

THE DIRECT AND INDIRECT APPROACHES TO PRECEDENT IN INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

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Daniel Terris, Cesare Romano and Leigh Swigart have observed that the role of precedent across international courts has not yet been thoroughly studied. Within the framework of Terris, Romano and Swigart's — admittedly tentative — 'theory of precedent', this article aims to analyse the use of precedent specifically across international criminal courts and tribunals, distinguishing between their direct and indirect approaches. With respect to their direct approaches, the article considers the relationship between the state of development of a court or tribunal's internal case law and its use of external judicial decisions and, in particular, the gradual shift in the locus of reference from external judicial decisions to internal case law. The use of external judicial decisions as additional support is also considered and, in this regard, the article underscores the dangers of excessive referencing. It further examines the risks of using external judicial decisions based on particular statutes to shed light on the interpretation of very different legal frameworks. With respect to their indirect approaches, the article analyses cases in which — for reasons of judicial economy — international criminal courts and tribunals have borrowed their reviews of customary international law or surveys of general principles of law from external judicial decisions and outlines some of the dangers associated with such use. The article concludes by considering that, although there are some areas of overlap, the use of external judicial decisions by international criminal courts and tribunals would not appear to fit easily within a coherent 'theory of precedent', before making the case for more detailed normative guidance in this area.

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I INTRODUCTION

Although ‘in the last 10 years, [the] literature on ... “transjudicial communication” has grown vast’,¹ this has mainly been confined to the study of the use of foreign judgments by domestic courts. The use of precedent by international courts and tribunals has not received the same degree of attention.² This has led Cesare Romano to note that ‘[t]he role of precedent across international courts is still a largely unmapped territory’.³ This article is specifically concerned with the use of precedent by international criminal courts and tribunals.

An important contribution in this regard is Daniel Terris, Romano and Leigh Swigart’s *The International Judge*, which is based on research conducted between 2004 and 2006 primarily through qualitative interviews with international judges from various courts and tribunals, including such institutions at the international level. They observe that ‘[t]he role of precedent across international courts has not yet been thoroughly studied, since it is only recently that the number of international rulings of most courts has become sizeable’.⁴ According to them, international judges pay attention not only to the jurisprudence of their own court but also to that of other courts. The authors aver that, although ‘it does not happen often that judges have a formal reason to consider one another’s rulings ... from time to time, courts seem to use rulings to engage in a sort of jurisprudential dialogue’.⁵

In their research, Terris, Romano and Swigart examine, inter alia, the emergence of some elements of a sort of ‘theory of precedent’, observing that no international judge seems to feel bound by the jurisprudence of another court. Moreover, the jurisprudence of other courts is taken into consideration only when one’s own court has no useful precedents. Terris, Romano and Swigart find that, ‘[a]lthough some judges might be more willing than [sic] others to cite, citing is generally done sparingly, selectively, and grudgingly’.⁶ In the context of this, admittedly tentative, ‘theory of precedent’, this article sets out to examine whether any patterns concerning the use of judicial decisions from other courts

¹ Tania Groppi and Marie-Claire Ponthoreau, ‘Introduction. The Methodology of the Research: How to Assess the Reality of Transjudicial Communication?’ in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart, 2013) 1, 1. See also Robert Cryer, ‘Neither Here Nor There? The Status of International Criminal Jurisprudence in the International and UK Legal Orders’ in Kaiyan Homi Kaikobad and Michael Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice* (Martinus Nijhoff, 2009) 183; Christopher McCrudden, ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 *Oxford Journal of Legal Studies* 499.

² A few notable exceptions in this regard are Nathan Miller’s examination of the jurisprudence of nine international judicial bodies and Cesare Romano’s work on international jurisprudential dialogue: see Nathan Miller, ‘An International Jurisprudence? The Operation of “Precedent” across International Tribunals’ (2002) 15 *Leiden Journal of International Law* 483; Cesare P R Romano, ‘Deciphering the Grammar of the International Jurisprudential Dialogue’ (2009) 41 *New York University Journal of International Law and Politics* 755.

³ Romano, ‘Deciphering the Grammar’, above n 2, 759–60.

⁴ Daniel Terris, Cesare P R Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World’s Cases* (Oxford University Press, 2007) 120.

⁵ Ibid 119.

⁶ Ibid 120.

and tribunals ('external judicial decisions')⁷ may be seen to emerge from the practice of five international criminal courts and tribunals:

- (i) the International Criminal Tribunal for the Former Yugoslavia ('ICTY');
- (ii) the International Criminal Tribunal for Rwanda ('ICTR');
- (iii) the Special Court for Sierra Leone ('SCSL');
- (iv) the Extraordinary Chambers in the Courts of Cambodia ('ECCC');
- and
- (v) the International Criminal Court ('ICC').

A notable difference between Terris, Romano and Swigart's study and the present article is that the former was not confined to international criminal courts and tribunals. In their study, Terris, Romano and Swigart included interviews not only with serving judges from the ICTY, the ICTR, the SCSL and the ICC, but also with judges from other international and regional courts and tribunals, such as the International Court of Justice ('ICJ'), the European Court of Human Rights ('ECtHR'), the International Tribunal for the Law of the Sea and the World Trade Organization Appellate Body.⁸ However, given that their tentative 'theory of precedent' is not qualified or restricted to any specific type of court and is expressed in language which would appear to be all-encompassing, it is submitted that this theory is intended to apply also to the practice of international criminal courts and tribunals.

After offering a definition of the direct and indirect approaches and outlining the methodology used, this article discusses the legal basis for the use of external judicial decisions by international criminal courts and tribunals. Subsequently, in the context of the direct approach, it examines some of the purposes for which international criminal courts and tribunals have used the legal notions or findings of external judicial decisions. The article considers the relation between the state of development of a court or tribunal's internal case law and its use of external judicial decisions and, in particular, the gradual shift in the locus of reference from external judicial decisions to internal case law. The use of judicial decisions as additional support is also considered and, in this regard, the research underscores the dangers of excessive referencing. Finally, with respect to direct uses, the article discusses the risks of using external judicial decisions based on particular statutes to shed light on the interpretation of very different legal frameworks. The article proceeds by considering, in the context of the indirect approach, cases in which international criminal courts and tribunals have borrowed their reviews of customary international law or surveys of general principles of law from external judicial decisions in order to avoid having to 'reinvent the wheel'.⁹ The article, however, outlines some of the dangers which may be associated with such use. Finally, the article considers that although there are some areas of overlap, the use of external judicial decisions by international criminal courts and tribunals would not appear to fit easily within the framework

⁷ This article makes use of the (unimaginative) phrase 'external judicial decisions' instead of the more encumbered notion of 'precedent'. For a discussion of this point, see Miller, above n 2, 488.

⁸ Terris, Romano and Swigart, *The International Judge*, above n 4, 246–7.

⁹ Romano, 'Deciphering the Grammar', above n 2, 780.

of Terris, Romano and Swigart's 'theory of precedent'. The next Part briefly defines the distinction between direct and indirect uses of external judicial decisions.

II THE DIRECT V INDIRECT APPROACH

This article examines the approaches of international criminal courts and tribunals through the basic and general distinction of whether such approaches are direct or indirect. A referring court or tribunal may derive assistance *directly* from the legal notions or findings of a given external judicial decision, as these may shed light on the existence, state or proper interpretation of a particular rule of law. This approach may be described as direct, in that such legal notions or findings are directly relied on by the referring court or tribunal. However, where an external judicial decision is concerned with establishing a rule of customary international law on the basis of a review of state practice and *opinio juris* or identifying a general principle of law on the basis of a survey of national jurisdictions (the 'review or survey'), instead of borrowing directly the legal notions or findings from a given decision, a referring court or tribunal may borrow the external judicial decision's review or survey. This approach may be characterised as indirect because the external judicial decision is not primarily used for its legal notions or findings, but *indirectly* for the review or survey. Both of these approaches are discussed in the article.

III METHODOLOGY

Unlike Terris, Romano and Swigart's study — which was based on interviews with international judges — this article is based on a qualitative legal analysis of some of the final judgments of five international criminal courts and tribunals, which constitute the primary sources. Following a thorough reading of these judgments, any instances of the use of external judicial decisions were recorded. With respect to the SCSL, the ECCC and the ICC, all the final judgments were included. However with respect to the ad hoc Tribunals, only 15 final judgments for each were included in the research, based in part on their date of delivery and in part on the basis that they made at least some use of external judicial decisions.¹⁰ Therefore, while the findings of this article may not be considered

¹⁰ The article tends to cite examples from the International Criminal Tribunal for the Former Yugoslavia ('ICTY') more frequently than it does those from the International Criminal Tribunal for Rwanda ('ICTR'). While any imbalance in examples is not deliberate and is regretted, this may have to do with the fact that, chronologically, the ICTY started operations before the ICTR and, therefore, may have had occasion to address particular legal issues and to use external judicial decisions before its sister Tribunal in Arusha. Naturally, however, this has not always been the case — for instance, it is well-known that the ICTR in *Prosecutor v Akayesu (Judgment)* established a definition of the crime of rape at international law well before the ICTY: see *Prosecutor v Akayesu (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [596] ('*Akayesu (Trial)*'). Moreover, while some of the ICTY judgments examined contained extensive passages specifying their approaches to the use of external judicial decisions, none of the ICTR judgments examined contained similar passages: see, eg, *Prosecutor v Furundžija (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [194] ('*Furundžija (Trial)*'); *Prosecutor v Kupreškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [537]–[542] ('*Kupreškić (Trial)*').

representative, they may provide some indication of the patterns which may be distilled from the practice of the courts and tribunals examined. In so doing, the article has adopted a broadly descriptive approach. Moreover, the article has made no findings with respect to the frequency of use of specific approaches. In particular, it does not make use of the citational analysis technique, which is based on a count of instances of use of citations, even though the popularity of this technique is said to be growing, particularly with respect to the study of citations in the national sphere.¹¹ The next Part discusses the legal basis for the use of external judicial decisions.

IV THE LEGAL BASIS FOR THE USE OF EXTERNAL JUDICIAL DECISIONS

Although some scholarly works have considered the use of external judicial decisions by international courts primarily from the perspective of an ongoing judicial dialogue between courts,¹² such a characterisation may lead one to lose sight of the fact that in international criminal law — where the principle of legality finds particular application — international criminal courts and tribunals do not make use of external judicial decisions in order to participate in a ‘dialogue’. Instead, they are used as a means for the proper determination of rules of law in the particular circumstances of the case. It is therefore pertinent to examine the legal basis for such use.

Lassa Oppenheim, in 1908, anticipated that international courts and tribunals would ‘produce precedents which would possess the same degree of binding force for international law as precedents of municipal courts possess for municipal law’,¹³ specifically with respect to international criminal proceedings. In 1946, however, the Judge-Advocate in the *Trial of Franz Schonfeld* assessed that there are no binding precedents in international law,¹⁴ a position which was subsequently echoed by, inter alia, the ICTY Trial Chamber in 1997 in *Prosecutor v Tadić (Opinion and Judgment)* (*‘Tadić (Trial)’*).¹⁵ While this represents the prevailing view in international criminal law,¹⁶ the position has become slightly more nuanced since the early 1990s when the ad hoc Tribunals commenced their work and it became necessary to distinguish, in view of their appellate structure, between the use of their internal jurisprudence and the use of external judicial decisions. With respect to the former, the ICTY Appeals Chamber in *Prosecutor v Aleksovski (Judgment)* (*‘Aleksovski (Appeals)’*) held that the ratio decidendi of the judicial decisions of the Appeals Chamber was

¹¹ Richard A Posner, ‘The Theory and Practice of Citations Analysis, with Special Reference to Law and Economics’ (John M Olin Law & Economics Working Paper No 83, 2nd Series, University of Chicago Law School, 1999) 1, 2.

¹² Romano, ‘Deciphering the Grammar’, above n 2, 758.

¹³ L Oppenheim, ‘The Science of International Law: Its Task and Method’ (1908) 2 *American Journal of International Law* 313, 332.

¹⁴ *Trial of Franz Schonfeld* (British Military Court, Essen, Case No 66, 11–26 June 1946) in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (His Majesty’s Stationary Office, 1949) vol XI, 64, 72.

