

1

The nature of international criminal procedure

CONTENTS

|       |  |        |
|-------|--|--------|
| 1.1   | What is international criminal procedure?                                  | page 2 |
| 1.1.1 | The sources of international criminal procedure                            | 2      |
| 1.1.2 | The structure of rulemaking at the international criminal tribunals        | 5      |
| 1.1.3 | A coherent body of international rules of procedure?                       | 8      |
| 1.1.4 | Principles and rules   | 11     |
| 1.1.5 | Human rights: the legal principles behind international criminal procedure | 12     |
| 1.2   | Common law versus civil law: the old debate in a new light                 | 14     |
| 1.3   | Scope of this book and terminology used                                    | 17     |

Few today would dispute the existence of substantive international criminal law and its legitimacy under international law. With some noteworthy exceptions, it is well accepted that the core categories of crimes, their underlying offences, and the forms of responsibility listed in the statutes of the international and internationalised criminal courts and tribunals (collectively, ‘international criminal tribunals’) are established in customary international law, treaty law or general principles of international law.<sup>1</sup> The same cannot be said, however, for the procedural rules that govern the conduct of international criminal proceedings. Despite fifteen years of procedural activity at the international criminal tribunals, generating far more jurisprudence on matters of procedure than on substantive law, considerable scepticism remains about the legitimacy of international criminal procedure as a body of international law in its own right.

<sup>1</sup> See Gideon Boas, James L. Bischoff, and Natalie L. Reid, *Forms of Responsibility in International Criminal Law* (2007), pp. 113–114; Gideon Boas, James L. Bischoff, and Natalie L. Reid, *Elements of Crimes in International Criminal Law* (2008), pp. 5–9 (‘Boas, Bischoff, and Reid, *Elements of Crimes*’). See also, e.g., Antonio Cassese, *International Criminal Law* (2nd edn 2008), pp. 13–22; Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2007), pp. 6–12; Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (2007), pp. 79–105; Karim Khan and Rodney Dixon, *Archbold International Criminal Courts: Practice, Procedure, and Evidence* (2nd edn 2005), pp. 7–14.

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Gideon Boas, James L. Bischoff, Natalie L. Reid and B. Don Taylor III

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This third volume of the *International Criminal Law Practitioner Library Series* presents international criminal procedure as a comprehensive and coherent body by describing and explaining the framework within which substantive international criminal law is developed and applied at the tribunals. The first three chapters look at the infrastructure of the international criminal tribunals, including the sources of rules of international criminal procedure and the tribunals' relationship with national courts. The remaining chapters examine the key procedures as defined and elaborated in the governing instruments and jurisprudence of the international criminal tribunals, including those relating to investigations, detention, assignment of defence counsel and self-representation, the pre-trial and trial processes, victim participation, evidence, judgement, sentencing, and appeal.

This chapter proceeds in Section 1.1 with a discussion of the sources of international criminal procedure and its status as a unitary set of rules and principles existing in international law. Section 1.2 examines a persistent challenge facing those constructing rules of international criminal procedure: the difficulty in reconciling, in an international forum, procedures deriving from inquisitorial systems characteristic of civil law countries, and those deriving from accusatorial systems characteristic of common law countries. The section discusses how the debate over the merits of each system too often ignores the reality that international criminal procedure is a *sui generis* system that should be left free to borrow from any existing legal tradition or to invent rules of its own, with the ultimate goal of fairer, more efficient, and more transparent proceedings. Finally, Section 1.3 describes the scope of the subject matter covered in this book, as well as some of the key terms used throughout.

### **1.1 What is international criminal procedure?**

Much has been written about specific rules of international criminal procedure including, most notably, the rules of evidence, the role of the victim, and the relationship between the international criminal tribunals and national jurisdictions. By contrast, little has been thoughtfully written about the more fundamental questions of what international criminal procedure is, the sources from which it is derived, or how it exists and is developed within the international legal framework. Moreover, the little that has been written, in limited scholarship and in some international tribunal case law, provides unclear answers to these questions, which play a fundamental role in understanding the nature and legitimacy of international criminal procedure and the place of international criminal law within the broader regime of international law.

