

Part I

Introduction

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Introduction: What is International Criminal Law?

1.1 MEANING OF INTERNATIONAL CRIMINAL LAW

International law typically governs the rights and obligations of States;¹ criminal law, conversely, is paradigmatically concerned with prohibitions addressed to individuals, violations of which are subject to penal sanction by a State.² The two aspects are sometimes in tension. The development of a body of international criminal law which imposes responsibilities directly on individuals and punishes violations through international judicial mechanisms is also relatively recent. Although there are historical precursors and precedents of and in international criminal law,³ it was not until the 1990s, with the establishment of the ad hoc Tribunals for the former Yugoslavia and Rwanda, that it could be said that an international criminal law regime had evolved. This is a relatively new body of law, which is not yet uniform, nor are its courts global in their authority.⁴

International criminal law developed from various sources. War crimes originate from the ‘laws and customs of war’, which accord certain protections to individuals in armed conflicts. Genocide and crimes against humanity evolved to protect persons from what are now often termed gross human rights abuses, including those committed by their own governments. With the exception of the crime of aggression with its focus on inter-State conflict, the concern of international criminal law is now with individuals and with their protection from wide-scale atrocities. As was said by the Appeals Chamber in the *Tadić* case in the International Criminal Tribunal for the former Yugoslavia (ICTY):

A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach . . . international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings.⁵

¹ See e.g. Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, 9th edn (London, 1994) 5–7.

² Glanville Williams, ‘The Definition of Crime’ (1955) 8 *Current Legal Problems* 107.

³ See Chapter 6 and e.g. Timothy L. H. McCormack, ‘From Sun Tzu to the Sixth Committee, the Evolution of an International Criminal Law Regime’ in Timothy L. H. McCormack and Gerry J. Simpson (eds.), *The Law of War Crimes: National and International Approaches* (The Hague, 1997) 31.

⁴ For useful discussion of the concept of international criminal law, see Helmut Satzger, *International and European Criminal Law*, 2nd edn (Oxford, 2018) 2–5. On EU criminal law, see Sarah Summers, Christian Schwazenegger, Gian Ege and Finlay Young, *The Emergence of EU Criminal Law* (Oxford, 2014).

⁵ *Tadić*, ICTY AC, 2 October 1995, para. 97.

The meaning of the phrase ‘international criminal law’ depends on its use, but there is a plethora of definitions, not all of which are consistent.⁶ In 1950, the most dedicated chronicler of the uses of ‘international criminal law’, Georg Schwarzenberger, described six different meanings that have been attributed to that term.⁷ All of those meanings related to international law, criminal law and their interrelationship, but none referred to any existing body of international law which directly created criminal prohibitions addressed to individuals. Schwarzenberger believed that no such law existed at the time. ‘An international crime’, he said in reference to the question of the status of aggression, ‘presupposes the existence of an international criminal law. Such a branch of international law does not exist’.⁸

On the other hand, Cherif Bassiouni, writing almost half a century later,⁹ listed twenty-five categories of international crimes, being crimes which affect a significant international interest or consist of egregious conduct offending commonly shared values. Such crimes involve more than one State because of differences of nationality of victims or perpetrators or the means employed, or concern a lesser protected interest which cannot be defended without international criminalization. His categories include, as well as the more familiar ones, trafficking in obscene materials, falsification and counterfeiting, damage to submarine cables, and unlawful interference with mail.

Different meanings of international criminal law have their own utility for their different purposes and there is no necessary reason to decide upon one meaning as the ‘right’ one. Nevertheless, it is advisable from the outset to be clear about the sense in which the term is used in any particular situation. In this chapter we will attempt to elaborate the meaning which we give to the term for the purposes of this book and compare it with other definitions.