¹⁵ *Prosecutor v Tadić (Opinion and Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-I-T, 7 May 1997) [678] (*‘Tadić (Trial)’*).

¹⁶ See, eg, Patricia M Wald, ‘Judging War Crimes’ (2000) 1 *Chicago Journal of International Law* 189, 192.

binding on Trial Chambers.¹⁷ With respect to the latter, however — that is, the use of external judicial decisions (which constitute the primary focus of this article) — international criminal courts and tribunals have consistently held that such external judicial decisions have no binding force, but may have persuasive value.¹⁸ This position is, in part, necessitated by the fact that there is no kind of hierarchy or structured relationship between the various international criminal courts and tribunals.¹⁹ In *Tadić (Trial)*, the ICTY Trial Chamber stated that ‘the International Tribunal is not bound by past doctrine’;²⁰ and in *Prosecutor v Kupreškić (Judgment)* (*Kupreškić (Trial)*) it held that ‘[t]he Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes’.²¹ Within the SCSL, in *Prosecutor v Sesay (Judgment)* (*‘RUF Case’*), the Trial Chamber underscored that it was ‘not bound by decisions of the ICTY Appeals Chamber’.²² Further, the ECCC Supreme Court Chamber, while acknowledging that ‘the ECCC clearly benefits from the reasoning of the ad hoc Tribunals’,²³ emphasised that the judicial decisions of the ad hoc Tribunals ‘are *non-binding* and are not, in and of themselves, primary sources of international law for the ECCC’.²⁴ Elsewhere, the ECCC Supreme Court Chamber noted that the *Trial of the Major War Criminals before the International Military Tribunal* (*‘Nuremberg Judgment’*) ‘does not constitute binding precedent for the ECCC’.²⁵

¹⁷ *Aleksovski v Prosecutor (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/1-A, 24 March 2000) [113] (*‘Aleksovski (Appeals)’*). Moreover, the ICTY in *Delalić v Prosecutor (Judgment)* confirmed that this applied not only to final judgments but also to interlocutory decisions of the Appeals Chamber: see *Delalić v Prosecutor (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [122] (*‘Čelebići (Appeals)’*). Judge Shahabuddeen has characterised this approach as more a matter of internal discipline than ‘any exemption from the general principle that there is no doctrine of binding precedent in international law’: *Krajišnik v Prosecutor (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-00-39-A, 17 March 2009) [32] n 41 (Judge Shahabuddeen). For a more detailed consideration of this subject, see Claire Harris, ‘Precedent in the Practice of the ICTY’ in Richard May et al (eds), *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* (Kluwer Law International, 2001) 341, 344; Cryer, above n 1, 186.

¹⁸ See Karim A A Khan and Rodney Dixon, *Archbold International Criminal Courts: Practice, Procedure and Evidence* (Sweet and Maxwell, 3rd ed, 2009) 16.

¹⁹ R Y Jennings, ‘The Judiciary, International and National, and the Development of International Law’ (1996) 45 *International and Comparative Law Quarterly* 1, 5. See also Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge University Press, 1996) 67.

²⁰ *Tadić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [654].

²¹ *Kupreškić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [540].

²² *Prosecutor v Sesay (Judgment)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [295] (*‘RUF Case’*).

²³ *Kaing v Prosecutor (Appeal Judgment)* (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case No 001/18-07-2007/ECCC/SC, 3 February 2012) [97] (*‘Duch (Appeal)’*).

²⁴ *Ibid* (emphasis added).

²⁵ *Ibid* [110] (emphasis added). See also ‘International Military Tribunal (Nuremberg), Judgment and Sentences’ (1947) 41 *American Journal of International Law* 172 (*‘Nuremberg Judgment’*).

With respect to the ICC, the Trial Chamber noted in *Prosecutor v Lubanga (Judgment)* ('*Lubanga (Trial)*') that 'decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the [*Rome*] *Statute*'.²⁶ In this respect, the ICC Trial Chamber emphasised that the precedent of the ad hoc Tribunals

is in no sense binding on the Trial Chamber at this Court. Article 21 of the *Statute* requires the Chamber to apply first the *Statute*, *Elements of Crimes* and *Rules* of the ICC. Thereafter, if ICC legislation is not definitive on the issue, the Trial Chamber should apply, where appropriate, principles and rules of international law. ... [T]he Chamber does not consider the ... jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis.²⁷

In view, therefore, of the inapplicability of the doctrine of binding precedent in international criminal law, international criminal courts and tribunals have generally had recourse to external judicial decisions for their persuasive value. This is in accordance with the doctrine of sources of international law as reflected in art 38(1)(d) of the *Statute of the International Court of Justice* ('*ICJ Statute*'), which states that judicial decisions may be used 'as subsidiary means for the determination of rules of law'.²⁸ In addition to art 38(1)(d) of the *ICJ Statute*,²⁹ the legal regimes of some courts and tribunals have incorporated further guidance on the use of external judicial decisions. For instance, with respect to the ICC, art 21 of the *Rome Statute of the International Criminal Court* ('*Rome Statute*') makes provision for that Court's applicable law.³⁰ However, art 21(2) of the *Rome Statute*, which provides that the ICC 'may apply principles and rules of law as interpreted in its previous decisions', only appears to apply to the Court's own internal jurisprudence and not to external judicial decisions. This was confirmed by the ICC Trial Chamber in *Lubanga (Trial)*, which held that 'decisions of other international courts and tribunals are not part

²⁶ *Prosecutor v Lubanga (Judgment pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) [603] ('*Lubanga (Trial)*').

²⁷ *Prosecutor v Lubanga (Decision regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 30 November 2007) [44] (emphasis altered) ('*Lubanga (Decision Regarding Witnesses at Trial)*'). See also *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*'); *Report of the Preparatory Commission for the International Criminal Court: Addendum 1*, UN Doc PCNICC/2000/1/Add.1 (2 November 2000) ('*ICC Rules of Procedure and Evidence*'); *Report of the Preparatory Commission for the International Criminal Court: Addendum 2*, UN Doc PCNICC/2000/1/Add.2 (2 November 2000) ('*ICC Elements of Crimes*').

²⁸ Although, in principle, art 38(1) of the *Statute of the International Court of Justice* ('*ICJ Statute*') only professes to provide a direction to the International Court of Justice ('*ICJ*'), authorising it to consider various materials when deciding disputes submitted to it, this article has come to constitute the foundation for any credible discussion on the sources of international law and an inquiry into this subject inescapably has to begin with it: see Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law* (Oxford University Press, 4th ed, 2003) 19; Robert Y Jennings, 'What is International Law and How Do We Tell It When We See It?' (1981) *Schweizerisches Jahrbuch für Internationales Recht* 37, reprinted in Martti Koskeniemi (ed), *Sources of International Law* (Ashgate, 2000) 27, 28.

²⁹ *ICJ Statute* art 38(1)(d).

³⁰ *Rome Statute* art 21.

of the directly applicable law under Article 21 of the [Rome] *Statute*.³¹ Therefore, the use of external judicial decisions by the ICC would appear to remain governed by the doctrine of sources of international law.

With respect to the SCSL, art 20(3) of *Statute of the Special Court for Sierra Leone* ('*SCSL Statute*') states that in hearing appeals, '[t]he judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda'.³² Therefore, in hearing appeals and in affirming, reversing or revising the decision taken by a SCSL Trial Chambers, art 20(3) of the *SCSL Statute* requires the SCSL Appeals Chamber to 'be guided by' the decisions of the Appeals Chamber of the ad hoc Tribunals.³³ In this respect, although art 20(3) of the *SCSL Statute* has been drafted in mandatory language³⁴ — in other words, the Appeals Chamber *shall* be guided (rather than *may* be guided) by the decisions of the ad hoc Tribunals — in practice, this provision has been interpreted as simply a permissive provision, allowing the SCSL chambers to have recourse to relevant decisions of the ad hoc Tribunals at their discretion. In the *RUF Case*, the SCSL Trial Chamber underscored that art 20(3) of the *SCSL Statute* should not be construed to mean that the decisions of the ad hoc Tribunals are in any way binding on the SCSL, insisting that the Chamber was 'not bound by decisions of the ICTY Appeals Chamber'.³⁵ In this context, therefore, art 20(3) of the *SCSL Statute* would not appear to diverge in any significant way from the doctrine of sources with respect to the use of external judicial decisions.³⁶

The next Part examines some of the various direct uses of external judicial decisions.

V THE DIRECT APPROACH

This article has found that the judgments it has examined have used external judicial decisions directly in reliance on their legal notions or findings. For instance, André Nollkaemper states that the ICTY 'has made extensive use of national case law in interpreting and applying its *Statute* and *Rules of Procedure*

³¹ *Lubanga (Trial)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) [603], citing *Rome Statute* art 21.

³² See *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, signed 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002) annex ('*Statute of the Special Court for Sierra Leone*') art 20(3) ('*SCSL Statute*'): this article is reminiscent of the interpretive rule codified in s 39(1)(c) of the *Constitution of the Republic of South Africa Act 1996* which states, inter alia, that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum ... may consider foreign law', and s 11(2)(c) of the *Constitution of the Republic of Malawi Act 1994*, which states that '[i]n interpreting the provisions of this Constitution, a court of law shall ... where applicable, have regard to current norms of public international law and comparable foreign case law'. See also Groppi and Ponthoreau, 'Introduction', above n 1, 2.

³³ *SCSL Statute* art 20(3).

³⁴ *Ibid*.

³⁵ *RUF Case* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [295].

³⁶ *SCSL Statute* art 20(3).

and Evidence and in determining points of general international law'.³⁷ With respect to the ICC, Volker Nerlich observes that 'the decisions of the [ICC] Chambers often contain references to the jurisprudence of the two ad hoc tribunals of the United Nations'.³⁸

The purposes for which international criminal courts and tribunals have made direct use of the legal notions or findings of external judicial decisions have been various. Miller observes that such purposes 'are remarkable for admitting of no easy categorization'.³⁹ He notes further that '[t]ribunals cite to one another on a wide variety of issues, from procedural matters, to discrete propositions of law to statements of general principle'.⁴⁰ Making a similar point with respect to the ICTY, Nollkaemper notes that the Tribunal has used external judicial decisions from national courts for 'heterogeneous' purposes.⁴¹

The next section provides an overview of some of these purposes, including, inter alia, to verify the existence, state and interpretation of rules of law and to provide additional support for an interpretation.

A To Verify the Existence and/or State of Rules of International Law

One of the purposes for which international criminal courts and tribunals have used external judicial decisions has been to establish, inter alia, 'whether a customary international rule has formed, or ... whether a general principle of international law exists'.⁴² In seeking to verify the existence or state of a rule of international law, courts and tribunals have sometimes adopted a legal-historical approach, which typically seeks to trace the origins of the rule of law in question and to outline its development up to the time of the alleged offence(s). This is a legitimate method which is frequently used by domestic courts.⁴³ The following examples appear to illustrate the legal-historical approach.

For instance, in the context of war crimes, the ICTY Trial Chamber in *Prosecutor v Furundžija (Judgment)* ('*Furundžija (Trial)*') considered that the prohibition of torture 'has gradually crystallised from the [1863] *Lieber Code* and *The Hague Conventions* ... read in conjunction with the "Martens clause"

³⁷ André Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' in Gideon Boas and William A Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff, 2003) 277, 277. See also SC Res 827, UN SCOR, 3217th mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 6155th mtg, UN Doc S/RES/1877 (7 July 2009). With respect to the ICTY's extensive use of European Court of Human Rights ('ECtHR') jurisprudence, see Antonio Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals — Some Methodological Remarks' in Morten Bergsmo (ed), *Human Rights and Criminal Justice For the Downtrodden: Essays in Honour of Asbjørn Eide* (Martinus Nijhoff, 2003) 19, 31.

³⁸ Volker Nerlich, 'The Status of ICTY and ICTR Precedent in Proceedings before the ICC' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, 2009) 305, 305–6.

³⁹ Miller, above n 2, 496.

⁴⁰ Ibid.

⁴¹ Nollkaemper, 'Decisions of National Courts', above n 37, 277.

⁴² Cassese, above n 37, 20 (emphasis omitted).

