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# *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*

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## **Abstract**

*This article seeks to initiate a dialogue within international criminal law (ICL) on treaty interpretation. The state of the art is reviewed and three fundamental interpretive dilemmas are identified and analysed. In the author's view, these dilemmas need to be addressed before a method of interpretation for crimes in Articles 6, 7, and 8 of the Rome Statute of the International Criminal Court can be formulated and operationalized. The 'normative dilemma' highlights how the normative tensions underlying ICL might be perpetuated by the interpretive imperatives in Articles 21(3) and 22(2) of the Rome Statute. The 'interpretive aids dilemma' concerns the respective roles of the Elements of Crimes and custom as aids to interpreting crimes in the Rome Statute. The 'inter-temporal dilemma' pertains to whether these crimes are 'frozen' or are to be interpreted in light of relevant and applicable legal developments. Throughout, the aforementioned dilemmas are grafted onto Article 31 of the Vienna Convention on the Law of Treaties to illustrate that they are, at their core, universal problems of interpretation.*

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A word is its own little solar system of meaning. – *Ted Hughes*

## 1 Introduction

At a symposium dedicated to treaty interpretation, it is perhaps impertinent to highlight the dearth of discourse on this topic in the field of international criminal law. To be clear though, shining a spotlight on unresolved interpretive dilemmas is not intended to cast doubt on the progress made in this field to date. Without question, international criminal lawyers have accomplished a Herculean task in the past 17 years. They have worked tirelessly to develop substantive and procedural international criminal law from its embryonic state at the end of World War II to an increasingly sophisticated body of law. Their work is best reflected in the jurisprudence of several *ad hoc* tribunals and the Rome Statute of the International Criminal Court (1998) (Rome Statute),<sup>1</sup> which entered into force on 1 July 2002 and established the first permanent international criminal court (Court) in history. Articles 6, 7, and 8 of the Rome Statute give the Court jurisdiction to try persons for committing genocide, other crimes against humanity, and war crimes.<sup>2</sup> The call in this article for the development of an interpretive methodology for crimes in the Rome Statute is thus a testament to this most admirable progress, a sign that international criminal law is entering its adolescence and should thus start developing certain ‘secondary law’<sup>3</sup> attributes which will help ease its transition into a mature and increasingly respected field of international law.

The purpose of this article is briefly to review the state of the art before proceeding to introduce three fundamental interpretive dilemmas which, in the author’s view, ought to be addressed before a method of interpretation for crimes in Articles 6, 7, and 8 of the Rome Statute is formulated and operationalized.<sup>4</sup> Thus, while tentative observations will be offered on how to resolve some of these dilemmas, one of the main aims of this article is to problematize key interpretive issues expected to confront judges of the Court and lawyers appearing before them – to initiate a dialogue. Going forward, whatever outcome is preferred in respect of these dilemmas, it is submitted that their resolution might usefully form at once the foundation of an interpretive method but also a yardstick against which proposed methods could be evaluated.

This article is divided into four main parts. In section 2, the state of the art for interpretation in the field of international criminal law will briefly be described. Consideration will be given to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR),

<sup>1</sup> UN Doc A/CONF.183/9; 2187 UNTS 90.

<sup>2</sup> The Court also has jurisdiction to try persons for the crime of aggression. However, it is unable to exercise this jurisdiction until a definition for this crime is adopted, conditions for the exercise of jurisdiction over this crime are adopted, and all relevant amendments enter into force. These matters were on the agenda for the Review Conference of the Rome Statute, which was held in Kampala in June 2010. The final outcome, Res RC/Res 6, was adopted by consensus on 11 June. However, owing to its newness, it was not possible to incorporate an analysis of this outcome into this contribution.

<sup>3</sup> H.L.A. Hart, *The Concept of Law* (1961).

<sup>4</sup> This term is borrowed from Sands, ‘Treaty, Custom and the Cross-fertilization of International Law’, 1 *Yale Human Rights & Development LJ* (1998) 85.

and the Court, as well as their statutory frameworks.<sup>5</sup> In section 3, the ‘normative dilemma’ will be analysed. The normative tensions underlying international criminal law will be explained and their impact on the Rome Statute considered by examining Articles 21(3) and 22(2), provisions which have the potential to perpetuate these tensions. In section 4, the ‘interpretive aids dilemma’ will be considered. While customary international law has traditionally been a key interpretive aid and source of law in the field of international criminal law, crimes in the Rome Statute are complemented by the Elements of Crimes (Elements), a non-treaty document adopted by the Assembly of States Parties of the Court (ASP) on 9 September 2002,<sup>6</sup> which lists mental and material elements for each crime in the Court’s jurisdiction. Consideration will be given to whether the advent of the Elements signals the end of custom serving as an aid to the interpretation of crimes in the Rome Statute and, if not, what their respective roles might be. In section 5, the ‘inter-temporal dilemma’, namely whether the crimes in the Rome Statute are to be interpreted in light of relevant and applicable legal developments, will be addressed.

Throughout, the aforementioned dilemmas will be explained and analysed as they pertain to interpreting crimes in the Rome Statute. In the author’s view, as will become evident, the Rome Statute articulates an interpretive imperative specific to the crimes and other provisions may have objects and purposes meriting a slightly different hermeneutic. An attempt will also be made to graft each interpretive dilemma onto the general rule of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties (1969) (Vienna Convention or VCLT),<sup>7</sup> which provides:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

<sup>5</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc S/RES/827, annex (‘ICTY Statute’); Statute of the International Criminal Tribunal for Rwanda, UN Doc S/RES/955, annex (‘ICTR Statute’).

<sup>6</sup> ICC-ASP/1/3 (part II-B), adopted by consensus.

<sup>7</sup> UN Doc A/CONF.39/27; 1155 UNTS 331.

The ICTY, ICTR, and Court have recognized the applicability of Articles 31–33 of the Vienna Convention to the interpretation of international criminal law statutes.<sup>8</sup> By situating the interpretive dilemmas identified within Article 31, the hope is to illustrate that, while these dilemmas manifest themselves in a unique manner within the Rome Statute regime, at their core, they can be understood as universal problems of interpretation.<sup>9</sup>

## 2 State of the Art

A method of interpretation, for the purposes of this article, is understood to mean a systemic general approach to reasoning through the resolution of interpretive issues. A fully developed method has three tiers. It offers its user, in this case judges and lawyers in the field of international criminal law, the following levels of assistance: (1) a primary interpretive principle to guide their reasoning process when confronted with interpretive issues; (2) arguments or reasons which support this interpretive principle; and (3) a catalogue of materials or aids which must, may, and, if applicable, may not be taken into account in support of these arguments.<sup>10</sup> The interpretive imperatives in Articles 31–33 of the Vienna Convention are reflective of customary international law but not an exhaustive catalogue of interpretive techniques used by

<sup>8</sup> Even though the ICTY and ICTR Statutes are not technically treaties, both tribunals have held that the interpretive rules in the Vienna Convention are relevant and applicable to their work: *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY-94-1-AR72, 2 Oct. 1995, at para. 18 ('*Tadić Jurisdiction Decision*'); *Prosecutor v. Erdemović*, Judgment, Joint Separate Opinion of Judges McDonald and Vohrah, ICTY-96-22-A, 7 Oct. 1997, at para. 3; *Prosecutor v. Bagosora et al.*, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Theoneste Bagosora and 28 Others, ICTR 98-37-A, 8 June 1998, at paras 28–29; *Prosecutor v. Delalić et al.*, Judgment, ICTY-96-21-T, 16 Nov. 1998, at para. 1161. On the merits of the reasons given by the ICTY and ICTR for applying the Vienna Convention to their Statutes see Schabas, 'Interpreting the Statutes of the Ad Hoc Tribunals', in L.C. Vohrah (ed.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003), at 847, 849–852. On the Court accepting the applicability of the Vienna Convention see *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 Mar. 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, at paras 33–42, cited in Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC', in C. Stahn (ed.), *The Emerging Practice of the International Criminal Court* (2009), at 281, 295.

<sup>9</sup> For an argument of this nature made in respect of the interpretation of international human rights treaties see Christoffersen, 'Impact on General Principles of Treaty Interpretation', in M.T. Kamminga and M. Scheinin (eds), *The Impact of Human Rights Law on General International Law* (2009), at 37.

<sup>10</sup> This definition takes its inspiration from the study in D.N. MacCormick and R.S. Summers (eds), *Interpreting Statutes: A Comparative Study* (1991). A legal methodology may be defined 'as a systemic general approach to the duly purposive and consistent execution of a recurrent type of major task arising in the making or application of law': R.S. Summers, *Form and Function in a Legal System: A General Study* (2006), at 241.

international judges.<sup>11</sup> The International Law Commission (ILC) in its commentary to Article 31 stated:

The Commission, by heading the article 'General Rule of Interpretation' in the singular and by underlining the connection between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible and their interaction would give the legally relevant interpretation.<sup>12</sup>

The crucible approach has generally yielded three schools of interpretation: (1) the textual approach; (2) the intent-based approach; and (3) the object and purpose approach.<sup>13</sup> In an established area of law which includes detailed treaty texts and a well-accepted normativity, the crucible approach might yield the prevalence of one of these schools as well as a coherent and stable body of jurisprudence on interpretation. However, the ICTY and ICTR Statutes ushered in the modern era of international criminal law under relatively impoverished circumstances. Neither of the Statutes contains interpretive guidance and each provides little more than vague jurisdictional headings for entire categories of crimes, some of which are not exhaustively listed, with little indication of requisite mental and material elements that must be proven or possible defences to crimes. And while the rights of the accused are briefly mentioned, the rules of procedure and evidence for the ICTY and ICTR were left to judges to adopt. Further, as will be seen, the normativity of international criminal law when these tribunals began their work was (and is) far from settled.