1.1.1 Crimes Within the Jurisdiction of an International Court or Tribunal

The approach taken in this book is to use ‘international crime’ to refer to those offences over which international courts or tribunals have been given jurisdiction under general international law. They comprise the so-called ‘core’ crimes of genocide, crimes against humanity, war crimes and the crime of aggression (sometimes known as the crime against peace). Our use thus does not include piracy, slavery, torture, terrorism, drug trafficking and many crimes which States Parties to various treaties are under an obligation to criminalize in their domestic law. But because a number of the practical issues surrounding the repression of these crimes are similar to those relating to international crimes (in the way we use the term), they are discussed in this book, although only terrorist offences and torture will be

⁶ See Claus Krefß, ‘International Criminal Law’ in Rüdiger Wolfrum (ed.), *V Max Planck Encyclopaedia of Public International Law* (Oxford, 2012) 717–21; Kai Ambos, *Treatise on International Criminal Law, vol. I: Foundations and General Part* (Oxford, 2013) 54–5.

⁷ Georg Schwarzenberger, ‘The Problem of an International Criminal Law’ (1950) 3 *Current Legal Problems* 263.

⁸ Georg Schwarzenberger, ‘The Judgment of Nuremberg’ (1947) 21 *Tulane Law Review* 329, 349.

⁹ M. Cherif Bassiouni, ‘International Crimes: The Ratione Materiae of International Criminal Law’ in M. Cherif Bassiouni (ed.), *International Criminal Law*, 3rd edn (Leiden, 2008) vol. I, 129, 134–5.

discussed in any detail. Some of them (terrorist offences, drug trafficking and individual acts of torture) have been suggested as suitable for inclusion within the jurisdiction of the International Criminal Court (ICC)¹⁰ and may therefore constitute international crimes within our meaning at some time in the future. Terrorism has been included in the jurisdiction of one ‘internationalized’ tribunal, the Special Tribunal for Lebanon, but this Tribunal is intended to apply Lebanese domestic law on point, although its practice has been more equivocal (and controversial).¹¹

Our approach does not differentiate the core crimes from others as a matter of principle, but only pragmatically, by reason of the fact that no other crimes are currently within the jurisdiction of international courts. However, it is clear that since these crimes have a basis in international law, they are also regarded by the international community as violating or threatening values protected by general international law, as the Preamble to the Rome Statute of the International Criminal Court makes clear.¹²

‘International criminal law’, as used in this book, encompasses not only the law concerning genocide, crimes against humanity, war crimes and the crime of aggression, but also the principles and procedures governing the international investigation and prosecution of these crimes. As we shall see, in practice the greater part of the enforcement of international criminal law is undertaken by domestic authorities. National courts both are, and are intended to be, an integral and essential part of the enforcement of international criminal law.¹³ In this book, therefore, we shall cover not only the international prosecution of international crimes, but also various international aspects of their domestic investigation and prosecution. However, as mentioned above, this is only one way of conceiving of international criminal law; below we evaluate some of the other approaches to defining the subject.

1.2 OTHER CONCEPTS OF INTERNATIONAL CRIMINAL LAW

1.2.1 Transnational Criminal Law

Until the establishment of the international criminal courts and tribunals in the 1990s, the concept of international criminal law tended to be used to refer to those parts of a State’s domestic criminal law which deal with transnational crimes, that is, crimes with actual or potential transborder effects. This body of law is now more appropriately termed ‘transnational criminal law’.¹⁴ A similar terminological distinction between ‘international criminal law’ (criminal aspects of international law) and ‘transnational criminal law’ (international aspects of national criminal laws) can also be found in other languages, such as German

¹⁰ See Final Act of the Rome Conference, A/CONF.183/10, Res. E. ¹¹ See further Chapters 9 and 14.

¹² See, in particular, preambular paragraphs 3–4, which affirm that such crimes threaten the ‘peace, security and well-being of the world’, and as such, must be prosecuted.

¹³ See ICC Statute, Arts. 17 and 18. As to the situation generally, Judges Higgins, Koopmans and Buergenthal have stated: ‘the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play’. *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment of 14 February 2002, Separate Opinion, para. 51.

¹⁴ See Neil Boister, *An Introduction to Transnational Criminal Law*, 2nd edn (Oxford, 2018).