#### ***1.1.1 The sources of international criminal procedure***

As international criminal procedure is a creature of public international law, its primary legal sources are those enumerated in Article 38 of the Statute of the

International Court of Justice (ICJ): treaties or conventions; customary international law, or the consistent practice of states undertaken in the belief that the conduct is permitted, required, or prohibited by international law; the general principles of law recognised by, and typically derived from the domestic legal systems of, states; and, as a subsidiary source, commentaries in judicial decisions and academic writings of the ‘most highly qualified publicists’.<sup>2</sup> Yet there is considerable internal confusion – or disregard – in the decision-making of the international criminal tribunals about what some of the primary sources of law actually are, which of them are applicable, and in what manner they bind courts applying international criminal procedure. Having considered these issues in the broader context of international law and suggested a place for them, this volume seeks in its subsequent chapters to unravel some of the ensuing confusion that occurs in specific areas of procedure.

Before the creation of the ICTY and ICTR (jointly, ‘*ad hoc* Tribunals’),<sup>3</sup> the idea that international criminal law, including international criminal procedure, constituted a legitimate body of international law was in some doubt. Given the conjecture by some eminent theorists as to whether international law existed at all,<sup>4</sup> it is hardly surprising that international criminal law was considered, a mere ten years before the creation of the ICTY, as an area of international law constituting no more than an idea or aspiration. Georg Schwarzenberger, writing in 1983, considered that the

<sup>2</sup> Statute of the International Court of Justice, 26 June 1945, entered into force 24 October 1945, 3 Bevans 1179, T.S. 993, Art. 38(1). This traditional list of the sources of international law has been criticised as underinclusive and overly focused on the role of states as international actors, as it is now generally accepted that other entities and persons have international legal personality and should therefore play a role in providing the content and shaping the development of international law. See, e.g., Maurice H. Mendelson, ‘Formation of Customary International Law’, (1998) 272 *Recueil des Cours* 165, 188, 203; Jonathan Charney, ‘Universal International Law’, (1993) 87 *American Journal of International Law* 529, 543 (‘Rather than state practice and *opinio juris*, multilateral forums [where representatives of states and other interested groups come together to address important international problems of mutual concern] often play a central role in the creation and shaping of contemporary [customary] international law’). In particular, the role of international and non-governmental organisations in the field of international criminal law has been especially pronounced in the preparations for, establishment, and initial functioning of the ICC. Furthermore, despite there being no formal system of precedent in international law, the ICJ has increasingly begun to rely upon its own prior decisions respecting statements of the customary international legal status of a proposition, or to simply state that it has reviewed state practice without articulating clearly the sources of such a review. See, e.g., Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*), (2002) ICJ Rep. 3, para. 58. The ICJ also appears to have begun to relax its previously rigorous requirement that state practice and *opinio juris* be identified before custom can be said to exist, relying more heavily on UN Resolutions. See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, (2004) ICJ Rep. 136, paras. 18–23.

<sup>3</sup> As noted in the Table of Short Forms, throughout this volume we call the International Criminal Tribunal for the former Yugoslavia the ICTY, the International Criminal Tribunal for Rwanda the ICTR, the International Criminal Court the ICC, the Special Court for Sierra Leone the SCSL or the ‘Special Court’, the East Timor Special Panels for Serious Crimes the SPSC or the ‘Special Panels’, the Extraordinary Chambers in the Courts of Cambodia the ECCC or the ‘Extraordinary Chambers’, the Supreme Iraqi Criminal Tribunal the SICT, and the Special Tribunal for Lebanon the STL.

