footnote exclusively refers to French legislation and case-law.⁵⁰

In the *Kupreskic* case, the Trial Chamber sets out to analyse to problem of cumulation of offences. It notes that:

Certain criteria for deciding whether there has been a violation of one or more provisions consistently emerge from national legislation and the case-law of national courts and international human rights bodies. In other words, it is possible to deduce from a survey of national law and jurisprudence some principles of criminal law common to the major legal systems of the world. These principles have to some extent been restated by a number of international courts.⁵¹

⁴⁷ *Tadic* case, *supra* note 35, par. 225.

⁴⁸ Cases mentioned in Cassese, *supra* note 37, p. 49.

⁴⁹ *Prosecutor v. Erdemovic*, (IT-96-22), Sentencing Judgment, 29 November 1996, par. 19.

⁵⁰ *Supra*, note 48., The case is also noted by Cassese, *supra* note 37, p. 47.

⁵¹ *Kupreskic* case, *supra* note 38, par. 680.

However, the analysis appears unbalanced. The Trial Chamber immediately adopts the test of US Courts (the so-called *Blockburger test*) as the guiding principle,⁵² and considers principles from other jurisdictions as qualifications or exceptions. Why the *Blockburger test* is adopted up front as the leading test is not clear. While on analysis this may be the principle that best represents the principles from all major legal systems, the text of the judgment does not make this clear. As in the case of customary law, the persuasiveness of conclusions based on a relatively narrow set of data would be much enhanced if the Tribunal would explain why it proceeds in the way it does and why, in this case, the *Blockburger test* is considered more authoritative than tests from other legal systems. In the absence thereof, the conclusion is open to the traditional critique on resort to general principles that no sufficient investigation has been carried out into the legal systems of the members of the international community.⁵³ The conclusion does not only rest on a neutral analysis of case-law or other national practice, but also on other, more substantive considerations.⁵⁴

5. Decisions of national courts as independent authorities

In some cases, the weight attached to decisions of national courts appears to go beyond their role in the interpretation of treaties or the identification or interpretation of rules of customary law or general principles of law.

In his Separate and Dissenting Opinion in the *Erdemovic* case on the question whether duress can be a complete defence to the massacre of innocent civilians, Judge Li determined there is neither applicable conventional nor customary international law, and national laws and practices of various States are so divergent that no general principle of law recognised by civilized nations can be deduced from them.⁵⁵ He noted that for that reason ‘recourse is to be had to the decisions of Military Tribunals, both international

⁵² *Idem.* par. 681.

⁵³ Cassese, *supra* note 37, p. 45

⁵⁴ Cf. *Delalic* case, *supra* note 15, par 412, where the rule is put in context of ‘reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions’.

⁵⁵ Separate and Dissenting Opinion Judge Li in *Erdemovic*, *supra* note 8, par 2 – 3.

and national, which apply international law'.⁵⁶ After noting that the test put forward by the International Military Tribunal at Nuremberg was never applied, vague and had been differently interpreted by authors, Judge Li then noted that the decisions of the US Military Courts at Nuremberg set up under Control Council No. 10 and those of Military Tribunals and/or Courts set up by various other allied countries set up for the same purpose must be consulted.⁵⁷ He considered three judgments of the US Military Courts set up under Control Council No. 10, one judgment of a Canadian Military Court and two Judgments of British Military Courts. From a study of these decisions, Judge Li obtained a number of principles determining when duress can be a complete defence⁵⁸ and considered that these principles are 'reasonable and sound' and should be applied by the Tribunal.⁵⁹

It thus appears that Judge Li took the position that rules of law might be inferred from case-law, including national case-law, and that the criteria for doing so were distinct from the identification of rules of customary law or general principles of law.⁶⁰ In his analysis of the Opinion of Judge Li, Bing Bing Jia notes that it can be said 'with certainty' that the legal rules derived from decisions of national military tribunals 'are precedents unless a treaty or a principle of law has emerged ... stating otherwise'.⁶¹

This conclusion can be put in perspective by considering the sources of general international law. Article 38(1)(d) of the Statute of the International Court of Justice provides that judicial decisions are subsidiary means for the determination of rules of law. It generally is accepted that 'judicial decisions' includes decisions of national courts.⁶² That judicial decisions are only subsidiary means, reflects the fact that

⁵⁶ *Ibid.* par. 4.

