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# State Practice as Element of Customary International Law: A White Knight in International Criminal Law?

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## Abstract

Inter-state practice is relatively scarce in the area of human rights and international criminal law. This article ventures to inquire how this has affected the process of identification of customary international law by international criminal tribunals and courts. The main conclusion is that the two components of customary international law – *opinio juris* and state practice – have become blurred. In search of customary international law, international tribunals have resorted to national legislation and case law of domestic courts. These legal artefacts can be qualified as both evidence of state practice and *opinio juris*. The author attempts to explain the reasons for this development and holds that, if properly applied, the methodology, while seemingly messy, comports with the nature of international criminal law.

## Keywords

international customary law – state practice – international criminal law – *opinio juris* – International Court of Justice (ICJ) – human rights

## 1 Introduction

Customary international law has a modest role in the Rome Statute. It is implied in the concept of ‘principles and rules of international law’ (Article 21(1)(b)) that outlines the law to be applied by the International Criminal

Court,<sup>1</sup> but it serves as a secondary source, subsidiary to the Statute, the Elements of Crimes and the Rules of Procedure and Evidence.<sup>2</sup> Beyond the realm of the ICC, customary international law still may have a bright future. Article 10 stipulates that ‘Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute’. The provision seeks to guarantee that the evolution of international criminal law is not paralysed by its codification in the Statute.

Some scholars have welcomed the decline of customary international law as a source of international criminal law. Due to its lack of precision and volatile nature, it would not meet the rigid requirements of foreseeability and accessibility that derive from the *nullum crimen* principle.<sup>3</sup> Others have deplored this development, arguing that it stifles the evolution of international criminal law and deprives judges of their inherent powers.<sup>4</sup> The discussion is likely to linger on, with some applauding the codification of the core crimes – along with a general part and rules on criminal procedure – in the Rome Statute, and others considering this as an unfortunate straight jacket.

The reduced relevance of customary international law for the ICC stands in contrast with its flourishing at the ad hoc tribunals, particularly the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>5</sup> Meron has traced the revival of customary international law back to the Nuremberg trials, as the

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- 1 William A. Schabas, *The International Criminal Court; A Commentary on the Rome Statute* (Oxford University Press, Oxford, 2010), p. 391. Pellet observes that an explicit reference to customary international law has been intentionally avoided because of the concerns of (criminal) lawyers that it impinges upon the legality principle, Alain Pellet, ‘Applicable Law’, in: A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Volume II (Oxford University Press, Oxford 2002), p. 1071.
  - 2 Article 21, 1, sub a. See on the hierarchy: Gilbert Bitti, ‘Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC’, in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Brill, Leiden, 2009), pp. 285–304.
  - 3 Compare Vladimir-Djuro Degan, ‘On the Sources of International Criminal Law’, 4 *Chinese Journal of International Law* (2005) 64–73; Kai Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (Oxford University Press, Oxford, 2013), p. 74; G.P. Fletcher and J.D. Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’, 3 *Journal of International Criminal Justice* (2005) 557–559.
  - 4 Compare Pellet, *supra* note 1, p. 1056 and Judge David Hunt, ‘The International Criminal Court; High Hopes, “Creative Ambiguity” and Unfortunate Mistrust in International Judges’, 2 *JICJ* (2004) 56–70.
  - 5 See Larissa van den Herik, ‘The Decline of Customary International Law as a Source of International Criminal Law’, in: C. Bradley (ed.) *Custom’s Future: International Law in a Changing World* (Cambridge University Press, Cambridge, 2016), pp. 232–256.

Tribunal could not rely on treaty law, in view of its sheer absence or the paucity of ratifications.<sup>6</sup> Customary international law served as a default option, as reflected in the finding of the International Military Tribunal that ‘the law of war was to be found not only in treaties but also in the customs and practices of states and in the general principles of justice.’<sup>7</sup> Some 40 years later the situation had hardly changed. In its Report accompanying the establishment of the ICTY, the UN Secretary General elevated customary international law to prime importance, forging an interesting – and perhaps surprising – link with the *nullum crimen* principle: ‘The application of the principle *nullum crimen sine lege* requires that the international Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.’<sup>8</sup>

Customary law was the legitimising bedrock of the Tribunal and the judges were explicitly invited to apply it in order to plug the many gaps in the texture of international humanitarian and criminal law. Trial and Appeals Chambers needed little encouragement. In a unique sequence of highly innovative judgments they uncovered the law on war crimes in non-international armed conflicts, reprisals, command responsibility, joint criminal enterprise etc., frequently referring to customary international law. The story is well-known and need not detain us here.<sup>9</sup> The most conspicuous aspect of this interpretation and application of customary international law was the emphasis on the element of *opinio juris sive necessitatis*, to the detriment of state practice. Several reasons have been advanced to explain this predilection. Partially, it mirrors the general decline of state practice in the formation of customary international law. Whereas in the 19<sup>th</sup> and the first half of the 20<sup>th</sup> century the law had to be gleaned from state practice by a process of induction, the proliferation of treaties introduced a new phase in international law creation, prompting

6 Theodor Meron, ‘Customary Humanitarian Law: From the Academy to the Courtroom’, in: Th. Meron, *The Making of International Criminal Justice* (Oxford University Press, Oxford, 2011), p. 28.

7 International Military Court (Nuremberg), ‘Judgment and Sentences’, 41 *American Journal of International Law* (1947) 172. Although one might wonder whether the introduction of crimes against peace and crimes against peace was not an example of overt law creation, rather than a tribute to customary international law.