(‘*Völkerstrafrecht*’ compared with ‘*Internationales Strafrecht*’),¹⁵ French (‘*droit international pénal*’ and ‘*droit pénal international*’) and Spanish (‘*derecho internacional penal*’ and ‘*derecho penal internacional*’).

Transnational criminal law includes the rules of national jurisdiction under which a State may enact and enforce its own criminal law where there is some cross-jurisdictional aspect of a crime. It also covers methods of cooperation among States to deal with domestic offences and offenders where there is a foreign element and the treaties which have been concluded to establish and encourage this inter-State cooperation. These treaties provide for mutual legal assistance and extradition between States in respect of crimes with a foreign element. Other treaties require States to criminalize certain types of conduct by creating offences in their domestic law, and to bring offenders to justice who are found on their territory, or to extradite them to States that will prosecute. While international law is thus the source of a part of this group of rules, the source of criminal prohibitions on individuals is national law.¹⁶

1.2.2 International Criminal Law as a Set of Rules to Protect the Values of the International Order

Another, and more substantive, approach to determining the scope of ‘international criminal law’ is to look at the values which are protected by international law’s prohibitions.¹⁷ Under this approach international crimes are considered to be those which are of concern to the international community as a whole (a description which is not of great precision), or acts which violate a fundamental interest protected by international law. Early examples include the suppression of the slave trade. The ICC Statute uses the term ‘the most serious crimes of concern to the international community as a whole’ almost as a definition of the core crimes,¹⁸ and recognizes that such crimes ‘threaten the peace, security and well-being of the world’.¹⁹

It is true that those crimes which are regulated or created by international law are of concern to the international community; they are usually ones which threaten international interests or fundamental values.²⁰ But there can be a risk in defining international criminal law in this manner, as it implies a level of coherence in the international criminalization process which may not exist.²¹ The behaviour which is directly or indirectly subject to

¹⁵ Kai Ambos, *Internationales Strafrecht*, 4th edn (Berlin, 2014).

¹⁶ See generally Neil Boister, ‘Transnational Criminal Law?’ (2003) 14 *EJIL* 953, 967–77.

¹⁷ For discussion in relation to the core crimes, see Bruce Broomhall, *International Justice and the International Criminal Court: Between State Sovereignty and the Rule of Law* (Oxford, 2003) 44–51.

¹⁸ ICC Statute, Arts. 1 and 5. The International Law Commission framed its investigation into international criminal law in the broad sense as being one into the ‘Crimes against the Peace and Security of Mankind’: ‘Draft Code of Crimes Against the Peace and Security of Mankind’ in *Report of the International Law Commission on the Work of its Forty-Eighth Session*, UN Doc. A/51/10 (1996). See also Lyal Sunga, *The Emerging System of International Criminal Law* (The Hague, 1997).

¹⁹ ICC Statute, Preamble, para. 3.

²⁰ M. Cherif Bassiouni, ‘The Sources and Content of International Criminal Law’ in M. Cherif Bassiouni (ed.), *International Criminal Law*, 2nd edn (New York, 1999) 3, 98.

²¹ See Robert Cryer, ‘The Doctrinal Foundations of the International Criminalization Process’ in M. Cherif Bassiouni (ed.), *International Criminal Law*, 2nd edn (New York, 1999) 107. For an example, see Barbara Yarnold, ‘Doctrinal Basis for the International Criminalisation Process’ (1994) 4 *Temple International and Comparative Law Journal* 85.

international law is not easily reducible to abstract formulae. Even if it were, it is not clear that these concepts would be sufficiently determinate to provide a useful guide for the future development of law, although arguments from coherence with respect to the ambit of international criminal law can have an impact on the development of the law (as has occurred, *inter alia*, in relation to the law of war crimes in non-international armed conflict, which were developed with reference to the law applicable to international armed conflicts).²²

1.2.3 Involvement of a State

Another approach to defining ‘international crimes’ relies upon State involvement in their commission.²³ There is some sense in this. For example, the crime of aggression is necessarily underpinned by an act of aggression committed by the State, which is enabled by high-level State agents.²⁴ War crimes, genocide and crimes against humanity often, or even typically, have some element of State or State-like agency. But the subject-matter of international criminal law, as we use it, deals with the liability of individuals, mostly irrespective of whether or not they are agents of a State. In the definition of the crimes which we take as being constitutive of substantive international criminal law, the official status of the perpetrator is almost always irrelevant, with the main exception of the crime of aggression.²⁵