⁵⁷ *Ibid.* par. 4.

⁵⁸ *Ibid.* par. 5.

⁵⁹ *Ibid.* par. 8.

⁶⁰ Similarly: Bing Bing Jia, "Judicial decisions as a source of international law and the defence of duress in murder or other cases arising from armed conflict", *International Law in the Post-Cold War World. Essays in Memory of Li Haopei* (Sienho Yee and Wang Tieya, eds.), London: Routledge, 2001, p. 77, at p. 78.

⁶¹ *Ibid.* p. 85.

⁶² Rosalyn Higgins, *Problems and process*, Oxford : Clarendon Press, 1994, p. 218, *Oppenheim's International Law*, *supra* note 17, pp. 41-42, Robert Y. Jennings, "What is International Law and How do we Tell it when we see it?", (1981) *Schweizerisches Jahrbuch für internationales Recht*, vol. 38, p. 59, at 77. Menzel, Ipsen, *Völkerrecht: ein Studienbuch*, 2e Auflage, München: Beck, 1979, pp. 87-88.

formally no system of precedents, let alone *stare decisis* exists. That holds for international courts,⁶³ and of course certainly for national courts. As an additional reason for the qualification ‘subsidiary’, it has been said that courts do not in principle make law but apply existing law that has an antecedent source.⁶⁴

As to international courts, it now generally is accepted that the rigid distinction between sources in art. 38(1)(b) and 38(1)(c), on the one hand, and subsidiary means in art. 38(1)(d) is overstated. In the interest of certainty and stability, the ICJ as well as other international courts tend to follow what in previous cases it has considered good law, unless there are cogent reasons not to follow previous judgments.⁶⁵ More generally, the distinctions between law application, interpretation and development are thin. In some respects, application often will involve interpretation and in that respect development.⁶⁶ For these reasons the qualification of ‘subsidiary’ is, at least as far as international courts are concerned, an understatement.⁶⁷

It is not immediately obvious that this also holds for decisions of national courts. While there are good reasons why international courts should in principle follow their own previous judgments, these reasons are not applicable to the weight international courts give to previous decisions of national courts. Similarly, why it can be accepted that international courts may develop the law, in the course of application and interpretation, it would not fit the decentralized and horizontal international legal system – in which one State cannot create law binding on another State - to accept that a decision of individual national courts in itself can develop international law. Also in other respects the differences between the position of international and national courts in the international legal system are significant: the fact that national courts generally will be tied to the national legal system,⁶⁸ have an at least partly national rather

⁶³ Cf ICJ Statute art. 59.

⁶⁴ *Oppenheim’s International Law*, *supra* note 17, 41; Schwarzenberger, *supra* note 42, referring to ‘law-determining agencies’, in contrast to law –creating processes; Menzel-Ipsen, *supra* note 62, p. 87; Lauterpacht, *supra* note 28, p. 21.

⁶⁵ See in general: Mohamed Shahabuddeen, *Precedent in the World Court*, Cambridge: CUP, 1996, p. 128; Hersch Lauterpacht, *supra* note 28. The Tribunal discussed the matter in *Prosecutor v. Aleksovski*, (IT-95-14/1), Judgment, 24 March 2000, par. 97.

⁶⁶ Jennings, *supra* note 6, p. 3; Lauterpacht, *supra* note 28, p. 21.

⁶⁷ Gerald Fitzmaurice, “Some Problems Regarding the Formal Sources of International Law”, (1958), *Symbolae Verzijl*, p. 175; Jennings, *supra* note 6, p. 4.

⁶⁸ *Oppenheim’s International Law*, *supra* note 17, p. 42; Schwarzenberger, *supra* note 42, p. 30.

than international outlook⁶⁹ and generally will lack expertise in applying international law⁷⁰ makes it implausible to consider decisions of national courts precedents in the same way as decisions of international courts.