⁴³ See *HSE v PJ Carroll & Company Ltd* (High Court of Ireland) [2012] IEHC 147 (29 March 2012) (Kearns P), citing *Crilly v T & J Farrington Ltd* (High Court of Ireland) [1999] IEHC 72, where it was noted that '[i]n innumerable cases the Courts, with a view to construing an Act, have considered the existing law and reviewed the history of legislation upon the subject'.

laid down in the *Preamble* to the same *Convention*'.⁴⁴ The Chamber proceeded to trace the development of this prohibition, inter alia, under art II(1)(c) of *Control Council Law No 10*⁴⁵ and the *Geneva Conventions* of 1949⁴⁶ and the *Protocols* of 1977.⁴⁷ The Chamber determined, not only that torture was proscribed under international law, but also that the prohibition had attained the state of *jus cogens*. In making this determination, the *Furundžija* Trial Chamber used, inter alia, several regional and national external judicial decisions.⁴⁸

Similarly, in seeking to verify the customary international law status of art 5 of the *ECCC Law* (on crimes against humanity), the Supreme Court Chamber in *Kaing v Prosecutor (Appeal Judgment)* noted that 'the antecedents to crimes against humanity date back to the writings of Hugo Grotius'.⁴⁹ The Chamber proceeded to trace the development of this category of crimes from the *St Petersburg Declaration* of 1868,⁵⁰ through the *Hague Conventions* of 1899

⁴⁴ *Furundžija (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [137]. See also *Lieber Code: Manual of Military Law* (Her Majesty's Stationary Office, 1863); *Convention for the Pacific Settlement of International Disputes*, opened for signature 18 October 1907, [1907] ATS 6 (entered into force 26 January 1910).

⁴⁵ 'Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity' (1946) 3 *Official Gazette of the Control Council for Germany* 50 ('Control Council Law No 10').

⁴⁶ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Prisoners in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, '*Geneva Conventions*').

⁴⁷ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem*, opened for signature 8 December 2005, 2404 UNTS 261 (entered into force 14 January 2007) (collectively '*Geneva Protocols*').

⁴⁸ *Furundžija (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [143]–[163]. In the context of crimes against humanity concerning the use of external judicial decisions to establish the existence and status of the prohibition of rape and serious sexual assault in armed conflict, see *Furundžija (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [168]; *Prosecutor v Brima (Judgment)* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [692] ('*AFRC (Trial)*').

⁴⁹ *Duch (Appeal)* (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case No 001/18-07-2007-ECCC/SC, 3 February 2012) [101] (citations omitted).

⁵⁰ *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight*, opened for signature 29 November 1868, [1901] ATS 125 (entered into force 11 December 1868) ('*St Petersburg Declaration*') (citations omitted).

and 1907,⁵¹ to the First and Second World Wars. In its analysis, the ECCC Supreme Court Chamber made use of, inter alia, the *Nuremberg Judgment* and jurisprudence of the Military Tribunals established under *Control Council Law No 10*, as well as national judicial decisions.⁵²

In *Tadić (Trial)*, with respect to art 7(1) of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* ('ICTY Statute') (on individual criminal responsibility), the Chamber noted that '[c]ertain types of conduct during armed conflict have been criminalised by the international community since at least the fifteenth century'.⁵³ The Chamber proceeded to trace the development of the principle of individual criminal responsibility through the First and Second World Wars with reference, inter alia, to the *Nuremberg Charter*⁵⁴ and *Judgment*,⁵⁵ as well as the jurisprudence of the Military Tribunals established under *Control Council Law No 10*, including the *Trial of Wagner*⁵⁶ and the *Trial of Martin Gottfried Weiss*.⁵⁷

As noted in the *Nuremberg Judgment*, rules of international law are 'not static, but by continual adaptation follow ... the needs of a changing world'.⁵⁸ In *Prosecutor v Kaing (Judgment)* ('*Duch (Trial)*'), reference was made to 'the evolving status of certain offences and forms of responsibility under international law'⁵⁹ and in *Prosecutor v Delalić (Judgment)* ('*Čelebići (Trial)*'), reference was made to 'the evolving nature of customary international law'.⁶⁰ The legal-historical approach therefore serves to place emphasis on the evolving dimension of rules of international law. However, where international criminal

⁵¹ *Convention for the Pacific Settlement of International Disputes*, opened for signature 18 October 1907, [1907] ATS 6 (entered into force 26 January 1910) ('*Hague Convention 1907*'). This *Convention* replaced the 1899 *Hague Convention for the Pacific Settlement of International Disputes*, opened for signature 29 July 1899, [1901] ATS 130 (entered into force 4 September 1900).

⁵² See *Duch (Appeal)* (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case No 001/18-07-2007-ECCC/SC, 3 February 2012) [103] n 202–3, citing *Nuremberg Judgment*, above n 25, 173–4, 253–5; *Control Council Law No 10*, above n 45.

⁵³ *Tadić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [663].

⁵⁴ *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 UNTS 279 (signed and entered into force 8 August 1945) annex ('*Charter of the International Military Tribunal at Nuremberg*') ('*Nuremberg Charter*').

⁵⁵ *Nuremberg Judgment*, above n 25.

⁵⁶ *Trial of Wagner* (French Permanent Military Tribunal, Strasbourg and the Court of Appeal, Case No 13, 23 April – 3 May and 24 July 1946) in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (His Majesty's Stationary Office, 1948) vol III, 23, 24, 40–2, 94–5.

⁵⁷ *Trial of Martin Gottfried Weiss* (General Military Government Court of the United States Zone, Dachau, Case No 60, 15 November – 13 December 1945) in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (His Majesty's Stationary Office, 1949) vol XI, cited in *Tadić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [668]–[669].

⁵⁸ This quote, taken from the *Nuremberg Judgment*, was specifically referring to the laws of war: see *Nuremberg Judgment*, above n 25, 219. See also *Prosecutor v Kunarac (Judgment)* (International Tribunal for the Former Yugoslavia, Appeals Chamber, Case Nos IT-96-23 and IT-96-23/1-A, 12 June 2002) [67] ('*Kunarac (Appeals)*').

⁵⁹ *Prosecutor v Kaing (Judgment)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No 001/18-07-2007/ECCC/TC, 26 July 2010) [34] ('*Duch (Trial)*').

⁶⁰ *Prosecutor v Delalić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [301] ('*Čelebići (Trial)*').

courts and tribunals include external judicial decisions in their legal-historical assessments, they should expressly ascertain that the decisions they rely on reflect the state of development of the law at the relevant time. This is because, as the following example illustrates, there may be a risk that external judicial decisions would not always reflect the proper state of development of the law. For instance, in *Duch (Trial)*, the ECCC Trial Chamber, relying on the posterior jurisprudence of the ad hoc Tribunals and the SCSL, concluded that rape already constituted a discrete crime against humanity in the period of 1975–79.⁶¹ However, this finding — which was subsequently overturned by the ECCC Supreme Court Chamber — did not reflect the proper state of development of the law on this issue, given that the ‘recognition of rape as a crime against humanity did not begin to take shape until the 1990s’⁶² and, in 1975–79, it was still in nascent form and did not exist as a discrete crime.⁶³ International criminal courts and tribunals should therefore always assess critically the legal notions or findings of any external judicial decisions they may rely on in the course of their legal-historical assessments.

B To Verify the Interpretation of Rules of International Law

External judicial decisions have also been used by international criminal courts and tribunals to shed light on the interpretation of rules of international law, whether substantive or procedural.⁶⁴ In this respect, in his declaration in *Prosecutor v Furundžija (Appeals Judgment)* (*‘Furundžija (Appeals)’*) Judge Shahabuddeen noted that in interpreting and applying a particular principle, an international criminal court or tribunal may ‘see value in consulting the experience of other judicial bodies with a view to enlightening itself as to how the principle is to be applied in the particular circumstances before it’.⁶⁵ In *Čelebići (Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić)*, the ICTY Trial Chamber underscored that ‘interpretations given by other judicial bodies ... are relevant to

⁶¹ *Duch (Trial)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No 001/18-07-2007/ECCC/TC, 26 July 2010) [361].

⁶² *Duch (Appeal)* (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case No 001/18-07-2007-ECCC/SC, 3 February 2012) [179].

⁶³ *Ibid* [174], [177]–[179].

⁶⁴ Miller observes that ‘[t]ribunals cite to one another on a wide variety of issues, from procedural matters, to discrete propositions of law to statements of general principle’: Miller, above n 2, 496. With respect to the distinction between substantive laws and procedural rules, moreover, Nollkaemper points out that ‘[w]hile textbooks commonly contain separate sections dealing with substantive and procedural law, respectively, the question of where the dividing line lies, and how they are connected, is usually neglected’: André Nollkaemper, ‘International Adjudication of Global Public Goods: The Intersection of Substance and Procedure’ (2012) 23 *European Journal of International Law* 769, 771 (citations omitted).

⁶⁵ *Furundžija v Prosecutor (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-17/1-A, 21 July 2000) [258] (Judge Shahabuddeen).

the interpretation of the International Tribunal's Rules'.⁶⁶ In *Prosecutor v Ntagerura (Judgment)* it was emphasised that external judicial decisions may 'reflect an interpretation as to the meaning to be ascribed to particular provisions'.⁶⁷

According to Ilias Bantekas, it is well-known that external judicial decisions may be used 'to elucidate the primary authorities'.⁶⁸ In this context, Antonio Cassese observes that external judicial decisions have often been used by the ad hoc Tribunals to determine 'whether the interpretation of an international rule adopted by another judge is convincing and, if so, applicable'.⁶⁹ He notes, for instance, that the ad hoc Tribunals 'have drawn upon Strasbourg case law in order to clarify concepts that are ambiguous or unclear in international law'.⁷⁰ Nollkaemper similarly observes that the ICTY has used external judicial decisions from national courts 'as elements in the construction of — respectively — treaties, customary law and general principles of (international) law'.⁷¹

While in most cases relevant external judicial decisions are valuable in assisting with the interpretation of a particular rule of law, they may serve as distractions in some instances, particularly where the precise value or relevance of an external judicial decision in a given case is not specified.⁷² For instance, in *Čelebići (Trial)*, the ICTY Trial Chamber had to interpret, in the context of art 2 of the *ICTY Statute*, the meaning of 'protected persons' under art 4 of the Fourth *Geneva Convention*.⁷³ Although the Trial Chamber's approach was primarily based on a teleological interpretation of the *Geneva Conventions*,⁷⁴ it also made reference to the 'effective link' doctrine that had gained currency in

⁶⁶ *Prosecutor v Delalić (Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 25 September 1996) [23]. Similarly, in *Stakić*, the Trial Chamber noted that 'when interpreting the relevant substantive criminal norms of the [ICTY] Statute, the Trial Chamber has used previous decisions of international tribunals': *Prosecutor v Stakić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [414] ('*Stakić (Trial)*').

⁶⁷ *Prosecutor v Ntagerura (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-46-A, 7 July 2006) [127].

⁶⁸ Ilias Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law' (2006) 6 *International Criminal Law Review* 121, 130.

⁶⁹ Cassese, above n 37, 20 (emphasis omitted).

⁷⁰ *Ibid* 31.

⁷¹ Nollkaemper, 'Decisions of National Courts', above n 37, 278.

⁷² In the national context, Cristina Fasone refers to the 'ornamental use' of foreign decisions by judges of the Supreme Court of Ireland. She refers in particular to the use of certain United States judicial decisions by Justice Duffy in *The People (Attorney-General) v Edge* (1943) 1 IR 115, noting that 'no reasons can be found for citing these US precedents in the present case which referred to a completely different subject matter': see Christine Fasone, 'The Supreme Court of Ireland and the Use of Foreign Precedents: The Value of Constitutional History' in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart, 2013) 97, 123.

⁷³ *Geneva Convention relative to the Protection of Civilian Prisoners in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 4.

⁷⁴ *Čelebići (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [265]–[266].

