
Customary International Law in the 21st Century: Old Challenges and New Debates

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Abstract

This article will survey the new non-traditional scholarship which has emerged in international law to challenge the two long-established sources of customary norms, state practice and opinio juris. With the recent growth, in the international system, of self-contained international criminal tribunals, new challenges facing international law have emerged. Institutionally structured as self-contained legal regimes, international legal tribunals such as the ICTY, ICTR, and now the ICC have nevertheless contributed to a new paradigm within international law. The jurisprudence of these international criminal tribunals, on a wide range of international legal questions, has slowly begun to be elevated into norms of customary international law. Given this fact then, the debate over whether consistent state practice and opinio juris are the only building blocks of customary international law is over, because clearly, for better or for worse, they no longer are. The new question, the new debate, will be over what the implications of this shift in the traditional building blocks of customary international law are, not only on the international system as a whole, but also, surprisingly perhaps, on national (domestic nation state) legal systems as well. The domestic law angle is key, for in the past few years the jurisprudence of these international tribunals has, aside from finding its way into customary international law, also begun to seep into the domestic (mainly criminal) law of several countries.

1 Introduction

For better or for worse, the two long-established sources of customary international law have been profoundly challenged in the past few decades. These two elements, the

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consistent practice of states,¹ coupled with the determination (by the practising state) that such practice is being undertaken out of a sense of legal obligation (labelled *opinio juris*),² are no longer held in the high regard they once were. Indeed, since the 1970s, a wide range of newer non-traditional scholarship³ has emerged arguing against a strict adherence to state practice and *opinio juris* in determining customary international law and advocating instead a more relaxed interpretive approach.⁴ Within this vein, other scholars have gone further, arguing that widely ratified multilateral conventions or treaties which have established human rights prohibitions against genocide,⁵ torture,⁶ and slavery⁷ actually form confirmation of customary international law binding upon all states, not just the signatories.⁸

Pushing back against this new movement, more traditional-minded scholars have castigated its seeming attempt to create shortcuts to the generation of international norms.⁹ According to one of the more prominent authors of this push-back, Professor Prosper Weil of the University of Paris, the purpose of international law throughout the centuries has never been to better mankind, but rather has been to ensure a set of universally recognized and agreed upon rules which allow mankind to live in relative peace and order.¹⁰ Given this, the international legal system is always looking to ensure that its power and function are universally accepted and applicable, rather than hierarchical.¹¹ Such a system is, argues Weil, by necessity all that international law can ever hope to achieve whilst still maintaining universal acceptability. In Weil's view, by now seeking to create a pre-eminence or hierarchy of obligations based on their content rather than on how they are created (the process), the non-traditional scholarship and its adherents are exhibiting a complete lack of understanding for what international law is.¹²

¹ Y. Simbeye, *Immunity and International Criminal Law* (2004), at 37–38.

² P. Malanczuk (ed.), *Akehurst's Modern Introduction to International Law* (1997), at 44.

³ Throughout this article the term 'non-traditional scholarship' shall be employed to describe the turn towards reinterpreting the traditional sources of customary international law. Other terms which have been employed by other commentators include 'new customary international law', 'new custom', and 'modern custom'. These terms of course refer to the end result of the scholarship, whereas the term employed by this article refers to the process (scholarship) through which the end result came about.

⁴ See, e.g., Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *Recueil des Cours* (1999) 9, at 86.

⁵ See Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, 78 UNTS 277.

⁶ See International Covenant on Civil and Political Rights (ICCPR), 19 Dec. 1966, 999 UNTS 171, Art. 2; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 Dec. 1975, 1465 UNTS 85.

⁷ See ICCPR, *supra* note 6, Art. 8.

⁸ See, e.g., Sohn, 'The International Law of Human Rights: A Reply to Recent Criticisms', 9 *Hofstra L Rev* (1981) 347; Sohn, 'The New International Law: Protection of the Rights of Individuals rather than States', 32 *Am U L Rev* (1982) 1; D'Amato, 'The Concept of Human Rights in International Law', 82 *Columbia L Rev* (1982) 1110; Sohn, "'Generally Accepted" International Rules', 61 *Washington L Rev* (1986) 1073.

⁹ See, e.g., Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413.

¹⁰ *Ibid.*, at 418.

¹¹ *Ibid.*

¹² *Ibid.*, at 425–426.

With the new emergence of self-contained *ad hoc*¹³ and permanent¹⁴ international criminal tribunals this debate has become, by and large, irrelevant. Established by international treaties and institutionally designed as self-contained legal regimes, international criminal legal tribunals such as the ICTY, ICTR, and now the ICC have, nevertheless, contributed to a new paradigm within customary international law. The jurisprudence of these international criminal tribunals, on a wide range of international legal questions, has slowly begun to be elevated into norms of customary international law. Given this fact, then, the debate over whether consistent state practice and *opinio juris* are the only building blocks of customary international law is over, because clearly, for better or for worse, they no longer are. The new question, the new debate, will be over what the implications of this shift in the traditional building blocks of customary international law are, not only on the international system as a whole,¹⁵ but also, surprisingly perhaps, on national (domestic nation state) legal systems as well. The domestic law angle is key, for in the past few years, the jurisprudence of these international tribunals has, aside from finding its way into customary international law, also begun to seep into the domestic (mainly criminal) law of several countries.

Section 2 of this article will provide a brief introduction to international law and the role treaty and custom have traditionally played in its formation. Section 3 shall recapitulate the old debate over the traditional sources of customary international law, state practice and *opinio juris*, analysing the newer non-traditional scholarship, first emergent in the 1970s, which has successfully challenged these two touchstones. Section 4 of this article will chart how the jurisprudence of the ICTY and ICTR,¹⁶ on certain key questions of international law, has begun to be elevated and accepted as norms of customary international law (and how certain elements of this jurisprudence clash with long held international norms); which will then set the stage for section 5, which shall explore how this same jurisprudence has begun to seep into the national criminal legal systems of Belgium and Kosovo. Relying on new theories within sociology and international relations which describe how the relationship between global and domestic norms are an iterative process, with law making and implementation functioning in a recursive cycle between the two levels, section 5 shall describe in detail how this process has led to problematic results in Belgium and Kosovo, as the newly imported international tribunal jurisprudence has clashed with long held domestic criminal law norms

¹³ I.e., the International Criminal Tribunal for the former Yugoslavia or ICTY, and the International Criminal Tribunal for the Rwanda or ICTR.

¹⁴ I.e., the International Criminal Court or ICC.

¹⁵ Some have already begun, in a preliminary manner, to address this question by worrying how the international system will cope with a proliferation of international tribunals issuing possibly contradictory opinions: see Spelliscy, 'The Proliferation of International Tribunals: A Chink in the Armor', 40 *Columbia J Transnat'l L* (2001) 143.

¹⁶ This article's analysis of the jurisprudence of international tribunals and their adoption into customary international and domestic law will concern itself with the work of the *ad hoc* ICTY and ICTR, not the permanent ICC, as the ICC has yet to adjudicate on any of its pending cases (and hence has not built a corpus of case law).

in those two countries. This article will conclude with its own modest normative suggestions on the way forward for international law, given the new paradigm presented.

2 The Foundations of International Law (Custom and Treaty)

Before one can delve into any meaningful discussion of the old debate within legal circles of the traditional sources of customary international law and their continued primacy in the formation of international norms, a brief review of the foundations of international law is in order. International law traditionally has had two components – law deriving from custom (customary international law) and law deriving from international treaties or conventions (conventional international law). The make-up and sources of these two components of international law will be discussed in turn.

A Customary International Law

Customary international law, it is generally agreed, finds its source in the widespread consistent practice of states.¹⁷ International custom is seen as a source of international law because the thought is that if states act in a certain consistent manner, then such states may be acting in such a manner because they have a sense of legal obligation – dubbed *opinio juris*. If enough states act in such consistent manner, out of a sense of legal obligation, for a long enough period of time, a new rule of international law is created.¹⁸ The system can thus be thought of as circular, in that states are in effect creating a rule, through acting in conformity with such rule over a period of time, because they feel they are legally obligated to do so.¹⁹ Customary international law depends upon the consent of nation states, which can be either explicit or implicit.²⁰ Thus, if in theory a nation state does not wish to be bound by a new rule of customary international law, then it can, in theory, vocally object and announce that it does not view itself as bound.²¹ This objection must be consistently reiterated, lest it be lost.²² Two (or more) states could also then enter into an agreement or treaty, between one another, and in such treaty contract out of one or indeed a whole set of customary

¹⁷ T. Buergenthal and S.D. Murphy, *Public International Law* (3rd edn, 2002), at sect. 2–4.

¹⁸ Note that there can also exist regional customary law which is binding on a group of nation states in a particular region, but not upon the international system as a whole: see *Asylum (Columbia v. Peru)* [1950] ICJ Rep 266.

¹⁹ What of the situation, however, when one has an inconsistency between state practice and *opinio juris* (on the part of one or a group of states)? According to the International Court of Justice, in such situations state conduct which runs counter to the rule should be viewed as a violation of such rule, not as evidence that the state does not intend to recognize it: see *Military and Paramilitary Activities (Nicaragua v. US)* [1986] ICJ Rep 14, at 98.

²⁰ I.e., if a rule of customary international law is emerging and a nation state remains silent, then this can be seen as giving implicit consent that the nation state will be bound by the new customary rule: see *Restatement (Third) of the Foreign Relations Law of the United States* (1987), at sect. 102 comment d.

²¹ See *Fisheries Case (UK v. Norway)* [1951] ICJ Rep 116. But see also *supra* note 19.

²² See Arnett, 'Death at an Early Age: International Law Arguments Against the Death Penalty for Juveniles', 57 *U Cincinnati L Rev* (1988) 245, at 260 n. 113.

international rules. New nations, however, it is generally held, cannot choose between the various rules of customary international law²³ – they are bound by all of the accepted customary rules (at the point of independence).²⁴ It does not matter that, of course, such newly independent states were unable to object to rules of customary international law as they were being formed.

The above being said, however, it is important to note that there are certain rules of customary international law which are considered so vital that they cannot be contracted out of by individual states – such preemptory rules are dubbed *jus cogens* norms.²⁵ *Opinio juris* plays a key role in elevating a regular customary international law norm into a *jus cogens* norm, for only when the majority of states in the international system believe that such a norm cannot be persistently objected to, or contracted out of, does a regular customary norm achieve elevation to a *jus cogens* norm.²⁶ Running parallel to *jus cogens* norms are what are called obligations *erga omnes*. Obligations *erga omnes* are obligations considered so vital and important within the international system (usually in the form of *jus cogens* norms) that any state (whether directly affected or not) may sue another state in order to compel the obligation to be met.²⁷ In this way obligations *erga omnes* can be seen as a determinant in questions concerning jurisdiction and standing in international law.²⁸

B Conventional International Law

Conventional international law finds its source in ‘international conventions, whether general or particular, establishing rules expressly recognized by the contesting states’.²⁹ Bilateral treaties are seen as creating obligations specific to the two states which signed them. Usually, such conventions or treaties, if entered into between only two states, are of course binding on the two states in question, but are not generally a source of international law. Multilateral treaties, on the other hand, can transform into sources of customary international law, binding on all states in the international system, whether they are parties to the particular treaty or not, if a large enough portion of non-signatory states in the international system adheres to their provisions out of a sense of legal obligation, i.e., *opinio juris*.³⁰

²³ For the minority-held contra view see Virally, ‘The Sources of International Law’, in M. Sorensen (ed.), *Manual of Public International Law* (1968), at 116, 148.

²⁴ *Restatement*, *supra* note 20, at sect. 102 comment d.

²⁵ Vienna Convention on the Law of Treaties, 23 May 1969, 155 UNTS 331, Arts 53, 64, 71; D.J. Bederman, *International Law Frameworks* (2001), at 23.