It is against this backdrop of vague and scant Statutes as well as serious normative tensions that judges at the ICTY and ICTR have had to put flesh on the bones of modern international criminal law. What they have achieved under these circumstances is extraordinary. However, from the perspective of interpretation, such a state of affairs opened the door for judges to develop their own methods which were perhaps inspired by their legal training<sup>14</sup> and/or understanding of international criminal law's normativity. No prevailing hermeneutic has emerged and the jurisprudence contains inconsistent reasoning with references to *inter alia* the following principles of interpretation:<sup>15</sup>

<sup>11</sup> International Law Commission (ILC), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, finalized by M. Koskenniemi, UN Doc A/CN.4/L.682 (2006), at 181; Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law', in Kamminga and Scheinin, *supra* note 9, at 1, 10.

<sup>12</sup> ILC, 'Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session', in *Yrbk Int'l Law Comm* (1966), ii, at 219–220.

<sup>13</sup> See Van Damme, in this volume.

<sup>14</sup> Wessel, 'Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication', 44 *Columbia J Transnat'l L* (2006) 377.

<sup>15</sup> For a review of the interpretive practices of the ICTY and ICTR see Schabas, *supra* note 8.

literal,<sup>16</sup> logical,<sup>17</sup> contextual,<sup>18</sup> purposive,<sup>19</sup> effective,<sup>20</sup> drafter's intent,<sup>21</sup> and progressive.<sup>22</sup> Human rights standards,<sup>23</sup> including fairness to the accused,<sup>24</sup> as well as interpretation most consistent with customary law have also been invoked as guiding considerations.<sup>25</sup> Regarding the customary law presumption, it is recalled that the UN Secretary-General's report on the establishment of the ICTY expressly stated that its jurisdiction is limited to conduct which is 'beyond doubt' criminal under customary international law.<sup>26</sup>

<sup>16</sup> *Delalić*, *supra* note 8, at paras 161, 170, and 438; *Prosecutor v. Tadić*, Judgment, ICTY-94-1-A, 15 July 1999, at para. 296 ('*Tadić Judgment*'); *Tadić Jurisdiction Decision*, *supra* note 8, at paras 35 and 71; *Prosecutor v. Krnojelac*, Judgment, Separate Opinion of Judge Schomburg, ICTY-97-25-A, 17 Sept. 2003, at para. 13; *Barayagwiza v. Prosecutor*, Decision, Separate Opinion of Judge Shahabuddeen, ICTR-97-19-AR72, 3 Nov. 1999, at s. 4; *Prosecutor v. Blagojević et al.*, Judgment, ICTY-02-60-A, 9 May 2007, at para. 281; *Prosecutor v. Kupreškić et al.*, Judgment, ICTY-95-16-T, 14 Jan. 2000, at para. 569; *Prosecutor v. Krstić*, Judgment, ICTY-98-33-T, 2 Aug. 2001, at para. 496; *Kanyabashi v. Prosecutor*, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinion of Judges McDonald and Vohrah, ICTR-96-15-A, 3 June 1999, at para. 13.

<sup>17</sup> *Delalić*, *supra* note 8 at paras 166 and 400; *Tadić Jurisdiction Decision*, *supra* note 8, at paras 79–95; *Kupreškić*, *supra* note 16, at paras 564, 571, and 620; *Kanyabashi v. Prosecutor*, Dissenting Opinion of Judge Shahabuddeen, *supra* note 16, at 21; *Tadić Judgment*, *supra* note 16, at para. 284.

<sup>18</sup> *Delalić*, *supra* note 8, at para. 166; *Prosecutor v. Blaškić*, Judgment, ICTY-95-14-T, 3 Mar. 2000, at paras 168 and 202; *Tadić Jurisdiction Decision*, *supra* note 8, at paras 11, 43 ff, 68, 73, 90, and 93; *Delalić*, *supra* note 8, at paras 166 and 438; *Barayagwiza*, Shahabuddeen Dissent, *supra* note 16.

<sup>19</sup> *Kanyabashi v. Prosecutor*, Joint Separate Opinion of Judges Wang Tieya and Rafael Nieto-Navia, *supra* note 16, at para. 13; *Kanyabashi*, Shahabuddeen Dissent, *supra* note 17; *Prosecutor v. Orić*, Judgment, ICTY-03-68-T, 30 June 2006, at para. 300; *Kanyabashi*, McDonald and Vohrah Opinion, *supra* note 16, at paras 16, 17, and 19; *Prosecutor v. Simić et al.*, Decision on Motion for Judicial Assistance to be provided by SFOR and Others, ICTY-95-9-PT, 18 Oct. 2000, at paras 46 and 48; *Blagojević*, *supra* note 16, at para. 281; *Tadić Jurisdiction Decision*, *supra* note 8, at paras 72–78; *Prosecutor v. Krstić*, Judgment, ICTY-98-33-A, 19 Apr. 2004, at para. 8; *Delalić*, *supra* note 8, at paras 163–165, 170.

<sup>20</sup> *Barayagwiza*, *supra* note 16, Shahabuddeen Dissent, *supra* note 17, at paras 46 and 110; *Tadić Judgment*, *supra* note 16, at para. 284; *Kupreškić*, *supra* note 16, at paras 606 and 623; *Delalić*, *supra* note 8, at paras 164 and 170.

<sup>21</sup> *Kanyabashi*, Wang Tieya and Nieto-Navia Opinion, *supra* note 19, at para. 13; *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, 2 Sept. 1998, at para. 516; *Prosecutor v. Musema*, Judgment, ICTR-96-13-T, 27 Jan. 2000, at para. 162. Drafter's intent is often used as a justification for interpreting provisions consistently with customary international law: *Delalić*, *supra* note 8, at paras 357, 390, and 439; *Blaškić*, *supra* note 18, at paras 219, 314 ff; *Prosecutor v. Simić*, Judgment, Dissenting Opinion of Judge Schomburg, ICTY-95-9-A, 28 Nov. 2006, at para. 3; *Musema*, *supra*, at para. 202 ff; *Prosecutor v. Tadić*, Judgment, ICTY-94-1-T, 7 May 1997, at para. 713 ('*Tadić Trial Judgment*' ICTY Statute).

<sup>22</sup> *Prosecutor v. Jelisić*, Judgment, ICTY-95-10-T, 14 Dec. 1999, at para. 61; *Tadić Jurisdiction Decision*, Separate Opinion of Judge Abi-Saab, *supra* note 8; *Tadić Jurisdiction Decision*, *supra* note 8, at para. 6; *Musema*, *supra* note 21, at para. 228; *Prosecutor v. Kunarac*, Judgment, ICTY-96-23 & ICTY-96-23/1-A, 12 June 2002, at para. 67; *Simić*, *supra* note 21, at para. 17.

<sup>23</sup> *Delalić*, *supra* note 8, at paras 265–266; *Prosecutor v. Furundžija*, Judgment, ICTY-95-17/1-T, 10 Dec. 1998, at para. 183.

<sup>24</sup> *Delalić*, *supra* note 8, at paras 408–413; *Kanyabashi*, Shahabuddeen Dissent, *supra* note 17, at 21; *Prosecutor v. Rutaganda*, Judgment, ICTR-96-3-T, 6 Dec. 1999, at para. 50; *Akayesu*, *supra* note 21, at paras 319 and 501; *Musema*, *supra* note 21, at para. 155; *Prosecutor v. Blagojević et al.*, Judgment, ICTY-02-60-T, 17 Jan. 2005, at para. 642, n. 2057; *Prosecutor v. Kayishema*, Judgment, ICTR-95-1-T, 21 May 1999, at para. 103. *Supra* note 21.

<sup>26</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704, at para. 34. In contrast to the ICTY Statute, the Secretary-General admitted that Art. 4 of the ICTR Statute goes somewhat beyond custom by including violations of the Protocol Additional to the

Adding to this confusion is that none of the aforementioned interpretive principles has been authoritatively defined, and so their meanings vary throughout the jurisprudence and sometimes even overlap. Not surprisingly, therefore, arguments supporting interpretive principles are not clearly connected to the interpretive principle to which they adhere. For example, judges have used the principle of literal interpretation to endorse arguments favouring both strict and broad interpretations of impugned words.<sup>27</sup> On other occasions, bald statements about the prudence of adopting a broad interpretation of a phrase, for example, are not buttressed by an explanation about how this argument achieves the greatest faithfulness to a particular interpretive principle (e.g., progressive interpretation, effective interpretation). Further, the scant detail in the ICTY and ICTR Statutes understandably leads to greater than normal convergence of interpretation and application of the law, with judges not always specifying whether they are invoking a legal source as an aid to interpreting a statutory provision or applying it directly to a set of facts. This confusion has extended to interpretive aids, which form the third tier of an interpretive methodology. Interpretive aids may be authoritative, that is, binding or non-binding materials which must be taken into account if relevant, or non-authoritative, meaning materials which may be taken into account.<sup>28</sup> In the jurisprudence of the ICTY and ICTR, it is difficult to ascertain the admissibility or persuasiveness of the materials which have aided judges in the interpretive process – the extent to which judges must, may, or may not consider these materials. In sum, the Statutes and jurisprudence of the ICTY and ICTR have not yielded a prevailing hermeneutic for international criminal law. Accordingly, the development of a method of interpretation, as defined above, has not been possible.