Nottebohm (Liechtenstein v Guatemala) ('*Nottebohm Case*') in the ICJ.⁷⁵ On appeal, the appellant submitted that the Trial Chamber had erred in not placing greater emphasis on this 'effective link' doctrine.⁷⁶ The *Čelebići* Appeals Chamber, while acknowledging that the Trial Chamber had referred to the *Nottebohm Case*'s 'effective link' test in the course of its legal reasoning, emphasised that the Trial Chamber's 'conclusion as to the nationality of the victims for the purposes of the *Geneva Conventions* did not depend on that test'.⁷⁷ The Appeals Chamber noted that

[t]he *Nottebohm [C]ase* was concerned with ascertaining the effects of the national link for the purposes of the exercise of diplomatic protection, whereas ... the Appeals Chamber [was] faced with the task of determining whether the victims could be considered as having the nationality of a foreign State involved in the conflict, for the purposes of their protection under humanitarian law.⁷⁸

As such, the Appeals Chamber found that the *Nottebohm Case*'s 'effective link' test was not relevant to the circumstances of this particular case and the reference thereto by the Trial Chamber was, at best, unnecessary. The next Section considers the relation between the state of development of a court or tribunal's internal case law and its use of external judicial decisions.

1 *A Gradual Shift in the Locus of Reference*

In the 'theory of precedent', it is stated that 'jurisprudence of other courts is taken into consideration only when one's own court has no useful precedents'.⁷⁹ In the context of domestic courts, it has been noted that

many scholars have emphasised the significance of so-called 'formative periods', and the propensity of recently-established courts not supported by an extensive line of precedents ... to look for inspiration to the case law of older and better established systems of rights protections.⁸⁰

This view would appear to be generally borne out also by an examination of the practice of international criminal courts and tribunals. In *Kupreškić (Trial)*, the ICTY Trial Chamber held that '[t]he Tribunal's need to draw upon [external] judicial decisions is only to be expected, due to the fact that both substantive and procedural criminal law is still at a rudimentary stage in international law',⁸¹ implying that as the law developed beyond such a rudimentary stage and the Tribunal developed a substantial body of internal case law, the ICTY's need to draw upon external judicial decisions would decrease. Cassese similarly envisaged that, as the internal case law of the ad hoc Tribunals would develop

⁷⁵ *Nottebohm Case (Liechtenstein v Guatemala) (Second Phase (Judgment))* [1955] ICJ Rep 4, 23. See also *Čelebići (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [257].

⁷⁶ *Čelebići (Appeals)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [100].

⁷⁷ Ibid [102], citing *Geneva Conventions*.

⁷⁸ Ibid [101].

⁷⁹ Terris, Romano and Swigart, *The International Judge*, above n 4, 120.

⁸⁰ Groppi and Ponthoreau, 'Introduction', above n 1, 9.

⁸¹ *Kupreškić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [537].

and enrich itself, the use of external judicial decisions would be displaced by references to the Tribunal's own internal case law.⁸²

The degree of reliance on external judicial decisions may, therefore, be related to the state of development of the internal case law of the referring court or tribunal in that, where a court or tribunal has accumulated a substantial body of jurisprudence, it may have less reason to use external judicial decisions. However, these observations would appear to apply, in particular, to those issues which would have become relatively well-settled and uncontroversial in the court or tribunal's jurisprudence. From this perspective, later judgments may have less reason to use external judicial decisions than earlier judgments, as the former would benefit from a broader base of settled internal case law from which to draw.⁸³ In the jurisprudence of the ICTY, for instance, as the issue of the legal character of Common Article 3 of the 1949 *Geneva Conventions* became more settled in the internal case law of the Tribunal, the extent of reliance on external judicial decisions decreased and, concomitantly, a gradual shift in the locus of reference from external judicial decisions to internal case law appeared to take place.

Already in May 1993, the report of the UN Secretary-General had underscored that the law applicable in armed conflict as embodied in the *Geneva Conventions* had 'beyond doubt become part of international customary law'.⁸⁴ Being required, by way of interlocutory appeal in *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* in October 1995,⁸⁵ to verify the customary international law character of Common Article 3, the ICTY Appeals Chamber relied on the authoritative holding of the ICJ in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ('*Nicaragua*')⁸⁶ that Common Article 3 of the 1949 *Geneva Conventions* formed part of customary international law.⁸⁷ The *Tadić (Trial)* decision subsequently also used the *Nicaragua* finding to confirm this same point.⁸⁸

In reaffirming the status of Common Article 3 of the *Geneva Conventions* as part of customary international law, the ICTY Trial Chamber in

⁸² According to Cassese, '[t]his process has already commenced. ... The Tribunals now prefer to cite directly the preceding ICT cases ...': Cassese, above n 37, 52.

⁸³ For instance, in *Prosecutor v Haradinaj (Judgment)*, the ICTY Trial Chamber relied extensively on the internal jurisprudence of the ICTY and made hardly any use of external judicial decisions: (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-04-84-T, 3 April 2008) ('*Haradinaj (Trial)*'). However, the Trial Chamber judgment was subsequently largely quashed on appeal: *Haradinaj (Appeals)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-84-A, 19 July 2010).

⁸⁴ *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN SCOR, 48th sess, 3200th mtg, UN Doc S/25704 (3 May 1993) [35], citing *Geneva Conventions*.

⁸⁵ *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 2 October 1995) [98] ('*Tadić (Jurisdiction Decision)*').

⁸⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 [218] ('*Nicaragua*').

⁸⁷ *Tadić (Jurisdiction Decision)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A 2 October 1995) [98].

⁸⁸ *Tadić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [611].

Čelebići (Trial) similarly used *Nicaragua*.⁸⁹ The Trial Chamber in *Prosecutor v Aleksovski (Judgment)* ('*Aleksovski (Trial)*') also noted that

[t]he International Court of Justice held, in the *Nicaragua* [C]ase, that [C]ommon Article 3, though conventional in origin, has crystallised into customary international law and sets out the mandatory minimum rules applicable in armed conflicts of any kind, constituting as they are 'elementary considerations of humanity'.⁹⁰

Thus far, therefore, the ICTY had relied on *Nicaragua* to reaffirm the customary international law nature of Common Article 3. However, by the year 2000, as the Tribunal had accumulated a sizeable and constant body of internal case law on this point, a gradual shift in the locus of reference from the external judicial decision of the ICJ (in *Nicaragua*) to the internal case law of the ICTY began to take place. In *Prosecutor v Blaškić (Judgment)* ('*Blaškić (Trial)*'), the ICTY Trial Chamber held that 'Common Article 3 must be considered a rule of customary international law', basing its holding on, inter alia, *Tadić (Trial)* and *Nicaragua*.⁹¹ In *Kunarac (Trial)*, the ICTY Trial Chamber found that '[i]t is well established in the jurisprudence of the Tribunal that Common Article 3 as set out in the *Geneva Conventions* has acquired the status of customary international law', grounding this finding solely on the internal case law of *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* ('*Tadić Jurisdiction Decision*') and *Čelebići (Appeals)*.⁹² This was reaffirmed by the Appeals Chamber in *Prosecutor v Kunarac (Appeals Judgment)* ('*Kunarac (Appeals)*') which found that 'Common [A]rticle 3 ... is indeed regarded as being part of customary international law' on the basis of *Tadić (Jurisdiction Decision)*.⁹³ In *Prosecutor v*

⁸⁹ *Čelebići (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [303], citing *Nicaragua* [1986] ICJ Rep 14 [218]–[220]. The Appeals Chamber held that

[i]t is indisputable that [C]ommon Article 3, which sets forth a minimum core of mandatory rules ... ha[d] already become customary law at the time of the adoption of the *Geneva Conventions* because they reflect the most universally recognised humanitarian principles.

Čelebići (Appeals) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [143].

⁹⁰ *Prosecutor v Aleksovski (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/1-T, 25 June 1999) [50] ('*Aleksovski (Trial)*'), citing *Nicaragua* [1986] ICJ Rep 14 [218].

⁹¹ *Prosecutor v Blaškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [166] ('*Blaškić (Trial)*'), citing *Tadić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [611]; *Nicaragua* [1986] ICJ Rep 14 [218].

⁹² *Kunarac (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) [406], citing *Tadić (Jurisdiction Decision)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 2 October 1995) [98], [134]; *Čelebići (Appeals)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [143].

⁹³ *Prosecutor v Kunarac (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case Nos IT-96-23 and IT-96-23/1-A, 12 June 2002) [68] ('*Kunarac (Appeals)*'), citing *Tadić (Jurisdiction Decision)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 2 October 1995) [98].

Orić (Judgment), the ICTY Trial Chamber based its finding that ‘Common Article 3 ... has acquired the status of customary international law’, on *Tadić (Trial)*, *Čelebići (Trial)* and *Kunarac (Trial)*.⁹⁴ In *Prosecutor v Haradinaj (Judgment)*, the ICTY Trial Chamber held that ‘[t]he rules contained in Common Article 3 are part of customary international law’, on the basis of *Tadić (Trial)* and *Čelebići (Trial)*.⁹⁵ This pattern continued in later ICTY decisions, such as *Prosecutor v Gotovina (Judgment)*⁹⁶ and *Prosecutor v Popović (Judgment)*.⁹⁷ Therefore, with respect to the issue of the customary international law nature of Common Article 3, in the jurisprudence of the ICTY⁹⁸ one may discern a gradual shift in the locus of reference from a reliance on external judicial decisions to a reliance on the internal case law of the ICTY.

A similar gradual shift in the locus of reference may be discerned with respect to the finding that the prohibition of torture in international law had evolved into a peremptory norm of *jus cogens*. In 1998, in *Prosecutor v Furundžija (Judgment)* (*‘Furundžija (Trial)’*), the ICTY Trial Chamber held that

[b]ecause of the importance of the values [the principle proscribing torture] protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules.⁹⁹

The *Furundžija* Trial Chamber supported this finding by reference not only to, *inter alia*, international instruments such as the *Geneva Protocols* and the *United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*,¹⁰⁰ but also to a series of external judicial decisions

⁹⁴ *Prosecutor v Orić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-03-68-T, 30 June 2006) [261], citing *Tadić (Jurisdiction Decision)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) [98], [134]; *Čelebići (Appeals)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [143]; *Kunarac (Appeals)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case Nos IT-96-23-T and IT-96-23/1-A, 12 June 2002) [68].

⁹⁵ *Haradinaj (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-04-84-T, 3 April 2008) [34], citing *Tadić (Jurisdiction Decision)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 2 October 1995) [89], [98]; *Čelebići (Appeals)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [138]–[139], [147].

⁹⁶ *Prosecutor v Gotovina (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-06-90-T, 15 April 2011) [1671].

⁹⁷ *Prosecutor v Popović (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-T, 10 June 2010) [746].

⁹⁸ The jurisprudence of the ICTR took a slightly different trajectory: see, eg, *Akayesu (Trial)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [608]; *Prosecutor v Kayishema (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [155] (*‘Kayishema (Trial)’*).

⁹⁹ *Furundžija (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [153] (emphasis altered).

¹⁰⁰ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1986).

including international human rights case law as well as national case law.¹⁰¹ The finding that the prohibition of torture constituted a norm of *jus cogens* was subsequently reaffirmed by the ICTY Trial Chamber in *Čelebići (Trial)*.¹⁰² However, as this matter becomes more settled and relatively less controversial in the internal jurisprudence of the ICTY, a gradual shift in the locus of reference may appear to have taken place from the external judicial decisions to the internal jurisprudence of the ICTY. In this respect, it may be observed that later trial chambers, such as in *Kunarac (Trial)*¹⁰³ and *Prosecutor v Naletilic (Judgment)*,¹⁰⁴ only referred to the internal jurisprudence of the ICTY in support of this finding.

Naturally, 'as time goes by a larger body of precedent accumulates for ... [international criminal courts and tribunals] to draw upon'.¹⁰⁵ However, this does not automatically mean that such a shift in the locus of reference from external judicial decisions to the internal jurisprudence of the referring court or tribunal will occur in each case. This shift may be more likely to occur with respect to legal issues which would be regarded as relatively well-established in the court or tribunal's internal jurisprudence.¹⁰⁶ It is less likely to occur with respect to those issues which remain controversial.¹⁰⁷

¹⁰¹ See, eg, *Furundžija (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [153] n 170.

¹⁰² See *Čelebići (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [454].

¹⁰³ *Kunarac (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) [466].

¹⁰⁴ *Prosecutor v Naletilic (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-34-T, 31 March 2003) [336]–[338].