²⁶ R. Higgins, *Problems and Processes: International Law and How We Use It* (1995), at 22. Other commentators, however, depart from this vision of *jus cogens* as a clear-cut concept: see, e.g., Parker and Neylon, ‘*Jus Cogens*: Compelling the Law of Human Rights’, 12 *Hastings Int’l & Comp L Rev* (1989) 411, at 414–416 (where the authors demonstrate the difficulty in determining the meaning of *jus cogens* through a discussion of the variety of definitions it has been given).

²⁷ *Barcelona Traction, Light & Power Co., Ltd. (New Application) (Belgium v. Spain)* [1970] ICJ Rep 4, at 33–34; Bederman, *supra* note 25, at 23.

²⁸ Simbeye, *supra* note 1, at 59–60.

²⁹ Statute of the International Court of Justice, 26 June 1945, 156 UNTS 77, Art. 38(1)(a).

³⁰ Buergethal and Murphy, *supra* note 17, at sect. 2–4.

3 The Old Debate: The Sources of Customary International Law

While state practice and *opinio juris* were, as has been seen, long held as the accepted sources of customary international law, the past few decades have seen a concerted movement in legal scholarship which has sought to redefine the sources of customary international law away from a blanket reliance on these two sources. At its most extreme, this scholarship argues that international treaties, especially those encompassing human rights obligations, actually generate international legal norms,³¹ because such conventions are inevitably not simply the codification of existing legal norms but rather the creation of new ones.³² Relying, at times, on findings from the International Court of Justice,³³ a framework has been presented by this scholarship which seeks to modify the role of prolonged state practice and *opinio juris* in the process of transforming conventional or treaty-based international law (binding only on the state signatories) into customary international law (binding on all).³⁴ This non-traditional scholarship presents a framework which insists that the signing of a convention or treaty by a wide group of countries is, in and of itself, evidence of the creation of new customary legal norms. Although this non-traditional scholarship has ultimately been successful in redefining the sources of customary international law, such a move has not been without its critics.

A Developments within the International Court of Justice

In the late 1960s and early 1970s the International Court of Justice (ICJ) was, in a set of novel, even revolutionary, opinions, setting up the doctrinal basis for a re-think of the traditional sources of customary international law: state practice and *opinio juris*.

In the *Barcelona Traction*³⁵ decision, the ICJ, in adjudicating on a claim by Belgium on behalf of certain of its nationals who were shareholders in Barcelona Traction Ltd. (a trading company incorporated in Canada) against alleged actions of the Spanish state which Belgium claimed were contrary to the principles of international law, greatly expanded the standing requirement under international law for states to claim violations. Normally, for a state to have standing to claim a violation of international law it must be directly affected by the violation at issue. However, as has been discussed, certain violations of customary international law are considered so vital that the system will allow any state to claim violation, and not simply the state directly

³¹ See, e.g., D'Amato, *supra* note 8, at 1129.

³² *Ibid.*, at 1137–1138.

³³ Sitting in The Hague, the ICJ is the principle judicial organ of the UN. All members of the UN are *ipso facto* members of the Court, and must therefore adhere to the Court's Statute. The Court consists of 15 judges, elected by absolute majorities in both the UN General Assembly and Security Council.

³⁴ See, e.g., *North Sea Continental Shelf*, (*W Germany v. Denmark*, *W Germany v. Netherlands*) [1969] ICJ Rep 3 (where the ICJ had held that 'widespread and representative' adoption of a conventional/treaty rule by non-signatory states, coupled with only the passage of a 'short period' of time, was all that was required to transform conventional international law into customary international law).

³⁵ *Barcelona Traction, Light & Power Co., Ltd. (New Application) (Belgium v. Spain)*, *supra* note 27.

affected – obligations *erga omnes*.³⁶ In *Barcelona Traction*, the Court held that the ‘basic rights of human persons’ created *erga omnes* obligations.³⁷ Thus, in the eyes of the Court, the protection of human rights did have a place in the international legal system.

In the *North Sea Continental Shelf*³⁸ decision, the ICJ rejected claims by both Denmark and the Netherlands that West Germany was bound by Article 6 of the 1958 Geneva Convention on the Continental Shelf³⁹ (and the principle of equidistance contained therein) in delineating the boundaries of its continental shelf *vis-à-vis* Denmark and Norway. West Germany was not a signatory to the Convention, and thereby not formally bound by its provisions, but Denmark and the Netherlands argued that the provisions of the Convention had transformed into customary international law (and were thereby binding on West Germany), and that West Germany itself had shown predilection to be bound by the rules contained in Article 6. The Court rejected this argument, and held that predilection was not enough; rather that there had to be some showing of *opinio juris* to demonstrate that the behaviour in question had transformed the conventional norm into a customary one.⁴⁰ Up to this point, the Court’s opinion had been fairly conservative and in line with traditional conceptions of international law. The revolutionary doctrine came in when the Court pronounced its view on (1) the amount of widespread participation required for a conventional rule of international law, binding only upon those states that have signed the convention at issue, to transfer into a customary rule of international law, binding on all; and (2) the amount of time required for this transformation to take hold. With regard to the first question, the Court stated that only a ‘widespread and representative participation in the convention might suffice of itself’ to transform the purely conventional rule into a customary one.⁴¹ With regard to the second question, the Court found that it could be that ‘the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule’.⁴² Thus, to summarize the Court’s position: while *opinio juris* would be required to transform a conventional norm into a customary one, this requirement would not be required of all the states in the international system, or even a majority; rather only ‘widespread and representative’ participation would be required; and only the passage of a ‘short period’ of time would suffice to seal the transformation (from conventional to customary international law). Thus, in the eyes of the Court a treaty provision adopted by a sufficiently representative sample of states could undergo a near instantaneous transformation into a norm of customary international law.⁴³

³⁶ Bederman, *supra* note 25, at 23.

³⁷ *Barcelona Traction*, *supra* note 27, at 32.

³⁸ *North Sea Continental Shelf*, *supra* note 34.

³⁹ Convention on the Continental Shelf, 29 Apr. 1958, 499 UNTS 311, Art. 6.

⁴⁰ *North Sea Continental Shelf*, *supra* note 34, at 41.

⁴¹ *Ibid.*, at 42.

⁴² *Ibid.*, at 43.

⁴³ See also Akehurst, ‘Custom as a Source of International Law’, 47 *British Yrbk Int’l L* (1977) 1, at 18–19, 53, where the author notes that one of the prime determinants of the length of the time period required to transform the treaty provision into a norm of customary international law was whether (a) there existed conflicting state practice regarding the norm; and (b) whether the new norm overturned existing rules.

B The Emergence of the Non-traditional Scholarship: Challenging the Sources of Customary International Law

The decades following the judgments of the ICJ in *Barcelona Traction* and *North Sea Continental Shelf* saw a push by a newer non-traditional legal scholarship advocating a revised understanding of the framework of international law. This non-traditional scholarship would seek to establish a sound legal basis for the incorporation of human rights norms within the body of customary international law, but in doing so would attack the primacy of state practice and *opinio juris* as the sources of customary international law.

1 Using *Barcelona Traction* and *North Sea Continental Shelf* as a Foundation

Certain strains of the non-traditional scholarship calling for the incorporation of human rights norms as generally accepted provisions of international law seized upon the doors put open by the ICJ in *Barcelona Traction* and *North Sea Continental Shelf*. The ICJ's finding in *Barcelona Traction* was used to justify the universality of human rights norms within the international system, while its judgment in *North Sea Continental Shelf* was used to justify a new understanding of the source of international law, one in which human rights norms by virtue of their inclusion in widely ratified international conventions were seamlessly transmuted into customary international law.

The argument developed by this strain of the non-traditional scholarship rests on the idea that widely ratified multilateral conventions which have set prohibitions against, for example, genocide,⁴⁴ torture,⁴⁵ and slavery⁴⁶ actually form confirmation of customary international law binding upon all states, not just the signatories.⁴⁷ International conventions, it is argued, actually generate international legal norms.⁴⁸ A logical conclusion would seemingly dictate that, for such a theory to work, at least some justification needs to be found towards an intent to universal applicability (of the treaty provision in question) in either the convention in question's preamble and/or its *travaux préparatoires*.⁴⁹ Interestingly however, this strain of the non-traditional scholarship takes the contra view. In its analysis, such material (convention preambles and/or *travaux préparatoires*) can never provide any real insight into what the treaty drafters intended, because any good negotiator would merely contend that what was being drafted was merely a 'restatement of the customary legal rule', rather than an intent towards building a new norm of international law;⁵⁰ the idea being then that countries would prefer the legal

⁴⁴ See Genocide Convention, *supra* note 5.

⁴⁵ See ICCPR, *supra* note 6, Art. 2.

⁴⁶ See *ibid.*, Art. 8.

⁴⁷ D'Amato, *supra* note 8, at 1129; Sohn (1981), *supra* note 8, at 352–353; Sohn (1982), *supra* note 8, at 12; Sohn (1986), *supra* note 8, at 1076. For an early (yet more thorough) description of this line of reasoning see generally A. D'Amato, *The Concept of Custom in International Law* (1971), at 103–166.

⁴⁸ D'Amato, *supra* note 8, at 1129; Sohn (1981), *supra* note 8, at 352–353; Sohn (1986), *supra* note 8, at 1076; D'Amato, *supra* note 47, at 104, 110, 164.

⁴⁹ The legislative history and preparatory materials of an international convention.

⁵⁰ D'Amato, *supra* note 8, at 1137–1138.

'fiction' of claiming to be simply codifying existing norms within negotiated conventions, rather than asserting that new norms of international law were being created.⁵¹

The ICJ's finding in *North Sea Continental Shelf*, stating that 'widespread and representative' adoption (of the conventional rule) by non-signatory states, coupled with the passage of only a 'short period' of time, was all that was required to transform conventional international law into customary international law, has been framed by some of these scholars in a way which envisages widely ratified international conventions seamlessly transforming into norms of customary international law.⁵² Not only international conventions, but resolutions of the United Nations (UN) General Assembly themselves, it is claimed, can then justifiably and legally be transformed into norms of customary international law.⁵³ The seemingly circular nature of the argument is combated through an appeal to historical fact; e.g., many generalizable provisions throughout history have in fact been transmuted into rules of customary international law.⁵⁴

2 Reinterpreting the Roles of State Practice and *Opinio Juris* Directly

While some strands of the non-traditional scholarship, as has been seen, use the jurisprudence of the ICJ in *Barcelona Traction* and *North Sea Continental Shelf* to forward the view that conventional international law can seamlessly transform into norms of customary international law, other strands take a different tack and focus instead on directly reinterpreting the roles of state practice and *opinio juris* in customary law formation.

Reviewing the role of state practice in customary norm formation, certain strands of the non-traditional scholarship have posited that, far from being a slow moving cautious process, the formation of customary international law through state practice and *opinio juris* is a dynamic and fast paced process – with the theoretical possibility of occurring nearly overnight.⁵⁵ The key stressed by this scholarship is that *opinio juris*

⁵¹ *Ibid.*

⁵² Sohn (1986), *supra* note 8, at 1077–1078.

⁵³ D'Amato, *supra* note 8, at 1128 n. 72; Sohn (1986), *supra* note 8, at 1074. Note that while it had never been disputed that the UN SC, under Arts 24(1) and 25 of the UN Charter (granting it the 'primary responsibility for the maintenance of international peace and security' and binding the other UN member states to carry out its directives), had a very real and concrete influence upon international law, it had never before been contended that the GA possessed this influence as well. This fact aside, some have taken the arguments forwarded by the non-traditional scholarship even further, claiming that the actions and indeed statements of non-governmental organizations can play a role in the formation of customary international law: see Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights', 31 *Virginia J Int'l L* (1991) 211, at 222–225.

⁵⁴ D'Amato, *supra* note 8, at 1133. That this is true is beyond reproach; one could however plausibly assert the counter-argument that this fact had as much to do with the role of *opinio juris* in the process as it did with states simply accepting generalizable treaty provisions as sources of customary (rather than conventional) international law.