<sup>4</sup> See, e.g., H.L.A. Hart, *The Concept of Law* (1961), p. 209 (‘[T]he absence of an international legislature, courts with compulsory jurisdiction, and centrally organised sanctions have inspired misgivings, at any rate in the breasts of legal theorists. The absence of these institutions means that the rules for states resemble that

law of international criminal procedure, along with substantive international criminal law, did ‘not exist in the international customary law of unorganized international society’.<sup>5</sup> He considered the creation by states of certain organs vested with criminal jurisdiction, along with unspecified supranational institutions, as ‘evidence of an incipient international criminal law and procedure’.<sup>6</sup> Interestingly, Schwarzenberger perceived the Charters of the Nuremberg and Tokyo Tribunals as representing no evidence of an international criminal jurisdiction; he believed the Allied states were doing no more in acting as a confederation of states than they could have done individually, exercising an extraordinary jurisdiction against individuals accused of war crimes.<sup>7</sup> Schwarzenberger concluded that international criminal law and procedure could only escape from ‘the limbo of *lex ferenda*’ by the creation of a ‘stronger *de facto* and *de jure* order than confederate unions are able to provide’.<sup>8</sup>

While this scepticism as to the existence of international criminal procedure may have been understandable in 1983, it would be absurd to suggest the same now. The extraordinary development of international criminal tribunals since 1993 has quelled any real debate about the existence of substantive international criminal law, and with it a set of rules of procedure and evidence that underpin the conduct of proceedings. Yet debate persists over whether these rules enjoy sufficient homogeneity and coherency to constitute a discrete and identifiable area of international law.<sup>9</sup> For example, Antonio Cassese argues that, while it may be possible to set out some ‘general principles governing international trials’<sup>10</sup> – including certain fundamental due-process rights enshrined in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and other human rights treaties – ‘[t]here do not yet exist international general rules on international criminal proceedings’.<sup>11</sup> As explained below, it is in fact the human rights principle of a right to a fair trial that is the foundation of international criminal procedure, providing coherency and legitimacy to it as a body of international law.

simple form of social structure, consisting only of primary rules of obligations ... It is indeed arguable ... that international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying “sources” of law and providing general criteria for the identification of its rules. These differences are indeed striking and the question “Is international law really law?” can hardly be put aside.’). See also Gillian D. Triggs, *International Law: Contemporary Principles and Practices* (2006), p. 3.

<sup>5</sup> Georg Schwarzenberger, ‘The Province of International Judicial Law’, (1983) 21 *Notre Dame International Law Journal* 21, 25 (‘Schwarzenberger, “International Judicial Law”’). Indeed, Schwarzenberger had maintained such a view since 1950. See generally Georg Schwarzenberger, ‘The Problem of an International Criminal Law’, (1950) 3 *Current Legal Problems* 263.

<sup>6</sup> Schwarzenberger, ‘International Judicial Law’, *supra* note 5, p. 25.

<sup>7</sup> *Ibid.* This view raises interesting questions about what Schwarzenberger considered to be the legal status of this ‘extraordinary jurisdiction’. Was he suggesting a form of universal jurisdiction? However, no specificity is provided. Cf. Cassese, *supra* note 1, p. 378.

<sup>8</sup> Schwarzenberger, ‘International Judicial Law’, *supra* note 5, p. 25.

<sup>9</sup> For a discussion of the source and status of substantive international criminal law, see Boas, Bischoff, and Reid, *Elements of Crimes*, *supra* note 1, pp. 5–9.