With the advent of the Court, some methodological progress has been made. First, the Rome Statute contains Articles 21(3) and 22(2), both of which contain interpretive guidance and will be discussed below. Secondly, whereas the distinction between interpretation and application of the law has not always been identified in the jurisprudence of the ICTY and ICTR, this distinction has not only been entrenched in Article 21 of the Rome Statute, which makes alternating references to ‘interpretation’ and ‘application’, but also recognized by judges of the Court.<sup>29</sup> By referring expressly

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Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977) (Additional Protocol II), 1125 UNTS 609 (Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc S/1995/134, at para. 12). On this point, it is interesting to note that Rwanda acceded to Additional Protocol II on 19 Nov. 1984.

<sup>27</sup> *Blaškić*, *supra* note 18, at para. 328; *Tadić Trial Judgment*, *supra* note 21, at para. 639; *Blagojević*, *supra* note 16, at para. 281; *Prosecutor v. Martić*, Judgment, ICTY-95-11-T, 12 June 2007, at para. 50.

<sup>28</sup> MacCormick and Summers, *supra* note 10, at 475–476. This distinction has been acknowledged on occasion by judges at the ICTY: *Delalić*, *supra* note 8, at paras 168–169. However, unlike the judges in *Delalić*, MacCormick and Summers define authoritative aids as including non-binding materials, such as official regulations and similar statutes in other jurisdictions.

<sup>29</sup> See, e.g., Art. 21 Rome Statute; *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Art. 19(2)(a) of the Statute of 3 Oct. 2006, ICC-01/04-01/06-772, 14 Dec. 2006, at para. 34, ICC-01/04-01/06-772, at para. 34, cited in Bitti, *supra* note 8; *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* [2003] ICJ Rep 161. Based on the Court’s reasoning and in the context of a case

to interpretation, the Rome Statute legitimates the role of judges as interpreters of international criminal law, a notion which was perhaps on shaky or contested ground in the past. Thirdly, judges have acknowledged that the Rome Statute regime is distinct from the ICTY and ICTR regimes.<sup>30</sup> The jurisprudence of the *ad hoc* tribunals is so rich that it is perhaps tempting for those working at the Court, many of whom spent time working at the tribunals, to transpose familiar legal approaches wholesale, which would be mistaken.

### 3 Normative Dilemma

#### A *International Criminal Law's Difficult Birth*

The normative tensions underlying international criminal law can be understood in two ways: (1) as an 'identity crisis' owing *inter alia* to its mixed legal parentage,<sup>31</sup> and (2) as a tension between its substantive justice origins and strict legality aspirations.<sup>32</sup> Each will briefly be explained.

International criminal law is a 'hybrid branch of law', as it is the child of a tripartite marriage between international human rights law, its *jus in bello* cousin, international humanitarian law, and domestic criminal law.<sup>33</sup> Whereas the fundamental principles underpinning a liberal criminal justice system are those of personal culpability, legality, and fair labelling,<sup>34</sup> international human rights law is focused on state responsibility and harm to the victim.<sup>35</sup> Thus, while the object and purpose of criminal justice favours the strict construction of statutes, the object and purpose of international human rights instruments is invoked to justify generally broad interpretations of crimes to ensure that 'harms are recognized and remedied, and that, over time, there is progressively greater realization of respect for human dignity and freedom'.<sup>36</sup>

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raising a procedural issue. Bitti defines a gap in the Rome Statute as follows: 'a gap in the Statute may be defined as an "objective" which could be inferred from the context or the object and purpose of the Statute, an objective which would not be given effect by the express provisions of the Statute or the Rules of Procedure and Evidence, thus obliging the judge to resort to the second or third source of law – in that order – to give effect to that objective. In short, the subsidiary sources of law described in Article 21 (1) (b) or (c) cannot be used just to add other procedural remedies to the Statute and the Rules of Procedure and Evidence'.

<sup>30</sup> See, e.g., *Prosecutor v. Kony et al.*, Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes in the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, ICC-02/04-01/05-60, 28 Oct. 2005, at para. 19, cited in Bitti, *supra* note 8, at 297.

<sup>31</sup> Robinson, 'The Identity Crisis of International Criminal Law', 21 *Leiden J Int'l L* (2008) 925; Danner and Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California L Rev* (2005) 75.

<sup>32</sup> A. Cassese, *International Criminal Law* (2nd edn, 2008), at 36 ff.

<sup>33</sup> *Ibid.*, at 6–7.

<sup>34</sup> Robinson, *supra* note 31, at 930–931.

<sup>35</sup> Danner and Martinez, *supra* note 31, at 87–89.

<sup>36</sup> *Ibid.*, at 89. On the imprecise meaning of human dignity see McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', 19 *EJIL* (2008) 655. On the evolutive interpretation of human rights treaties see Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights', 42 *German Yrbk int'l L* (1999) 11; Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties', 21 *Hague Yrbk Int'l L* (2008) 101; Christoffersen, *supra* note 9.

Of course, there is some overlap in the objectives of these normative frameworks, such as fair trial protections for the accused and victim participation rights in legal proceedings. Additionally, whereas both international human rights and humanitarian law aim to protect the individual, the latter generally admits more rights limitations, as it seeks to strike an acceptable 'compromise between humanitarian ideals and the desire to ensure military effectiveness in warfare'.<sup>37</sup> At the same time, it has been demonstrated that international human rights has had a 'humanizing effect' on international humanitarian law.<sup>38</sup> Thus, while many international crimes initially 'emerged directly from'<sup>39</sup> international humanitarian law or were at least characterized as such, this relationship is weakening and international criminal law's direct ties to international human rights strengthening. In light of this 'cross-fertilization' and the influence of three sets of parent norms,<sup>40</sup> it is not surprising that international criminal law suffers from an identity crisis.

A second way to understand the uncertain normativity of international criminal law is to consider its substantive justice origins and strict legality aspirations. The genesis of modern international criminal law can be traced to the trial of war criminals at Nuremberg and Tokyo after the Second World War.<sup>41</sup> These trials have been criticized *inter alia* as offending the principle of legality because certain crimes contained in their governing statutes, namely crimes against peace and crimes against humanity, were said to have been created after the acts in question were committed. Confronted with an objection to the retroactive application of these laws, the Nuremberg tribunal responded:

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is a general principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.<sup>42</sup>

In recent times, where dynamic interpretation motivated by substantive justice considerations has been perceived as offending the principle of legality, a distinction has been drawn between the jurisdiction of international criminal tribunals and the criminality of the conduct being adjudicated:

Some criminal defence lawyers from national systems may be scandalised at the ease with which the [international criminal law] judges have enlarged the definitions of crimes and the general principles of criminal responsibility. But this writer is not overly troubled by the point, because whether or not criminal behaviour falls within the scope of international prosecution

<sup>37</sup> R. Provost, *International Human Rights and Humanitarian Law* (2002), at 136; J. Pictet, *Development and Principles of International Humanitarian Law* (1985).

<sup>38</sup> See generally Meron, 'International Law in the Age of Human Rights', 301 *Recueil des cours* (2003), at 24 ff.

<sup>39</sup> Danner and Martinez, *supra* note 31, at 81.

<sup>40</sup> This term is borrowed from Sands, *supra* note 4.

<sup>41</sup> Cassese, *supra* note 32, at 319 ff.

<sup>42</sup> International Military Tribunal (Nuremberg), Judgment and Sentences, 41 *AJIL* (1947) 172, at 217, emphasis added.

by the ad hoc Tribunals is fundamentally a jurisdictional issue. Even if we suppose, for the sake of argument, and as many believed before the *Tadić Jurisdiction Decision*, there was no individual criminal liability at international law in internal armed conflict, the underlying acts of killing, torture and rape remained crimes under general principles of law. An offender can plead that the Tribunal is without jurisdiction, based on a certain interpretation of the subject-matter provisions, but it cannot be argued that he or she did not know it was wrong.<sup>43</sup>

The above passage may be seen as the modern manifestation of the substantive justice and strict legality tension within international criminal law. Notions of fair warning or notice and individual autonomy which the principle of legality is intended to protect are thought not to be undermined in certain situations. However, legality as a constitutional principle in municipal jurisdictions is also concerned with safeguarding the separation of powers, leaving law-making to the legislature (or states at the international level) and law interpretation and application to judges.<sup>44</sup>

### B Article 22, Adolescence and the Emergence of a Distinct Identity?

At the Rome Diplomatic Conference in 1998, delegates were familiar with the experiences of the ICTY and ICTR judges adjudicating cases of individual criminal liability. Keenly aware that the treaty they were negotiating was for establishing an international criminal court with permanent jurisdiction to try *inter alia* their own state agents, delegates were guided by the principle of specificity, meaning that they attempted 'to set out in detail all the classes of crimes falling under the jurisdiction of the Court, so as to have a *lex scripta* laying down the substantive criminal rules to be applied by the ICC'.<sup>45</sup> Their goal was to list crimes within the Court's jurisdiction exhaustively and in as detailed and clear a manner as possible so that states and their agents could know with reasonable certainty what the outer reaches of prohibited conduct were and what obligations they had under the Rome Statute.<sup>46</sup> The principle of legality was said to require this.<sup>47</sup> While not perfect,<sup>48</sup> four aspects of the Rome Statute evidence extraordinary advances relative to the ICTY and ICTR Statutes in terms of legal certainty. First, it contains not only categories of offences, but also nearly

<sup>43</sup> Schabas, *supra* note 8, at 887.

<sup>44</sup> A. Ashworth, *Principles of Criminal Law* (4th edn, 2003), at 81–82; Ashworth, 'Interpreting Criminal Statutes: a Crisis of Legality?', 107 *LQR* (1991) 419, at 420 ff.

<sup>45</sup> Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *EJIL* (1999) 144, at 152.

<sup>46</sup> Broomhall, 'Article 22', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), at 713, 713–717.