⁵⁵ Cheng, 'The Future of General State Practice in a Divided World', in R. St J Macdonald and D.M. Johnston (eds), *The Structure and Process of International Law* (1983), at 513, 531–532.

alone, rather than coupled with consistent state practice, formulates the foundational source of customary international law.⁵⁶ State practice, if it has any role at all to play, is a secondary factor in customary international norm formation,⁵⁷ in that it can be thought of as composed of a general ‘communal’ acceptance (on the part of the community of states in the international system as a whole) rather than the expressed will of individual states.⁵⁸ Indeed, taking this view further, the premise is forwarded that it is well nigh impossible to determine whether individual states in the international system are specifically aware of their obligations (whatever such obligations may be) – for how can one determine the attitudes and beliefs of a state which is a political institution, not a sentient being?⁵⁹ Although not overtly cited in all cases, these arguments all owe an intellectual debt to an earlier wave of scholarship in international law which directly challenged the role of the state (as the primary actor) within the international system, and claimed that states were not entitled to ignore international norms within their own borders.⁶⁰

Taking the analysis even further, some scholars have even questioned the traditional formula for determining whether a rule of customary international law has

⁵⁶ Cheng, ‘United Nations Resolutions on Outer Space: “Instant” International Customary Law?’, 5 *Indian J Int’l L* (1965) 23; Cheng, *supra* note 55, at 532; ‘Remarks of Judge Jimenez de Arechaga’, in A. Cassese and J.H.H. Weiler (eds), *Change and Stability in International Law-Making* (1988), at 47, 48–50. Of course, a counter-argument could be made that the flaw in such a line of reasoning is that, without state practice, the true intent, interests, and commitment of the state to the rule in question are impossible to determine: see, e.g., Charney, ‘International Agreements and the Development of International Law’, 61 *Washington L Rev* (1986) 971, at 990–996.

⁵⁷ Indeed, the ICJ seemed, in part, to endorse this point of view when, in the *Nicaragua* case, *supra* note 19, at 98–107, it relied more heavily on UN resolutions and international treaties (in order to ascertain customary international rules on the use of force and principle of non-intervention) than on actual state practice.

⁵⁸ Pellet, ‘The Normative Dilemma: Will and Consent in International Law-making’, 12 *Australian Yrbk Int’l L* (1992) 22, at 37–46. There are, however, contrary views to this line of reasoning within the new scholarship: see, e.g., Chodosh, ‘An Interpretive Theory of International Law’, 28 *Vanderbilt J Transnat’l L* (1995) 973, at 1052–1056 (Chodosh proposes 4/5 quorum of states adopting a treaty provision before it can be elevated into a customary norm).

⁵⁹ D’Amato, *supra* note 47, at 82–85. This line of reasoning is however highly problematic. A sceptic to D’Amato’s line of argument could propose that there are numerous ways (e.g., diplomatic correspondence and notes, policy papers, public statements, etc.) to survey the attitudes and beliefs of a nation state. Indeed, if one were to accept D’Amato’s premise, then what would remain of *opinio juris* which is, after all, a determination of why a state acts in a way that it does. D’Amato would most probably reply to the last point of the critique, regarding *opinio juris*, with the retort that as he conceptualizes *opinio juris* as only encompassing overt physical acts of states (rather than claims or statements) *opinio juris* would therefore not be affected: see *ibid.*, at 88.

⁶⁰ See, e.g., Ermacora, ‘Human Rights and Domestic Jurisdiction’, 124 *Recueil des Cours* (1968) 375, at 436 (where the author argues that principles of non-intervention in international law do not apply in cases of human rights violations, as such violations do not fall within domestic jurisdiction and are rather an international concern); McDougal and Reisman, ‘Rhodesia and the United Nations: The Lawfulness of International Concern’, 62 *AJIL* (1969) 1, at 18 (where the authors argue that flagrant deprivations of basic human rights do not stop within the territory of the state within which they occur).

become elevated to a *jus cogens* norm.⁶¹ Moving away from the traditional method, which, as was discussed earlier,⁶² involves a determination of whether the majority of states in the international system believe that a regular customary norm cannot be persistently objected to or contracted out of, this scholarship has proposed that the prohibition of an internationally recognized crime⁶³ which (a) threatens the peace and security of mankind; and (b) shocks the conscience of humanity, attains elevation (i.e., its prohibition) as a *jus cogens* norm.⁶⁴ In a somewhat confused turn, this scholarship claims that while both elements are not necessarily required for a crime to elevate to a *jus cogens* norm, if they are in fact found (i.e., within the context of an international crime), then that crime has absolutely attained status as *jus cogens*.⁶⁵

C Responses and Critiques of the Non-traditional Scholarship

The non-traditional scholarship and its move towards reinterpreting the role of state practice and *opinio juris* in the formation of customary international law have provoked a series of push-backs by legal scholars who disagree heavily with its methods and conclusions. At their core, these push-backs argue that the reinterpretation of customary international law advocated by the non-traditional scholarship, one which, as has been seen, envisages the transformation of conventional international law into customary international law as a seamless process and minimizes the role of state practice as a key component in customary international law formation, poses a danger to the entire concept of customary international law.⁶⁶

The reinterpretation of customary international law advocated by the non-traditional scholarship is, according to those who oppose it, one which seeks to move the sources of customary international law (i.e., state practice and *opinio juris*) away from their 'practice-based' methodological orientation and instead employ methods which are completely normative in nature.⁶⁷ International treaties or resolutions of international bodies such as the UN should be seen as *possible* starting points in the

⁶¹ See Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', 59 *Law & Contemp Problems* (1996) 63, at 69.

⁶² See *supra*, sect 2A, for a discussion of the traditional method for determining whether a rule of customary international law has become elevated to a *jus cogens* norm.

⁶³ There are 3 categories of generally accepted international offences (derived from various international treaties and custom): (1) War Crimes and Grave Breaches of the Geneva Conventions; (2) Crimes Against Humanity; and (3) Genocide. See I. Bantekas and S. Nash, *International Criminal Law* (3rd edn, 2007).

⁶⁴ Bassiouni, *supra* note 61, at 69.

⁶⁵ *Ibid.*

⁶⁶ See, e.g., Simma and Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles', 12 *Australian Yrbk Int'l L* (1988–1989) 82, at 83. See also Jennings, 'The Identification of International Law', in B. Cheng (ed.), *International Law, Teaching and Practice* (1982), at 3, 5, where the author, on commenting on the non-traditional scholarship, claims that what they elevate to customary international law 'is not only not customary law: it does not even faintly resemble a customary law'.

⁶⁷ G.J.H. van Hoof, *Rethinking the Sources of International Law* (1983), at 107–108; Weil, *supra* note 9, at 425–426. The same Anthony D'Amato, whose work so integrally contributed to the non-traditional scholarship, has in later works criticized its seeming promotion of *opinio juris* over state practice: see D'Amato, 'Trashing Customary International Law', 81 *AJIL* (1987) 101.

development of custom, not norm-generating acts in and of themselves.⁶⁸ Many of the resolutions the UN General Assembly votes upon are aspirational in nature and are not intended to be embraced fully and unconditionally by those states voting for them.⁶⁹ Given this fact, the act of using state practice and *opinio juris* together as the yardsticks of custom formation gains all the more importance, for only then can aspirational or symbolic acts be separated from those intended to be law-making⁷⁰ – in the absence of state practice, these scholars claim, anything labelled as a customary norm of international law lacks legitimacy.⁷¹ Given this, although the traditional reliance on state practice and *opinio juris* in tandem may be far from perfect, these scholars see no other alternative which would preserve the consensual nature of international law.⁷²

4 The ICTY and ICTR as Formulators of Customary International Law

With the widescale acceptance that many of the human rights norms found in international treaties actually form a key component of customary international law, the old debate between the non-traditional scholarship and its critics can safely be said to be over. The balance of methods advocated by the non-traditional scholarship in its reinterpretation of the sources of international law has been adopted within the field. No better evidence of this fact can be seen than the elevation of the jurisprudence of international criminal legal tribunals such as the ICTY and ICTR⁷³ into norms of customary international law. While the majority of ICTY and ICTR jurisprudence follows generally accepted international law, certain case law does not, and in fact conflicts with long-held international norms. It is through an analysis of this case law that one can see the beginnings of the new debate in the field – the new debate being, in part, the implications of the shift in the traditional building blocks of customary international law and the role of international tribunals in the process. This case law centres upon

⁶⁸ Simma and Alston, *supra* note 66, at 89–90.

⁶⁹ Franck, 'Appraisals of the ICJ's Decision: *Nicaragua v. United States (Merits)*', 81 AJIL (1987) 116, at 119.

⁷⁰ See, e.g., Weisburd, 'American Judges and International Law', 36 *Vanderbilt J Transnat'l L* (2003) 1475, at 1505–1506, where the author criticizes international law commentators who, when purporting to make claims about what constitutes international law, do not refer to state practice. One can compare this critique to the view forwarded by the International Law Institute in its *Restatement (Third) of the Foreign Relations Law of the United States*, when it claims the following: '[i]nternational human rights law governs relations between a state and its own inhabitants. Other states are only occasionally involved in monitoring such law through ordinary diplomatic practice. Therefore, the practice of states that is accepted as building customary international law of human rights includes some forms of conduct different from those that build customary international law generally': see *Restatement, supra* note 20, at Rptr nn 1, 2.

⁷¹ Weisburd, 'Customary International Law: The Problem of Treaties', 21 *Vanderbilt J Transnat'l L* (1988) 1. For a response to this line of reasoning see D'Amato, 'Custom and Treaty: A Response to Professor Arthur A. Weisburd', 21 *Vanderbilt J Transnat'l L* (1988) 459.

⁷² Van Hoof, *supra* note 67, at 289–292; K. Wolfke, *Custom In Present International Law* (2nd edn, 1993), at 172–173.

⁷³ See *supra* note 16, on why the work of the ICC will not be analysed here.

the following three questions: (1) what the correct standard is in international law for determining whether an armed conflict is international (as opposed to internal) in nature; (2) whether the traditional official immunities found within international law for heads of state and members of government are still absolute; and (3) what the correct procedure for determining the mental element that attaches to the doctrine of command responsibility (a special category of ancillary offence in international law) is?

It should be noted, at the outset, that none of the forgoing discussion is designed to cast doubt on the legitimacy of either the ICTY or ICTR. Both the ICTY and ICTR were established by the UN's executive arm (the Security Council) through a binding Chapter VII resolution.⁷⁴ As members of the UN, the successor states of the former Yugoslavia, Rwanda, and their assorted neighbours were and are treaty bound to comply with the Security Council's demands. The Security Council is well within its legal rights to establish tribunals to judge the actions of its fellow UN members and establish rules and procedures for such tribunals to do so. The problem which arises however is that while neither the ICTY nor ICTR is tasked with 'making' international law,⁷⁵ but rather simply applying it,⁷⁶ it is inevitable (as legal institutions tasked with the implementation of, at times, ambiguous and general legal rules) that their jurisprudence will, at times, fundamentally reshape the law that they are being asked to apply. This insight is nothing new, as legal sociologists have charted this phenomenon for quite some time. The work of Lauren Edelman, in particular, has demonstrated how new law often arises, not from lawmaking bodies, but rather from citations of practice where often general and ambiguous rules and statutes are interpreted and put into action.⁷⁷ Thus, that one should see the jurisprudence of the ICTY and ICTR,

⁷⁴ For the resolution establishing the ICTY see SC Res 827, UN SCOR, 48th Sess., 3217th mtg., UN Doc S/RES/827 (1993) (establishing the ICTY under the SC's Chap. VII powers, and determining that ethnic cleansing in the former Yugoslavia constituted a threat to international peace and security). For the resolution establishing the ICTR see SC Res 955, UN SCOR, 49th Sess., 3453rd mtg., UN Doc S/RES/955 (1994) (establishing the ICTR under the SC's Chap. VII powers, and determining that genocide and other human rights abuses in Rwanda constituted a threat to international peace and security).