<sup>10</sup> Cassese, *supra* note 1, p. 378.      <sup>11</sup> *Ibid.*

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[More information](#)**1.1.2 The structure of rulemaking at the international criminal tribunals**

The anxiety over declaring the existence of a body of international criminal procedural rules appears to relate to two areas of concern. First, there is a belief that while a myriad of international criminal tribunals have developed and applied rules of international criminal procedure, there remains too much diversity, in both the varying regulatory structure of these institutions and in the apparently divergent application of the same or analogous rules in different tribunals, for these rules to be regarded as a coherent body of international law. Göran Sluiter reasons that the ‘growing number of international criminal tribunals, with their own distinctive law of criminal procedure, and numerous amendments to their rules of procedure and evidence may make it difficult to identify *firmly* established rules of international criminal procedure’.<sup>12</sup> Second, there is a concern that international criminal procedure as a coherent body of rules is not rooted to a formal source of international law and, therefore, lacks legitimacy. As we will show, both of these concerns can be assuaged.

It is simple to highlight differences among the tribunals on a variety of issues that arguably make it difficult to identify a unitary, coherent body of procedural law. For a start, the tribunals were each created under different circumstances and with different mandates imbuing them with different jurisdictional parameters and procedural structures.<sup>13</sup> The Security Council created the *ad hoc* Tribunals pursuant to Chapter VII of the United Nations Charter, and they thus derive their constitutional legitimacy from their status as subsidiary bodies of the United Nations, an organisation that was itself created by a treaty (the Charter) with almost universal membership. Yet unlike the Rome Statute of the ICC, the Statutes of the *ad hoc* Tribunals contain very few procedural and evidentiary rules themselves; they instead invest the judges with the authority and duty to elaborate and enforce such rules.<sup>14</sup> At the ICTY, the judges adopted the Rules of Procedure and Evidence in 1993 that they have since amended more than forty times and that now contain more than 150 rules; the ICTR judges based their Rules on those elaborated by the ICTY and have amended them some sixteen times, often to reflect amendments made to the ICTY Rules. The *ad hoc* Tribunal structure, with a skeletal primary instrument created by Security Council resolution and the judges left to elaborate the vast majority of rules and enforce rules they have themselves created, is extraordinary.

<sup>12</sup> Göran Sluiter, ‘The Law of International Criminal Procedure and Domestic War Crimes Trials’, (2006) 6 *International Criminal Law Review* 605, 606 (emphasis in original).

<sup>13</sup> For a discussion of these issues, see generally Steven R. Ratner, Jason S. Abrams, and James L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (3rd edn 2008), ch. 9.

<sup>14</sup> See ICTY Statute, Art. 15; ICTR Statute, Art. 14. The structure of the rule creation and amendment process is considered at length later in this volume. See generally Chapter 2.

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The internationalised, or hybrid, tribunals, by contrast, were developed under agreements between the relevant host state and the United Nations, and have varying procedural structures. The SCSL, for example, was set up in 2002 following a cessation of hostilities achieved by UN peacekeeping forces.<sup>15</sup> It formally adopted the Rules of the ICTR as being applicable to the conduct of its proceedings *mutatis mutandis*.<sup>16</sup> Furthermore, the SCSL's Statute provides that '[t]he judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda'.<sup>17</sup> This statement has since been held equally applicable to SCSL trial chambers.<sup>18</sup> At the same time, the judges 'may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation' and, in so doing, may be guided by the Criminal Procedure Act 1965 of Sierra Leone.<sup>19</sup> As illustrated on several occasions in the chapters that follow, since the importation of the ICTR Rules for the SCSL, the SCSL's judges have made a number of unique changes to their Rules, and have declined to adopt certain changes implemented by the ICTR's judges, thereby fostering an increasing divergence between these two sets of Rules.

By comparison, the agreement between Cambodia and the United Nations on the establishment of the ECCC provides that proceedings before the Extraordinary Chambers shall be conducted in accordance with Cambodian law.<sup>20</sup> Interestingly, the same provision states that where Cambodian law 'does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule ... or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level'.<sup>21</sup> In this way, the ECCC has created a set of procedural rules that embrace its domestic context but refer it to rules applied at the international level. In a similar vein to the ECCC, the procedural law governing

<sup>15</sup> See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000. See also Ratner, Abrams, and Bischoff, *supra* note 13, p. 250.