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

9 See for accounts, Degan, *supra* note 3; Meron, *supra* note 6; Michael P. Scharf, ‘Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change’, 43 *Cornell Int. L.J.* (2010) 442.

the inquiry into the intentions of the drafters of conventions.<sup>10</sup> Parallel to and probably as a consequence of this shift in emphasis from practice to *opinio juris*, the function of international law also changed, from a retrospective assessment of what the law *is* to a programmatic and future-looking approach what the law *should be*.<sup>11</sup>

In the area of human rights and international criminal law this development is even more acute. The creation of state practice is a slow and arduous affair that cannot be reconciled with the sense of urgency that inspires human rights advocates. Hence the preference for *opinio juris* that has the capacity to create instant customary international law. Closely related to this consideration is the regrettable fact that state practice often does not comport with the lip service paid to the respect for international humanitarian and human rights law.<sup>12</sup> *Opinio juris* can conveniently compensate for the lack of identifiable state practice.<sup>13</sup> These underlying 'activist' rationales have been candidly avowed by the Trial Chamber of the ICTY in the *Kupreškić et al.* case. Commenting on the prohibition of reprisals against civilians under customary international law, the Chamber admitted that:

There does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* has taken shape. This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus*, as a result of the aforementioned Martens Clause. (...) this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands

10 For an analysis of this development, see Ted. L. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 *Harvard Int. L.J.* (1985) 464: 'The era of speculative reason first gave way to the era of inductive inquiry, which is itself now giving way to the era of textual exegesis'.

11 Stein, *supra* note 10, p. 465: 'Correspondingly, *opinio juris* is no longer seen as a consciousness that matures slowly over time (and finally imparts obligatory force to a practice once motivated by habit, convenience, or moral sentiment), but instead as a conviction that instantaneously attaches to a rule believed to be socially or desirable'.

12 Ambos, *supra* note 3, p. 76: 'From a public international law perspective the problem arises that the required state practice (*repetitio facti*), which must exist beside the *opinio iuris* for the existence of international customary law, remains difficult to demonstrate given the widespread impunity of grave human rights violations'.

13 Compare Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *Am.J. of Int'l L.* (2001) 757.

of humanity or the dictates of public conscience, *even where State practice is scant or inconsistent*.<sup>14</sup>

While I acknowledge the relevance of these considerations as an explanation for the preference for *opinio juris*, there is an additional aspect that is often slightly ignored and deserves more attention. In inter-state disputes on observance and violation of human rights, state practice plays a modest role, if any. The deliberations by the International Court of Justice (ICJ) on state practice were delivered in the context of territorial border conflicts, delimitation of exploitation rights of the seabed/ continental shelf, violation of diplomatic immunities, limitation of (criminal) jurisdiction, because practice emerged from inter-action of states, keen on protecting their interests. By contrast, human rights violations do not *directly* impinge upon another state's sovereign rights and interests.<sup>15</sup> And that may be the deeper reason for Professor Henkin's famous assertion that the emerging law of human rights 'is not based on "custom", is not based on state practice at all'.<sup>16</sup>

In this essay I intend to explore whether the scarcity of evaluations of state practice in human rights and international criminal law can indeed be attributed to the lack of immediate relevance for litigating states. If this connection can be established, does it reflect the persistent sovereignty paradigm, entailing that states are not to interfere in other states' treatment of their own citizens because that is essentially the latter's own business?<sup>17</sup> I will first briefly summarise the approach of the ICJ towards the identification of customary international law (Section 2). Next, I will address the dwindling relevance of state practice as component of customary international law in the case law of international criminal courts and tribunals, in search of a better understanding of

14 ICTY, *Prosecutor v. Kupreškić et al.*, Case No. : IT-95-16-T, Trial Chamber, Judgement, 14 January 2000, para. 527 (italics mine).

15 This statement requires perhaps some qualification. States will move to offer their nationals diplomatic protection if they fall prey to human rights violations in another country, see for instance International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Merits, Judgment, 30 November 2010, I.C.J. Reports 2010, p. 639. Moreover, refugee flows and deportations may have spill-over effects and cause social and economic disruption in other states. The dismal fate of the Rohingya's in Bangladesh easily comes to mind.

16 Louis Henkin, 'Human Rights and State "Sovereignty"', 25 *Ga. J. Int'l L.* (1995–1996) 38.

17 That is the opinion of Anthony d'Amato in his unvarnished criticism of Henkin's position, A. d'Amato, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms', *Northwestern University School of Law Scholarly Commons* (2010), Faculty Working Papers, Paper 88.

this change of attitude (Section 3). In Section 4, I reflect on the outcome of the analysis and discuss whether the ‘activist’ approach of the ICTY and some scholars in shifting the balance to *opinio juris* is warranted against the backdrop of states’ reluctance to more vigorously pursue the cause of human rights. And Section 5 ends with some final conclusions.

The limited scope of this article compels me to focus on international criminal law. A comparison with human rights is sometimes ventured, because both areas of law largely address the relationship between the state and the individual. International humanitarian law, on the other hand, is outside the purview of my inquiry and will be only mentioned in passing.<sup>18</sup> Moreover, I will mainly discuss the element of state practice and I do not envisage a comprehensive discourse on customary international law as a source of international law.<sup>19</sup>

## 2 The ‘Classic’ Identification of Customary International Law

Arguably, no judgment of the ICJ has been more influential for the identification and relevance of customary international law than the *North Sea Continental Shelf* cases.<sup>20</sup> The bone of contention was whether, in the assessment of fisheries rights on the Continental Shelf, the equidistance principle was leading, an opinion that was denied by Germany. The Court found that Article 6 of the 1958 Geneva Continental Shelf Convention, in which the equidistance principle was incorporated could not be considered as a codification of customary international law.<sup>21</sup> However, that was not the end of the matter. The principle might have crystallised in a rule of customary international law, even in a relatively short time, if massive subsequent state practice had corroborated it. Mere state practice, however, would not suffice. The rule-following must

18 See J.M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, 2 vols. (ICRC, Cambridge University Press, Cambridge, 2005).