⁷⁵ See 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808' (1993), UN Doc S/25704, at para. 29 (where the Secretary General states the following with regard to the establishment of the ICTY: 'the Security Council would not be creating or purporting to "legislate" the law. Rather, the International Tribunal would have the task of applying existing international humanitarian law').

⁷⁶ See Statute for the International Criminal Tribunal for the Former Yugoslavia, adopted at New York, 25 May 1993, SC Res 827, UN SCOR 48th Sess., 3217th mtg., UN Doc S/RES/827 (1993), Art. 1; Statute for the International Criminal Tribunal for Rwanda, adopted at New York, 8 Nov. 1994, SC Res 955, UN SCOR 49th Sess., 3453d mtg., UN Doc S/RES/955 (1994), Art. 1.

⁷⁷ See, e.g., Edelman, 'Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law', 97 *American J. Sociology* (1992) 1531; Edelman, 'Legality and the Endogeneity of Law', in R.A. Kagan, M. Krygier, and K. Winston (eds), *Legal And Community: On the Intellectual Legacy of Philip Selznick* (2002); Edelman, 'Law at Work: The Endogenous Construction of Civil Rights', in L.B. Nielson and R.L. Nelson (eds), *Handbook of Employment Discrimination Research: Rights and Realities* (2005). It should be noted that while Edelman's work views 'lawmaking bodies' as encompassing both legislatures and courts (with 'sites of practice' often encompassing corporations); the argument being forwarded here, in this portion of the article, is that within the international legal system the ICTY and ICTR, as bodies called on to interpret and apply law which was sometimes general and ambiguous, are acting as 'sites of practice' for the purpose of Edelman's theory.

both legal institutions called on to particularize and apply sometimes amorphous and ambiguous international legal rules; at times clash with certain long held international norms is not by itself surprising. The phenomenon would also not be terribly troubling were the jurisprudence of the ICTY and ICTR clearly understood as having internal (within the legal regime constructed by the Security Council) applicability only and not establishing new norms of customary international law. As shall be seen, this, unfortunately, has not been the case, with commentators at times seizing on the jurisprudence of the ICTY and ICTR as evidence of the formation of new customary international law. When this happens with respect to newly articulated rules which, however understandably,⁷⁸ run counter to long-held customary international law norms, the consequences can be problematic.

A Standards for Determining the Nature of Armed Conflict: Effective Control or Overall Control?

In *Prosecutor v. Tadić*,⁷⁹ the appeals chamber of the ICTY was charged with determining whether the conflict that occurred in Bosnia-Herzegovina (with the break-up of the former Socialist Federal Republic of Yugoslavia and the descent of the country into war) was international or internal in nature under international law. This determination was at issue because the prosecutable crimes listed in Article 2 of the ICTY Statute (Grave Breaches of the Geneva Conventions) could be applied to a defendant only if the nature of the conflict (in which he or she stood accused of committing Grave Breaches) was international in nature.⁸⁰ Under international law, a conflict can be classified as international (versus internal) in nature only where there is ongoing conflict and violence between two states.⁸¹ The key question then is to determine whether the forces engaged against one another represent two or more states. Regarding the conflict in Bosnia-Herzegovina, the Tribunal had, prior to the *Tadić* appeals chamber judgment, ruled in the *Tadić* trial chamber judgment that the conflict was internal in nature – this ruling resting on the determination that the Bosnian Serb Army (VRS)⁸² fighting in Bosnia-Herzegovina was not an agent of Federal Republic of Yugoslavia (FRY)⁸³ in any legal sense.⁸⁴

The question before the appeals chamber of the Tribunal in *Tadić* was simple then: was the Bosnian Serb Army an agent of the Federal Republic of Yugoslavia? Relying on an established and accepted norm of international law, the *Tadić* trial chamber judgment had, in deciding the question in the negative, relied on the ICJ's finding in

⁷⁸ See *supra* note 77.

⁷⁹ *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment (15 July 1999).

⁸⁰ See *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras 79–84 (2 Oct. 1995).

⁸¹ Bantekas and Nash, *supra* note 63, at sect. 5.2.

⁸² The Armed Forces of the self-declared Bosnian Serb Republic (*Republika Srpska*).

⁸³ Which was composed of the republics of Serbia and Montenegro (under the old Socialist Federal Republic of Yugoslavia), which had decided to remain in the Yugoslav union.

⁸⁴ See *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber Judgment (7 May 1997).

the *Nicaragua*⁸⁵ case. In *Nicaragua*, the ICJ was faced with the question whether certain groups fighting the Nicaraguan government which were supported by the United States were in fact its agents. In answering this question, the Court, surveying the corpus of international law, promulgated a judicial test known as the *effective control standard*, which held that agency (between organized private groups and a state) could be established only if the state in question coordinated and supervised (as well as issued specific instructions to) the group.⁸⁶

Taking a wholly different route from the trial chamber, the appeals chamber in *Tadić* expressly refused to apply the *effective control standard*, and instead formulated its own rule to determine whether private groups fighting in a war were in fact the agents of a foreign state. The appeals chamber's test, known as the *overall control standard*, held that agency (between organized private groups and a state) could be established if the state in question coordinated the group's general military planning.⁸⁷ Thus, the stringent requirement of the *effective control standard* that specific instructions be issued (i.e. to the group on behalf of the state in question) was replaced with a looser one which required mere coordination of some sort. In justifying the fact that it had expressly ignored an established rule of international law (i.e., the ICJ's *effective control standard*), the *Tadić* appeals chamber justified its actions by claiming that the *effective control standard* ran counter to both judicial⁸⁸ and state practice.⁸⁹

While it is perfectly legitimate for the ICTY to create its own test for determining whether, in an armed conflict, agency exists between a private group and an internationally recognized state, the potential problem that can arise is when this jurisprudence is, rather than being accepted as what it is, the internal law of a self-contained legal regime, is instead accepted by commentators as evidence of a norm of international law. With regard to the ICTY's *overall control standard*, there is a wide

⁸⁵ *Nicaragua v. US*, *supra* note 19.

⁸⁶ *Ibid.*, at 62–65, 110–116.

⁸⁷ *Tadić*, Appeals Chamber Judgment, *supra* note 79, at para. 131.

⁸⁸ As examples of where the *effective control standard* fell foul of judicial practice the appeals chamber cited cases from the Mexico–US Claims Tribunal, the Iran–US Claims Tribunal, and the European Court of Human Rights. The following should be noted regarding the cases cited by the appeals chamber: (1) the work of the Mexico–US Claims Tribunal was completed decades before the ICJ's ruling in *Nicaragua*; (2) the Iran–US Claims Tribunal, as a private arbitral body designed to adjudicate monetary claims between the US and the Islamic Republic of Iran, stands on a hierarchical footing which is considerably lower than that of the ICJ; (3) the fact pattern in the European Court of Human Rights decision cited (i.e., App. No. 15318/89, *Loizidou v. Turkey (Merits)*, 1996-VI ECHR 2216) would actually meet the *effective control standard*: see Tyner, 'The Internationalization of War Crimes Prosecutions: Correcting the International Criminal Tribunal for the Former Yugoslavia's Folly in *Tadić*', 18 *Florida J Int'l L* (2006) 843, at 859 n.91.

⁸⁹ *Tadić*, Appeals Chamber Judgment, *supra* note 79, at paras 116–145. Not all the judges on the appeals panel agreed that expressly attacking the ICJ's *effective control standard* was a wise course of action: see *ibid.* (Separate Opinion of Judge Shahabuddeen), at paras 154–156.

avalanche of evidence to indicate that this is happening.⁹⁰ The non-traditional scholarship, with its emphasis on a potentially seamless transformation of conventional to customary international law and its de-emphasis on state practice and *opinio juris* would, as has been seen, have very little problem with this.⁹¹ Such an acceptance of this state of affairs, while posing no problems in instances where the international legal rules do not conflict, poses very real problems when conflict does arise. In a primitive, fairly non-hierarchical, international legal system, what is one to do in the cases of conflicting law?⁹²

B Immunities for Heads of State and Government Officials: Still Absolute?

Both the ICTY and ICTR Statutes expressly do not recognize the traditional immunity provided to heads of state and government officials.⁹³ These official immunities in international law can be divided into two different (yet inter-related) types. The first type, absolute immunity *ratione personae*, attaches to heads of state and certain diplomatic officials, and provides them with absolute criminal immunity for all actions committed whilst in office, both official and otherwise.⁹⁴ The second type, the more limited immunity *ratione materiae*, attaches to general state officials, and provides them with criminal immunity for all official acts committed whilst in office.⁹⁵

The immunity *ratione personae* which heads of state have traditionally enjoyed developed as an outgrowth of sovereign immunity, a doctrine of international law which barred domestic courts from exercising jurisdiction over foreign states and authorities.⁹⁶ While originally an absolute grant of immunity, sovereign immunity has shifted to a more limited grant.⁹⁷ Under this new restrictive approach, the acts of

⁹⁰ For evidence of this with regard to the ICTY's overall control standard see M. Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (2002), at 554; R. Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (2004), at 80–81; Sassoli and Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the *Tadić* Case', 839 *Int'l Rev Red Cross* (2000) 733, at 739; Jinks, 'State Responsibility for Sponsorship of Terrorist and Insurgent Groups: State Responsibility for the Acts of Private Armed Groups', 4 *Chicago J Int'l L* (2003) 83, at 88–89; M. Dixon, *Textbook on International Law* (4th edn, 2000), at 239; Stahn, 'International Law Under Fire: Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism', 27 *Fletcher Forum World Affairs* (2003) 35, at 47.

⁹¹ See *supra* sect. 3B.

⁹² Shane Spelliscy makes much the same point (in relation to the *Tadić* appeals chamber decision): see Spelliscy, *supra* note 15.

⁹³ See Statute for the International Criminal Tribunal for the Former Yugoslavia, *supra* note 76, Art. 7; Statute for the International Criminal Tribunal for Rwanda, *supra* note 76, Art. 6.

⁹⁴ Bantekas and Nash, *supra* note 63, at sect. 4.10.

⁹⁵ *Ibid.* Although note that heads of state can also enjoy immunity *ratione materiae*, in addition to immunity *ratione personae* – with *ratione personae* transforming to *ratione materiae* once the head of state has left office. See Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', 247 *Recueil des Cours* (1994) 8, at 56, 88.

⁹⁶ Dorsey, 'Reflections on the Foreign Sovereign Immunities Act After Twenty Years', 28 *J Maritime L & Commerce* (1997) 257, at 257.

⁹⁷ I. Brownlie, *Principles of Public International Law* (4th edn, 1990), at 326–327.

foreign sovereigns which are governmental in nature (*jure imperii*) are still granted an absolute immunity, but the acts of foreign sovereigns which are commercial in nature (*jure gestionis*) are not.⁹⁸ While originally immunity *ratione personae* was part of sovereign immunity (due to the outmoded idea that the sovereign was the representation of the state), at some point in time the two split into distinct legal doctrines.⁹⁹

Both immunity *rationae personae* and immunity *rationae materiae* are recognized as norms of international law.¹⁰⁰ The ICJ, in no uncertain terms, has confirmed the absolute bar to prosecution which immunity *ratione personae* confers upon the holder,¹⁰¹ while national courts have upheld immunity *ratione materiae* for official acts with narrow exceptions for violations of international crimes (e.g., such as torture), which have been held by some national courts as not constituting official acts.¹⁰²

The fact that the ICTY and ICTR Statutes expressly do not recognize the traditional immunity provided to heads of state and government officials is, in and of itself, not terribly problematic. Both the ICTY and ICTR, as creatures of the UN Security Council, are free to contract out of non-*jus cogens* norms of international law – this is exactly what they have done with regard to the immunities traditionally provided to heads of state and members of government. The potential problem that can arise is when this perfectly legitimate action is, rather than being accepted as what it is – the ability of a self contained legal regime to contract out of a non-*jus cogens* norm of international law – is instead accepted by commentators as evidence of a general norm of international law. In the years since the establishment of both the ICTY and ICTR, the general consensus amongst commentators has been that the international law with regard to the immunity heads of state and government officials enjoy is in flux,¹⁰³ with the ICTY and ICTR being cited, amongst other factors, as contributors to this flux.¹⁰⁴

⁹⁸ *Ibid.*, at 327.