1.2.4 Crimes Created by International Law

An international crime may also be defined as an offence which is created by international law itself, without requiring the intervention of domestic law. In the case of such crimes, international law imposes criminal responsibility directly on individuals. The classic statement of this form of international criminal law comes from the Nuremberg International Military Tribunal’s classic statement that:

crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced . . . individuals have international duties which transcend the national obligations of obedience imposed by the individual state.²⁶

The definition of an international crime as one created by international law is now in frequent use.²⁷ But this criterion may lead to unhelpful debate as to what is and what is not

²² On such developments, see Chapter 12.

²³ See e.g. M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd edn (The Hague, 1999) 243–6, 256.

²⁴ See Chapter 13.

²⁵ The reference in ICC Statute, Art. 8(2)(b)(viii) to the transfer of population ‘by the Occupying Power’ would also seem to require that the perpetrator is a State agent.

²⁶ ‘Nuremberg IMT: Judgment and Sentences’ (1947) 41 *AJIL* 172, 221.

²⁷ Broomhall, *International Justice and the International Criminal Court* (n. 17 above) 9–10; Robert Cryer, *Prosecuting International Crimes: Selectivity in the International Criminal Law Regime* (Cambridge, 2005) 1; Hans-Heinrich Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (Bonn, 1951) 9; Otto Triffterer, *Dogmatische Untersuchungen*

‘created’ by international law.²⁸ The more pragmatic meaning used in this book, which we do not claim to be authoritative, excludes from detailed discussion certain conduct which has been suggested to be subject to direct liability in international criminal law but which others dispute, such as piracy and slavery,²⁹ a general offence of terrorism,³⁰ and individual acts of torture.³¹

Occasionally the *sui generis* penal system of the international criminal tribunals and courts is described as a developing ‘supranational criminal law’.³² This term, to the extent that it has a determinate meaning, is somewhat misleading since it is normally reserved for law imposed by supranational institutions and not treaty-based or customary international law.³³

1.3 SOURCES OF INTERNATIONAL CRIMINAL LAW

As international criminal law is a subset of international law, its sources are those of international law enumerated in Article 38(1)(a)–(d) of the Statute of the International Court of Justice; in other words, treaty law, customary law, general principles of law and, as a subsidiary means for the determination of the law, judicial decisions and the writings of the most qualified publicists.³⁴ As will be seen, all of these have been used by the ad hoc Tribunals. They are available for use by national courts insofar as the relevant national system concerned will allow. The ICC Statute contains its own set of sources for the ICC to apply, which are analogous, although by no means identical, to those in the ICJ Statute.³⁵

1.3.1 Treaties

Treaty-based sources of international criminal law, either directly or as an aid to interpretation, include the 1907 Hague Regulations, the 1949 Geneva Conventions (and their Additional Protocols) and the 1948 Genocide Convention. They form the basis for many of the crimes within the jurisdiction of the ad hoc Tribunals and the ICC. The Statute of the ICC, which sets out the definitions of crimes within the jurisdiction of the ICC, is, of course,

zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg (Freiburg im Breisgau, 1966) 34; Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law*, 3rd edn (Oxford, 2014) 31–3, 45–9.

²⁸ A slightly different criterion of an international offence, one with a ‘definition as a punishable offence in international (and usually conventional) law’, leads to the inclusion of a much wider category of crimes, including hijacking, injury to submarine cables and drugs offences (Yoram Dinstein, ‘International Criminal Law’ (1975) 5 *Israel Yearbook of Human Rights* 55, 67). Many of these would fall, under our taxonomy, to be considered under the rubric of transnational criminal law.

²⁹ See e.g. Broomhall, *International Justice and the International Criminal Court* (n. 17 above) 23–4; Jean Allain (ed.), *The Legal Understanding of Slavery* (Oxford, 2012); Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea* (Oxford, 2011).