19 See for broader discourses on the topic, for instance, M. Akehurst, ‘Custom as a Source of International Law’, 47 *British Yearbook of International Law* (1974–1975) 3; G. Danilenko, ‘The Theory of Customary International Law’, 31 *German Yearbook of International Law* (1989) 9; and, comprehensively, ILC, *The Second Report on Identification of Customary International Law*, A/CN.4/672, 22 May 2014, by the Special Rapporteur of the International Law Commission on the Identification of Customary International Law, Sir Michael Woods.

20 International Court of Justice, *North Sea Continental Shelf cases* (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands*), Judgment, 20 February 1969, 1969 General List Nos. 51 and 52.

21 *Continental Shelf cases*, *supra* note 20, para. 68.

have been engendered by a conviction that the state in question was legally compelled to do so.<sup>22</sup> Of the 15 cases cited by the parties, in which delimitation occurred on the basis of the equidistance principle – not a very high proportion in the first place – none of the states revealed the belief that they were applying a rule of customary international law.<sup>23</sup> The Court clarified that *opinio juris* and state practice were inextricably entwined: state conduct served as evidence of opinion, while the states' point of view could be deduced from their practice.

The most pregnant principles upholding the system of international relations and state sovereignty – the prohibition of the use of force and the principle of non-intervention – came to the fore in the *Nicaragua* case.<sup>24</sup> At first blush, the Court's space for identifying customary international law seemed limited. After all, both the prohibition of the use of force and the exception (the right to individual and collective self-defence) have been incorporated in the UN Charter. However, the Court found that the codification of customary international law in the Charter did not 'supervene' the latter, rendering customary law redundant.<sup>25</sup> The acknowledgement of the separate existence of treaty law and customary international law – though in content largely similar – gave the Court some leeway to consider further developments in customary international law. More prominence as an independent source of international law was given to customary international law in the recognition of the principle of non-intervention. The Court referred to several Resolutions of the General Assembly that sustained its conclusion that the principle had acquired customary status, without mentioning further state practice.<sup>26</sup> For the assessment of the exact content of the principle of non-intervention, the presence or absence of state practice appeared crucial. The Court observed that there 'had been a number of instances of foreign interventions for the benefit of forces opposed to the government of another State'.<sup>27</sup> Hinting at a potential burgeoning principle of humanitarian intervention, the Court contended that this would involve a fundamental modification of the customary international law principle of non-intervention. The full relevance of the Court's prior finding in the

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22 *Ibid.*, para. 77.

23 *Continental Shelf* cases, *supra* note 20, para. 76.

24 International Court of Justice, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, 1986 General List No. 70.

25 *Nicaragua* case, *supra* note 24, para. 177.

26 *Ibid.*, paras. §203–204.

27 *Ibid.*, para. 206.

*Continental Shelf* cases resonated in the opinion that States had not justified their conduct – the support for internal opposition – by referring to a new right of intervention, but merely had resorted to statements of international policy. In other words, a new rule of customary international law, allowing humanitarian intervention, had not crystallised. The Court subsequently crossed the border between *jus ad bellum* and *jus in bello* by holding that the mining of the Nicaraguan territorial waters was not only in contravention of the principles of the prohibition of the use of force and non-intervention, but also violated international humanitarian law. This prompted the Court to inquire whether Common Article 3 to the Geneva Conventions had customary international law status, as it enabled the Court both to circumvent the thorny issue whether the conflict was international or non-international in character (the protections offered by Common Article 3 applying in both situations) and counter any reservations of the United States to the Geneva Conventions. The Court answered the question in the affirmative, again adducing no state practice to sustain its finding.<sup>28</sup>

In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons of 1996, the Court investigated whether such a prohibition had solidified in a rule of customary international law.<sup>29</sup> Interestingly, States had invoked state practice to advocate opposite positions. Some had argued that a consistent practice of non-utilisation since 1945 expressed an *opinio juris* on the part of those who possess such weapons. Other states contended that the doctrine *and practice* of deterrence bore evidence to the fact that states reserved the right to use those weapons in case of self-defence.<sup>30</sup> The opinion of the Court on the topic was not very consistent. It indicated that it did not wish to pronounce on the practice of deterrence, but merely interpreted the dissent of states on the topic as evidence of lack of *opinio juris*. As a matter of fact, the Court made some interesting observations on the relevance of resolutions of the General Assembly for the formation of *opinio juris*. It noted that such resolutions, despite their non-binding character, ‘may sometimes have normative value’, adding that ‘they can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also

28 *Nicaragua case*, *supra* note 24, paras. 218–219.

29 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, 1996 General List No. 95.