⁹⁹ Mallory, 'Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings', 86 *Columbia L Rev* (1986) 169, at 170–171.

¹⁰⁰ Bantekas and Nash, *supra* note 63, at sect. 4.10.

¹⁰¹ *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium)* [2002] ICJ Rep 3, at 20–22.

¹⁰² See generally *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No. 3) [1999] 2 All ER 97 (where the Law Lords held that the coming into force of the Torture Convention (to which both the UK and Chile were signatories) and its introduction of universal jurisdiction for the offence swayed the balance away from viewing torture as an 'official act' shielded by immunity *rationae materiae* and towards instead a non-official act not covered by such immunity), but contrast App. No. 35763/97, *Al-Adsani v. UK*, 34 ECHR (2002) 11, at paras 55–66, where the ECtHR held that the prohibition against violations of fundamental norms of international law, including *jus cogens*, had to be interpreted in a way which did not violate other accepted norms of international law, such as state immunities.

¹⁰³ See, e.g., O'Neill, 'A New Customary Law of Head of State Immunity?: Hirohito and Pinochet', 38 *Stanford J Int'l L* (2002) 289, at 297, where the author claims that the customary law on head of state immunity has become 'undefined and vague'.

¹⁰⁴ See, e.g., Singerman, 'It's Still Good to be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity', 21 *Emory Int'l L Rev* (2007) 413, at 429–440, citing the ICTY and ICTR as two of the factors contributing to a possible shift in the international law regarding head of state immunity; O'Donnell, 'Certain Criminal Proceedings in France (Republic of Congo v. France) and Head of State Immunity: How Impenetrable Should the Immunity Veil Remain?', 26 *Boston U Int'l LJ* (2007) 375, at 386–388, where the author points to the establishment of the ICTY and ICTR, and their refusal to recognize head of state immunity, as contributing factors to the movement away from an absolute head of state immunity in international law.

C Command Responsibility: An Objective Mens Rea Standard?

The doctrine of command responsibility is a principle of liability found in international law which seeks to enshrine the duty that superiors supervise the activities of their subordinates through, assuming certain elements are met, holding superiors liable for the offences¹⁰⁵ committed by their subordinates.¹⁰⁶ Emerging out of the jurisprudence of the post-World War II international military tribunals at Nuremberg and Tokyo,¹⁰⁷ the doctrine was specifically incorporated into both the ICTY and ICTR Statutes.¹⁰⁸

The jurisprudence of the ICTY regarding the *mens rea*,¹⁰⁹ or mental element, required for a defendant to meet command responsibility is, to say the least, problematic,¹¹⁰ in that, as a relatively new and untested doctrine, the requisite elements required of command responsibility were undeveloped in international law (aside from in a few cases adjudicated on by the Nuremberg and Tokyo Tribunals);¹¹¹ it could be argued that the proper course of action for the ICTY to take would have been to attempt to fill these gaps or *lacunae*¹¹² with general principles of domestic law culled from the civil and common law legal traditions present in Europe. Unfortunately, the ICTY has failed to do this, and instead has articulated a highly problematic *mens rea* for command responsibility, one which clashes with the general principles of both the civil and common criminal law traditions. Before this argument can be probed further, however, a brief introduction to the general principles of *actus reus* and *mens rea* in the civil and common law traditions is in order.

¹⁰⁵ See *supra* note 63 for a list of recognized international offences.

¹⁰⁶ Bantekas and Nash, *supra* note 63, at sect. 2.8.1. Certain commentators have analogized command responsibility to the accomplice liability found in many domestic criminal law systems, in that accomplice liability holds an accomplice also liable for the crime committed by the perpetrator if the requisite intent is established: see Bantekas, 'The Contemporary Law of Superior Responsibility', 93 AJIL (1999) 573, at 575–577.

¹⁰⁷ See generally Vetter, 'Command Responsibility of Non-military Superiors in the International Criminal Court (ICC)', 25 *Yale J Int'l L* (2000) 89, where the author charts the history of the doctrine of command responsibility in the Nuremberg and Tokyo Tribunals; Bantekas and Nash, *supra* note 63, at sect. 2.8.3.

¹⁰⁸ See Statute for the International Criminal Tribunal for the Former Yugoslavia, *supra* note 76, Art. 7; Statute for the International Criminal Tribunal for Rwanda, *supra* note 76, Art. 6.

¹⁰⁹ Under both the Roman-inspired civil law and English-inspired common law, all crimes are composed of 2 basic elements: the physical element or guilty act (*actus reus*) and the mental element or guilty mind (*mens rea*). See *infra* note 113.

¹¹⁰ For a particularly well constructed early critique see Damaška, 'The Shadow Side of Command Responsibility', 49 *American J Comp L* (2001) 455.

¹¹¹ Bantekas and Nash, *supra* note 63, at sect. 2.8.3. Indeed, commentators have been split as to the *mens rea* finding of the most often-cited Tokyo Tribunal case dealing with the doctrine, that of General Yamashita: see Martinez, 'Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond', 5 *J Int'l Criminal Justice* (2007) 638, at 641–643.

¹¹² For a general discussion on the concept of *lacunae* in international law and the different theories of how they can be filled see Weil, "'The Court Cannot Conclude Definitively . . .'" *Non Liquet Revisited*, 36 *Columbia J Transnat'l L* (1997) 109.

1 Actus Reus and Mens Rea in the Civil and Common Law (Generally)

Under both the civil and common law, all crimes, at their base, require two elements: (1) the physical guilty act or *actus reus*; and (2) the mental guilty mind or *mens rea*.¹¹³ The criminal law insists on an act because such a requirement assists in differentiating between mere thoughts of criminal intent versus actual overt action which results in an offence.¹¹⁴ The requirement of an act then prevents the criminal law from extending into the realm of mere thoughts, however distasteful, which are never put into concrete action.¹¹⁵ *Actus reus* can consist of affirmative physical acts (*delicta commissiva*) or omissions (*delicta omissiva*) – this distinction is also sometimes referred to as positive versus negative acts.¹¹⁶ Affirmative acts, as the title suggests, consist of overt action,¹¹⁷ while omissions consist of failing to act either when either (a) one fails to prevent a consequence set in motion by an earlier affirmative or positive act (e.g., refusing to put one's car in reverse and thus move its tyre off the foot of a person on whose foot the tyre was earlier driven on to¹¹⁸);¹¹⁹ or (b) one has a duty of some type to act (based on an earlier affirmative or positive act) but fails to do so (e.g. falling asleep with a lighted cigarette, waking up to find it smouldering, but proceeding to go back to sleep and thus failing to take any action to put it out¹²⁰).¹²¹

The concept of *mens rea* emerges, in both the civil and common law traditions, from the Latin legal maxim that *actus non facit reum nisi mens sit rea*.¹²² The criminal law

¹¹³ See, e.g., G. Stefani and G. Levasseur, *Droit Pénal Général et Procédure Pénal* (1964), at 226 ff.; J. Pradel, *Manuel de Droit Pénal Général* (9th edn, 1994), at 436 ff.; Dupont and Fijnaut, 'Criminal Law (Belgium)', in R. Blanpain and M. Colucci (eds), *International Encyclopedia of Laws (Criminal Law)* (1993) (2008 supp.), at paras 109, 126 (2008); Stojanović, Perić, and Ignjatović, 'Criminal Law (Yugoslavia)', in *ibid.*, at paras 133–134, 150–152 (2008); R. Card, *Criminal Law* (15th edn, 2001), at sect. 3.1; D. Stuart, *Canadian Criminal Law* (4th edn, 2001), at 79–80, 153–156; W.R. LaFave, *Criminal Law* (3rd edn, 2000), at sect. 3.1.

¹¹⁴ Dupont and Fijnaut, *supra* note 113, at para. 111; Stuart, *supra* note 113, at 79–80; LaFave, *supra* note 113, at sect. 3.2(b).

¹¹⁵ Dupont and Fijnaut, *supra* note 113, at para. 111; Stuart, *supra* note 113, at 79–80; LaFave, *supra* note 113, at sect. 3.2(b).

¹¹⁶ Dupont and Fijnaut, *supra* note 113, at para. 109; Stojanović, Perić, and Ignjatović, *supra* note 113, at para. 137; Card, *supra* note 113, at sects 3.6, 3.7; Stuart, *supra* note 113, at 83–84, 89; LaFave, *supra* note 113, at sect. 3.2(a).

¹¹⁷ Dupont and Fijnaut, *supra* note 113, at para. 115; Stojanović, Perić, and Ignjatović, *supra* note 113, at para. 138; Card, *supra* note 113, at sect. 3.6; Stuart, *supra* note 113, at 83–84; LaFave, *supra* note 113, at sect. 3.2(a).

¹¹⁸ This was the fact pattern in the oft-cited *Fagan* case in the UK: see *Fagan v. Commissioner of Metropolitan Police* [1969] QB 439 (CA).

¹¹⁹ Card, *supra* note 113, at sect. 3.7 ff.; Stuart, *supra* note 113, at 89–90.

¹²⁰ This was the fact pattern in the well-known *Miller* case in the UK: see *R. v. Miller* [1983] AC 161 (HL).

¹²¹ Dupont and Fijnaut, *supra* note 113, at paras 116–117; Stojanović, Perić, and Ignjatović, *supra* note 113, at paras 139–140; Card, *supra* note 113, at sect. 3.7 ff.; Stuart, *supra* note 113, at 90; LaFave, *supra* note 113, at sect. 3.3.

¹²² Which translates as 'an act does not become guilty unless the mind is guilty'.

insists on *mens rea* because it helps ascertain personal fault in the commission of a crime.¹²³ The concept of *mens rea* specifically refers to a defendant's state of mind,¹²⁴ with specific formulations varying with the offence in question, although some general formulations can be grouped under the rubrics of intention, recklessness, and knowledge.¹²⁵ This being said, it would be a fallacy to conclude that, just because there are different formulations of the concept of a mental state (keyed to particular offences), there is not a unifying concept of *mens rea*.¹²⁶ In the Anglo-Canadian criminal law, the concept of *mens rea*, with its various aforementioned formulations, can be split into two different standards – the subjective standard ('whether the accused was actually aware of the risk'¹²⁷) and the objective standard ('whether the accused failed to measure up to the external standard of the reasonable person, irrespective of awareness'¹²⁸). Apart from a few exceptions, this subjective/objective distinction does not exist in either the civil law or the common law as practised in the United States, where the *mens rea* utilized is the subjective standard only.¹²⁹

¹²³ Dupont and Fijnaut, *supra* note 113, at paras 126–129; Stojanović, Perić, and Ignjatović, *supra* note 113, at para. 150; Card, *supra* note 113, at sect. 3.23; Stuart, *supra* note 113, at 154–155.

¹²⁴ Dupont and Fijnaut, *supra* note 113, at paras 126–129; Stojanović, Perić, and Ignjatović, *supra* note 113, at para. 150; Card, *supra* note 113, at sect. 3.23; Stuart, *supra* note 113, at 154–155; LaFave, *supra* note 113, at sect. 3.4.

¹²⁵ Card, *supra* note 113, at sect. 3.23; LaFave, *supra* note 113, at sect. 3.4(c). In the US, e.g., the Model Penal Code differentiates between 4 *mens rea* formulations: purpose, knowledge, recklessness, and negligence: see Model Penal Code, (1962), at sect. 2.02(2).