<sup>16</sup> SCSL Statute, Art. 14.

<sup>17</sup> *Ibid.*, Art. 14(1).

<sup>18</sup> *Prosecutor v. Brima, Kamara, and Kanu*, Case No. SCSL-04-16-T, Judgement, 20 June 2007, para. 639 n. 1269 ('[T]he Trial Chamber finds that as a matter of course, the provision equally applies to triers of fact at first instance').

<sup>19</sup> SCSL Statute, Art. 14(2).

<sup>20</sup> ECCC Agreement, Art. 12(1).

<sup>21</sup> *Ibid.* ECCC Rules, Rule 2, (providing for any lacunae in the ECCC Internal Rules to be resolved by reference, *inter alia*, to Art. 12 of the ECCC Agreement). For a discussion of these issues, see Göran Sluiter, 'Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers', (2006) *Journal of International Criminal Justice* 314. See also Ernestine E. Meijer, 'The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal', in Cesare P.R. Romano, André Nollkaemper, and Jann K. Kleffner (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (2004), pp. 224–228.



East Timor's now-defunct SPSC set up a deference to international rules. The relevant provision of one of the Special Panels' governing instruments provided that in respect of 'points of criminal procedure not prescribed in the present regulation, internationally recognized principles shall apply'.<sup>22</sup>

The ICC applies a different institutional approach. The Rome Statute and the ICC Rules are negotiated outcomes of a multilateral treaty-making process. Their content, so far as it relates to international criminal procedure, is determined by a broad agreement amongst states parties to the Statute, which currently number at least 110 states,<sup>23</sup> and the Rome Statute has a self-contained provision dealing with sources of law.<sup>24</sup> The procedural structure of the ICC is also characterised by 'architecture ... of unprecedented complexity',<sup>25</sup> due to the Regulations of the Court and the Regulations of the Registry. These Regulations, unlike the Statute and Rules of the Court, are not formally created – or subject to amendment by – the Assembly of States Parties, but by the judges. Although they are limited by the Statute to matters 'necessary for [the Court's] routine functioning',<sup>26</sup> these provisions have in some areas developed into rules of international criminal procedure that are quite fundamental to the operation of the Court.<sup>27</sup> To the extent that the ICC's Statute and Rules reflect those of other international criminal tribunals, they may serve as a statement by a considerable body of states as to the content of international criminal procedure.

<sup>22</sup> United Nations Transitional Administration in East Timor, Regulation No. 2000/30 on Transitional Rules of Criminal Procedure, UN Doc. UNTAET/REG/2000/30, 25 September 2000, § 53.5.

<sup>23</sup> See 'ICC at a Glance', at [www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance](http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance).

<sup>24</sup> Article 21 of the Rome Statute provides for a set of sources similar, but not exactly the same as, Article 38 of the ICJ Statute:

1. The Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

It should be noted that the failure of Article 21 to include either the Regulations of the Court or the Regulations of the Registry makes the ICC's sources of law somewhat hierarchically ambiguous. See B. Don Taylor III, 'Demystifying the Procedural Framework of the International Criminal Court: A Modest Proposal for Radical Revision', in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009), p. 756.

<sup>25</sup> Claus Kreß, 'The Procedural Texts of the International Criminal Court', (2007) 5 *Journal of International Criminal Justice* 537, 537.

<sup>26</sup> Rome Statute, Art. 52(1).

<sup>27</sup> Kreß, *supra* note 25, p. 537; Taylor, *supra* note 24, pp. 757–758. For discussions of regulations in the ICC that have proven especially sweeping, see Chapter 2, Section 2.2.3.

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Yet caution is necessary in drawing conclusions too hastily as to the transformation of this treaty activity into customary international law. Indeed, the *travaux préparatoires* of the Statute at times reveal intense debate between a variety of international actors over how far a specific requirement or prohibition had developed in customary international law,<sup>28</sup> with the result that the final text represents a partial codification of custom, partial progressive development of the law, and often a compromise between the different participants in the process.<sup>29</sup> Nonetheless, this widespread agreement between a diverse range of states, particularly where it reflects rules applicable in other international criminal tribunals, is further evidence of the development and crystallisation of a body of rules of international criminal procedure.