30 Advisory Opinion on Legality, *supra* note 29, paras. 65–66 (my italics).

necessary to see whether an *opinio juris* exists as to its normative character.<sup>31</sup> Applying this standard to Resolution 1653 (XVI) of 24 November 1961 which affirmed the illegality of nuclear weapons and observing that this resolution had been repeated year after year, the Court acknowledged the strong desire of a large part of the international community to reach an express prohibition of the use of nuclear weapons. That nascent *opinio juris*, however, was counterbalanced by the 'still strong adherence to the practice of deterrence'.<sup>32</sup> Suddenly, practice which the Court, as we recall, did not intend to consider, was decisive in prompting the Court to the conclusion that a rule of customary law prohibiting the use of nuclear weapons had not materialised. Admittedly, the Court faced the difficult task of weighing abstention from action (non-use of nuclear weapons) and another form of intangible practice (deterrence). Consequently, it translated the practice prong into *opinio juris*, concluding that the ensuing stalemate did not warrant the finding that the use of nuclear weapons would be contrary to customary international law. The Court hence corroborated its prior opinion that the subjective and objective components of customary international law were inextricably linked. One is tempted to wonder whether the absence of first strikes since 1945 could not have prompted the Court to reach the more narrow finding that *opinio juris* on the prohibition of the first use of nuclear arms had crystallised. This would indirectly have reinforced the arguments of the proponents of deterrence. In his comment on the judgment, Shaw indeed suggests that the Court intended to limit any possible use of nuclear arms to self-defence, by implication outlawing first strikes: '(...) it does seem clear that the possession of nuclear weapons and their use in *extremis* and in strict accordance with the criteria governing the right to self-defence are not prohibited under international law'.<sup>33</sup> However, the Court does not explicitly make this restriction and it might be difficult to reconcile with the position of the United States and the United Kingdom that repudiate the 'no first use'-doctrine.<sup>34</sup> The application of the Martens Clause which serves as minimum standard on principles of international law did not make the Court change its opinion.<sup>35</sup> After much deliberation, the Court found that it did not

31 *Ibid.*, para. 70.

32 *Ibid.*, para. 73.

33 Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge University Press, Cambridge, 2008), p. 1198.

34 See for the position of the United States: [https://www.globalsecurity.org/wmd/library/policy/dod/jp3\\_12fc2.pdf](https://www.globalsecurity.org/wmd/library/policy/dod/jp3_12fc2.pdf), accessed 23 July 2019.

35 The Martens Clause reads as follow: 'Until a more complete code of the laws of war have been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain

have 'sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance'.<sup>36</sup>

In its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the ICJ paid little attention to customary international law in general and state practice in particular.<sup>37</sup> It merely reiterated the opinion of the Nuremberg Tribunal that the Hague Conventions and Regulations on the Laws and Customs of War had solidified into customary international law, a position that was accepted by the parties and therefore needed no further inquiries.<sup>38</sup> The real bone of connection was whether the 4<sup>th</sup> Geneva Convention (1949) was applicable to the West Bank – which Israel denied – , and the Court resolved the issue without much ado by referring to Resolutions of the Security Council. Customary international law surfaced briefly in the discussion on 'necessity' which Israel might possibly rely on in order to challenge the wrongfulness of the construction of the wall. By referring to a previous paragraph in which it had addressed 'military necessity', the Court actually confused that concept which is a balancing factor inherent to the assessment of the conduct's wrongfulness, with the 'state of necessity' which serves as an external circumstance excluding the initial and provisional assumption of wrongfulness.<sup>39</sup>

With the exception of the *North Sea Continental Shelf* cases, the International Court of Justice did not engage heavily in State practice as component of customary international law. That may appear rather surprising as many cases involved the use of force which entails a direct confrontation between states. If such cases already yield scant discussion on state practice, one is tempted to wonder whether war crimes in an internal armed conflict and other flagrant violations of human rights that imply far less interaction between states will produce any opportunity to address this at all. It prompted the ad hoc tribunals to

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under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized nations, from the laws of humanity, and dictates of the public conscience'. The Clause made its first appearance in the preamble of the Hague Convention (11) on the Laws and Customs of the War on Land (1899).

36 Advisory Opinion on Legality, *supra* note 29, para. 95.

37 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, General List No. 131.

38 Advisory Opinion on the Palestinian Wall, *supra* note 37, para. 89.

39 *Ibid.*, para. 140. See for similar criticism Tamás Hoffmann, 'Dr. Opinio Juris and Mr. State Practice: The Strange Case of Customary International Humanitarian Law', 46 *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae Sectio Juridica* (2006) 386–387.

chart a dauntless course by giving a novel interpretation of what state practice actually is.

### 3 The 'Modern' Approach to Customary International Law in IHL and ICL: Blurring the Lines between *opinio juris* and State Practice

In the very first case that came before the ICTY, the Appeals Chamber immediately grasped the opportunity to develop its ideas on customary international law. One of the contested issues was whether individual criminal responsibility for war crimes existed in non-international armed conflicts and as the nature of the armed conflict in the former Yugoslavia had not been definitely settled, the Tribunal could not evade the question. The Chamber was quite straightforward in elucidating that the appraisal of practice in international humanitarian law required a different approach. One of the obstacles of ascertaining practice was that 'the examination (of the actual behaviour of the troops in the field) was rendered extremely difficult by the fact that access to the theatre of military operations was normally refused to independent observers'.<sup>40</sup> Moreover, the parties to the conflict were usually secretive on actual conduct of hostilities or even inclined to spreading 'fake news' in order to mislead enemies, public opinion and foreign governments. In view of this complexities, the court had no other option than to resort to official pronouncements of States, military manuals and judicial decisions. The Appeals Chamber proceeded by quoting numerous official state pronouncements, which claimed protection of the civilian population and other non-combatants against hostilities, irrespective of the nature of the armed conflict. Importantly, such statements were often issued by parties involved in the conflict and demonstrated commitment to the law of war out of a sense of legal obligation. The German Military Manual of 1992 was cited twice, both as proof of domestic adherence to international humanitarian law in the conduct of military operations in all armed conflicts, 'whatever the nature of such conflicts', and in connection with ensuing criminal responsibility in case of violation of common Article 3 of the Geneva Conventions.<sup>41</sup> Case law of Nigerian courts, imposing capital punishment on soldiers who had killed civilians and other non-combatants during the protracted civil war between Nigeria and Biafra in the late sixties, was

40 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 99.

41 *Ibid.*, paras. 118 and 130. The Appeals Chamber referred to similar provisions in the Military Manuals of New Zealand, the United States and the United Kingdom.

adduced as evidence of states' proclivity to observe international humanitarian law in non-international armed conflicts and recognise individual criminal responsibility in case of (serious) violations.<sup>42</sup> The Appeals Chamber did not bother to distinguish sharply between *opinio juris* and *usus*, lumping the two together in the instances that served the purpose of supporting the customary international law claim.