¹²⁶ See Mueller, 'On Common Law *Mens Rea*', 42 *Minnesota L Rev* (1957–1958) 1043, at 1055 ('[t]here has crept into our thinking the idea that there is no singular concept of mens rea but that, since every crime has a different mens rea requirement, one should talk of *mentes reae* rather than mens rea. This is a misconception and it is false to conclude, as some do, that there is no unifying mens rea concept. Just as all cars have different wheels, little cars little wheels and big cars big wheels, and we are justified in referring to them collectively under the unifying concept wheels, so all crimes have a different mens rea and yet the concept of mens rea must be regarded as a unifying concept of various possible frames of mind').

¹²⁷ Stuart, *supra* note 113, at 157–160.

¹²⁸ *Ibid.*

¹²⁹ There are however certain exceptions to this rather sweeping assertion. First, there is the general exception of certain strict liability crimes which do not require *mens rea* at all (e.g., statutory rape as defined in certain US jurisdictions). Secondly, there are certain (usually via statute) iterated lesser status offences which usually employ the aforementioned negligence formulation (discussed in *supra* note 125) within the mental element – examples include 'negligence in the context of unintended death and unintentional wounding' (Belgium), and 'negligent homicide' (in certain US jurisdictions). In Canada and England such lesser status or 'quasi-criminal' offences (employing a negligence formulation within the mental element) can be found as well – the 2 most prominent examples on the English statute books being 'involuntary manslaughter' and 'public nuisance'.

a The Subjective *Mens Rea* Standard

Subjective *mens rea* hinges on the state of mind of each defendant in each case, with all factors being taken into the analysis.¹³⁰ One oft-quoted, yet inaccurate, critique of the subjective standard is that it simply opens up the possibility of wide-scale acquittals to any defendant who claims that he or she was not, at the time of the crime, in possession of the requisite guilty mind.¹³¹ One of the better responses to this critique has been provided by the Australian High Court in *R. v. Vallance*:¹³²

A man's own intention is for him a subjective state, just as are his sensations of pleasure or of pain. But the state of another man's mind, or of his digestion, is an objective fact. When it has to be proved, it is to be proved in the same way as other objective facts are proved. A jury must consider the whole of the evidence relevant to it as a fact in issue. If an accused gives evidence of what his intentions were, the jury must weigh his testimony along with whatever inference as to his intentions can be drawn from his conduct or from other relevant facts. References to a 'subjective test' could lead to an idea that the evidence of an accused man as to his intent is more credible than his evidence of other matters. It is not: he may or may not be believed by the jury. Whatever he says, they may be able to conclude from the whole of the evidence that beyond doubt he had a guilty mind and a guilty purpose. But always the questions are what did he in fact know, foresee, expect, intend.¹³³

The take away point then is that, although subjective *mens rea* rests, as the name implies, on a subjective presumption (i.e., what the defendant knew), the methodology employed by triers of fact to ascertain the mental state is, necessarily, somewhat objective in nature.

b The Objective *Mens Rea* Standard

Objective *mens rea* hinges on, in part, a 'reasonable man' standard more familiar to those with knowledge of the law of torts than of criminology. When making a determination of *mens rea*, the objective standard asks the question what the reasonable man would have foreseen, rather than the mental state of the actual defendant at the moment of the offence.¹³⁴ The awareness of the defendant then is not the point of analysis – rather the question is what the defendant *should have known*.¹³⁵

¹³⁰ See Stuart, *supra* note 113, at 157–160 ('[w]hat is vital is that . . . [the] accused given his personality, situation and circumstances, actually intended, knew or foresaw the consequences and/or circumstances as the case may be. Whether he "could," "ought" or "should" have foreseen or whether a reasonable person would have foreseen is not the relevant criterion of liability').

¹³¹ *Ibid.*, at 158.

¹³² *R. v. Vallance*, 108 CLR (1961) 56. See also Stuart, *supra* note 113, at 158–159, where the same passage from *Vallance* is quoted by the author also to respond to the critique that the subjective *mens rea* standard simply opens the door to the wide-scale acquittal of defendants.

¹³³ *Vallance*, *supra* note 132, at 82.

¹³⁴ Stuart, *supra* note 113, at 157, 160–162, 247–250.

¹³⁵ *Ibid.*

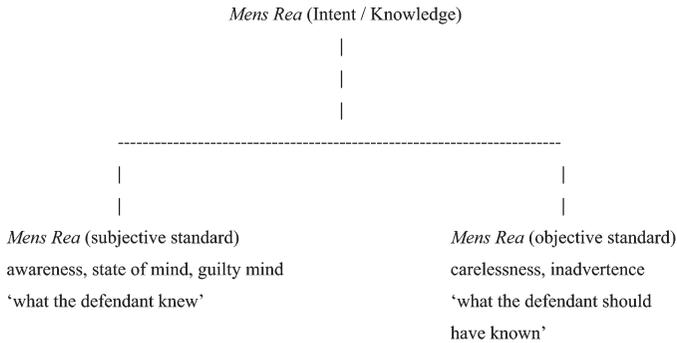


Figure 1.1 Subjective and objective *mens rea* in comparison¹³⁶

c Controversy and Critiques of the Objective *Mens Rea* Standard

The objective *mens rea* standard was long critiqued by criminologists in England and throughout the Commonwealth as a problematic.¹³⁷ The debate over the standard was re-opened in England (and, by extension, the Commonwealth) in 1960 when the English Law Lords in *Director of Public Prosecutions v. Smith*¹³⁸ held that the correct *mens rea* standard for the offence of murder was the objective approach. The facts of the case involved one Jim Smith, who had driven his car for 130 yards through traffic with the knowledge that police constable Leslie Meehan was clinging to it.¹³⁹ Eventually, Meehan fell off Smith's car and was struck and killed by oncoming traffic.¹⁴⁰ While Smith was convicted of capital murder for Meehan's death by the trial court, the Court of Criminal Appeal substituted a verdict of manslaughter.¹⁴¹ The prosecution appealed to the Law Lords who overruled the Court of Criminal Appeal and restored the original verdict of capital murder. The Law Lords, in explaining their decision, held that, irrespective of Smith's actual mental state, a reasonable man should and would have foreseen that his actions (i.e., driving his car for 130 yards through traffic, with the knowledge that someone was clinging to it) could cause the death of the victim.¹⁴² The decision of the House of Lords in *Smith* caused universal outrage, both within England itself and throughout the Commonwealth.¹⁴³ Noted scholars in

¹³⁶ The figure builds off the chart provided in Stuart, *supra* note 113, at 157.

¹³⁷ *Ibid.*, at 161. See, e.g., G. Williams, *The Mental Element In Crime* (1965).

¹³⁸ *Director of Public Prosecutions v. Smith* [1961] AC 290 (HL).

¹³⁹ *Ibid.*, at 292.

¹⁴⁰ *Ibid.*

¹⁴¹ See *supra* note 129.

¹⁴² *Smith*, *supra* note 138, at 327–336.

¹⁴³ Stuart, *supra* note 113, at 161.

England castigated the objective standard employed by the Law Lords in *Smith*,¹⁴⁴ and the Australian High Court, based on the decision in *Smith*, ended its practice of citing the House of Lords as controlling authority.¹⁴⁵ In New Zealand, the controversy over *Smith* prompted the legislature to repeal the criminal code provisions which had contained an objective standard for murder.¹⁴⁶ In England itself, the decision did not stand for very long, as Parliament, responding to the wide-scale criticism of the opinion, in 1967 abolished the objective standard for murder which had been promulgated by the Law Lords in *Smith*.¹⁴⁷

Today, the objective *mens rea* standard is no longer applied in either England or Canada for serious criminal offences.¹⁴⁸ In England, for a defendant to meet the requirement for indirect or 'oblique' intent, he or she must have had subjective foresight that it was a virtual certainty that his or her actions would result in death or bodily harm, and subjectively appreciate this to be the case.¹⁴⁹ In Canada, the Supreme Court has ruled that the requisite *mens rea* standard for criminal offences, with some exceptions, must be subjective.¹⁵⁰

¹⁴⁴ See, e.g., Williams, 'Constructive Malice Revisited', 23 MLR (1960) 605, at 624 ('[i]n *Smith*, the evidence made it obvious that the accused did not set out to kill the policeman. He was trying to escape, and for this purpose he tried to shake the policeman off. His obvious purpose explains and renders intelligible the whole of his conduct. It is not a case where you say: "He must have intended to kill the policeman, because otherwise why did he do it?" It is not even clear from such facts that he must have foreseen the probability of serious harm; and, in any case, foresight that a result is probable is not the same as intending it. What *Smith* did was to create a risk; but creating a risk of death should fall within the law of manslaughter, not murder. To use an irrebuttable presumption in a case like this creates a fiction of the most revolting kind. It is a fiction that might have been expected in the age before Bentham, but comes badly from judges of the twentieth century').

¹⁴⁵ *R. v. Parker*, 111 CLR (1963) 610, at 632 ('[h]itherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's Case* I think that we cannot adhere to that view or policy. There are propositions laid down in that judgment which I believe to be misconceived and wrong', per Dixon CJ).

¹⁴⁶ Stuart, *supra* note 113, at 161.

¹⁴⁷ *Ibid.*

¹⁴⁸ With regard to England note the exception of the lesser status or 'quasi criminal' offences of 'involuntary manslaughter' and 'public nuisance' discussed in *supra* note 129. It should also be noted that in England in offences in which 'recklessness' (i.e., as a consequence of the *actus reus* of the crime) is a required element an objective test, in certain situations, may be employed: see *Metropolitan Police Com'r v. Caldwell* [1982] AC 341 (HL). This approach has met with some criticism however: see *Elliot v. C* [1983] 2 All ER 1005; *Director of Public Prosecutions v. K* [1990] 1 All ER 331.

¹⁴⁹ *R. v. Nedrick* [1986] 3 All ER 1, at 4.

¹⁵⁰ *R. v. Sault Ste. Marie* [1978] 2 SCR 1299, 1305 ('[w]here the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with willful blindness toward them . . . Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law', per Dickson J). Although note that in the years since *Sault Ste. Marie* the rigorous standard employed by the Supreme Court of Canada has become somewhat relaxed, with an objective *mens rea* standard allowed for the aforementioned lesser status or 'quasi-criminal' offences discussed in *supra* note 129. See Stuart, *supra* note 113, at 162.

2 *The Objective Mens Rea Standard Employed by the ICTY for the Ancillary Offence of Command Responsibility*

Now that a sufficient background discussion on *actus reus* and *mens rea* generally, in both the civil and common law traditions, has been concluded, discussion can return to the problematic *mens rea* standard articulated by the ICTY for the ancillary offence of command responsibility.¹⁵¹

Article 7(3) of the ICTY Statute sets the parameters of the *mens rea* for the offence of command responsibility in the following manner:

The fact that any of the acts referred to in . . . the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.¹⁵²

The ICTY has interpreted the above Article as imposing command responsibility on a superior (for the actions of his or her subordinate) only if information is available to the superior that would make him or her aware that a subordinate is committing crimes.¹⁵³ The ‘information’ available need not directly point to the fact that crimes have been committed by a subordinate (a difficult standard to meet), but rather need only consist of the type of information that puts the superior on ‘further inquiry’ that a possibility of crimes having occurred exists.¹⁵⁴ If such information is available but the superior does not take reasonable measures to avail his or herself of it, then the superior is said to have had ‘reason to know’ crimes were being committed by subordinates, thereby attaching *mens rea*.¹⁵⁵ This last point is important, because it is

¹⁵¹ All of the recognized international offences (listed in *supra* note 63) may also be committed in their ancillary forms. In addition to command responsibility, these ancillary forms consist of: aiding and abetting, planning, instigating, and ordering. See Statute for the International Criminal Tribunal for the Former Yugoslavia, *supra* note 76, Art. 7 (1); Statute for the International Criminal Tribunal for Rwanda, *supra* note 76, Art. 6 (1).