³⁰ See e.g. Antonio Cassese et al., *Cassese’s International Criminal Law*, 3rd edn (Oxford, 2013) ch. 8.

³¹ *Ibid.* 132–5. For a counterpoint see Paola Gaeta, ‘International Criminalization of Prohibited Conduct’ in Antonio Cassese et al. (eds.), *The Oxford Companion to International Criminal Justice* (Oxford, 2009) 63, 68–9.

³² E.g. Roelof Haveman, Olga Kavran and Julian Nicholls (eds.), *Supranational Criminal Law: A System Sui Generis* (Antwerp, 2003).

³³ See e.g. Werle and Jeßberger, *Principles of International Criminal Law* (n. 27 above) 49–50.

³⁴ See generally Dapo Akande, ‘Sources of International Criminal Law’ in Antonio Cassese et al. (eds.), *The Oxford Companion to International Criminal Justice* (Oxford, 2009) 41.

³⁵ ICC Statute, Art. 21. See Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge, 2014); Robert Cryer, ‘Royalism and The King: Article 21 of the Rome Statute and the Politics of Sources’ (2009) 12 *New Criminal Law Review* 390.

itself a treaty. Security Council Resolutions 827(1993) and 955(1994), which set up the ICTY and International Criminal Tribunal for Rwanda (ICTR), respectively, were adopted by the Security Council pursuant to its powers under Chapter VII of the UN Charter, and thus find their binding force in Article 25 of the Charter. The source of their binding nature is therefore a treaty. The Statutes of the Tribunals have had an important effect on the substance of international criminal law both directly, as applied by the Tribunals, and indirectly as a source of inspiration for other international criminal law instruments.³⁶

It has been suggested that treaties might not suffice to directly create liability of individuals.³⁷ Such arguments are misplaced. As the Permanent Court of International Justice noted over ninety years ago, treaties can operate directly on individuals, if that is the intent of the drafters.³⁸ The International Committee of the Red Cross and Red Crescent (ICRC) study on customary humanitarian law reports that ‘the vast majority of practice does not limit the concept of war crimes to violations of customary international law’.³⁹

It is only those treaties or provisions of a treaty which are intended to apply directly to an individual that can give rise to criminal responsibility. The ‘suppression conventions’, for example, which require States to criminalize conduct such as drug trafficking, hijacking and terror bombing,⁴⁰ are not generally regarded as creating individual criminal responsibility of themselves; the conduct covered by those treaties will be incorporated in national law by whatever constitutional method is used by the State concerned.⁴¹ Further, if a court is to apply the terms of a treaty directly to an individual, it will be necessary to show that the prohibited conduct has taken place in the territory of a State Party to the treaty or is otherwise subject to the law of such a Party.⁴² The practice of the ICTY has been, with occasional deviations,⁴³ to accept that treaties may suffice to found criminal liability. This began with the *Tadić* decision of 1995 and the position was reasserted in the *Kordić and Čerkez* appeal.⁴⁴ In the *Galić* case, the ICTY Appeals Chamber noted that treaties suffice for criminal responsibility, although ‘in practice the International Tribunal always ascertains that the relevant provision is also declaratory of custom’.⁴⁵ This is to adopt a ‘belt and braces’ approach rather than to require a customary basis for war crimes.⁴⁶ The proposition that treaties may found international criminal liability is inherent in the ICTR Statute, which

³⁶ See Theodor Meron, ‘War Crimes in Yugoslavia and the Development of International Law’ (1994) 88 *AJIL* 78.

³⁷ Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford, 2005) 7–9.

³⁸ *Jurisdiction of the Courts in Danzig* Case 1928 PCIJ Series B. No. 15, 17. See Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge, 2011) 17–26. For a sceptical reading see Roland Portmann, *Legal Personality in International Law* (Cambridge, 2010) 68–73.

³⁹ See further Chapter 12. ⁴⁰ See Chapter 14.