<sup>47</sup> *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court* (1995), UN Doc A/50/22, at paras 52 and 57, and *Report of the Preparatory Committee on the Establishment of an International Criminal Court* (Proceedings of the Preparatory Committee during Mar.–Apr. and Aug. 1996), i, UN Doc A/51/22, at paras 52, 180, and 185, cited in Lamb, 'Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law', in A. Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002), i, at 733, 747.

<sup>48</sup> See, e.g., Ambos, 'Nulla Poena Sine Lege in International Criminal Law', in R. Haveman and O. Olusanya (eds), *Sentencing and Sanctioning in Supranational Criminal Law* (2006), at 17.

exhaustively lists more than 90 crimes,<sup>49</sup> which are supplemented by the Elements of Crimes. Secondly, Article 21 contains a hierarchy of law which judges are to apply if interpretation of the Rome Statute and Elements of Crimes fail to resolve an issue. Thirdly, the Rome Statute contains numerous procedural protections for suspects and accused which are further supplemented by Rules of Procedure and Evidence.<sup>50</sup> Fourthly, Part 3 of the Rome Statute sets out, for the first time, general principles of international criminal law applicable to crimes within the Court's jurisdiction. These address *inter alia*: basic concepts and modes of individual criminal responsibility, requisite mental elements, grounds for excluding criminal responsibility, and mistakes of fact and law.

For interpretive purposes, one of the most important developments at Rome was the express mention of the principle of legality in Article 22(2):

The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

Article 22(2) obliges judges to construe crimes strictly, not extend them by analogy, and to interpret them in favour of the suspect or accused in case of ambiguity.<sup>51</sup> The perceived liberal interpretive reasoning of the *ad hoc* tribunals was a motivating factor for states to adopt this provision.<sup>52</sup> The principle of legality is further manifested in the following three prohibitions: (1) retroactive exercise of jurisdiction by the Court (Article 11(1)); (2) conviction for a crime which is not within the Court's jurisdiction at the time it is perpetrated (Articles 22(1) and 24(1)); and (3) retroactive application of all applicable law set out in Article 21 prior to a final judgment unless the new law is more favourable to the person being investigated, prosecuted, or convicted (Article 24(2)). In light of the principle of specificity guiding drafters of the Rome Statute and their decision to embed the principle of legality firmly in Article 22(2), the normative dilemma confronting international criminal law has arguably been resolved for the Court with respect to interpreting Articles 6, 7, and 8. Whether the principle of legality

<sup>49</sup> Arts. 7(1)(g) ('any other form of sexual violence of a comparable gravity') and (k) ('other inhumane acts of a similar character') leave the list of crimes against humanity in the Rome Statute somewhat open-ended. See also Art. 8(b)(xxii) and (e)(vi) on sexual violence as a war crime.

<sup>50</sup> ICC-ASP/1/3, adopted by the ASP on 9 Sept. 2002.

<sup>51</sup> There is an abundance of literature on the rationale for and content of the legality principle. See, e.g., Ashworth, *Principles*, *supra* note 44, at 69 ff; Broomhall, *supra* note 46; Cassese, *supra* note 32, at 36 ff; K. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (2009); Kreß, 'Nullum crimen, nulla poena sine lege', in R. Wolfrum (ed.), *Max Planck Encyclopedia Public Int'l L* (forthcoming, on file with author); Lamb, *supra* note 47; Ritter von Feuerbach, 'The Foundations of Criminal Law and the Nullum Crimen Principle', 5 *J Int'l Crim Justice* (2007) 1005; von Liszt, 'The Rationale for the Nullum Crimen Principle', 5 *J Int'l Crim Justice* (2007) 1009; Bassiouni, 'Principles of Legality in International and Comparative Criminal Law', in M.C. Bassiouni (ed.), *International Criminal Law* (2008), i, at 73; Haveman, 'The Principle of Legality', in R. Haveman, O. Kavran, and J. Nicholls (eds), *Supranational Criminal Law: A System Sui Generis* (2003), at 39; Hall, 'Nulla Poena Sine Lege', 47 *Yale LJ* (1937) 165; Jeffries, Jr., 'Legality, Vagueness, and the Construction of Penal Statutes', 71 *Virginia L Rev* (1985) 189; Mokhtar, 'Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects', 26 *Statute L Rev* (2005) 41.

<sup>52</sup> Broomhall, *supra* note 46, at 725.

may appropriately impact on the interpretation of other parts of the Rome Statute is not considered here.

If Article 22(2) signals international criminal law's full commitment to a liberal criminal justice identity rooted in the principle of legality, how is this principle supposed to operate in the Rome Statute regime for purposes of interpretation? The evolution and application of the legality principle in domestic legal systems, at the international level and before international criminal tribunals, has been fitful and qualified, especially in jurisdictions where a legal tradition of unwritten laws exists.<sup>53</sup> In various jurisdictions, the legality principle's scope reveals a persistent albeit attenuated tension between compelling considerations of substantive justice and strict legality. A legal order modelled on the substantive justice doctrine has as its aim the punishment of socially harmful or dangerous conduct even if this requires retroactive application of the law.<sup>54</sup> As previously mentioned, the Nuremberg and Tokyo trials attempted to derive some of their legitimacy from the substantive justice doctrine.<sup>55</sup>

A legal order premised on the doctrine of strict legality purports to punish an individual only for acts which were criminal when performed so as to protect individuals against the harsh and arbitrary exercise of state power.<sup>56</sup> The influence of strict legality on the task of interpretation is to limit the power of unelected judges to curtail individual autonomy illegitimately<sup>57</sup> and to ensure respect for the law-making role of the legislature as distinct from the law interpretation and application role of the judiciary.<sup>58</sup> While most criminal law jurisdictions have adopted a doctrine of strict legality in theory, and invoke it to justify the principle of legality,<sup>59</sup> considerations of substantive justice have, in practice, qualified the principle's application in absolute terms. It is submitted that, like domestic criminal law jurisdictions, international criminal law cannot adhere to the strict legality doctrine absolutely. Some crimes are inherently vague,<sup>60</sup> some vagueness is inevitable to avoid 'excessive rigidity and to keep pace with changing circumstances',<sup>61</sup> and in the absence of a world legislature, universally binding written criminal prohibitions (and defences to them) do not exist.<sup>62</sup> Further, while courts and tribunals have worked hard to give clear content to vague international criminal law concepts, the absence of a supreme international criminal court means that this work has occurred in a decentralized manner through *ad hoc* international tribunals, hybrid tribunals, and domestic courts.<sup>63</sup> Like some domestic

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, at 719; Cassese, *supra* note 32, at 36–37; Ashworth, *Principles*, *supra* note 44, at 74–75, 78–80, 82–84.

<sup>55</sup> Cassese, *supra* note 32, at 39.

<sup>56</sup> *Ibid.*, at 37.

<sup>57</sup> Ashworth, *Principles*, *supra* note 44, at 70.

<sup>58</sup> *Ibid.*, at 69–70.

<sup>59</sup> J. Raz, *The Authority of Law* (1979), at 214–215, cited in Ashworth, *Principles*, *supra* note 44, at 70.

<sup>60</sup> E.g., Art. 7(1)(k) ('other inhumane acts of a similar character').

<sup>61</sup> App. No. 14307/88, *Kokkinakis v Greece*, ECHR (1994) Series A, No. 260-A, at para. 52.

<sup>62</sup> Cassese, *supra* note 32, at 42.

<sup>63</sup> *Ibid.*, at 42–43.

jurisdictions, the legality principle applied at the international level may therefore be 'subject to a number of significant qualifications',<sup>64</sup>

For example, the European Court of Human Rights held in *SW and CR v. United Kingdom*<sup>65</sup> that the principle of strict construction is satisfied when a judicial interpretation, while not strictly in conformity with the wording of a criminal prohibition or relevant case law, is nonetheless reasonably foreseeable – even if this requires obtaining legal advice<sup>66</sup> – and is consistent with the essence of an offence. The Rome Statute does not expressly admit the qualification of foreseeability and so it remains to be seen whether the Court will recognize it. This qualification is said to leave scope for the 'thin ice' principle, which is underpinned by considerations of substantive justice, to operate.<sup>67</sup>

In addition to the qualifications of foreseeability and constructive knowledge of the illegality of criminal conduct, it is often asserted that strict construction cannot surreptitiously gut the concept of interpretation of all meaning. Judges are mandated to interpret and apply the law, which requires giving content in good faith to the text in light of its ordinary or special meaning, context, object, and purpose, as well as subsequent practice, subsequent agreements, and applicable law.<sup>68</sup> Thus, both the strict construction imperative and ban on analogy are said to 'not stand in the way of progressive juridical clarification of the content of an offence'.<sup>69</sup> This interpretive exercise is not considered to undermine the notion of fair warning or separation of powers concerns so long as the Court's reasoning does not yield a new crime not contemplated by states parties.<sup>70</sup> The ban on analogy is also intended to discourage the creation of substantially new crimes.<sup>71</sup> Indeed, these liberal standards will render the line between interpretation and judge-made law fine in hard cases. However, if Articles 6, 7, and 8 are lacking in some way, it is for the ASP to decide whether to amend the Court's jurisdiction.<sup>72</sup> While strict construction cannot be said to have a fixed place in interpretive reasoning, it has been suggested that it is one of the points which a

<sup>64</sup> *Ibid.*, at 41.

<sup>65</sup> App No 47/1994/494/576, ECHR (1995) Series A, Nos 335-B and 335-C, at paras 36 and 34, respectively; Gallant, *supra* note 51, at 359 ff.

<sup>66</sup> See Art. 32(2) Rome Statute.