¹⁵² Statute for the International Criminal Tribunal for the Former Yugoslavia, *supra* note 76, Art. 7(3). This is more or less identical to the parameters listed in Art. 86 of the 1977 Protocol I to the Geneva Conventions, in which the doctrine of command responsibility was codified (following the jurisprudence of the Nuremberg and Tokyo Tribunals); see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 12 Dec. 1977, 1124 UNTS 3, Art. 86.

¹⁵³ *Prosecutor v. Delalić et al. (Čelebići)*, Case No. IT-96-21-T, Trial Chamber Judgment, at para. 393 (16 Nov. 1998).

¹⁵⁴ *Ibid.* See also *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Chamber Judgment, paras 369–370 (31 Jan. 2005).

¹⁵⁵ *Prosecutor v. Delalić et al (Čelebići)*, Case No. IT-96-21-A, Appeals Chamber Judgment, para. 226 (20 Feb. 2001) (‘[t]he point here should not be that knowledge may be presumed if a person fails in his *duty* to obtain the relevant information of a crime, but that it may be presumed if he had the *means* to obtain the knowledge but deliberately refrained from doing so’). See also Bantekas and Nash, *supra* note 63, at sect. 2.8.3 (‘[t]he superior may in fact demonstrate that he was not at all aware of subordinate crimes, but if the prosecutor shows that the accused did not take the necessary and reasonable measures to appraise himself of available and specific information, his truthful ignorance does not constitute a valid defense’).

through this proviso that, if the superior does not take steps to obtain the necessary information, then *mens rea* will attach, irrespective of the actual intent or knowledge of the superior, that the ICTY has read an objective *mens rea* standard into the ancillary offence of command responsibility.¹⁵⁶ What matters here, according to the ICTY, is not what the defendant knew (with regard to potential crimes being committed by subordinates), but rather what the defendant, through not taking reasonable steps to avail him- or herself of necessary information, should have known. The reasoning here is nearly identical to that of the Law Lords in *Smith*¹⁵⁷ – the defendant is being held liable for what he or she, as a reasonable person, should have known, rather than the subjective standard of what exactly he or she did actually know at the time of the crime. It would be one thing if this standard were being used, as in the United States and England,¹⁵⁸ for specific lesser status or ‘quasi-criminal’ offences such as negligent homicide or public nuisance – but recall that the command responsibility doctrine allows for superiors to be held directly liable for the serious international offences committed by their subordinates.¹⁵⁹

The jurisprudence of the ICTY in determining the proper *mens rea* standard for the ancillary offence of command responsibility is troubling, for it reads into the offence a highly problematic objective *mens rea* standard which clashes with the general principles of both the civil criminal law tradition (within which such a standard does not even exist) and the common criminal law tradition (where the standard has been thoroughly discredited for serious criminal offences).¹⁶⁰ Rather than using general principles of domestic law to fill the *lacunae* or gaps found within the command responsibility doctrine,¹⁶¹ the ICTY instead articulated a discredited and problematic objective *mens rea* standard for the offence. While the ICTY, as a creature of the UN Security Council charged with applying international (rather than domestic) law,¹⁶² was perfectly within its legitimate rights to articulate any *mens rea* standard it pleased, it

¹⁵⁶ Contrast the position of the ICTY Appeals Chamber here in *Čelebići*, *supra* note 155, to the reasoning of the Supreme Court of Canada in *R. v. Finta* [1994] 1 SCR 701, 816 ([t]he requisite mental element of a war crime or a crime against humanity should be based on a subjective test. I reach this conclusion for a number of reasons. First, the crime itself must be considered in context. Such crimes are usually committed during a time of war. Wars are concerned with death and destruction. Sweet reason is often among the first victims. The manipulation of emotions, often by the dissemination of false information and propaganda, is part and parcel of the terrible tapestry of war. False information and slanted reporting is so predominant that it cannot be automatically assumed that persons in units . . . would really know that they were part of a plot to exterminate an entire race of people [i.e., in relation to the Holocaust during World War II], *per Cory J.*).

¹⁵⁷ See *supra* sect. 4C1c.

¹⁵⁸ See *supra* note 129.

¹⁵⁹ See *supra* note 63 for a categorization of recognized international offences.

¹⁶⁰ See *supra* sect. 4C1c.

¹⁶¹ The use of general principles of domestic law to fill *lacunae* in international criminal law is well accepted in ICTY jurisprudence: see, e.g., *Čelebići*, Trial Chamber Judgment, *supra* note 153, at paras 1165–1170, where the Trial Chamber, in constructing a judicial test for the defence of diminished capacity, cited and relied on the test constructed by the English courts in *R. v. Byrne* [1960] All ER 1, at 4.

¹⁶² See Statute for the International Criminal Tribunal for the Former Yugoslavia, *supra* note 76, Art.1.

nevertheless raised fundamental questions regarding its inherent procedural fairness by adopting an objective *mens rea* standard for command responsibility.¹⁶³

5 International Criminal Norms Refracted onto Domestic Legal Systems: Law as an Iterative Dual-level Process

As has been seen, some of the key jurisprudence of the ICTY and ICTR has had far-reaching effects on the international legal system. As they are legal institutions charged with applying norms of international law this is, especially in the wake of the non-traditional scholarship,¹⁶⁴ not terribly surprising or controversial. What is emerging, however, as an object of interest is the phenomenon of the jurisprudence of the ICTY and ICTR bleeding into the domestic legal systems of certain countries – specifically Belgium and Kosovo. What makes this phenomenon of even more interest is the fact that the international criminal tribunal norms that are bleeding into certain domestic legal systems run, quite often, counter to the long-held domestic criminal norms.

The fields of sociology and international relations have long been interested in the study of how norms, values, policies, and the like can be exchanged and transferred, not only between different domestic states; but also between the transnational governmental and quasi-governmental institutions within the international community as a whole and domestic states.¹⁶⁵ Legal sociologists Terence Halliday and Bruce Carruthers, in particular, have proposed a theory on how this process works in relation to laws, rules, and legal norms.¹⁶⁶ According to Halliday and Carruthers, law making and implementation, on both the international and domestic state levels, can act as an iterative and recursive process.¹⁶⁷ Exogenous international actors, such as quasi- and non-governmental institutions, develop legal norms which are then

¹⁶³ See generally Damaška, *supra* note 110.

¹⁶⁴ See *supra* sect. 3B.

¹⁶⁵ In international relations see M. Finnemore, *National Interests in International Society* (1996), where the author seeks to explore how states can be 'socialized' by the network of actors (both state and transnational) that made up the international system); J. Smith, C. Chatfield, and R. Pagnucco (eds), *Transnational Social Movements and Global Politics: Solidarity Beyond the State* (1997), where the authors study how various transnational advocacy groups are able to push their policy preferences onto domestic states through organizing constituencies, targeting international organizations, and mobilizing resources; S. Khagram, J.V. Riker, and K. Sikkink (eds), *Restructuring World Politics: Transnational Social Movements, Networks, and Norms* (2002), where the authors argue that the main ability of transnational actors to affect change in the international system is through either taking well established 'international norms' (i.e. shared standards of behaviour accepted by a majority of actors within the international system) and using them to 'persuade' outlying actors to conform their behaviour to them; or attempting to establish new 'international norms' where none have previously existed. Such 'persuasion' is accomplished by transnational actors through 'the use of information, persuasion, and moral pressure to contribute to change in international institutions and government'.

¹⁶⁶ See Halliday and Carruthers, 'The Recursivity of Law: Global Norm Making and National Law Making in the Globalization of Corporate Insolvency Regimes', 112 *American J Sociology* (2007) 1135.

¹⁶⁷ *Ibid.*, at 1135–1138.

refracted into domestic states through exogenous processes such as economic coercion, persuasion through international institutions, and universal norms which act as models (to domestic states) for what constitutes acceptable behaviour within the international system.¹⁶⁸ On the domestic level, formal law ('the law on the books') goes through cycles of change as it is interpreted and implemented ('law in practice'), possibly eventually refracting back into the international system.¹⁶⁹ While Carruthers and Halliday have developed their theory to explain recursive cycles of bankruptcy law filtering back and forth between the international system and nation states, their theory can just as easily explain the current phenomenon regarding ICTY and ICTR jurisprudence filtering into the criminal legal systems of certain domestic states.

A Belgium: Head of State/Government Immunity

In 1993 the Kingdom of Belgium enacted a domestic statute, the *Loi du 16 Juin*,¹⁷⁰ which codified (in domestic Belgian law) the use and application of universal jurisdiction¹⁷¹ (for international crimes) in Belgian courts. The statute, which went through two major revisions in February 1999¹⁷² and April 2003,¹⁷³ granted Belgian courts jurisdiction over war crimes, crimes against humanity, and genocide, regardless of where in the world they took place.¹⁷⁴ In August 2003, facing intense international pressure, Belgium repealed the statute and instead incorporated limited provisions for universal jurisdiction into the country's Criminal Code (*Code Pénal Belge*) and the preliminary title of the Code of Criminal Procedure (*Titre préliminaire du Code de procédure pénale*).¹⁷⁵ Belgium's experiment with universal jurisdiction which, though drastically curtailed post August 2003, is still ongoing has been surveyed extensively elsewhere.¹⁷⁶ The purpose of this discussion is to detail how the ICTY's and ICTR's refusal to recognize the *rationae personae* and *rationae materiae* immunity traditionally

¹⁶⁸ *Ibid.*, at 1146–1148.

¹⁶⁹ *Ibid.*, at 1144, 1146–1147. See also *supra* note 77.

¹⁷⁰ *Loi du 16 juin 1993 relative à la repression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions* (Law of 16 June 1993) [1993] *Moniteur Belge* 17751.

¹⁷¹ Universal jurisdiction is a form of jurisdiction in international law which grants the courts of any state the ability to bring proceedings in respect of certain (internationally defined) crimes without regard to the location of the crime, the nationality of the offender, or the nationality of the victim. See Randall, 'Universal Jurisdiction Under International Law', 66 *Texas L Rev* (1988) 785; Bantekas and Nash, *supra* note 63, at sect. 4.6.

¹⁷² See *Loi relative à la repression des violations graves de droit international humanitaire* (Law of 10 February 1999) [1999] *Moniteur Belge* 9286.

¹⁷³ See *Loi modifiant la loi du 16 juin 1993 relative à la repression des violations graves de droit international humanitaire et l'article 144ter du Code judiciaire* (Law of 23 Apr. 2003) [2003] *Moniteur Belge* 24846.

¹⁷⁴ See *supra* note 63.

¹⁷⁵ See *Loi relative à la repression des violations graves de droit international humanitaire* (Law of 5 Aug. 2003) [2003] *Moniteur Belge* 40506.

¹⁷⁶ See, e.g., Reydams, 'Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law', 1 *J Int'l Criminal Justice* (2003) 679; Vandermeersch, 'Prosecuting International Crimes in Belgium', 3 *J Int'l Criminal Justice* (2005) 400; Baker, 'Universal Jurisdiction and the Case of Belgium: A Critical Assessment', 16 *ILSA J Int'l & Comp L* (2009) 1.

provided to heads of state and government officials, recognized in both international¹⁷⁷ and domestic Belgian law,¹⁷⁸ was refracted downward into the domestic Belgian legal system, and the consequences of that process.

The original iteration of Belgium's universal jurisdiction statute¹⁷⁹ did not contain any reference to either *rationae personae* or *rationae materiae* immunity. With the first major revision of the statute however, in February 1999, both *rationae personae* and *rationae materiae* immunity for heads of state and members of government were expressly not recognized.¹⁸⁰ The primary motivation behind the Belgian parliament's decision not to recognize official immunities in the February 1999 revision rested with the timing of the revision, 1998–1999, which coincided with the adoption of the Rome Statute of the International Criminal Court.¹⁸¹ The Belgian Minister of Justice at the time was specifically influenced by Article 27 of the Rome Statute, in which the International Criminal Court expressly refused to recognize *rationae personae* and *rationae materiae* immunity for heads of state and members of government¹⁸² – Article 27 of the Rome Statute being directly influenced by Articles 7 and 6 of the ICTY and ICTR Statutes respectively, which also, as was discussed earlier, refused to recognize official immunities for heads of state and members of government. Following Halliday's and Carruthers' theory, it would appear that Article 27 of the Rome Statute (which was directly influenced, as has been seen, by the similar Articles in the ICTY and ICTR Statutes respectively) acted as a universal norm or model which Belgium decided to follow. In this way, ICTY and ICTR norms expressly refusing to recognize the traditional official immunities found in international law found themselves refracted downwards into the Belgian domestic criminal justice system.