*Tadić* set the stage for subsequent approaches towards the formation of customary international law. In the *Hadžihasanović, Alagić and Kubura* case, the Trial Chamber confirmed that command responsibility applied in non-international armed conflicts.<sup>43</sup> The evidence the Chamber adduced for that position was rather thin. It loosely referred to academic writing and the opinion of the ICRC and reasoned that the Additional Protocol II, being silent on the topic, should not be interpreted *a contrario*.<sup>44</sup> The Chamber agreed with the observation of the Defence that there is 'practically no national legislation or military manual touching upon command responsibility in the context of internal armed conflicts', but countered that this scarcity had to be considered in the context of States' general reluctance to legislate on internal armed conflicts.<sup>45</sup> Remarkably, the Appeals Chamber in the same case attached importance to the lack of supporting *opinio juris* – including national legislation – in respect of criminal responsibility of a commander who assumed command after crimes had been committed by his current subordinates.<sup>46</sup> As already indicated in the introduction, the position that state practice should give way to *opinio juris* was most conspicuously advanced in the *Kupreškić et al.* case in the context of an appraisal of the permissibility of reprisals. Again, the Trial Chamber invoked military manuals that confined the use of reprisals to enemy forces, *a contrario* implying that reprisals against civilians were not allowed. The Chamber pointed at a Resolution of the General Assembly that had been supported by a high number of states which stated that 'civil population, or individual members thereof, should not be object of reprisals'.<sup>47</sup> Moreover, the Chamber mentioned that most states that had participated in international or internal armed conflicts in the last fifty years, had 'refrained from claiming that

42 *Ibid.*, para. 106.

43 ICTY, *Prosecutor v. Hadžihasanović, Alagić and Kubura*, Case No. IT-01-47-PT, Trial Chamber, Decision on Joint Challenge to Jurisdiction, 12 November 2002.

44 Decision on Joint Challenge to Jurisdiction, *supra* note 43, para. 161.

45 *Ibid.*, para. 165.

46 ICTY, *Prosecutor v. Hadžihasanović, Alagić and Kubura*, Case No. IT—1-47-AR72, Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 45.

47 *Prosecutor v. Kupreškić*, *supra* note 14, para. 532.

they had a right to visit reprisals upon enemy civilians in the combat area'.<sup>48</sup> In short, paper practice and abstentions were considered as the major indicators of customary international law.

Other international criminal courts and tribunals followed the course of the ICTY. A Trial Chamber of the Rwanda Tribunal invoked several Criminal Codes of domestic jurisdictions prohibiting hate speech against specific segments of the population as evidence that 'hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination'. Next, it made the inferential leap that, if such vile practice was committed on a widespread or systematic scale, it would qualify as a crime against humanity of 'persecution', which, after all, similarly required a discriminatory intent.<sup>49</sup>

The Special Court for Sierra Leone investigated whether individual criminal responsibility for recruitment of children under 15 had crystallised into a rule of customary international law prior to 1996. It noted that 108 states had explicitly prohibited child recruitment by 2001 and that the list of states featuring in the 2001 Child Soldiers Global report comprised states with different legal systems (civil law, common law, Islamic law) sharing the same view on the topic.<sup>50</sup> Beyond this legislative recognition of the prohibition, the Court attached particular importance to abstention: 'the number of states needed to create a rule of customary law varies according to the amount of practice which conflicts with the rule and even a practice followed by a very small number of states can create a rule of customary law if there is no practice which conflicts with the rule'.<sup>51</sup> In his dissenting opinion, Judge Robertson censured the rather facile assumption that global criminalisation would elevate certain conduct to the status of an international crime, giving the example of theft that, although being unlawful in every state, did not *for that reason* qualify as a crime under international law.<sup>52</sup>

48 *Ibid.*, para. 533.

49 ICTR, *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, Case No. ICTR-99-52-T, Trial Chamber, Judgment and Sentence, 3 December 2003, paras. 1075–1077.

50 SCSL, *Prosecutor v. Norman*, SCSL-2004-14-AR72E, Appeals Chamber, Decision on Preliminary Motion Based on Lack of Jurisdiction, 31 May 2004, para. 44.

51 *Prosecutor v. Norman*, *supra* note 50, para. 49. In paragraph 51 the Appeals Chamber added that 'The overwhelming majority of states, as shown above, did not practice recruitment of children under 15 according to their national laws and many had, whether through criminal or administrative law, criminalized such behaviour prior to 1996'.

52 SCSL, *Prosecutor v. Norman*, SCSL-2004-14-AR72E, Dissenting Opinion of Justice Robertson, para. 33 (my emphasis).

That message was not lost on the Special Tribunal for Lebanon which engaged in a very thorough investigation into the question whether transnational terrorism had materialised as an international crime under customary international law.<sup>53</sup> In contrasting transnational terrorism with murder, the Appeals Chamber acknowledged that mere concordance of laws would not suffice:

(..) the fact that all States of the world punish murder through their legislation does not entail that murder has become an international crime (...) in addition, it is necessary that States and intergovernmental organisations, through their acts and pronouncements, sanction this attitude by clearly expressing the view that the world community considers the offence at issue as amounting to an international crime.<sup>54</sup>

To that purpose, the Appeals Chamber explored resolutions of the General Assembly and the Security Council that qualified terrorism as an international crime (para. 88), conducted a comprehensive investigation into domestic legislation in search of common elements (paras. 93–98) and inquired whether national courts had already acknowledged that terrorism had crystallised as a crime under customary international law (paras. 86 and 99/100). All these aspects, so the Tribunal reasoned, reflected the behaviour of States.<sup>55</sup> Although the research is fairly impressive, one cannot fail to notice some weak points. The enumeration of national case law was rather thin, consisting of no more than 5 or 6 judgments and the summary of domestic legislation, while indeed displaying remarkable consistency in the identification of elements of terrorism, only incidentally indicated whether the enactment of legislation had been induced by resolutions of international organisations.