<sup>67</sup> '[T]hose who skate on thin ice can hardly expect to find a sign which will denote the precise spot where he will fall in': *Kneller v. DPP* [1973] AC 435, cited in Ashworth, *Principles*, *supra* note 44, at 74–75.

<sup>68</sup> *US v. Davis*, 576 F2d 1065, at 1069 (3d Cir. 1978) (Aldisert, J. concurring), cited in Paust, 'Nullum Crimen and Related Claims', 25 *Denver J Int'l L & Policy* (1997) 321, at 325; *Delalić*, *supra* note 8, at para. 413: '[t]he effect of strict construction of the provisions of a criminal statute is that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of construction fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself' (emphasis added).

<sup>69</sup> *SW and CR*, *supra* note 65; Broomhall, *supra* note 46, at 724; Cassese, *supra* note 32, at 44–47; Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?', 2 *J Int'l Crim Justice* (2004) 1007.

<sup>70</sup> On fair warning and the surreptitious broadening of crimes see Cassese, *supra* note 32, at 48. For a critique of strict construction and the concept of fair warning see Jeffries, Jr., *supra* note 51.

<sup>71</sup> Lamb, *supra* note 47, at 753; Broomhall, *supra* note 46, at 725.

<sup>72</sup> *Ibid.* at 725; Arts 121–123, Rome Statute.

judge must consider when interpreting a criminal offence.<sup>73</sup> It requires judges to ‘exercise restraint’ and favour the suspect or accused when ‘left in doubt about the legislative purpose’.<sup>74</sup> Similarly, where Articles 31–33 of the Vienna Convention fail to resolve an ambiguity, the interpretation most favourable to the accused is to be adopted.<sup>75</sup> Thus, elements of the principle of legality remind judges to begin with the text of a criminal prohibition and return to it before reaching a conclusion by asking whether the interpretation contemplated respects the right of the accused to fair notice and is consistent with the role of judges interpreting and applying the law but not making it.

Like the principle of strict construction, the ban on analogy has enjoyed mixed use at the national level,<sup>76</sup> remains to be defined in the Rome Statute regime, and is often subject to a number of qualifications. For example, the ban on analogy is not prohibited in major legal systems of the world in the following situations: (1) where resort is made to general principles of international criminal law or criminal justice, or to ‘principles common to the major legal systems of the world’, to determine whether the impugned conduct is prohibited under custom or treaty law;<sup>77</sup> (2) where the wording of the crime itself requires reasoning by analogy (e.g., ‘other inhumane acts of a similar character’);<sup>78</sup> (3) where logical reasoning leads to the invocation of treaty provisions to determine whether the impugned conduct is prohibited under general principles of law;<sup>79</sup> or (4) where a plain reading of the statutory text in light of its object and purpose reveals a gap which needs to be filled by reference to other Articles or paragraphs of the same Article.<sup>80</sup> Thus, the ban on analogy does not typically prohibit contextual reasoning inspired by statutory provisions, logical reasoning, or resort to applicable law to fill gaps in a criminal statute. In some jurisdictions which uphold the ban, reasoning by analogy is even permitted to allow for judicially created crimes which are foreseeable and for penalties which are not legislated but left to be determined by judges, who perhaps consider previous sentences in similar cases when issuing a sentence in the instant case.<sup>81</sup> As these examples reveal, the ban on analogy could greatly benefit from being gradually defined by the Court in its case law, and

<sup>73</sup> Ashworth, *Principles*, *supra* note 44, at 81.

<sup>74</sup> *Ibid.*, at 82.

<sup>75</sup> Broomhall, *supra* note 46, at 726; Cassese, *supra* note 32, at 51.

<sup>76</sup> Broomhall, *supra* note 46, at 724.

<sup>77</sup> Cassese, *supra* note 32, at 49.

<sup>78</sup> *Ibid.*; Broomhall, *supra* note 46, at 725.

<sup>79</sup> Cassese, *supra* note 48, at 50. The example Cassese gives is where judges try to determine whether use of a particular weapon offends the general principle prohibiting the use of weapons that are inherently indiscriminate or cause unnecessary suffering. In doing so, they look at weapons prohibitions in treaties to see which weapons have been prohibited for this reason. Judges may then compare the characteristics of these weapons with the characteristics of the new weapon to determine whether the latter violates the aforementioned general principle.

<sup>80</sup> Broomhall, *supra* note 46, at 725. One example that Broomhall gives of this is where the Rome Statute and Elements of Crimes do not clearly define the elements that need to be proven in light of a particular set of facts. Here, other provisions of the Statute and Elements may be consulted to aid the Court in its reasoning.

<sup>81</sup> Lamb, *supra* note 47, at 752.

the line between permissible interpretation by analogy and law-making will be fine in hard cases.<sup>82</sup> In particular, states parties may have left the door open for substantive justice considerations when interpreting the residual category of ‘other inhumane acts of a similar character’ as a crime against humanity.<sup>83</sup>

If legality is recognized as the guiding principle for interpreting crimes in the Court’s jurisdiction, it would require the textual approach to prevail over competing intent as well as object and purpose based approaches to applying Article 31 of the Vienna Convention.<sup>84</sup> This means, quite simply, textual primacy. Considerations of context, object, and purpose as well as interpretive aids such as the Elements of Crimes and *travaux préparatoires* cannot be invoked inappropriately to broaden, modify, or override the plain meaning of these Articles. The same is true of normative arguments about the importance of protecting victims of crimes or giving effect to the Court’s jurisdiction to end impunity. Any interpretive argument which suggests modifying the language in these Articles is arguably inconsistent with the principle of legality and its corresponding textual approach to interpretation.<sup>85</sup> As well, ‘where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning that the canons of construction fail to solve, the benefit of doubt should be given to the subject and against the legislature that has failed to explain itself’.<sup>86</sup>

The viability of legality as a primary or guiding interpretive principle for crimes in the Rome Statute is due in no small part to the detail contained in Articles 6, 7, and 8 and the maturation of international criminal law in recent years. Indeed, ‘we are now heading for the formation of a fully fledged body of law in this area’.<sup>87</sup> The existence of several treaties which have attained the status of custom as well as case law which has contributed to crystallizing and clarifying the content of crimes under international law and defences to them has been key to making this transition possible.<sup>88</sup> Owing to these developments, international criminal law is able to gradually move away from the substantive justice doctrine and towards strict legality.<sup>89</sup> Further,

<sup>82</sup> *Ibid.*, at 753. The unprecedented detail of Arts 6, 7, and 8 of the Rome Statute will, it is hoped, go a long way to attenuating this problem.

<sup>83</sup> Emphasis added. This is not to say that the principle of legality is unacceptably compromised; see the introduction to crimes against humanity in the Elements of Crimes.

<sup>84</sup> *Kokkinakis*, *supra* note 61: clear definition of the law in accordance with the legality principle requires that ‘the individual can know from the wording of the relevant provision, and if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him liable’.

<sup>85</sup> Consideration could be given to whether an exception should be made for avoiding absurd results arising from unusual facts which could not have been intended by a ‘rational legislator’.

<sup>86</sup> Kreß, *supra* note 51, at para. 29, citing *Delalić*, *supra* note 8, at para. 413 and *Bell Express Vu Limited Partnership v. Rex* [2002] 2 SCR 559, at paras 26–30. Akande suggests that, where an ambiguity exists, the legality principle bars resort to *travaux préparatoires* pursuant to Art. 32 VCLT to resolve it in a manner unfavourable to the suspect or accused: ‘Sources of International Criminal Law’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 41, 45.

<sup>87</sup> Cassese, *supra* note 32, at 7; Van Schaack, ‘Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals’, 97 *Georgetown LJ* (2008) 119, at 189.

<sup>88</sup> Cassese, *supra* note 32, at 40–41.

<sup>89</sup> *Ibid.*, at 10, 40. This evolution bears some resemblance to that experienced in countries where common law offences were gradually codified in or displaced by criminal law statutes.

unlike international criminal law generally, the Rome Statute regime could be said to have a ‘supreme court’, the International Criminal Court, and a legislature, the ASP. While the normative tensions underlying international criminal law may continue to play out in other respects, these tensions have, to some degree, been resolved for purposes of interpreting crimes within the jurisdiction of the Rome Statute.

As for the shape that the principle of legality will take, it is for judges of the Court to determine this. In this regard, Article 21(2) provides: ‘The Court may apply principles and rules of law as interpreted in its previous decisions.’ While not creating a system of binding precedents, Article 21(2) is arguably intended to promote consistency and certainty in the jurisprudence of the Court.<sup>90</sup> By defining the contours of the principle of legality in its early case law, the Court could go a long way towards realizing this goal.

### C Article 21(3) and the Revival of an Identity Crisis?

While Article 22(2) of the Rome Statute might be invoked in support of an open and shut case for legality emerging as the primary or guiding interpretive principle for crimes in the Court’s jurisdiction, drafters of the Rome Statute, ironically in their zeal to safeguard this principle, may have created serious competition for it by inadvertently reviving the normative tensions described previously.

In order of hierarchy, Article 21 of the Rome Statute sets out the law to be applied by the Court, including the Rome Statute, Elements of Crimes, ‘applicable treaties and the principles and rules of international law’, ‘including the established principles of the international law of armed conflict’, general principles of law, and national laws as appropriate. Article 21(2) also permits the Court to ‘apply principles and rules of law as interpreted in its previous decisions’. Article 21(3) closes the provision and provides:

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

On its face, this provision appears to create what has been termed a ‘super-legality’,<sup>91</sup> a normative superiority for international human rights which can be invoked to override all applicable sources of law, including the Rome Statute and established principles of the international law of armed conflict. For example, it has been argued that the absolute ban on torture under international human rights law is a *jus cogens* norm and that, accordingly, Article 21(3) should operate to exclude application of the

<sup>90</sup> McAuliffe deGuzman, ‘Article 21’, in Triffterer, *supra* note 46, at 701, 711.