Nonetheless, in particular cases decisions of national courts can be considered as an impartial expression of what these courts believe to be the state of the law. In that respect they may be of practical importance of determining what is the correct rule of international law. There is a widespread practice of national courts that refer to decisions of courts of other States.⁷¹ This is not because of an interest in other legal systems, but because courts can consider it relevant to “to consult other experience regarding points of detail and applications of international law”.⁷² In particular when there is a certain convergence between decisions of courts of States,⁷³ decisions may then obtain a certain authority as to the determination of the interpretation of the law that need not be explained in terms of customary law or general principles of law. It appears that it is in this manner that Judge Li considered the weight of decisions of national courts.

Also other practice of the Tribunal suggests that in some cases decisions of national courts indeed were considered as authoritative expressions of the state of the law. As noted above, the interpretation or identification of particular rules of international law – whether as treaty law, customary law or general principles, often hinges largely on a few decisions that cannot be explained as either ‘subsequent practice establishing the agreement between the parties’ as evidence of customary law or as indicators of all major legal systems. The few national cases on which the analysis of the Appeals Chamber in *Tadic*, pertaining to the question whether crimes against humanity can be committed for purely private reasons rests, cannot possibly provide a basis for customary law. Rather, they are used as independent means to determine the contents of a particular rule of international law.⁷⁴

⁶⁹ Antonio Cassese, “Remarks on Scelle’s theory of “role splitting” (dédoublé fonctionnel) in international law”, (1990) *EJIL* vol. 1, p. 210

⁷⁰ Higgins, *supra* note 62, p. 218; Schwarzenberger, *supra* note 42, p. 30.

⁷¹ Anne-Marie Slaughter, “A typology of transjudicial communication”, (1994) *University of Richmond Law Review*, vol. 29 p. 99-137.

⁷² Jennings, *supra* note 62, p. 77.

⁷³ Schwarzenberger, *supra* note 42, p. 31.

⁷⁴ Also *Krstic* case, *supra* note 11, par 514: The Chamber noted it is “is fully satisfied that the wounds and trauma suffered by those few individuals who managed to survive the mass executions do constitute

In the *Krstic* case the Tribunal interpreted the term ‘military reasons’, contained in the 1949 Geneva Convention, as part of its analysis in what circumstances evacuations of the population are allowed. It noted that:

In terms of military necessity, two World War II cases are relevant. General Lothar Rendulic was accused of violating Article 23(g) of the 1907 Hague Regulations, which prohibits the destruction or seizure of the enemy’s property, “unless such destruction or seizure [is] imperatively demanded by the necessities of war”. Retreating forces under his command engaged in scorched earth tactics, destroying all facilities that they thought might aid the opposing army. In addition, Rendulic ordered the evacuation of civilians in the area. Rendulic raised the defence of “military necessity”, since his troops were being pursued by what appeared to be overwhelming Soviet forces. The U.S. Military Tribunal at Nuremberg concluded that, even though Rendulic may have erred in his judgement as to the military necessity for evacuating the civilians, his decisions were still justified by “urgent military necessity” based on the information in his hands at the time. By contrast, Field Marshall Erich von Manstein was convicted by a British military tribunal of “the mass deportation and evacuation of civilian inhabitants” of the Ukraine. Von Manstein argued that the evacuation was warranted by the military necessity of preventing espionage and depriving the enemy of manpower. This was not found to be a legitimate reason for the evacuation of the population or the destruction of their property. In addition, the judge advocate noted that the Prosecution’s evidence showed that “far from this destruction being the result of imperative necessities of the moment, it was really the carrying out of a policy planned a considerable time before, a policy which the accused had in fact been prepared to carry out on two previous occasions and now was carrying out in its entirety and carrying out irrespective of any question of military necessity”.⁷⁵