At the International Criminal Court, a Pre-Trial Chamber has attempted to thwart the immunity of sitting Heads of States and other high officials under customary law by postulating the emergence of another rule of customary international law, entailing an exception to immunity in case of international crimes.<sup>56</sup> The Chamber referred to the findings of the Nuremberg and Tokyo

53 Special Tribunal for Lebanon, STL-11-01/1AC/R176bis, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 (hereafter: STL on Terrorism).

54 *Ibid.*, para. 91.

55 *Ibid.*, para. 87.

56 ICC, *Situation in Darfur, Sudan; Prosecutor v. Al Bashir*, No.: ICC-02/05-01/09, Pre-Trial Chamber I Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011.

Tribunals, mentioned the Nuremberg Principles and cited case law of the Special Court for Sierra Leone Court in the *Taylor* case and the ICTY in the *Milošević* case.<sup>57</sup> In other words, the Pre-Trial Chamber entirely ignored both practice and *opinio juris* of states. While the idea that Heads of State – even those in office – should not enjoy immunity before international criminal courts is certainly commendable, its founding on customary international law is questionable, to say the least. It is to this quick and make-shift pottering of customary international law that the ‘modern approach’ owes its bad reputation. Indeed, this *coutume bien sauvage* has been harshly criticised.<sup>58</sup> Steven Ratner, for instance, comments that ‘the creative interpretation of the elements of custom, leading to a law-making function, seems to be an occupational hazard of courts interpreting IHL rules’.<sup>59</sup> While there is truth in this contention, it is arguably too sweeping, as some courts have displayed greater methodological rigidity than others. The origins and potential legitimacy of the ‘modern approach’ therefore deserve further scrutiny.

#### 4 In Search of an Apology for the Modern Approach towards Custom

A comprehensive discussion of the identification of customary international law by international criminal courts and tribunals would clearly exceed the scope of this essay. The brief discussions of case law in the previous section merely serve as examples. We have, however, discovered a common denominator. In the ‘modern approach’ the aspect of *opinio juris* has eclipsed the element of state practice or, perhaps better phrased, *opinio juris* and state practice have collapsed. At first blush that development seems alarming, in view of the priority that Article 38(1)(b) of the Statute of the International Court of Justice

57 ICTY, *Prosecutor v. Milošević*, Case No. IT-99-37-PT, Trial Chamber, Decision on Preliminary Motions, 8 November 2001, para. 28: ‘Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7(2) of the Statute and article 6(2) of the Statute of the International Criminal Tribunal for Rwanda [...] are indisputably declaratory of customary international law’.

58 The French expression is invented by R.J. Dupuy who introduced the term in contradistinction to *coutume sage* and is used (amongst others) by Van den Herik, *supra* note 5, p. 240.

59 Steven R. Ratner, ‘Sources of International Humanitarian Law and International Criminal Law; War/Crimes and the Limits of the Doctrine of Sources’, in: Samantha Besson and Jean d’Aspremont (eds.), *The Oxford Handbook on the Sources of International Law* (Oxford University Press, Oxford, 2017) p. 922.

renders to state practice. After all, this provision defines custom as a general practice that has been accepted as law.

A deeper inquiry into the reasons why the heuristics of customary international law in the realm of human rights and international criminal law differ from the traditional approach may shed some light on the question whether it is sustainable. First, it should be observed that, different from what is often asserted, the international criminal tribunals were not the first to relegate the importance of state practice. As expounded in section 2, the ICJ in the Nicaragua-case paid scarce attention to actual practice of states. In *Tadić*, the ICTY's Appeal Chamber offered a reasonable explanation for its turn to 'paper practice', pointing to the difficulties to ascertain the conduct of belligerents in the fog of war.<sup>60</sup> However, in case of non-international armed conflicts or systematic and flagrant violations of human rights the search for state practice is compounded by another factor. Traditionally, state practice was generated by states interacting in pursuit of their own interests and in defence of their sovereignty. In a number of areas governed by international law, like disputes over territory or fishery rights, this is likely to endure so long as the state as political entity will exist. Inter-state agreement on the resolution of such conflicts is based on reciprocity, reinforces the legitimate expectation that future disputes will be settled according to similar standards and corresponds with the classic view of customary international law as 'tacit consent' in the absence of a world legislator.<sup>61</sup> Because the sovereignty and direct interests of other states are not affected by atrocities committed in internal armed conflicts and other serious human rights violations, such interaction and hence the formation of state practice – at least as understood in the traditional sense – is conspicuously missing. This distinctive feature of human rights and international criminal law has been acknowledged by a number of perceptive authors. Simma and Alston argue that 'the – relatively – uncontroversial instances of customary law making *lege artis* (...) can be derived from constant interaction, from claims and tolerances as to what sovereign States can do to *each other* (...)', contrasting these with the performance of most human rights

60 See *supra* note 40 and accompanying text.

61 On this inductive process, see briefly Roberts, *supra* note 13, p. 758; and Niels Petersen, 'Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation', 23(2) *American University International Law Review* (2007) 294–295. This approach is usually associated with the judgement of the Permanent Court of International Justice in the Lotus Case (*France v. Turkey*), 7 September 1927, Series A no. 10, p. 18, in which the Court held that 'binding international law derives from the will of states as expressed via their actions and in conventions generally expressing principles of international law'.

obligations which 'lacks this element of interaction proper; it does not "run between" States in any meaningful sense'.<sup>62</sup>