<sup>91</sup> Pellet, ‘Applicable Law’, in A. Cassese *et al.* (eds), *supra* note 47, ii, at 1051, 1080–1081; Arsanjani, ‘The Rome Statute of the International Criminal Court’, 93 *AJIL* (1999) 22, at 28–29; Perrin, ‘Searching for Law While Seeking Justice: The Difficulties of Enforcing International Humanitarian Law in International Criminal Trials’, 39 *Ottawa L Rev* (2008) 367, at 398; Akande, *supra* note 86, at 46–47.

defences available under Articles 31(c) (self-defence of oneself or others) and 31(d) (necessity) of the Rome Statute for cases of 'preventive torture'.<sup>92</sup> While the aforementioned argument is based on *jus cogens* and not just on the torture ban deriving from international human rights, it nevertheless illustrates how Article 21(3) might be invoked to exclude the application of certain Rome Statute provisions on the basis of an internationally recognized human rights standard. As a super-legal norm, it could also be understood as requiring the interpretation of crimes consistent with internationally recognized human rights in all cases, thereby resolving the normative tensions underlying international criminal law in favour of human rights. In fact, the intent of the drafters at Rome was rather modest.

In spite of the sparse legislative history for this provision, commentators agree that consistency with internationally recognized human rights was intended to require consistency with the principle of legality<sup>93</sup> and to maximize other fair trial protections for the *alleged perpetrator* which originate from international human rights law.<sup>94</sup> In addition to legality, some specific fair trial issues that were raised include the age of persons over which the Court would have jurisdiction, respect for the fair trial standards set out in Article 14 of the International Covenant on Civil and Political Rights (ICCPR),<sup>95</sup> and ensuring that any recourse to national law is consistent with international human rights law.<sup>96</sup> Indeed, this latter role for Article 21(3) may in the longer term prove to be its main field of application. Interestingly, the limited debate on Article 21(3) focussed on the non-discrimination clause and the meaning to be given to 'gender'.<sup>97</sup> Thus, in terms of a hierarchy of applicable sources of law for purposes other than protecting the rights of the accused, little or no thought was given to the relationship between internationally recognized human rights and the Rome Statute. Ironically, the drafting of Article 21 was motivated by the principle of legality and the desire to limit judicial discretion in the interpretation and application of the Rome Statute.<sup>98</sup> And in terms of normative

<sup>92</sup> Jessberger, 'Bad Torture – Good Torture? What International Criminal Lawyers may Learn from the Recent Trial of Police Officers in Germany', 3 *J Int'l Crim Justice* (2005) 1059, citing therein for reaching the same conclusion: Gaeta, 'May Necessity be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?', 2 *J Int'l Crim Justice* (2004) 785. On the inapplicability of exclusionary grounds in a case before the Court see also Art. 31(2) Rome Statute and Eser, 'Article 31', in Triffterer, *supra* note 46, at 863, 888 ff.

<sup>93</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court* (1998), UN Doc A/CONF.183/2/Add.1, at 47 (fn. 63), 48.

<sup>94</sup> McAuliffe deGuzman, *supra* note 90, at 711; Hafner and Binder, 'The Interpretation of Article 21(3) ICC Statute Opinion Reviewed', 9 *Austrian Rev Int'l and Eur L* (2004) 163, at 166–167; Roht-Arriaza, 'Letter to the Office of the Prosecutor on the meaning of Article 21(3)', 14 Dec. 2004, at 2; Perrin, *supra* note 91, at 403.

<sup>95</sup> 999 UNTS 171 (1966).

<sup>96</sup> Roht-Arriaza, *supra* note 94, at 2.

<sup>97</sup> McAuliffe deGuzman, *supra* note 90, at 712.

<sup>98</sup> *Ibid.*, at 702 ff; Arsanjani, *supra* note 91, at 28–29; Verhoeven, 'Article 21 of the Rome Statute and the Ambiguities of Applicable Law', 33 *Netherlands Yrbk Int'l L* (2002) 3, at 17; Hafner and Binder, *supra* note 94, at 175; Gallant, 'Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court', in M.C. Bassiouni (ed.), *International Criminal Law* (1999), at 693, 702–703.

hierarchies, little or no thought was given to the relationship between internationally recognized human rights and the ‘international law of armed conflict’. Indeed, it is the reference in Article 21 to sources of law as well as fields of law which is curious and confusing.

In addition to the drafting history of this provision, several reasons have been provided for rejecting the systemic supremacy of Article 21(3) relative to the Rome Statute.<sup>99</sup> First, Article 21(3) is at the end of this provision rather than at the beginning, thereby suggesting a lack of supremacy.<sup>100</sup> Secondly, Article 21(3) does not refer to internationally recognized human rights as *jus cogens* norms.<sup>101</sup> Thirdly, the crimes in the Rome Statute are likely to be of a ‘general’, ‘*ordre public*’, or *jus cogens* character themselves and so there is no *a priori* reason to privilege Article 21(3) in this context.<sup>102</sup> Fourthly, if Article 21(3) could be invoked to override the Rome Statute, no alternative rule would exist and the Court would have to apply judge-made law.<sup>103</sup> Fifthly, if Article 21(3) were to operate in the manner contemplated, this mandate could be more clearly expressed.<sup>104</sup> Sixthly, owing to the reference in Article 69(7) of the Rome Statute to the exclusion of evidence that violates the Rome Statute or internationally recognized human rights, these two bodies of law do not have a hierarchical relationship to one another.<sup>105</sup>

On balance, none of these arguments seems sufficiently compelling to override the clear and ordinary meaning of this provision.<sup>106</sup> For this reason, perhaps the better legal approach is to assign a meaning to Article 21(3) that respects its wording but is also consistent with the legality provision, which is specifically addressed to the interpretation of crimes, and the fair trial protections it is intended to safeguard. The principle of legality seems poised to emerge as a central pillar in the Rome Statute regime and could be seriously undermined if, as in the past,<sup>107</sup> a neighbouring and vast body of law which is undefined in the Rome Statute were used to widen the scope of individual criminal liability under international law. Article 32 of the Vienna Convention provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.<sup>108</sup>

<sup>99</sup> Hafner and Binder, *supra* note 94, at 173–174.

<sup>100</sup> *Ibid.*, at 174.

<sup>101</sup> Gallant, *supra* note 98, at 702; Hafner and Binder, *supra* note 94, at 173–174.

<sup>102</sup> Verhoeven, *supra* note 98, at 15.

<sup>103</sup> *Ibid.*, at 14.

<sup>104</sup> Hafner and Binder, *supra* note 94, at 174.

<sup>105</sup> *Ibid.*

<sup>106</sup> Akande, *supra* note 86, at 47.

<sup>107</sup> Robinson, *supra* note 31.

<sup>108</sup> Emphasis added.

Apart from where the Rome Statute conflicts with a *jus cogens* norm,<sup>109</sup> what content can be given to Article 21(3)? Should it have any other role to play in the interpretation and application of crimes in the Rome Statute? It appears that the motivation for Article 21(3) was to protect the rights of the accused, and that these rights were envisaged as mainly procedural. However, a suspect or accused may have other rights protected under customary international law or a treaty ratified by the state of which he or she is a national. In this regard, what role, if any, can these rights have where the Court interprets the definition of a crime in conflict with such a right or states parties include a crime in the Rome Statute which does this? Does Article 21(3) give the suspect or accused the right to challenge the interpretation and application of crimes in the Rome Statute that conflict with such rights?

For example, were the Court to interpret the crime of directly and publicly inciting others to commit genocide to include hate speech, could the suspect or accused not rely on Article 21(3) to argue that the Court's interpretation conflicts with his or her right to freedom of expression, assuming that this right was protected under customary international law or a treaty ratified by the relevant state, and hate speech had not been criminalized under international law?<sup>110</sup> Here, international human rights norms would be invoked in a manner consistent with the principle of legality (e.g., strict construction). As well, if states parties were to add to the Court's jurisdiction a panoply of terrorism-related offences which violated the suspect's or accused's right to liberty or freedom of association, again assuming these rights were protected by custom or an applicable treaty, could Article 21(3) not be invoked by the accused to argue that the Court cannot apply these provisions to the extent that they are 'inconsistent with internationally recognized human rights'? Such an interpretation of Article 21(3) would roughly resemble the role that constitutional rights and freedoms play in domestic criminal justice systems by virtue of their character as individual rights and their status as customary or relevant treaty norms. As well, this understanding would presume that definitions of crimes are consistent with the rights of the suspect or accused unless a rights violation is proven. Such an approach is markedly different

<sup>109</sup> Art. 53 VCLT.

<sup>110</sup> Art. 19(3) ICCPR, *supra* note 95, provides: 'The exercise of the rights provided for in paragraph 2 of this article [which includes freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals' (emphasis added). On this point, it is interesting to note that the *travaux préparatoires* for the Genocide Convention reveal a clear intent to exclude hate speech from the definition of this crime and that the ICTR Appeals Chamber held that there is no norm under customary international law criminalizing hate speech. See *Nahimana et al. v. Prosecutor*, Judgment, ICTR-99-52-A, 28 Nov. 2007, at paras at 221–223, and 376; Orentlicher, 'Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana', 12 *New England J Int'l & Comp L* (2005) 17; Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks', in M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide* (2003), at 157.

from that of imputing to Article 21(3) a mandate to interpret crimes in the Rome Statute broadly in order to attain maximum protection for potential victims.