⁴¹ The two concepts are not hermetically sealed though, see e.g. International Convention for the Protection of All Persons from Enforced Disappearance, 2006, GA Res. 61/177, Arts. 4–5.

⁴² This problem will no longer arise in regard to crimes derived from the four Geneva Conventions which now have universal State participation.

⁴³ *Galić*, ICTY TC I, 5 December 2003, Separate and Partially Dissenting Opinion of Judge Nieto-Navia, paras. 109–12; *Milutinović et al.*, ICTY AC, 21 May 2003, paras. 10ff. See further Héctor Olásolo, ‘A Note on the Principle of Legality in International Criminal Law’ (2007) 19 *Criminal Law Forum* 301.

⁴⁴ *Kordić and Čerkez*, ICTY AC, 17 December 2004, paras. 41–6, clarifying *Tadić*, ICTY AC, 2 October 1995, para. 143.

⁴⁵ *Galić*, ICTY AC, 30 January 2006, para. 85.

⁴⁶ Although at least two ICTY Appeals Chamber judges have taken the view that the ICTY only has jurisdiction over customary offences, Mohamed Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge’s Recollection* (Oxford, 2012) 61–70; *Galić*, ICTY AC, 30 November 2006, Partially Dissenting Opinion of Judge Schomburg, para. 21.

criminalizes violations of Additional Protocol II (not all of which was at the time considered customary),⁴⁷ and is the most likely basis for aspects of the ICC's jurisdiction.⁴⁸

1.3.2 Customary International Law

The ICTY has accepted that when its Statute does not regulate a matter, customary international law, and general principles, ought to be referred to.⁴⁹ Customary international law, that body of law which derives from the practice of States accompanied by *opinio juris* (the belief that what is done is required by law),⁵⁰ has the disadvantage of all unwritten law in that it may be difficult to ascertain its content. This is not always the case, however, when the customary law originates with a treaty or other written instrument, for example a General Assembly resolution, which is accepted as reflecting custom, or has been recognized by a court as such.⁵¹ Nevertheless the use of customary international law in international criminal law has sometimes been criticized on the basis that it may be too vague to found criminal liability⁵² or, even, that no law that is unwritten should suffice to found criminal liability. These claims will be discussed below at section 1.5.1 in relation to the principle of *nullum crimen sine lege*. Suffice it to say that this was not the position of the Nuremberg or Tokyo International Military Tribunals (IMTs), nor was it that of the ad hoc Tribunals.⁵³ Indeed the President of the ICTY, Theodor Meron, has argued that 'customary international law now comes up in almost every international court and tribunal . . . [but] . . . it is in the international criminal tribunals . . . that the jurisprudence on customary law has been most rich'.⁵⁴ There is little question that the ICTY in particular used customary law in an innovative fashion, to develop international criminal law in areas where its application was unclear or uncertain, and perhaps unforeseen.⁵⁵

⁴⁷ ICTR Statute, Art. 4; *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955, S/1995/134* (1994) para. 12.

⁴⁸ Marko Milanović, 'Is the Rome Statute Binding on Individuals (and Why We Should Care)' (2011) 9 *JICJ* 25; Marko Milanović, 'Aggression and Legality' (2012) 10 *JICJ* 165.

⁴⁹ *Kupreškić et al.*, ICTY TC II, 14 January 2000, para. 591. See generally, Noora Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (London, 2014).

⁵⁰ An alternative description of customary international law dispenses with the need for *opinio iuris*, relying on the constant and uniform practice of States: Maurice Mendelson, 'The Formation of Customary Law' (1998) 272 *Hague Recueil* 159.

⁵¹ E.g. para. 3(g) of the Definition on Aggression in GA Res. 3314(XXIX), 14 December 1974. See section 13.2.3 and Mendelson, 'The Formation of Customary Law' (n. 50 above) ch. 5.

⁵² Vladimir Djuro-Degan, 'On the Sources of International Criminal Law' (2005) 4 *Chinese Journal of International Law* 45, 67. See also Olásolo, 'A Note' (n. 43 above) 301.