The Trial Chamber considered in the *Tadic* case how close an accused must have been connected to a crime before he can be held responsible. The Trial Chamber stated that ‘the most relevant sources for such a determination re the Nuremberg war crimes trials’⁷⁶ and proceeded to identify patterns that emerged from the relevant cases. It considered in particular cases from the British Military Court, the United States Military Tribunal, German courts and the French Permanent Military Tribunal and proceeds to derive general principles from this practice.⁷⁷

Elsewhere in the same judgment, the Trial Chamber had to determine the definition of persecution under customary international law. Again it relied heavily on national case-law:

This is also the approach followed by the Nürnberg Tribunal. Indictment Number 1 contained charges of both war crimes and crimes against humanity and included the statement that “[t]he prosecution will rely upon the facts pleaded under Count Three [war crimes] as also constituting Crimes Against Humanity.” Subsequently, in its ruling on

serious bodily and mental harm within the meaning of Article 4 of the Statute.” As the only support, it refers to the *Eichmann* District Court Judgement, para. 199, that stated that “there is no doubt that causing serious bodily harm to Jews was a direct and unavoidable result of the activities which were carried out with the intention of exterminating those Jews who remained alive”.

⁷⁵ *Ibid.*, par. 526.

⁷⁶ *Tadic* case, *supra* note 24, par. 674.

⁷⁷ *Ibid.*, par. 688-690.

individual defendants, the Nürnberg Tribunal grouped war crimes and crimes against humanity together. Similar statements occur in other cases tried on the basis of Control Council Law No. 10, for example, the *Trial of Otto Ohlendorf and Others* ("*Einsatzgruppen* case" and the *Pohl case*. In the *Pohl case* the court found that for his actions as administrative head of the concentration camps, Pohl was guilty of direct participation in a war crime and a crime against humanity, and that Heinz Karl Fanslau, Hans Loerner, and Erwin Tschentscher had committed war crimes and crimes against humanity because of their association with the slavery and slave labour programme operating in the concentration camps. National cases also support this finding, such as *Quinn v. Robinson*, both the District Court and the Supreme Court decisions in *Eichmann*, and the *Barbie case*. As such, acts which are enumerated elsewhere in the Statute may also entail additional culpability if they meet the requirements of persecution.⁷⁸

The above excerpts cannot easily be explained in terms of customary law – the tribunal does not even purport to make an attempt to determine worldwide practice and *opinio iuris*. Rather, the national case-law is used as authority for the interpretation of rules of international law. The national cases are not used as exclusive and independent sources – but use is made of the experience of national courts in the application and interpretation of the law to determine the meaning of the relevant provisions. In that respect, no sharp distinction between national and international cases need be drawn, as illustrated by the following part of the Judgment in the *Jelusic case*:

From this point of view, genocide is closely related to the crime of persecution, one of the forms of crimes against humanity set forth in Article 5 of the Statute. The analyses of the Appeals Chamber and the Trial Chamber in the *Tadic case* point out that the perpetrator of a crime of persecution, which covers bodily harm including murder, also chooses his victims because they belong to a specific human group. As previously recognised by an Israeli District Court in the *Eichmann case* and the Criminal Tribunal for Rwanda in the *Kayishema case*, a crime characterised as genocide constitutes, of itself, crimes against humanity within the meaning of persecution.⁷⁹

Here decisions of national and international courts mutually influence each other without having formal binding authority.⁸⁰

6. Conclusions

⁷⁸ *Ibid.*, par. 701

⁷⁹ *Jelusic case*, *supra* note 10, par. 68.

The above overview that national case-law significantly influences the development and interpretation of international law. Now that more and more national courts consider international legal matters, and seek to objectively interpret and determine international law, the relative influence of such case-law can be expected to increase. The overview shows that case-law may in a variety of ways influence the interpretation and identification of rules of international law. It can serve as elements in the identification of subsequent agreement as to the interpretation of treaties, as elements in the identification of either state practice or *opinio iuris* required for customary law, as building blocks for the identification of general principles, or as more independent authority for the construction of rules of international law. The Tribunal has the liberty to use the practice of courts in either of these ways and, indeed, to use one and the same case in different ways.