¹⁰⁵ Patricia M Wald, 'Note from the Bench' in Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010) xxxv, xxxix.

¹⁰⁶ For a discussion of this phenomenon with respect to domestic courts, see McCrudden, above n 1, 513. Admittedly, there may be cases where this gradual shift in the locus of reference does not take place successfully. Thus, for example, with respect to the finding that the norm prohibiting genocide constitutes *jus cogens*, both earlier and later judgments of the ICTY appear to have continued to make reference to the 1951 ICJ advisory opinion on this subject: see, eg, *Prosecutor v Jelisić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-10-T, 14 December 1999) [60]; *Prosecutor v Krstić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 02 August 2001) [640] n 1409; *Stakić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [500] n 1064; *Prosecutor v Brđanin (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [680] n 1690; *Prosecutor v Blagojević (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I Section A, Case No IT-02-60-T, 17 January 2005) [639] n 2053. See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15.

¹⁰⁷ In the domestic sphere, one reason for which courts may continue to use foreign precedents even after they would have accumulated a substantial body of internal jurisprudence is that judges 'want to keep in step with the global community and thus participate in the global exchange of judicial knowledge on an ongoing basis': Christa Rautenbach, 'South Africa: Teaching an "Old Dog" New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995–2010)' in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart, 2013) 185, 195.

C To Provide Additional Support for an Interpretation

External judicial decisions may be used to provide additional support for an interpretation (as an '*ad abundantiam*' reference) where they are used 'despite the fact that the interpretation of the international rule in question was clear and the reference was not necessary, as such'.¹⁰⁸ According to Cassese, courts and tribunals have used external judicial decisions in this manner in order 'to show that the solution they have adopted is not only correct but also consistent with the views of other international judges'.¹⁰⁹

In some cases, international criminal courts and tribunals have openly acknowledged their use of external judicial decisions purely as additional support. For instance, in *Barayagwiza v Prosecutor*, the ICTR Appeals Chamber — in using an English and a Canadian judicial decision to support its interpretation of whether there was a discovery of a new fact under ICTR r 120 — openly admitted that

[t]he Appeals Chamber does not cite these examples as authority for its actions in the strict sense. ... However, the Chamber notes that the problems posed by the Request for Review have been considered by other jurisdictions, and that the approach adopted by the Appeals Chamber here is not unfamiliar to those separate and independent systems.¹¹⁰

In this case, according to Cassese, the Appeals Chamber acknowledged that it had already adopted an approach to the issue and the external judicial decisions it used merely served to provide additional support for this, in order to show that the Chamber's interpretation was not unfamiliar to certain national jurisdictions.¹¹¹

In other cases, however, particularly where a court or tribunal does not specify the reasons for which it has used external judicial decisions, it may be more difficult to ascertain whether a particular external judicial decision was used purely *ad abundantiam* or whether it played a more substantial role in relation to a given interpretation. In this respect, on the basis of a reading of the judgments alone, it may often be difficult to disentangle the reasoning which may have preceded and led to certain interpretations being made and the role which external judicial decisions may have played in those processes. In particular, it may be difficult to ascertain whether external judicial decisions served to shape those interpretations through a dialectical process or whether they merely served to support an opinion.¹¹² Moreover, although an indication of the roles external judicial decisions may have played could be gleaned from the

¹⁰⁸ Cassese, above n 37, 43. With respect to their study on the use of foreign precedent by constitutional judges, Groppi and Ponthoreau make reference to '[c]itations used for the purposes of "probative comparison", that is, with the purpose of proving that "even there" a certain measure was adopted, which the court intends to adopt "even here": Groppi and Ponthoreau, 'Introduction', above n 1, 9.

¹⁰⁹ Cassese, above n 37, 43.

¹¹⁰ *Barayagwiza v Prosecutor (Decision on the Prosecutor's Request for Review or Reconsideration)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-19-AR72, 31 March 2000) [69], quoted in Cassese, above n 37, 23.

¹¹¹ Cassese, above n 37, 23.

¹¹² See Pradyumna K. Tripathi, 'Foreign Precedents and Constitutional Law' (1957) 57 *Columbia Law Review* 319, 346.

manner in which they were referred to in the judgments, the manner of reference may equally be indicative, *inter alia*, of drafting styles.¹¹³

As an example of an *ad abundantiam* use of external judicial decisions, Cassese refers to the ICTY Appeals Chamber's reliance on ECtHR case law in *Aleksovski (Appeals)* with respect to its interpretation of the binding force of its judicial decisions.¹¹⁴ It is notable that, in identifying this example, Cassese's observation is couched in somewhat tentative language. He states '*it would seem* that the reference to Strasbourg case law was not indispensable as regards the binding force of ICT judgments'.¹¹⁵ In this case, after finding that the *ICTY Statute and Rules of Procedure and Evidence* did not deal with the question of whether the Appeals Chamber was bound by its own previous decisions, the *Aleksovski* Appeals Chamber launched into a comparative study covering both national law and the case law of international courts and tribunals. In particular, the ICTY Appeals Chamber referred to the ECtHR case of *Cossey v United Kingdom* ('*Cossey Case*'),¹¹⁶ which had noted:

It is true that ... the [ECtHR] is not bound by its previous judgments. ... However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the *Convention [for the Protection of Human Rights and Fundamental Freedoms]* case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so.¹¹⁷

Cassese appears to posit that because, in *Aleksovski (Appeals)*, the ICTY Appeals Chamber subsequently decided that the question was

to be resolved through an examination of the Tribunal's *Statute and Rules*, and 'a construction of them which gives due weight to the principles of interpretation (good faith, textuality, contextuality, and teleology) set out in the 1969 *Vienna Convention on the Law of Treaties*',

then the reference to Strasbourg case law was *not* indispensable and consequently the use of the *Cossey case* (as well as other ECtHR case law) was to be considered *ad abundantiam*.¹¹⁸ However, the interpretation reached by the *Aleksovski* Appeals Chamber on this question was that 'in the interests of certainty and predictability, the Appeals Chamber should follow its previous

¹¹³ For instance, even though certain external judicial decisions may have played a central role in the reaching of a particular determination, their importance may not appear evident in the judgment (for instance, they would merely be noted in passing), giving the impression that they would have been used merely as additional support on account of drafting convention.

¹¹⁴ See Cassese, above n 37, 45 n 44, citing *Aleksovski (Appeals)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/1-A, 24 March 2000) [92]–[97] ('*Aleksovski Appeals*').

¹¹⁵ Cassese, above n 37, 45 (emphasis added).

¹¹⁶ (1990) 184 Eur Court HR (ser A).

¹¹⁷ Ibid 11 [35], cited in Cassese, above n 37, 45. See also *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14* to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009).

¹¹⁸ Cassese, above n 37, 45–6 n 44 (emphasis added), citing *Aleksovski (Appeals)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/1-A, 24 March 2000) [98]. See also *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 115 UNTS 331 (entered into force 27 January 1980).

decisions, but should be free to depart from them for cogent reasons in the interests of justice'.¹¹⁹

This language seems to bear an uncanny resemblance to the language in the *Cossey case*, particularly its references to 'the interests of certainty' and to departing from an earlier decision for 'cogent reasons'.¹²⁰ It may, therefore, be debatable whether, as Cassese asserts, the *Cossey case* was merely used as additional support and the ICTY Appeal Chamber's reference thereto was 'not indispensable' to the Appeals Chamber's own interpretation.¹²¹ This instance may serve to illustrate the pervasive difficulty, in some cases, of determining with any degree of precision the value which would have been accorded to the legal notions or findings of external judicial decisions from a mere reading of the judgment. In this case, contrary to what Cassese avers, it could be that even though the *Cossey Case* may have played an influential role in the minds of the judges of the *Aleksovski* Appeals Chamber, it would appear to have been used as additional support merely on account of drafting convention.

At times, it may be possible to infer that external judicial decisions may have been used *ad abundantiam* from specific phrases in the judgment. For instance, in *Blaškić (Trial)*, the ICTY Trial Chamber found that infringements of the elementary and inalienable rights of man as affirmed in arts 3, 4, 5 and 9 of the *Universal Declaration of Human Rights*,¹²² by their very essence may constitute persecution when committed on discriminatory grounds.¹²³ The Chamber proceeded to note that

[t]his interpretation is *reaffirmed* by the established case-law of the Nuremberg Tribunal, the tribunals acting in accordance with [*Control Council*] *Law No 10* promulgated by the Allied Control Council for Germany on 20 December 1945, [and] the Supreme Court of Israel.¹²⁴

In this case, the *Nuremberg Judgment* and the other external judicial decisions used by the *Blaškić* Trial Chamber appear, therefore, to have been used merely to reaffirm the interpretation that the Chamber had already reached.

In the same case, the ICTY Trial Chamber had to consider whether the accused needed to have sought all the elements of the context in which his acts had been perpetrated under art 5 of the *ICTY Statute*.¹²⁵ In interpreting this provision, the Chamber adopted a teleological approach, invoking 'the spirit of the *Statute*'¹²⁶ and referring, inter alia, to internal jurisprudence, before finding

¹¹⁹ *Aleksovski (Appeals)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/1-A, 24 March 2000) [107].

¹²⁰ Cassese, above n 37, 45–6 n 44, citing *Aleksovski (Appeals)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/1-A, 24 March 2000) [107].

¹²¹ Cassese, above n 37, 45.

¹²² *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/3/217A (10 December 1948).

¹²³ *Blaškić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [220].

¹²⁴ *Ibid* [221] (emphasis added), citing *Control Council Law No 10*, above n 45.

¹²⁵ *Blaškić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [251].

¹²⁶ *Ibid* [252].

that

[t]he accused need not have sought all the elements of the context in which his acts were perpetrated; it suffices that, through the functions he willingly accepted, he knowingly took the risk of participating in the implementation of that context.¹²⁷

After reaching this finding, the *Blaškić* Trial Chamber held that its approach was ‘confirmed’ by the French Court of Cassation’s decision in the *Papon Case*.¹²⁸

The main purpose for using external judicial decisions as additional support is to provide the parties (and readers of the judgment) with a broader basis of supporting material for a particular finding, as well as — in the words of Cassese referred to above — to show that the solution the court or tribunal has adopted is not only correct but also consistent with the views of other judges.¹²⁹ However, in some cases, external judicial decisions used in this manner appear to simply have been ‘lumped’ together in a footnote with little indication as to which passages are considered relevant to and supportive of the court or tribunal’s interpretation. For instance, in *Tadić (Trial)*, the ICTY Trial Chamber considered the issue of whether a single act by a perpetrator could constitute a crime against humanity. It found, on the basis of customary international law, that it was clear that a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population could entail individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable.¹³⁰ In a footnoted reference, the ICTY Trial Chamber subsequently referred to a string of post-World War II judicial decisions as ‘additional support’ for its interpretation without, however, indicating which passages were considered relevant. The reference merely stated: ‘See, [eg], cases 2, 4, 13, 14, 15, 18, 23, 25, 31 and 34 of *Entscheidungen Des Obersten Gerichtshofes Für Die Britische Zone in Strafsachen*, Vol I’.¹³¹ Similarly, Larissa van den Herik notes that in some passages of *Kunarac (Appeals)*, concerning the policy requirement in crimes against humanity, the Appeals Chamber referred to external judicial decisions, but ‘the particular paragraph numbers ... which the ICTY relied upon, are not explicitly indicated in the judgment’.¹³²

The danger with this approach is that it may encourage excessive referencing. The potential effect of this may be apparent in the following extract from

¹²⁷ Ibid [251].

¹²⁸ Ibid [256], citing *Papon Case*, Cour de cassation [French Court of Cassation], 23 January 1997 reported in (1997) Bull crim n° 32: ‘Le dernier alinéa de l’article 6 du statut du tribunal militaire international ... n’exige pas que le complice de crimes contre l’humanité ait adhéré à la politique d’hégémonie idéologique des auteurs principaux ...’.

¹²⁹ Ibid [256].

¹³⁰ *Tadić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-I-T, 7 May 1997) [649].

¹³¹ Ibid [649] n 153, citing *Entscheidungen Des Obersten Gerichtshofes Für Die Britische Zone in Strafsachen* 19 (1949) vol I, 53–6.