⁵³ For comments on custom before the ICTY, see Mary Fan, 'Custom and General Principles and the Great Architect Cassese' (2012) 10 *JICJ* 1063; Robert Cryer, 'International Criminal Tribunals and the Sources of International Law: Antonio Cassese's Contribution to the Canon' (2012) 10 *JICJ* 1045.

⁵⁴ Theodor Meron, *The Making of International Criminal Justice: A View from the Bench* (Oxford, 2011) 29.

⁵⁵ See generally Shane Darcy and Joseph Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford, 2010); Beth van Schaack, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals' (2008) 97 *Georgetown Law Journal* 119; William Schabas, 'Customary Law or "Judge Made" Law: Judicial Creativity at the UN Criminal Tribunals' in Doria et al., *Legal Regime*, 77.

1.3.3 General Principles of Law and Subsidiary Means of Determining the Law

The ICTY resorted to general principles of law to assist it in its search for applicable rules of international law.⁵⁶ Indeed the Secretary-General's report that accompanied the creation of the ICTY expressly foresaw such a reliance, at least in the context of applicable defences.⁵⁷ Still, owing to the differences between international and national trials, the ICTY was wary of uncritical reliance on general principles taken from domestic legal systems and acontextual application of them to international trials.⁵⁸ That said, the ICTY and ICTR both resorted to national laws to assist them in determining the relevant international law through this source. According to the *Furundžija* decision, however, care must be taken when using such legislation, not to look simply to one of the major legal systems of the world, as 'international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world'.⁵⁹ In relation to criminal law, general principles of law are not ideal. After all they are, by their nature, general, and thus tend to be a last resort. Also, as the *Erdemović* case showed, at times there simply is no general principle to apply.⁶⁰ The International Criminal Court (ICC) is to apply, where the first two categories of law do not provide an answer:

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 [the] Statute and with international law and internationally recognized norms and standards.⁶¹

The ICC may also apply 'principles and rules of law as interpreted in its previous decisions'.⁶² The ICC is not, however, bound by its previous decisions; it has no equivalent to the common law principle of *stare decisis*. That said, the ICTY frequently had recourse to judicial decisions for determining issues of law,⁶³ and constructed a system of precedents for dealing with its own jurisprudence.⁶⁴ There was considerable reliance on each other's case law between the ad hoc Tribunals and the ICC has often relied upon their jurisprudence

⁵⁶ See Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (The Hague, 2008).

⁵⁷ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (3 May 1993) para. 58. See Shahabuddeen, *International Criminal Justice* (n. 46 above) 54–5.

⁵⁸ *Erdemović*, ICTY AC, 7 October 1997, Separate and Dissenting Opinion of Judge Cassese, para. 5.

⁵⁹ *Furundžija*, ICTY TC II, 10 December 1998, para. 178.

⁶⁰ *Erdemović*, ICTY AC, 7 October 1997, Joint Separate Opinion of Judges McDonald and Vohrah, paras. 56–72.

⁶¹ ICC Statute, Art. 21(1)(c). This and all other sources of law available to the ICC are qualified by Art. 21(3) which requires application and interpretation of the law to be consistent with internationally recognized human rights, and without adverse discrimination.

⁶² *Ibid.* Art. 21(2). William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd edn (Oxford, 2016) 511; Margaret M. de Guzman, 'Article 21' in Triffterer and Ambos, *Commentary*, 932.

⁶³ See Shane Darcy, *Judges, Law, and War: The Judicial Development of International Humanitarian Law* (Cambridge, 2014); Paolo Lobba and Triestino Mariniello (eds.), *Judicial Dialogue on Human Rights: The Practice of International Criminal Tribunals* (Leiden, 2017).

⁶⁴ *Aleksovski*, ICTY AC, 24 March 2000, paras. 89–115. See Robert Cryer, 'Neither Here nor There? The Status of International Criminal Jurisprudence in the International and UK Legal Orders' in Michael Bohlander and Kaiyan Kaikobad (eds.), *Law, Perspectives on Legal Order and Justice, Essays in Honour of Colin Warbrick* (Leiden, 2010) 155.