In particular because of the use of national case-law as independent authority for the determination and interpretation of international law, the reference to case-law in terms of the formal sources of international law can, at times, strike the reader of the case-law as a routine with limited legal effect – after all, in many cases the Tribunal can, if analysis of the formal sources does not yield anything, still resort to resort to national case-law as more autonomous authority. The formal sources of international law do not provide a full account of the methods of the judicial determination and interpretation of the law as evidenced in the practice of the Tribunal.

The critical question in the assessment of the use of national case-law is how representative the selection of the case-law is that has been used by the Tribunal. The Tribunal relies heavily on a limited range of cases from a limited number of states. The requirements for identification of subsequent practice (for treaty interpretation), state practice (for customary law) and commonality between legal systems (for general principles) to some extent guarantee representativeness. However, as noted above, in several instances the number of cases is limited and the choice of case-law by the Tribunal strikes the reader as

⁸⁰ Anne-Marie Slaughter , A typology of transjudicial communication, *University of Richmond Law Review*, vol. 29 (1994) p. 99-137; Karen Knop, Here and there : international law in domestic courts, *N.Y. Univ. Journal of International Law & Politics*, vol. 32, 2000, page 501-535.

arbitrary. That problem increases when case-law is resorted to as independent persuasive authority and only one or a few cases can carry a particular interpretation. How are those cases selected and why are they preferred over cases that may point in a different (or the same) direction? The point is illustrated by the discussion on the relevance of national case-law in the *Congo- Belgium Case*. Belgium relied on a few cases, but chose not to rely on a case from a Belgrade court in which Western politicians were convicted. Congo noted:

The only case which comes close to the legal position adopted by Belgium is one before a Belgrade court as a result of the conflict in Kosovo, one in which the presidents, prime ministers, foreign ministers and chiefs of staff of the member countries of NATO, together with the Secretary General of the Organization, were sentenced in their absence for the crime of aggression and war crimes. It is understandable that Belgium was at pains not to mention this precedent, a surprising one to say the least!⁸¹

It may be that the selection of cases is based on the intrinsic merit of the decisions or the quality of the courts at issue. But in the absence of explicit reasoning on this point, it is difficult to assess the quality of the judgments of the Tribunal on this point. It would increase the persuasiveness of the judgments if the Tribunal would better indicate why it chooses the cases that it bases its analysis on and why these cases can provide the basis for the determination and interpretation of rules of international law.

Access to national case-law is too incomplete and unbalanced to make proper assessments of the relevant cases and the legal weight thereof. Whatever the merits of the relatively few cases on which the Tribunal relies, they may not provide the basis for a balanced development and interpretation of the law. This points to the importance for an improved access of national case-law. The International Law Reports, still

⁸¹Oral pleadings Congo in Congo Belgium *supra* note 2. From a legal point of view, and unless the intrinsic merit of decisions requires otherwise, in principle no distinction between cases may be made based on political colour. This is rightly noted by Cassese in his Sep and diss Op. Judge Cassese in *Erdemovic*, *supra* note 8, par. 39 ((noting that the German case-law reviewed by him shows beyond any doubt that a number of courts did indeed admit duress as a defence to war crimes and crimes against humanity whose underlying offence was the killing, or the participation in the killing, of innocent persons but that ‘taking account of the legal significance of this case-law does not entail that one should be blind to the flaws of such case-law from an historical viewpoint; in other words, whilst one is warranted in taking into account the legal weight of those cases, one may just as legitimately entertain serious misgivings about the veracity of the factual presuppositions or underpinning of most of those cases’). The political basis for selection of case-law is also discussed by Knop, *supra* nt 80.

the most notable source, contain too few cases to cover worldwide practice in the various fields of international law. The cases reported in the Yearbook of International Humanitarian Law have improved the situation, but also cover only part of the cases relevant to the Tribunal and the ICC. More work therefore needs to be done to disclose practice across the world, to provide the conditions for a balanced assessment of the relevance of national cases and thereby for a more balanced development of international law that takes into account the position from all or in any case most States across the world.