The diagnosis is, in my opinion, generally sound, but raises a number of pertinent questions. First, one may wonder whether the distinction is currently as sharp as it used to be, when Simma and Alston wrote their article some 30 years ago. Nowadays, states are less reluctant to express concern and expose human rights violations in other states, either by means of 'silent diplomacy' or more vociferously by endorsing resolutions of, for instance, the General Assembly.<sup>63</sup> While the former is by its nature not accessible, the latter provides proof of both *opinio juris* and state practice. The concern for humanity certainly inspires states to denounce in the most indignant terms mass atrocities and there is no lack of such pronouncements. However, these resolutions are to be taken into account 'with due caution', as the ICJ in the *Nicaragua* case has acknowledged, because they may reflect political statements without a concomitant commitment of states to abide by them out of a sense of legal obligation.<sup>64</sup> Moreover, state complaints in the framework of human rights protection mechanisms are scarce and the International Criminal Court's jurisdiction has until now mainly been triggered by self-referrals.<sup>65</sup>

Secondly, if we accept that the realms of human rights and international criminal law yield less inter-state practice than the more 'traditional' areas of international law, we should ask ourselves what the reasons for this difference are. As pointed out above, the rather trivial explanation is that, at least in case of internal armed conflicts, other states' interests are in most cases not affected. More generally, it echoes an ineradicable respect for the sovereignty of the state and conveys the unwholesome message that the way a state treats its own nationals is (still) its own business. States do often not react on human rights violations and international crimes out of fear to trespass on another state's

62 Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', *Australian Yearbook of International Law* (1988–1989) 99 (italics in original). Petersen, *supra* note 61, p. 305, largely agrees with this analysis where he contends that 'with regard to the protection of human rights (...) reciprocity plays no role whatsoever' explaining that 'the behavior of other states does not give an incentive for complying with human rights obligations'.

63 The GA Resolution on the 'Situation of human rights in Myanmar' of 16 November 2018, doc. A/C.3/73/L.51 is a good example of the latter, <https://www.un.org/press/en/2018/gashc4254.doc.htm>, accessed 23 July 2019.

64 Compare Hoffmann, *supra* note 39, p. 380.

65 Articles 13 and 14 of the Rome Statute allow States Parties to refer to the Prosecutor a 'situation' in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to start an investigation.

sovereign prerogatives. That fear may be aggravated when states realise that their negative responses may backfire and may expose themselves to denunciations of human rights violations.

Last but not least, we are to inquire how the findings of Simma and Alston bear upon the process of identification of customary international law by international tribunals in the realm of human rights and international criminal law. The relationship between state practice and *opinio juris* as elements of customary international law is much debated and beyond the scope of this brief contribution.<sup>66</sup> The main claim made so far is that in these areas the two components have become blurred, *opinio juris* overshadowing state practice, at least as understood in the traditional sense as inter-state action. The reasons are not hard to grasp. The assessment of state practice directs the attention of the court to the intra-state plan, where compliance with and violation of human rights obligations are to be balanced. The former reinforces the state's commitment and the latter may *a contrario* have a similar effect, especially if the state is inclined to deny such infringements.<sup>67</sup> Both 'practices', however, are difficult to gauge and sometimes unreliable, in view of the state's potential to cover up or distort infringements that occur within its jurisdiction.<sup>68</sup> From this perspective, it is understandable that international tribunals have resorted to domestic legislation and case law of national courts, because recognition of conduct as an international crime through the establishment of universal jurisdiction and abolition of statutes of limitation reflects at least the *opinio juris* of states on the issue. An argument can be made that they can be considered as state practice as well,<sup>69</sup> but such 'practice' is definitely of another character

66 See for interesting discussions, amongst many others, Akehurst, *supra* note 19; J. Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', 15 *EJIL* (2004) 523–553; K. Wolfke, *Custom in Present International Law*, 2<sup>nd</sup> ed. (Kluwer Academic Publishers, Dordrecht, 1993); and K. Zemanek, 'What is State Practice and Who Makes It?', in: U. Beyerlin et al. (eds.), *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatstrecht: Festschrift für Rudolf Bernhardt* (Springer Verlag, Berlin, 1995), pp. 289–306.

67 That 'Abstention from action, also referred to as "a negative practice of States", may also count as practice', is acknowledged by the Special Rapporteur, *supra* note 19, p. 28.

68 Compare Roberts, *supra* note 13, p. 779 who admits that '(...) *even though intrastate action and inaction may be difficult to identify and evaluate*, they are still important forms of state practice in modern international law' (italics mine).

69 Drawing from *Brownlie's Principles of International Law*, the Special Reporter, *supra* note 19, pp. 24–25 confirms that both domestic legislation and decisions of national courts can constitute 'state practice'.

than the physical acts that states perform and from which custom has traditionally been gleaned.

The question arises whether customary international law deserves that predicate, if the requirement of state practice has dwindled. Niels Petersen confronts this issue head-on by contending that general principles and customary international law are distinct in the sense that the former can dispense with proof of state practice.<sup>70</sup> By implication, he argues that for the identification of general principles *opinio juris* suffices. He elucidates his position by pointing out that rules are conduct-related while principles are value-related. As principles are by their very nature not supposed to offer rigid and predictable solutions for concrete situations, their recognition on the basis of precedent is largely futile.<sup>71</sup> Petersen's approach is ingenious and attractive, because he tries to forge a link between the function of sources of international law and their identification. Yet, it does not allay all our qualms, because in criminal law clear rules are indispensable in view of the *lex certa* principle.