¹³² Larissa van den Herik, ‘Using Custom to Reconceptualize Crimes against Humanity’ in Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010) 80, 92. See also *Kunarac (Appeals)* (International Tribunal for the Former Yugoslavia, Appeals Chamber, Case Nos IT-96-23 and IT-96-23/1-A, 12 June 2002) [98] n 114.

Prosecutor v Akayesu (Appeals Judgment) concerning the subject of hearsay evidence.¹³³

The Appeals Chamber notes that this subject has been considered in some detail by the Trial Chambers and the Appeals Chamber of ICTY. See for example: *Prosecutor v Dusko Tadić, Decision on Defence Motion on Hearsay*, Case No IT-94-1-T, 5 August 1996 (as relied on by *Akayesu* in *Akayesu's Brief*, Ch 9, paras 1 and 6); *The Prosecution v Tihomir Blaškić, Decision on the Standing Objection of the Defence to the Admission of Hearsay with No Inquiry as to its Reliability*, Case No IT-95-14-T, 21 January 1998; *Blaškić Trial Judgment; Prosecutor v Zlatko Aleksovski, Decision on Prosecutor's Appeal on Admissibility of Evidence*, Case No IT-95-14/1-AR73, 16 February 1999 ('the *Aleksovski Decision*'); *Prosecutor v Dario Kordic and Mario Cerkez, Decision on Appeal regarding Statement of a Deceased Witness*, Case No IT-95-14/2-AR73.5, 21 July 2000 ('the first *Kordic Decision*') and *Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and one Formal Statement*, 18 September 2000 ('the second *Kordic Decision*') (*To Add ICTR Jurisprudence*).¹³⁴

In this extract, the place-holder '*(To Add ICTR Jurisprudence)*' appears to have been lost in the midst of the excessive referencing of ICTY jurisprudence. In this respect, Peter McCormick cautions that

[i]f the universe of citable precedents is a manageable size, then judicial citations are a way of meshing the immediate decision against a stable and coherent background. If that universe becomes too large, then we are in danger of the confusion that can be created by ... 'precedent overload'.¹³⁵

VI SOME REFLECTIONS ON THE DIRECT APPROACH

Bruno Simma notes that sometimes international courts and tribunals may have had to rely on external judicial decisions as a matter of 'practical necessity'.¹³⁶ In this respect, the *Kupreškić* Trial Chamber emphasised that

¹³³ Admittedly these external judicial decisions are not used *ad abundantiam*. This example only serves to illustrate the dangers of excessive referencing more generally.

¹³⁴ *Prosecutor v Akayesu (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-4-A, 1 June 2001) [285] n 499 (emphasis altered), citing *Prosecutor v Tadić (Decision on Defence Motion on Hearsay)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-94-1-T, 5 August 1996); *Prosecutor v Blaškić (Decision on the Standing Objection of the Defence to the Admission of Hearsay with No Inquiry as to Its Reliability)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-14-T, 21 January 1998); *Blaškić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [36]; *Prosecutor v Aleksovski (Decision on Prosecutor's Appeal on Admissibility of Evidence)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/1-AR73, 16 February 1999) [15]; *Prosecutor v Kordic (Decision on Appeal Regarding Statement of a Deceased Witness)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-AR73.5, 21 July 2000) [23]–[28]; *Prosecutor v Kordic (Decision on Appeal regarding the Admission into Evidence of Seven Affidavits and One Formal Statement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-AR73.5, 18 September 2000) [24].

¹³⁵ Peter McCormick, 'Judicial Authority and the Provincial Courts of Appeal: A Statistical Investigation of Citation Practices' (1994) 22 *Manitoba Law Journal* 286, 302, quoting Neil Postman, *Technopoly: The Surrender of Culture to Technology* (Knopf, 1992) 121.

¹³⁶ Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 *European Journal of International Law* 265, 284.

[t]he Tribunal's need to draw upon [external] judicial decisions is only to be expected, due to the fact that both substantive and procedural criminal law is still at a rudimentary stage in international law. ... This being so, it is only logical that international courts should rely heavily on such jurisprudence.¹³⁷

However, practical necessity alone would not appear to provide a complete explanation for why international criminal courts and tribunals have continued to use external judicial decisions throughout their lifespan. Another reason may be increased legitimacy for their findings. In this respect, Simma underscores that 'it will obviously add to the legitimacy of a judgment if an international court relies on the case law of other such courts'.¹³⁸ However, it has to be borne in mind that the reliance on external judicial decisions carries certain risks. International criminal courts and tribunals have frequently underscored the dangers of relying on external judicial decisions from courts based on different statutes or grounded within different legal systems. For instance, in *Čelebići (Trial)*, the ICTY Trial Chamber highlighted the dangers of importing wholesale legal notions or findings derived from ICJ judicial decisions because

[t]he International Tribunal is a criminal judicial body, established to prosecute and punish individuals for violations of international humanitarian law, and not to determine State responsibility for acts of aggression or unlawful intervention.¹³⁹

While these dangers would appear most evident with respect to external judicial decisions from national courts or from courts operating in a different branch of international law, they would also subsist with respect to external judicial decisions from other international criminal courts and tribunals, even though these generally apply international criminal law. For instance, Leena Grover notes that, although '[t]he jurisprudence of the ad hoc Tribunals is so rich that it is perhaps tempting for those working at the [ICC], many of whom spent time working at the tribunals, to transpose familiar legal approaches wholesale', such an approach 'would be mistaken' because of the distinctiveness of the *Rome Statute* and the ICTY and the ICTR regimes.¹⁴⁰ As noted above, in its decision in *Prosecutor v Lubanga (Decision regarding Witnesses at Trial)*, the ICC

¹³⁷ *Kupreškić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [537]. Making a similar point, Cassese notes that 'many penal concepts are not defined by the relevant normative texts, whence the need for the international judge to have recourse to ... where applicable, case law': Cassese, above n 37, 19.

¹³⁸ Simma, above n 136, 279. In the national context, some other reasons which have been identified as encouraging or facilitating the use of foreign precedent include: a 'genealogical' relationship between statutes; an attitude of openness of a system of law as found, particularly, in the common law methodology; an inductive method of reasoning by reference to decided cases; a specific form of judgment writing, which is more discursive in character; and the adversarial nature of proceedings, in which the respective parties may refer to foreign precedent which the court will necessarily have to respond to, unless it rejects them out of hand: see Cheryl Saunders and Adrienne Stone, 'Reference to Foreign Precedents by the Australian High Court: A Matter of Method' in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart, 2013) 13, 18–20.

¹³⁹ *Čelebići (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [230].

¹⁴⁰ Leena Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the *Rome Statute of the International Criminal Court*' (2010) 21 *European Journal of International Law* 543, 550.

emphasised the distinctiveness of its instruments from those of the ad hoc Tribunals, when it noted that 'the Chamber does not consider the ... jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis'.¹⁴¹ In view of these considerations, Volker Nerlich posited that '[f]rom a methodological perspective, the relevance of jurisprudence of the ad hoc tribunals for the interpretation of the instruments of the ICC appears *doubtful*'.¹⁴² In his view:

Why should the case law of the ad hoc tribunals shed light on the *Rome Statute* or its subsidiary instruments? The *Rome Statute* has established an international criminal jurisdiction that is distinct from, and independent of, the ad hoc tribunals; and when interpreting legal texts applicable in a given jurisdiction one does not normally turn to the jurisprudence of *other* jurisdictions relating to the interpretation of *other* legal texts.¹⁴³

While this caution should be taken seriously, such legal particularism would effectively deny international criminal courts and tribunals the guidance which could be derived from external judicial decisions.¹⁴⁴ These concerns would appear to already have been met by an appropriate response within the national context. For instance, Justice Breyer of the United States Supreme Court wrote that

[o]f course, we are interpreting our own [*United States*] *Constitution*, not those of other nations, and there may be relevant political and structural differences between their systems and our own ... But their experience may nonetheless cast

¹⁴¹ *Lubanga (Decision regarding Witnesses at Trial)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 30 November 2007) [44].

¹⁴² Nerlich, above n 38, 317 (emphasis added).

¹⁴³ *Ibid* (emphasis in original). This argument seems to echo, in part, Judge Hunt's view, in *Aleksovski (Appeals)*, that the ICTY Appeals Chamber should be slow in relying on 'the practices of other international courts (which are necessarily not criminal courts) or in the doctrine of judicial precedent in the domestic courts where the situation in which those courts operate is quite different to that in which this Tribunal operates': *Aleksovski (Appeals)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/1-A, 24 March 2000) [7] (Judge Hunt). Similar concerns have also been expressed in the national context. For instance, in *Lavigne v Ontario Public Service Employees Union*, Justice Wilson held that

[t]his Court has consistently stated that even although it may undoubtedly benefit from the experience of American and other courts in adjudicating constitutional issues, it is by no means bound by that experience or the jurisprudence it generated. The uniqueness of the *Canadian Charter of Rights and Freedoms* flows not only from the distinctive structure of the *Charter* as compared to the American Bill of Rights but also from the special features of the Canadian cultural, historical, social and political tradition.

[1991] 2 SCR 211, 236. See also *Canada Act 1982* (UK) c 11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*').

¹⁴⁴ Indeed, even where the influence exerted by external judicial decisions on the result actually reached would be limited, they may still serve 'to provide a useful structure for analysis, and [to] identify many of the issues which have to be considered': McCrudden, above n 1, 512. As Saunders and Stone observe, they may also

help to identify or throw a different light on a legal issue, may suggest options for judicial development of a particular legal doctrine, may be used empirically, to illustrate the consequences of a certain course of action; may support or confirm a conclusion that a Justice already was minded to reach; or may be not much more than a rhetorical flourish.

Saunders and Stone, above n 138, 23–4.

an empirical light on the consequences of different solutions to a common legal problem.¹⁴⁵

In a similar vein, Justice O'Regan, of the South African Constitutional Court, emphasised that

[i]t would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further. ... It is clear that in looking to the jurisprudence of other countries, all the dangers of shallow comparativism must be avoided. To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions. Our courts will look at other jurisdictions for enlightenment and assistance in developing our own law. The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the courts and our law will benefit. If it is not, the courts will say so, and no harm will be done.¹⁴⁶

If the legal-particularist view had to be taken to its logical conclusion, many of the landmark decisions of the ad hoc Tribunals may never have been reached because these relied in part on the *Nuremberg* and *Tokyo* judgments, as well as other post-WWII jurisprudence, which had been delivered on the basis of distinct and independent statutes.¹⁴⁷ While, undoubtedly, the statutes of the ad hoc Tribunals and the ICC are distinct, it does not necessarily follow that the jurisprudence of the former may not be relevant to the latter — quite the contrary, in fact. In this respect, the genus of these judicial bodies applying international criminal law is more significant than their *differentiam*. And, while it remains true that it would be dangerous for the ICC (or any other international criminal court and tribunal) to mechanically import legal notions or findings derived from other courts and tribunals wholesale, the distinctiveness of these international bodies could be bridged through the processes of transposition and adaptation. In fact, in the above quotation, the ICC Trial Chamber did not rule out the relevance of the jurisprudence of the ad hoc Tribunals, but averred that it would not be applicable to the ICC 'without detailed analysis'.¹⁴⁸ Indeed, in *Lubanga (Trial)*, the ICC Trial Chamber found the SCSL case law on the conscription, enlistment and use of child soldiers potentially of assistance in the interpretation of the relevant provisions of the *Rome Statute*. The ICC Trial Chamber held:

The jurisprudence of the SCSL has been considered by the Trial Chamber. Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the *Statute*, the wording of the provision criminalising the conscription, enlistment and use of children under the age of 15 within the *Statute* of the SCSL is identical to Article 8(e)(vii) of the

¹⁴⁵ *Printz v United States*, 521 US 898, 977 (1997) (Judge Breyer).

¹⁴⁶ *NK v Minister of Safety and Security* [2005] 6 SA 419 (Constitutional Court) [35].

¹⁴⁷ See, eg, *Kupreškić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [537].

¹⁴⁸ *Lubanga (Decision regarding Witnesses at Trial)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 30 November 2007) [44].