While it is not possible here to resolve conclusively the normative dilemma arising from a reading of Articles 21(3) and 22(2) side by side, a few tentative observations can be made. First, if it is recognized that Article 21(3) implicitly safeguards the principle of legality and the rights of the alleged perpetrator, consistent with the intent of its drafters, it may be concluded that the principle of legality, as articulated in Article 22(2), should guide judges as a primary principle for interpreting crimes in the Court's jurisdiction. This may be seen as an example of the *lex specialis* rule operating to harmonize Articles 21(3) and 22(2) as they pertain to the definitions of crimes in the Rome Statute.<sup>111</sup> The proposed relationship is also consistent with the notion that the Rome Statute defines crimes within the Court's jurisdiction, not (customary) international human rights law (see Article 22(3)).<sup>112</sup> Secondly, if this approach is accepted, it may shield Articles 6, 7, and 8 against arguments favouring their expansive interpretation for no other reason than the wording of Article 21(3). Stated differently, such an approach would prevent the object and purpose of international human rights being invoked as the sole justification for broad or progressive interpretations of crimes.

Thirdly, the Court may decide that, for purposes of interpreting crimes within the Rome Statute, the principle of legality mandates that violations of the accused's international human rights protected by custom or applicable treaties may *limit* interpretations of crimes in the Rome Statute. For example, interpreting the crime of incitement to commit genocide as including hate speech could be deemed inconsistent under Article 21(3) with the accused's right to freedom of expression, and therefore impermissible. Fourthly, when relying on international human rights to interpret the *content* of crimes in the Rome Statute, such as 'other inhumane acts of a similar character' as a crime against humanity, the Court, in light of Articles 21(3) and 22(2), may wish to limit itself to customary international human rights and norms. Such an approach would appear to be consistent with the sentiments expressed in the first paragraph of the Elements of Crimes introduction to crimes against humanity:

Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible *under generally applicable international law*, as recognized by the principal legal systems of the world.<sup>113</sup>

Fifthly, reading down or strictly construing Article 21(3) for interpreting crimes in the Court's jurisdiction would not prevent the Court from interpreting this provision

<sup>111</sup> Koskenniemi, 'Study on the Function and Scope of the Lex Specialis Rule and the Question of "Self Contained Regimes"' (2004), UN Doc ILC(LVI)/SG/FIL/CRD.1 and Add.1, at 4, cited in Droege, 'Elective Affinities? Human Rights and Humanitarian Law', 90(871) *Int'l Rev of the Committee of the Red Cross* (2008) 501, at 524.

<sup>112</sup> I am grateful to Thomas Weigend for both of these observations.

<sup>113</sup> Von Hebel and Robinson, 'Reflections on the Elements of Crimes', in R.S. Lee *et al.* (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), at 219, 228, emphasis added.

broadly (e.g., to include soft law human rights instruments) when applied to a different set of provisions in the Rome Statute (e.g., fair trial protections).<sup>114</sup> Sixthly, care should be taken not to give Article 21(3) a meaning which would frustrate the legislative intent of the ASP to impose legally permissible limits on international human rights within the Rome Statute. For example, Article 19(2) of the International Covenant on Civil and Political Rights guarantees *inter alia* the freedom to receive information, but Article 19(3)(b) permits it to be limited for the protection of national security.<sup>115</sup>

## 4 Interpretive Aids Dilemma

### *A Hello Elements of Crimes, Goodbye Customary International Law?*

In addition to recognizing a primary interpretive principle and arguments that are consistent with this principle, a method of interpretation should ideally identify what authoritative and non-authoritative material aids to interpretation can be of use to judges and lawyers. Unlike the ICTY and ICTR Statutes, Article 21 of the Rome Statute lists in order of hierarchy sources of law which the Court shall apply where interpretation of the Statute, Elements of Crimes, and its Rules of Procedure and Evidence fail to resolve a legal issue raised in a case. These sources of law are authoritative aids to interpreting crimes in the Rome Statute. The Elements of Crimes is a non-treaty document setting out the requisite material and mental elements for each crime in the Court's jurisdiction. It must be 'consistent' with the Rome Statute and 'shall assist the Court in the interpretation and application of articles 6, 7 and 8'.<sup>116</sup> Accordingly, the Rome Statute expressly identifies the Elements as a key authoritative non-binding interpretive aid for Articles 6, 7, and 8. The Elements instrument was drafted by states after the Rome Statute was adopted and involved 'experts from a variety of diverse fields, including military lawyers, human rights lawyers, and criminal lawyers'.<sup>117</sup> In fact, proponents of the Elements argued that it would 'give teeth to' the principle of legality.<sup>118</sup>

As for other authoritative interpretive aids, Article 21 mandates the Court to apply, 'where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'. This reference is understood to include customary international law, which is a source of principles and rules of international law.<sup>119</sup> Given the definition of international criminal law *stricto sensu*, which establishes international criminal responsibility

<sup>114</sup> See, e.g., Hafner and Binder, *supra* note 94; Roht-Arriaza, *supra* note 94; Piragoff and Robinson, 'Article 69', in Triffterer, *supra* note 46, at 1301, 1309, 1310, 1333.

<sup>115</sup> 999 UNTS 171. See Art. 72 Rome Statute.

<sup>116</sup> Art. 9(3) and (1) Rome Statute, emphasis added.

<sup>117</sup> Kirsch, 'Foreword', in K. Dörmann *et al.*, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003), at xiii.

<sup>118</sup> Pellet, *supra* note 91, at 1060, citing US Reference Paper, 'Elements of Offenses for the International Criminal Court', submitted to Preparatory Committee, 27 Mar. 1998.

<sup>119</sup> Pellet, *supra* note 91, at 1070–1071.

directly under international law, and the practice of establishing international criminal tribunals *ex post facto*, customary international law has historically been a key aid to interpreting crimes and a source of law for filling gaps in the statutes of international criminal tribunals.<sup>120</sup> As well, Article 31(3)(c) of the Vienna Convention acknowledges that the complex and entangled relationship between custom and treaties must be taken into account when interpreting the latter if relevant and applicable.

However, Article 10 of the Rome Statute provides: ‘Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.’ Similarly, Article 22(3) states that application of the legality principle ‘shall not affect the characterization of any conduct as criminal under international law independently of this Statute’. Accordingly, Articles 6, 7, and 8 each begin with the proviso, ‘For the purpose of this Statute’ before continuing to state what genocide, other crimes against humanity, and war crimes mean. What does all of this tell us about the role of customary international law as an aid in the interpretation of these provisions? Must it assist the Court, may it assist the Court, and, if the Elements and custom diverge on whether a particular material or mental element needs to be proven or articulate the content of an element in different ways, to which aid should judges defer? Did the drafters of the Rome Statute intend to create a self-contained sub-regime of international criminal law that is sealed off from the influence of customary international law, relevant treaty law, as well as general principles of law? Stated differently, what is the relationship between custom and Articles 6, 7, and 8 of the Rome Statute?

Commentators have repeatedly pointed out that not all crimes under customary international law fall within the Court’s jurisdiction. For example, the list of prohibited weapons in Article 8(2)(b) of the Rome Statute is thought to fall short of customary international law because agreement could not be reached on including the use of certain weapons of mass destruction within the Court’s jurisdiction.<sup>121</sup> Further, commentators have consistently pointed out that the Rome Statute innovates in places by going beyond customary international law to include ‘new’ international crimes, and also contains retrogressive definitions of crimes that fall short of their customary legal counterparts.<sup>122</sup> Article 8(1) of the Rome Statute also suggests a gravity threshold,

<sup>120</sup> On the definition of international criminal law *stricto sensu* and its relationship to custom see, e.g., Kreß, *supra* note 51, at paras 10–11; Cassese, *supra* note 32, at 11.

<sup>121</sup> Clark, ‘Building on Article 8(2)(b)(xx) of the Rome Statute of the International Criminal Court: Weapons and Methods of Warfare’, 12 *New Crim L Rev* (2009) 366.

<sup>122</sup> On the convergence and divergence of the definition of genocide in the Rome Statute and customary international law see, e.g., von Hebel and Robinson, ‘Crimes within the Jurisdiction of the Court’, in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), at 79; McCormack and Robertson, ‘Jurisdictional Aspects of the Rome Statute for the new International Criminal Court’, 23 *Melbourne U L Rev* (1999) 25; Danilenko, ‘ICC Statute and Third States’, in Cassese, *supra* note 47, ii, at 1871; Cassese, *supra* note 32, at 146–147. For the same regarding crimes against humanity see, e.g., Boot, Dixon, and Hall, ‘Article 7’, in Triffler, *supra* note 46, at 159, 167; Danilenko, *supra*; Robinson, ‘The Elements for Crimes Against Humanity’, in R.S. Lee et al. (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), at 57; McCormack and Robertson, *supra*; Cassese, *supra* note 35, at 123 ff; von Hebel and Robinson, *supra*. For the same regarding war crimes see,

which is intended to limit the Court's jurisdiction to only the most serious perpetrations of war crimes listed in Article 8. For present purposes, therefore, it is assumed that the Rome Statute does not give the Court jurisdiction over all crimes under customary international law, is both retrogressive and progressive in parts, and suggests a gravity threshold to exclude from the Court's jurisdiction some 'less serious' perpetrations of crimes in its jurisdiction. One way to understand better the relationship between crimes in the Rome Statute and customary international law is to ask whether Articles 6, 7, and 8 codify or progressively develop international criminal law.