### 1.1.3 A coherent body of international rules of procedure?

The debate over whether international criminal procedure is a coherent body of international law appears to revolve around the fact that distinct sets of rules are applied in the different international criminal tribunals. Indeed, it has become fashionable since the 2006 Fragmentation Report of the International Law Commission (ILC)<sup>30</sup> to talk about the differences between international institutions adjudicating or regulating the same or similar issues as fragmenting, and thereby weakening, the status of international law.<sup>31</sup> The thrust of this argument is that different tribunals apply different rules, apply similar but not identical rules, or construe and apply the same or analogous rules in a manner different from that of other tribunals. Much can no doubt be made of the differences between the rules and the tribunals' interpretation of them.<sup>32</sup> Cassese has suggested that, with the closure of the *ad hoc* Tribunals and the ICC becoming the central rule-making court, a set of procedural rules might emerge to create a body of 'general international rules'.<sup>33</sup> He considers there to be some established general principles

<sup>28</sup> See generally Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, 6 September 1995 ('1995 *Ad Hoc* Committee Report').

<sup>29</sup> An interesting discussion may revolve around the question of whether the Rome Statute constitutes a 'general multilateral treaty', which the ILC has stated relates to general norms of international law or matters of general interest to states as a whole. See Draft Articles on the Law of Treaties, in First Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur, International Law Commission, UN Doc. A/CN.4/144 and Add.1 (1962), Art. 1, para. 1. However, it is difficult to see the relevance of the Rome Statute as a 'general multilateral treaty' beyond its potential reflection of customary rules generated by broad membership.

<sup>30</sup> Report of the Study Group of the ILC on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.702, 18 July 2006.

<sup>31</sup> See, e.g., Sergey Vasiliev, 'General Rules and Principles of International Criminal Procedure: Definition, Legal Nature, and Identification', in Göran Sluiter and Sergey Vasiliev (eds.), *International Criminal Procedure: Towards A Coherent Body of Law* (2008), p. 11.

<sup>32</sup> See, e.g., *ibid.*

<sup>33</sup> Cassese, *supra* note 1, p. 378. It is unclear precisely what Cassese means by this term.



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Gideon Boas, James L. Bischoff, Natalie L. Reid and B. Don Taylor III

Excerpt

[More information](#)*The nature of international criminal procedure*

9

governing international criminal trials: '(i) the requirement that the accused be tried by an independent and impartial court; (ii) the presumption of innocence ...; (iii) the requirement that the trial be fair and expeditious; and (iv) the right of the accused to be present during trial'.<sup>34</sup> However, he, like others, argues that beyond such fundamental principles, themselves reflected in established human rights treaties and customary law, an accepted body of international rules is some years away.<sup>35</sup>

Yet despite the scepticism of some academic commentators, considerable homogeneity does exist in the content of many rules of international criminal procedure and the tribunals' interpretation of them, even though the rules may differ in certain details, and may be created by significantly different processes. As the subsequent chapters of this volume attest,<sup>36</sup> a great many rules of this nature currently exist. If these rules do not reflect a coherent body, then what do they reflect?

Part of the difficulty in answering this question is the confusion over how these rules are characterised in the literature and jurisprudence of international criminal law. For example, endeavours to identify some higher order of international law norms – usually derived from an over-thinking of language employed by the ICJ<sup>37</sup> – has led to conjecture as to the existence of 'fundamental principles' or principles of international 'constitutional' law that sit somehow above the accepted sources of international law.<sup>38</sup> However, the ILC had clearly resolved this issue as long ago as 1976:

[I]t is only by erroneously equating the situation under international law with that under internal law that some lawyers have been able to see in the 'constitutional' or 'fundamental' principles of the international legal order an independent and higher 'source' of international obligations, in reality there is, in the international legal order, no special source of law for creating 'constitutional' or 'fundamental' principles. The principles which come to mind when using these terms are themselves customary rules, rules embodied in treaties, or even rules emanating from bodies or procedures which have themselves been established by treaties.<sup>39</sup>

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.* Interestingly, this argument has echoes of the comments made by Schwarzenberger in 1983. See *supra* text accompanying notes 5–8.