Rome Statute, and they were self-evidently directed at the same objective. The SCSL's case law therefore potentially assists in the interpretation of the relevant provisions of the *Rome Statute*.¹⁴⁹

Making a similar point, the SCSL Trial Chamber, in *Prosecutor v Brima (Judgment)* ('*AFRC (Trial)*'), held that

[s]ince the ICTY and ICTR ... apply customary international law, the Special Court will, where appropriate, be guided by decisions of those tribunals for their persuasive value, with necessary modifications and adaptations in view of the particular circumstances of the Special Court.¹⁵⁰

VII THE INDIRECT APPROACH

An international criminal court or tribunal may use external judicial decisions, not directly for their legal notions or findings, but *indirectly* to borrow their review of state practice and *opinio juris* or their survey of national principles. The borrowed review or survey may serve to supplement the referring court or tribunal's own review or survey on the same or a similar issue and, indeed, may save the referring court or tribunal from having to undertake it from scratch.¹⁵¹ Robert Cryer points out that '[a]fter all, where cases contain a detailed review of State practice and/or *opinio juris*, it is far simpler to refer to the relevant case than repeat the discussion it contains'.¹⁵² This approach may, at least in part, reflect the solutions-oriented approach described by Rosemary Byrne — quoting David Nelken — where 'borrowing ... is seen just as a method of speeding up the process of finding legal solutions to similar problems'.¹⁵³ After all, as Anthony Aust posits, '[n]o wise judge (international or national) wants to reinvent the wheel'¹⁵⁴ and, similarly, Romano notes that 'it is inefficient to reinvent the wheel every time anew'.¹⁵⁵

On account of the similarities of the issues before them and their common statutory basis, chambers of coordinate jurisdiction within the same court system have not infrequently borrowed reviews or surveys from their sister chambers.

¹⁴⁹ *Lubanga (Trial)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) [603] (citations omitted).

¹⁵⁰ *AFRC (Trial)* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [639] (Citations omitted).

¹⁵¹ Peil makes a similar point with respect to the use of the teachings of publicists, namely,

[w]here a publicist has conducted a thorough review of State practice and concluded that the threshold for a rule of customary international law has (or has not) been met, judges frequently rely upon those teachings, rather than citing directly to primary evidence of State practice.

Michael Peil, 'Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice' (Research Paper No 12-07-03, Legal Studies Research Paper Series, Washington University in St Louis School of Law, July 2012) 15.

¹⁵² Cryer, above n 1, 184.

¹⁵³ Rosemary Byrne, 'The New Public International Lawyer and the Hidden Art of International Criminal Trial Practice' (2010) 25 *Connecticut Journal of International Law* 243, 252, quoting David Nelken, 'Towards a Sociology of Legal Adaptation' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart, 2001) 7, 13.

¹⁵⁴ Anthony Aust, 'Peaceful Settlement of Disputes: A Proliferation Problem?' in Tafsir Malik Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law, and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah* (Martinus Nijhoff, 2007) 131, 137, quoted in Simma, above n 136, 279.

¹⁵⁵ Romano, 'Deciphering the Grammar', above n 2, 780.

For instance, in discussing the applicable standard for the imposition of individual criminal responsibility under art 7(1) of the *ICTY Statute*, the *Čelebići* Trial Chamber borrowed from the *Tadić* Trial Chamber's extensive review of the 'existing body of precedents arising out of the war crimes trials conducted after the Second World War'.¹⁵⁶ Indeed, when the ICTY Trial Chamber in *Aleksovski (Trial)* similarly came to consider the question of individual criminal responsibility under art 7(1) of the *ICTY Statute*, it noted that several chambers of the ICTY and the ICTR had already carried out in-depth reviews of this question, making it possible to set out the rules of existing customary international law on the basis of these reviews. As such, the *Aleksovski* Trial Chamber held that it saw 'no point in making the same analysis' and proceeded to rely on these reviews.¹⁵⁷

International criminal courts and tribunals may, however, also borrow the reviews or surveys from external judicial decisions. For instance, in considering a chamber's duty to give a reasoned opinion, the ICTR Appeals Chamber in *Prosecutor v Musema (Appeals Judgment)* borrowed the review of ECtHR case law contained in *Furundžija (Appeals)*.¹⁵⁸ Similarly, in the context of superior responsibility, the ICTR Trial Chamber in *Prosecutor v Kayishema (Judgment)* ('*Kayishema (Trial)*') borrowed from the *Čelebići (Trial)*, which had provided 'an exposition of the jurisprudence on this point'.¹⁵⁹ In both the *Prosecutor v Fofana (Judgment)* and the *RUF Case*, the SCSL Trial Chambers relied on the *Prosecutor v Strugar* trial judgment's review of 'case law developed by the military tribunals in the aftermath of World War II' to enumerate the factors that a chamber may take into account in determining whether a superior has discharged his duty to prevent the commission of a crime.¹⁶⁰ In addition, the ECCC Trial Chamber in *Duch (Trial)*, with respect to the elements of the offence of persecution as a crime against humanity, relied on the *Tadić* and *Kupreškić*

¹⁵⁶ *Čelebići (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [325], citing *Tadić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [670]–[672].

¹⁵⁷ *Aleksovski (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/1-T, 25 June 1999) [60].

¹⁵⁸ *Musema v Prosecutor (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-13-A, 16 November 2001) [18], citing *Furundžija (Appeals)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-17/1-A, 21 July 2000) [69].

¹⁵⁹ *Kayishema (Trial)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [492], citing *Čelebići (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [375]–[376].

¹⁶⁰ *Prosecutor v Fofana (Judgment)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-14-T, 2 August 2007) [248]; *RUF Case* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009) [315], citing *Prosecutor v Strugar (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [347].

trial judgments for their ‘review of the relevant Nuremberg-era jurisprudence as well as subsequent jurisprudence from national courts’.¹⁶¹

While in some cases, referring courts and tribunals have relied entirely on the borrowed review or survey, in other cases the borrowed review or survey merely served to complement the referring court or tribunal’s own first hand review or survey. For instance, in *Nchamihigo v Prosecutor (Appeals Judgment)*, the ICTR Appeals Chamber had to consider whether any rule of customary international law prohibited a Chamber from relying on the uncorroborated evidence of an accomplice witness. To this end, the *Nchamihigo* Appeals Chamber undertook a first hand review of state practice and *opinio juris* which, however, was mainly confined to common law jurisdictions.¹⁶² With respect to civil law jurisdictions, rather than conducting its own, first hand review, the *Nchamihigo* Appeals Chamber relied on the review which had been conducted by the ICTY Appeals Chamber in *Prosecutor v Tadić (Appeals Judgment)*.¹⁶³ In part, this approach may be influenced by a certain reluctance to rely on external judicial decisions from jurisdictions with which the judges of international criminal courts and tribunals may not be familiar. For instance, in Terris, Romano and Swigart’s research, one SCSL judge acknowledged that

[w]e don’t use civil law doctrine and jurisprudence much because, even within the civil law, there’s not the degree of harmony that people thought. German civil law is different from the French civil law. And there is so much variation and if you are not a civil lawyer, you do have to leave that side alone.¹⁶⁴

The borrowing of reviews or surveys which would have been conducted by other courts or tribunals established on different statutory bases may carry certain risks, particularly if undertaken mechanically. For instance, in *AFRC (Trial)*, the SCSL Trial Chamber had to consider the customary law status of acts of terrorism under art 3(d) of the *SCSL Statute*.¹⁶⁵ In this respect, the *AFRC* Trial Chamber¹⁶⁶ relied heavily on the extensive review of domestic legislation undertaken by the ICTY Appeals Chamber in *Prosecutor v Galić (Appeals Judgment)* (*‘Galić (Appeals)’*) concerning the criminalisation of acts of terror against the civilian population as a method of warfare.¹⁶⁷ However, in borrowing the *Galić (Appeals)* review, the *AFRC* Trial Chamber appeared to take no express account of Judge Schomburg’s separate and partially dissenting opinion

¹⁶¹ *Duch (Trial)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No 001/18-07-2007/ECCC/TC, 26 July 2010) [375] n 687, citing *Tadić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [699]–[700]; *Kupreškić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [586]–[614].

¹⁶² *Nchamihigo v Prosecutor (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-2001-63-A, 18 March 2010) [43].

¹⁶³ *Ibid*, citing *Tadić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [539].

¹⁶⁴ Terris, Romano and Swigart, *The International Judge*, above n 4, 122.

¹⁶⁵ *SCSL Statute* art 3(d).

¹⁶⁶ *AFRC (Trial)* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [663].

¹⁶⁷ *Ibid* [663] n 1305, citing *Prosecutor v Galić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-29-A, 30 November 2006) [95] n 297 (*‘Galić (Appeals)’*).

which had underscored certain shortcomings in that review. According to Judge Schomburg, in view of a number of deficiencies with the review which had been conducted by the ICTY Appeals Chamber,¹⁶⁸

[t]he Appeals Chamber was thus only able to establish with certainty that just an extraordinarily limited number of states at the time relevant to the Indictment had penalized terrorization against a civilian population in a manner corresponding to the prohibition of the Additional Protocols [to the *Geneva Conventions*]. ... It is doubtful whether this can be viewed as evidence of 'extensive and virtually uniform' state practice on this matter.¹⁶⁹

Moreover, where the referring court or tribunal borrows its review or survey from trial-level external judicial decisions, there is the ever-present danger that such reviews or surveys may be modified or overturned on appeal. For instance, in considering the appropriate standard of control in the context of superior responsibility, the ICTR Trial Chamber in *Kayishema (Trial)* relied on 'the *Čelebići* case and the authorities cited therein'¹⁷⁰ to conclude that 'powers of influence not amounting to formal powers of command provide a sufficient basis for the imposition of command responsibility'.¹⁷¹ In this respect, the *Čelebići (Trial)* had included reference, inter alia, to the *Tokyo Judgment* and, specifically, to the conviction of Lieutenant General Akira Muto on the basis of superior responsibility in relation to the 'Rape of Nanking' atrocities.¹⁷² Subsequently, however, on appeal, the *Čelebići* Appeals Chamber considered the Muto case as 'providing limited assistance' on this question and found the review in the *Čelebići (Trial)* to be insufficient to support the proposition that the substantial influence of a superior alone may suffice for the purpose of command responsibility.¹⁷³

VIII SOME REFLECTIONS ON THE INDIRECT APPROACH

While the advantages of the indirect approach to the use of external judicial decisions are apparent, in terms of efficiency gains and avoiding the duplication of efforts (that is, not reinventing the wheel), it is also clear that this approach has to be adopted with caution, as relying on a review or survey which was undertaken by another court or tribunal stemming from a different statutory

¹⁶⁸ *Galić (Appeals)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-29-A, 30 November 2006) ch xxii [8]–[9].

¹⁶⁹ *Ibid* ch XXII [10].

¹⁷⁰ *Kayishema (Trial)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [220], citing *Čelebići (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [364]–[378].

¹⁷¹ *Kayishema (Trial)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [220], quoting *Čelebići (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [375].

¹⁷² *Čelebići (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [368]–[369], citing B V A Röling and C F Rüter (eds), *The Tokyo Judgment: The International Military Tribunal for the Far East (IMTFE) 29 April 1946 – 12 November 1948* (APA / University Press Amsterdam, 1977) vol 1, 49.

¹⁷³ *Čelebići (Appeals)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [259], citing Röling and Rüter, above n 172, 117.

framework carries certain risks. As discussed above, these risks may include the danger of such reviews or surveys being defective or incomplete and, particularly with respect to reviews or surveys undertaken by trial-level courts or tribunals, their being modified on appeal. The subject of defective or incomplete reviews of state practice and *opinio juris* or surveys of national jurisdictions has received a fair share of attention in the literature.¹⁷⁴ The question is, however: how are referring courts or tribunals adopting the indirect approach to avoid the pitfall of borrowing a defective or incomplete review or survey?