International courts have not always bothered to distinguish sharply between customary international law and general principles, as evinced in the comprehensive discussion of national legislation in the decision on terrorism of the Special Tribunal of Lebanon under the heading of 'customary international law'.<sup>72</sup> Strictly speaking, classification as 'general principles derived from legal systems of the world', as Article 21(1), sub c of the Rome Statute reads, would have been more appropriate. However, more relevant than the proper qualification is that the Rome Statute apparently sanctions earlier methods of identification of law as applied by the criminal tribunals.

## 5 Conclusions

Endorsing the position of Simma and Alston that inter-state practice is relatively scarce in the area of human rights and international criminal law, this article has ventured to inquire how this has affected the process of identification of customary international law by courts in those areas. International criminal tribunals have displayed a preference for national legislation and decisions of domestic courts. They are hardly interested as to whether these elements constitute state practice or are evidence of *opinio juris* and have obfuscated the doctrinal distinction between the two elements of customary international

<sup>70</sup> Petersen, *supra* note 61, p. 292.

<sup>71</sup> *Ibid.*, pp. 286–289.

<sup>72</sup> STL on Terrorism, *supra* note 53, paras. 83–144.

law. While state practice has not completely disappeared, it has certainly obtained a new sense within these sub-sections of international law.

The search for customary international law in the realm of human rights and international criminal law is by no means an easy process. We can demonstrate this by a brief discussion of national legislation. Any investigation of national legislation in search of shared concepts of criminal law is fraught with difficulties. For one thing, the selection of 'representative' jurisdictions is a delicate affair, as a comprehensive inquiry into *all* systems is highly laborious, if not impossible.<sup>73</sup> This partially explains the popularity of Resolutions of the General Assembly, as it is tempting for courts to ascertain 'at a glance' what the *communis opinio* of the international community is. In the absence of Resolutions of the General Assembly on a topic, courts, in the words of the ICTY in the *Furundžija* judgment, 'must draw upon the general concepts and legal institutions common to all the major legal systems of the world', which obviously begs the question which systems would qualify as such.<sup>74</sup> This exercise does not provide relief, however, if those major systems are deeply divided on an issue, the most conspicuous example being the availability of duress in case of international crimes as a complete defence in the *Erdemović* case.<sup>75</sup> A second question that arises in the context of an assessment of national jurisdictions in search of a common denominator is whether any special weight should be attributed to the legislation and legal practice of the state *locus delicti*. Two positions can be defended. On the one hand, one could argue that compliance or approval by the state 'most involved' is not required for the formation of customary international law, as this would obviate the institute of 'persistent objector'. From a criminal law perspective, however, the consideration of implementation of international crimes in the national legislation of the state where the crimes have been committed is in line with the *nullum crimen*

73 Compare ICTY, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Appeals Chamber, Judgment, Separate Opinion of Judges McDonald and Vohrah, 7 October 1997, para. 57: 'It is generally acknowledged that a comprehensive survey of all legal systems of the world is not required, as this would involve a practical impossibility and has never been the practice of the International Court of Justice or other international tribunals which have had recourse to Article 38(1)c) of the ICJ Statute'.

74 ICTY, *Prosecutor v. Furundžija*, Case No: IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, para. 178. Van den Herik, *supra* note 5, 244, is alluding to this problem where she observes that '(...) the capacity of CIL to be a ground for rules on procedure and modes of liability is limited because of the domestic origins of these rules'.

75 *Prosecutor v. Erdemović*, *supra* note 73 (Separate Opinion of Judges Mc Donald and Vohrah, speaking on behalf of the majority), para. 55 (on the absence of customary international law) and para. 72 (on the lack of a general principle).

principle and refutes one of the most common objections against customary international law in this area. The record of international tribunals is mixed in this respect. In the case law of the ICTY, the Penal Codes of the former Yugoslavia or Bosnia and Herzegovina are mentioned, but usually do not feature as *primi inter pares*.<sup>76</sup> The Special Court for Sierra Leone, on the other hand, explicitly observed that Sierra Leone had ratified the Geneva Conventions and Additional Protocol II in the context of its discussion whether the prohibition of child recruitment had crystallised into a rule of customary international law by 1996.<sup>77</sup> From a doctrinal point of view, the approach of the Special Tribunal of Lebanon in its decision on the international legal nature of terrorism was arguably the most accurate. First, the Tribunal took great pains in demonstrating that terrorism was a crime under customary international law, without any reference to Lebanon. Next, it inquired whether this finding could provide guidance to the Tribunal's interpretation of the Lebanese Criminal Code, in view of the (direct) applicability of customary international law within the Lebanese legal order. This final step was explicitly tested against the principle of *nullum crimen*, as the 'influx' of customary international law might be conducive of an expansion of criminal responsibility to the detriment of any accused.<sup>78</sup> No doubt, this systematic approach was inspired, if not directed by Article 2 of the Statute of the STL, enjoining the Tribunal to apply Lebanese law.

At first blush, this 'methodology' may appear to be messy and lacking rigour, but perhaps it is inevitable. In (international) criminal law all the perplexities of customary international law converge. Customary international law is always suspect in view of the *nullum crimen* principle. If international tribunals seek to meet apprehensions in this respect by giving more prominence to the legal system of the state *locus delicti*, they are confronted with the ambiguous position of the state. On the one hand, the state offers protection and facilitates the enjoyment of human rights, on the other hand the state is often – directly or indirectly – involved in international crimes. For this reason, international criminal courts are understandably reluctant to rely on state practice in the traditional sense of the word. Rather, they are inclined to remind states of their own legal obligations as solidified in legislation and case law, because it is the strongest anchor that they have in a quagmire of law and politics.<sup>79</sup>

76 See, for instance, *Erdemović case*, *supra* note 73, para. 59; and *Furundžija case*, *supra* note 74, para. 180.

77 *Prosecutor v. Norman*, *supra* note 50, para. 18.

78 STL on Terrorism, *supra* note 53, paras. 131–144.

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