The track the Belgian government took in February 1999, i.e., revising the statute expressly to refuse to recognize official immunities for heads of state and members of government, was problematic in many respects. Not only were *rationae personae* and *rationae materiae* immunity recognized under international law, but Belgian law, prior to February 1999, expressly recognized the established international custom of granting immunity to foreign heads of state and government officials.¹⁸³ Belgian law also, it should be said, granted absolute *rationae personae* immunity to the Belgian King (i.e., the head of state) and *rationae materiae* immunity to members of the Belgian government.¹⁸⁴

With the repeal of the Belgian statute in August 2003 and the incorporation of limited provisions for universal jurisdiction into the country's Criminal Code (*Code Pénal Belge*) and preliminary title of the Code of Criminal Procedure (*Titre préliminaire du Code de procédure pénale*),¹⁸⁵ the Belgian government, under intense international

¹⁷⁷ See *supra* sect. 4B.

¹⁷⁸ See *infra* note 183.

¹⁷⁹ Law of 16 June 1993, *supra* note 170.

¹⁸⁰ Law of 10 Feb. 1999, *supra* note 172, Art. 5(3).

¹⁸¹ Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90.

¹⁸² See *Rapport de la Commission de la Justice du Sénat*, 1 Dec. 1998 (Doc. No. 1-749/3).

¹⁸³ Dupont and Fijnaut, *supra* note 113, at paras 102–104.

¹⁸⁴ *Ibid.*, at paras 100–101.

¹⁸⁵ See Law of 5 Aug. 2003, *supra* note 175.

pressure,¹⁸⁶ decided to recognize both *rationae personae* and *rationae materiae* immunity in its new universal jurisdiction scheme.¹⁸⁷ The 1999–2003 period had seen an intense process playing out within the domestic Belgian criminal legal system, as the Belgian courts were faced with the challenge of adjudicating on actions based on a statute which did not recognize official immunities for heads of state and members of governments, provisions which expressly conflicted with set norms of domestic Belgian law which did recognize such immunities. The results were a predictable mess.¹⁸⁸

B Kosovo: Command Responsibility and the Objective Mens Rea Standard

Between March and June of 1999 the North Atlantic Treaty Organization (NATO) launched a protracted air campaign against the Federal Republic of Yugoslavia in order to stop the ethnic cleansing and killing being perpetrated, in the country's province of Kosovo, against its ethnic Albanian majority. Since June of 1999 the province of Kosovo has been under an international supervisory regime, administered by the UN.¹⁸⁹ On 17 February 2008 Kosovo declared independence, but it is still, at the current time, under partial UN supervisory authority (the UN regime in place is known as the United Nations Mission in Kosovo or UNMIK). As part of the UN regime in place in Kosovo post-1999, UNMIK enacted regulations which allowed the regime to recruit foreign international (non-Kosovar) judges and prosecutors into the province's judiciary (which had been decimated by the conflict which had engulfed the province for the past decade).¹⁹⁰ Shortly after the establishment of the UNMIK regime, the new hybrid international–Kosovar judiciary began investigating war crimes committed in the province (under domestic law¹⁹¹) during the just concluded conflict. In early 2002 the first trial, *Prosecutor v. Latif Gashi et al. (Llapi)*¹⁹² commenced, with the verdict being issued in July 2003.

¹⁸⁶ See Bernstein, 'Belgium Rethinks Its Prosecutorial Zeal', *New York Times*, 1 Apr. 2003, at A8. The ensuing years post-1999 had seen a rash of criminal actions filed in Belgium against current and former heads of state and government officials from around the world, severely damaging Belgium's international relations with other countries: see Ratner, 'Belgium's War Crimes Statute: A Postmortem', 87 *AJIL* (2003) 888, at 890.

¹⁸⁷ Law of 5 Aug. 2003, *supra* note 175, Art. 13.

¹⁸⁸ See, e.g., Cour de Cassation, Arrêt No. P.02.1139.F, 12 Feb. 2003, where the Court of Cassation, Belgium's highest criminal court, expressly held that members of foreign national governments could not be prosecuted under the statute while still in office, but instead could be prosecuted only once they had left office. The Court of Cassation based its decision on the understanding that customary international law had afforded members of national governments immunity for official acts and thus a shield from prosecution whilst in office (immunity *rationae materiae*).

¹⁸⁹ See SC Res 1244, UN SCOR, 54th Sess., 4011th mtg. P 10, UN Doc S/RES/1244 (1999).

¹⁹⁰ See UNMIK Reg. 2000/6 on the Appointment and Removal from Offices of International Judges and International Prosecutors (15 Feb. 2000).

¹⁹¹ It should be noted that, at this point in time, the domestic law applicable in the province was that of the former Yugoslavia. See UNMIK Reg. 1994/24 on the Law Applicable in Kosovo (12 Dec. 1999).

¹⁹² *Prosecutor v. Latif Gashi et al. (Llapi)*, C.C. No. 425/2001 (Dist. Ct. Priština, 16 July 2003), reprinted in T.L.H. McCormack and A. McDonald (eds), *Yearbook of International Humanitarian Law: Volume 6* (2003), at 594–601.

The *Llapi* case involved alleged torture, inhuman treatment, illegal detention, and murder committed by members of the Kosovo Liberation Army (UCK), an armed group which had been involved in fighting a guerrilla war against Yugoslav federal forces prior to the province's administration by UNMIK. The case is central to this discussion because, in its written verdict, the Priština District Court, relying on Article 30 of the Yugoslav Criminal Code (which provides for criminal liability for cases where a defendant omits to act when there was a duty to do so¹⁹³) read together with Article 142 of the same code (which makes the international offence of war crimes punishable under domestic Yugoslav law), held that: (a) torture, inhuman treatment, illegal detention, and murder constituted war crimes (under international law) and thus qualified as offences under Article 142 of the Yugoslav Criminal Code;¹⁹⁴ (b) the ancillary offence of command responsibility, as a doctrine of international law related to the laws of war, was 'imported' into Article 142 of the Yugoslav Criminal Code;¹⁹⁵ and (c) the objective *mens rea* standard for command responsibility utilized by the ICTY was 'imported' into Article 30 of the Yugoslav Criminal Code.¹⁹⁶ Following Halliday's and Carruthers' theory, it would appear that command responsibility and the objective *mens rea* standard read into the doctrine by the ICTY acted as a universal norm or model¹⁹⁷ which the hybrid international–Kosovar Priština District Court sought to emulate. In this way, ICTY norms found themselves refracted downwards into the Kosovar domestic criminal justice system.

The track the Priština District Court took in *Llapi* in reading objective *mens rea* into the Kosovar domestic criminal legal system was problematic in many respects. On a policy level, it is difficult to see how the interests of procedural justice and fairness can be served through importing a legal doctrine, objective *mens rea*, which has no basis in civil law and has been completely discredited (for application to serious criminal offences) in the common law, into the Kosovar domestic criminal legal system.¹⁹⁸ On a

¹⁹³ See *supra* sect. 4C1 for a discussion of *actus reus* through omissions or negative acts.

¹⁹⁴ *Latif Gashi (Llapi)*, *supra* note 192, at 4–5, 15–16.

¹⁹⁵ *Ibid.*, at 5.

¹⁹⁶ *Ibid.*, at 26.

¹⁹⁷ Given the unique hybrid international–Kosovar make-up of the Priština District Court, an argument could also be forwarded that the causal trigger prompting the refraction of the international norm (i.e., command responsibility and the objective *mens rea* standard) into the Kosovar criminal legal system was the ability of the international community directly to insert its own values and norms into the Kosovar system through the international judges and prosecutors.

¹⁹⁸ There is nothing inherently connecting the objective *mens rea* standard to the doctrine of command responsibility. The doctrine can just as easily be introduced into a legal system (national or otherwise) without the objective *mens rea* standard and instead with the less problematic subjective standard. See, e.g., Krivični Zakon Republike Srbije (Criminal Code of the Republic of Serbia), Art. 384 (where the *mens rea* for the newly introduced offence of command responsibility in the Serbian Criminal Code is the subjective standard: '[a] military commander or person who in practice is discharging such function, *knowing* [author's emphasis, note that there is no "having reason to know" or objective standard here] that forces under his command or control are preparing or have commenced committing offences').

doctrinal level, the reasoning used by *Llapi* to ‘import’ the objective *mens rea* standard into Article 30 of the Yugoslav Criminal Code was completely flawed and ran counter to accepted norms of Yugoslav criminal law. The ‘had reason to know’ or objective standard for intent is a component of *mens rea*, i.e., the required mental element for a crime. Article 30 of the Yugoslav Criminal Code deals with *actus reus* which is committed through an omission or negative act – it deals with physical movement, not mental intent.¹⁹⁹ This glaring fact aside, criminal offences of omission are rare in Yugoslav law and specifically listed in the Yugoslav Criminal Code.²⁰⁰

The *Llapi* decision provoked a great deal of confusion in Kosovo, confusion which was resolved only in 2005 when the Supreme Court of Kosovo stepped into the breach by over-turning the original verdict and subsequently remanding the case back to the Priština District Court for a retrial.²⁰¹

6 Conclusion

Given the new described realities within the international legal system in the 21st century, all who are concerned for the healthy development of international law in future decades must ask themselves whether the current state of affairs is one which requires drastic change. It is without question that the non-traditional scholarship in international law which emerged in the years following the *Barcelona Traction* and *North Sea Continental Shelf* decisions by the ICJ has directly contributed to the expansion of human rights norms within the *corpus* of international law. The many positive developments of this incorporation are also beyond dispute – increasingly international crimes and the people who perpetrate them are no longer escaping justice. This positive development, however, has come at a high potential cost as the reinterpreting of the roles of state practice and *opinio juris* in customary law formation, coupled with the emergence of international criminal tribunals with seeming legal influence which far outstrips their mandates, has resulted in an environment where long-held legal norms find themselves under assault. As has been seen, the norms under assault do not consist just of international legal rules, but also of fundamental criminal legal protections, protections which have developed over the centuries in the civil and common law legal traditions. The influence of the self-contained international tribunals within customary international law raises troubling enough questions, but the refraction of some of their more problematic jurisprudence into domestic criminal legal systems is alarming. Ultimately solutions to this problem lie with an acceptance that, with the

¹⁹⁹ Stojanović, Perić, and Ignjatović, *supra* note 113, at para. 139.

²⁰⁰ *Ibid.*, at para 140.

²⁰¹ *Prosecutor v. Latif Gashi et al. (Llapi II)*, SCK, No. 139/2004 (Sup. Ct. Kosovo, 12 July 2005); see also *Prosecutor v. Andjelko Kolasinac*, SCK, No. 230/2003 (Sup. Ct. Kosovo, 9 Jan. 2004), at 28–36, reprinted in McCormack and McDonald, *supra* note 192, vii, 569–580, where the Supreme Court of Kosovo held that the doctrine of command responsibility and the objective *mens rea* standard it utilizes directly conflicted with domestic Yugoslav criminal law norms and could thus not be domestically applied.

present realities in international law ushered in with the non-traditional scholarship, the articulation of new international legal norms must be undertaken with even more care than was once the case. International jurists and commentators must realize that, with the degeneration of the twin pillars of state practice and *opinio juris*, contrary and problematic international norms are more likely to develop. The realization must also be made that the development of contrary and problematic international norms has, as has been seen, possible implications for domestic law.