If before borrowing such a review or survey the referring court or tribunal would be expected to subject it to extensive scrutiny, it would be unlikely that it could make any significant efficiency gains by borrowing, as opposed to conducting its own, first hand review or survey from scratch. The degree of scrutiny necessary, therefore, would have to depend on the circumstances of each case and, in particular, on how well-settled the issue may be. However, in general, an uncritical approach to such borrowing would not appear to be appropriate. Moreover, the rationale for the indirect approach is not merely based on efficiency gains. The analysis of a referring court or tribunal which engages with and scrutinises the review or survey from an external judicial decision may be likely to be more thorough and rigorous (and, thus, persuasive) than where the court or tribunal simply borrows the review or survey uncritically or, indeed, where it conducts its own, first hand review or survey from scratch, separately from other existing reviews or surveys (thus, in a sense, reinventing the wheel).

In borrowing reviews or surveys conducted by other courts or tribunals grounded on different statutory frameworks, international criminal courts and tribunals would have to be aware of another, more systemic, danger. Given that, in the majority of cases, a review or survey of *all* relevant jurisdictions is infeasible and in view of the absence of a coherent methodology for undertaking these reviews or surveys,¹⁷⁵ their conduct is always going to be a subjective endeavour, dependent on the priorities of the court or tribunal undertaking it and conditioned by the legal, factual and temporal context of such court or tribunal.

¹⁷⁴ For instance, with respect to reviews of state practice and *opinio juris* for the purpose of establishing customary international law, the review undertaken by the *Kunarac* Appeals Chamber has been criticised, inter alia, for using some Canadian cases which did not provide unequivocal support for the Chamber's determination. Moreover, the Chamber conveniently overlooked the 'the leading Canadian case on crimes against humanity', namely the case of *R v Finta*, which had made a finding contrary to the Chamber's determination on this issue: see van den Herik, above n 132, 93. See also *R v Finta* [1994] 1 SCR 701. With respect to surveys of national jurisdictions for general principles of law, the survey undertaken by the *Kupreškić* Trial Chamber with respect to the question of cumulation of offences has received criticism because although the Chamber purported to undertake 'a survey of national law and jurisprudence [and to deduce therefrom] some principles of criminal law common to the major legal systems of the world', in effect, it immediately adopted the 'Blockburger test' enunciated in the case of *Blockburger v United States of America* 284 US 229 (1932): see Nollkaemper, 'Decisions of National Courts', above n 37, 289, citing *Kupreškić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [680]. In addition, the *Kupreškić* Trial Chamber's survey pertaining to *tu quoque* has also been criticised. Degan contends that the Trial Chamber 'rejected the *tu quoque* argument as allegedly being "universally rejected", although ... it was recognized by the Nuremberg Judgment of 1946 in respect of two German Admirals, Dönitz and Raeder': see Vladimir-Djuro Degan, 'On the Sources of International Criminal Law' (2005) 4 *Chinese Journal of International Law* 45, 76.

¹⁷⁵ Bantekas, above n 68, 126–9.

For instance, with respect to surveys relating to general principles of law, Nerlich underscores that

the decision-maker will have to determine which jurisdictions to include in his or her survey and how much weight to afford to each of these jurisdictions for the 'distillation' of the general principle. The somewhat discomfiting consequence of the subjectivity of the identification of general principles of law is that the 'general principle' may vary, depending on who determines what the content of the principle is.¹⁷⁶

In this respect, some of the warnings expressed by comparatists with respect to legal transplants more generally may be applicable to the reviews or surveys borrowed from external judicial decisions and transplanted by the referring court or tribunal to its own analysis.¹⁷⁷ For instance, Nerlich notes that art 21(1)(c) of the *Rome Statute* provides that the municipal jurisdictions from which the ICC is to derive general principles may include 'as appropriate, the national laws of States that would normally exercise jurisdiction over the crime'.¹⁷⁸ Nerlich makes the point that, obviously, were the ICC to rely on a borrowed survey of general principles, such a borrowed survey would not necessarily have given particular consideration to those specific jurisdictions.

In view of these considerations, it is not implausible that the drafters of a given international criminal court or tribunal may have intended to limit the extent to which their court or tribunal may rely on the indirect approach. For instance, with respect to the ICC, Nerlich argues that

[i]t may be for that reason that Article 21(1)(c) of the *Rome Statute* states that the general principles must be '*derived by the Court*'. The *Statute* thus entrusts the judges of the ICC — who are elected by, and enjoy the confidence of, the Assembly of States Parties of the *Rome Statute* — with the task of identifying general principles of law.¹⁷⁹

IX CONCLUDING REMARKS

This article has found that, on the basis of the judgments it has examined, international criminal courts and tribunals have made some use of external judicial decisions both directly, to derive guidance from the legal notions or findings of a given external judicial decision, or indirectly, in order to borrow a review of state practice and *opinio juris* in the context of customary international law or a survey of national jurisdiction in the context of general principles of law. However, as Miller notes with respect to international courts more generally, the ways in which international criminal courts and tribunals have used external judicial decisions 'are remarkable for admitting of no easy categorization'.¹⁸⁰ While it has been possible to identify some patterns emerging from the practice of international criminal courts and tribunals, it is submitted that it may be early to speak of any fully coherent 'theory of precedent'. The

¹⁷⁶ Nerlich, above n 38, 314–15 (citations omitted).

¹⁷⁷ See Byrne, above n 153, 252; Jaye Ellis, 'General Principles and Comparative Law' (2011) 22 *European Journal of International Law* 949, 963.

¹⁷⁸ Nerlich, above n 38, 315.

¹⁷⁹ Ibid (emphasis added).

¹⁸⁰ Miller, above n 2, 496.

varied approaches of these courts and tribunals to the use of external judicial decisions may, in part, stem from a scarcity of normative guidance on this subject which could have 'opened the door for judges to develop their own methods which were perhaps inspired by their legal training and/or understanding of international criminal law's normativity'.¹⁸¹ It is notable, moreover, that such variety in the approaches to the use of external judicial decisions is not unique to the international level but exists also at the national level.¹⁸²

In this context, it may be helpful if more detailed guidance were provided on this subject through an express provision in the founding instrument of a given international criminal court or tribunal or through appropriate internal directives. For instance, writing with respect to the practice of the US Supreme Court, Ramsey puts forward four guidelines for a more rigorous use of foreign material, some of which may also be usefully adopted at the international level, namely

operating under an explicit set of principles established in advance and applied across the board; accepting rights-limiting as well as rights-enhancing implications; correctly describing national practices and opinions; and not taking shortcuts through UN agencies or other supposed evidence of the views of an artificial 'world community'.¹⁸³

It may be pertinent to recall that, very early on in the life of the ICTY, the Trial Chamber had already found the lack of guidance in the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993) on the appropriate approach to the use of external judicial decisions 'particularly troubling because of the unique character of the International Tribunal'.¹⁸⁴ More recently, it is notable that the 2009 *Manual on Developed Practices*, which aims to provide a 'blueprint of [the ICTY's] practices for use by other international and domestic courts',¹⁸⁵ makes little mention of this subject. Naturally, the effectiveness of any such provisions or directives would very much depend on their substance. Although provisions on the use of external

¹⁸¹ Grover was here referring to the scarcity of normative guidance on interpretative approaches with respect to the ad hoc Tribunals. However, her observations would appear to apply also to the issue of use of external judicial decisions: see Grover, above n 140, 547 (citations omitted).

¹⁸² For instance, in examining the use of foreign judicial precedents in the jurisprudence of the Hungarian Constitutional Court, Szente observes that '[i]t is certain that the Hungarian Constitutional Court has not evolved a coherent theory on a way of using foreign judicial precedents and practices': Zoltán Szente, 'Hungary: Unsystematic and Incoherent Borrowing of Law. The Use of Foreign Judicial Precedents in the Jurisprudence of the Constitutional Court, 1999–2010' in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart, 2013) 253, 271.

¹⁸³ Michael D Ramsey, 'International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence*' (2004) 98 *American Journal of International Law* 69, 80.

¹⁸⁴ *Prosecutor v Tadić (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses)* (International Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-I-T, 10 August 1995) [17]–[19], citing *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), UN SCOR, 48th sess, 3175th mtg, UN Doc S/25704 (3 May 1993) [99], [103], [108].

¹⁸⁵ International Criminal Tribunal for the Former Yugoslavia and United Nations Interregional Crime and Justice Research Institute, 'ICTY Manual on Developed Practices' (Manual, 2009) 1.

judicial decisions have been incorporated in both art 20(3) of the *SCSL Statute*¹⁸⁶ and art 17(b) of the *Statute of the Iraqi Special Tribunal*,¹⁸⁷ these provisions do little more than allow the SCSL or the Iraqi Special Tribunal to be guided by external judicial decisions. They provide little more in terms of normative guidance. In order to be effective, therefore, it would not be sufficient for any guidance on this subject to curiously state that external judicial decisions may be used 'for guidance' (such as art 20(3) of the *SCSL Statute*).¹⁸⁸ They would have to be more specific, elaborating the criteria on which external judicial decisions are to be considered persuasive and possibly specifying what factors have to be taken into account when approaching and using external judicial decisions. It is considered that such specific guidance may, eventually, result in more coherent approaches to the use of external judicial decisions in the practice of international criminal courts and tribunals. Moreover, in the context of judgment drafting, it would be beneficial if an express paragraph elaborating the court or tribunal's approach to external judicial decisions were included, especially in cases where substantial use of such decisions has been made. So far, only a handful of international criminal courts and tribunals have specified their approaches to the use of external judicial decisions in their judgments; most notably, the ICTY Trial Chamber in *Furundžija (Trial)*¹⁸⁹ and *Kupreškić (Trial)*.¹⁹⁰

Although it would not be realistic to expect international criminal courts and tribunals to adopt fully coherent approaches to the use of external judicial decisions, greater focus on this subject could promote more principled and rigorous approaches to the use of such decisions as well as greater awareness of

¹⁸⁶ *SCSL Statute* art 20(3).

¹⁸⁷ *Statute of the Iraqi Special Tribunal* (2003) 43 ILM 231, art 17(b).

¹⁸⁸ *SCSL Statute* art 20(3).

¹⁸⁹ *Furundžija (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [194]–[226].

¹⁹⁰ *Kupreškić (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [537]–[542].

the risks involved, such as the potential loss of legitimacy for the courts.¹⁹¹ In the final analysis, Nollkaemper points out that where a given court or tribunal expressly specifies its approach to the use of external judicial decisions and, in particular, where it indicates ‘why it chooses the cases that it bases its analysis upon and why such cases provide the basis for the determination and interpretation of rules of international law’,¹⁹² this may increase the persuasiveness of its judgments.

In the introduction to their book, Terris, Romano and Swigart express the hope that their study will furnish the starting point for further scholarly analysis in this area.¹⁹³ In a sense, therefore, this article has taken up that invitation and it is hoped that its reflections may, in turn, serve to focus attention on this subject and to contribute to a better understanding of the role of external judicial decisions across international criminal courts and tribunals.

¹⁹¹ A similar conclusion is reached by Groppi and Ponthoreau, who find that

[a]lthough we agree with some commentators that ‘bricolage is probably the only performance we can reasonably expect from judges’, and that a systematic use of foreign precedents would be a Herculean task, we believe that if judges engage in this practice (a practice that is completely optional) they should be careful in the selection of appropriate cases and in the understanding of the context for judicial cross-fertilisation. Dangers, coming in the form of potential loss of legitimacy for courts, of approximate comparisons etc, are well known ...

Tania Groppi and Marie-Claire Ponthoreau, ‘Conclusion. The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future’ in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart, 2013) 411, 423. However, Ramsey adopts a more pessimistic outlook, considering that the commitment to a more rigorous approach to foreign material poses formidable barriers in practice and suggests that the project would be ‘unworkable in its broader applications’: Ramsey, above n 183, 82.

¹⁹² Nollkaemper, ‘Decisions of National Courts’, above n 37, 296. The critique that courts do not often explain the reasons for using external judicial decisions has also been levelled at the domestic level. For instance, writing with reference to the jurisprudence of the Israeli Supreme Court, Navot notes that the Supreme Court’s use of foreign precedent has not always been coherent ‘mainly because judges ... do not always explain the reasons for their citing of foreign law’: Suzie Navot, ‘Israel: Creating a Constitution — The Use of Foreign Precedents by the Supreme Court (1994–2010)’ in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart, 2013) 129, 152.

¹⁹³ Terris, Romano and Swigart, *The International Judge*, above n 4, xvi.