<sup>36</sup> See especially Chapter 12, Section 12.1 (giving examples from throughout the chapters of this volume).

<sup>37</sup> See, e.g., Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*), (1986) ICJ Rep. 14, para. 181 (referring to the use of force); Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 28 June 1947, Advisory Opinion, (1988) ICJ Rep. 12, para. 57 (referring to the relationship between municipal and international law).

<sup>38</sup> See, e.g., M. Virally, 'The Sources of International Law', in M. Sørensen (ed.), *Manual of Public International Law* (1968), pp. 144–145; Georg Schwarzenberger, *The Inductive Approach to International Law* (1965), p. 89.

<sup>39</sup> Draft Articles on State Responsibility, in 'Report of the International Law Commission on the Work of Its Twenty-Eighth Session', UN Doc. A/31/10 (1976), Commentary to Article 17, para. 21.

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The simple fact is that the primary sources of international law are clear and defined: they are treaty, custom, or general principles of international law. A binding set of international rules must be rooted in one or more of these sources. However, the little international jurisprudence that discusses these issues tends to employ unhelpful nomenclature. Consider the confusing endeavour in one of the earlier ICTY trial judgements:

[A]ny 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 draftspersons 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.<sup>40</sup>

The proposition that the ICTY Statute is a primary source for the identification of rules, including those of international criminal procedure, seems clear. A reasonable interpretation of this statement is that these rules may be viewed as a form of subsidiary treaty law, derived from the power of the Security Council to create the ICTY pursuant to the UN Charter.<sup>41</sup> Analogous support for such a proposition may be drawn from the ICTY Appeals Chamber's ruling concerning the jurisdictional legitimacy of that Tribunal, created, as it was, by the Security Council acting under Chapter VII of the UN Charter.<sup>42</sup> The reference to customary international law in the *Kupreškić* extract is also meaningful as a primary source of international law itself.<sup>43</sup> The reference to three further forms of general principles, however, leaves one without any comprehension of their meaning or relationship with the 'general

<sup>40</sup> *Prosecutor v. Kupreškić, Kupreškić, Kupreškić, Josipović, Papić, and Šantić*, Case No. IT-95-16-T, Judgement, 14 January 2000, para. 591.

<sup>41</sup> See, e.g., Cassese, *supra* note 1, pp. 15–16.

<sup>42</sup> See *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ('*Tadić* Jurisdiction Appeal Decision'), paras. 21, 47 (determining that the ICTY maintained an 'incidental jurisdiction', empowering it to consider and determine jurisdictional questions unrelated to subject-matter jurisdiction, and finding 'that the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial' and 'is thus "established by law"') (quotation at para. 47).

<sup>43</sup> This is not to say that the international tribunals' application of this source of international law has been unproblematic. Indeed, the identification and use of custom as a source for particular rules of international criminal procedure has, at times, been confusing. This matter will be taken up in detail in relevant places throughout this volume. Furthermore, the myth of these international criminal tribunals conservatively and cautiously applying customary international law does little to clarify the law-creating role of these courts. See, e.g., Theodor Meron, 'Editorial Comment: Revival of Customary Humanitarian Law', (2005) 99 *American Journal of International Law* 817, 818, 821 (in particular arguing that international criminal tribunals have taken an essentially conservative and traditional approach to the identification and application of customary international legal principles – an assertion that is difficult to support in light of the actual practice of these institutions).