## B Articles 6, 7, and 8 and Custom

A review of the leading debates about the meaning of codification discloses the rejection of a strict definition of codification in the field of international law, that being 'the writing down of already existing rules of law' with only a few minor changes in the law.<sup>123</sup> To be a worthwhile undertaking, the codification process will involve states and thus entail some bargaining to achieve consensus so as to avoid yielding lowest common denominator results.<sup>124</sup> Further, compared with domestic codification efforts, the content of customary international law is regarded as less detailed.<sup>125</sup> Thus, every codification of international law involves an element of innovation, meaning the difference between codification of custom and progressive development of the law is a matter of degree – 'between minor and major changes of the law, respectively'<sup>126</sup> or between a 'few nuances' in relation to prior custom and going 'substantially beyond' that law.<sup>127</sup> Stated differently, 'when a process is qualified as "codification" or "development" in fact only the prevailing one is meant'.<sup>128</sup>

If the written rule's innovative or reformatory elements outnumber and outweigh the typical components of the original customary rule, and they appear on the whole as two separate entities, the written norm constitutes progressive development, and "it becomes misleading to describe the process as one of codification at all".<sup>129</sup>

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e.g., Cassese, *supra* note 32, at 94–97; Arnold *et al.*, 'Article 8', in Triffterer, *supra* note 46, 275, including 287 (Cottier) and 323 (Dörmann); Cassese, *supra* note 45, at 152 (on Art. 8(2)(b) and (e)); Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law', 10 *EJIL* (1999) 172, at 190; Kress, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice', 30 *Israel Yrbk Human Rights* (2000) 103.

<sup>123</sup> Jennings, 'The Progressive Development of International Law and its Codification', 24 *British Yrbk Int'l L* (1947) 301.

<sup>124</sup> O. Schachter, *International Law in Theory and Practice* (1991), at 66–68; von Hebel and Robinson, *supra* note 122, at 122.

<sup>125</sup> Lauterpacht, 'Codification and Development of International Law', 49 *AJIL* (1955) 16, at 17. On the different meanings of codification in common and civil law traditions see J.L. Brierly, *The Basis of Obligation in International Law and Other Papers* (1958), at 338–339.

<sup>126</sup> M.E. Villiger, *Customary International Law and Treaties* (1985), at 126.

<sup>127</sup> H.W.A. Thirlway, *International Customary Law and Codification* (1972), at 28; Dinstein, 'Interaction between Customary International Law and Treaties', 322 *Recueil des cours* (2006) 243, at 366.

<sup>128</sup> Wollke, 'Can Codification of International Law be Harmful?', in J. Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (1984), at 313, 314.

<sup>129</sup> Villiger, *supra* note 126, at 248, citing Brierly, 'The Future of Codification', 12 *British Yrbk Int'l L* (1931) 1, at 3.

Further, a customary rule codified in a treaty continues to exist alongside its articulation in a treaty, thereby continuing to bind all states *qua* customary law and not just parties to the codifying treaty.<sup>130</sup> It is submitted that the distinction between codification and progressive development is germane to the issue of relevant interpretive aids.<sup>131</sup> A customary rule is codified if one of the following three conditions is met: (1) the treaty rule is declaratory of an existing customary rule; (2) the treaty rule has crystallized into custom during the process of its formation and adoption; or (3) the treaty rule has generated new customary law subsequent to its adoption.<sup>132</sup> For the present discussion, codification is understood as satisfying one of the first two conditions. A treaty can be declaratory of custom at varying levels of abstraction,<sup>133</sup> and certain provisions, or parts of provisions, may be declaratory of custom while others are not,<sup>134</sup> which is often the case.<sup>135</sup>

The following considerations and statements in the following materials have been identified as having probative value for purposes of ascertaining whether a treaty codifies custom:<sup>136</sup> materials preceding the work of the ILC; ILC materials; UN General Assembly Sixth Committee statements; Diplomatic Conference *travaux préparatoires*; the adoption of a provision ‘without a dissenting voice’; whether an area of law is ripe for codification prior to the drafting of a treaty; widespread and representative drafting participation by states; adoption of a convention by ‘an overwhelming majority of States’; the text of the treaty, including its preamble; the final act of the Diplomatic Conference; ratifications and reservations to a treaty, as well as denunciations of it; subsequent practice; statements by states parties and non-states parties;<sup>137</sup> mention of the same conventional rules in subsequent legal texts; case law;<sup>138</sup> doctrinal writings;

<sup>130</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits Judgment [1986] ICJ Rep 14, at 85; Baxter, ‘Treaties and Custom’, 129 *Recueil des cours* (1970-I) 25, at 32; Arts 38 and 43 VCLT.

<sup>131</sup> Villiger, *supra* note 126, at 126: this distinction is of ‘central importance in the context of sources’.

<sup>132</sup> *North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. The Netherlands)* [1969] ICJ Rep 3, at paras 60–82; Schachter, ‘Entangled Treaty and Custom’, in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989), at 717, 718; Thirlway, ‘The Law and Procedure of the International Court of Justice: 1954–1989, Part Two’, 61 *British Yrbk Int’l L* (1990) 1, at 94.

<sup>133</sup> Baxter, *supra* note 130, at 41–42.

<sup>134</sup> *North Sea Continental Shelf Cases*, *supra* note 132; Dinstein, *supra* note 127, at 355–356.

<sup>135</sup> *Ibid.*

<sup>136</sup> See, e.g., Baxter, *supra* note 130, at 42–43; Baxter, ‘Multilateral Treaties as Evidence of Customary International Law’, 41 *British Yrbk Int’l L* (1965–66) 275, at 277–278, and 287; Thirlway, *supra* note 132, at 99–101; H.W.A. Thirlway, *International Customary Law and Codification* (1972), at 21; Villiger, *supra* note 126, at 158–159, 239–244, and 247; Schachter, *supra* note 132, at 735; Wollke, *supra* note 128, at 314. These indicia are variously identified as having probative value, although some commentators disagree on the relative weight to be given to each of them.

<sup>137</sup> The behaviour of states is subject to the Baxter paradox, *supra* note 130, at 64, 73: ‘as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty. . . . As the express acceptance of the treaty increases, the number of states not parties whose practice is relevant diminishes.’

<sup>138</sup> See, e.g., *Furundžija*, *supra* note 23, at para. 227; *Kupreškić*, *supra* note 16, at para. 50.

and the nature of the rules in the treaty, their norm-creating character.<sup>139</sup> While it is not possible to go into detail here, it is submitted that, on balance, these considerations and materials reveal an intention on the part of states parties to draft definitions of crimes in the Rome Statute which would mirror existing custom and crystallize emerging custom to the greatest extent possible, while recognizing the need to build consensus with a view to promoting universal ratification of the Rome Statute. Further, it is submitted that Articles 6, 7, and 8 of the Rome Statute are *broadly* consistent with crimes under international law, meaning that they are not completely exhaustive of custom and may depart from custom in places.

Importantly, how the legality principle is formulated in Article 22 of the Rome Statute appears to be consistent with the view that crimes in the Court's jurisdiction largely overlap with custom. While the Court is often described as having prospective jurisdiction, its jurisdiction appears to be exercised retroactively in two situations. First, this may occur where the Security Council refers a situation to the Court involving a non-state party, the accused is a national of a non-state party, and the impugned conduct occurred on the territory of a non-state party after 1 July 2002.<sup>140</sup> The Security Council's referral of the situation in Darfur, Sudan, to the Court is an example of this.<sup>141</sup> Secondly, this may occur where the Court exercises jurisdiction over the same kind of individual *vis-à-vis* a non-state party lodging a declaration with the Registrar that it accepts the Court's exercise of jurisdiction over the crime in question after it was allegedly committed.<sup>142</sup> In both of these situations, the Court cannot rely on the prior consent of the relevant state to be bound by the Rome Statute and exercise jurisdiction over its nationals or individuals perpetrating crimes on its territory. In these situations, the Rome Statute will be applied 'retroactively' to individuals of non-states parties. How can these practices be reconciled with delegates' legality concerns when drafting the Rome Statute? Here, absent relevant national criminal law prohibiting the impugned conduct when it occurred, the Court's jurisdiction would have to be established on the basis of the relevant crimes forming a part of customary international law.<sup>143</sup>

Thus, to the extent that the definitions of crimes in the Rome Statute are reflective of customary international law, they are binding on *all* individuals *qua* customary international law, not just nationals of states parties or individuals engaging in illegal conduct on the territory of states parties.<sup>144</sup> In his commentary on Article 22, the main

<sup>139</sup> Schachter, *supra* note 132, at 732–735.

<sup>140</sup> In the author's view, the Rome Statute's temporal jurisdiction for Security Council referrals related to crimes in Arts 6, 7, and 8 is limited to crimes committed after the Rome Statute's entry into force on 1 July 2002.

<sup>141</sup> SC Res 1593 (2005), 31 Mar. 2005; Art. 13(b) Rome Statute.

<sup>142</sup> Art. 12(3) Rome Statute. Such a declaration may be lodged by a non-state party where a state party has referred a situation to the Court (Art. 13(a)) or the Prosecutor has initiated an investigation in respect of the crime (Art. 13(c)).

<sup>143</sup> Broomhall, *supra* note 46, at 720; Gallant, 'Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts', 48 *Villanova L Rev* (2008) 763. For a different explanation see Sadat and Carden, 'The New International Criminal Court: An Uneasy Revolution', 88 *Georgetown LJ* (2000) 381, at 406 ff; Sadat, 'Custom, Codification and Some Thoughts about the Relationship Between the Two: Article 10 of the ICC Statute', 49 *DePaul L Rev* (2000) 909, at 919–920, and 923.

<sup>144</sup> Art. 38 VCLT; R.F. Roxburgh, *International Conventions and Third States* (1917), at 29, 111 (a state cannot incur legal obligations under a treaty to which it is not a party).

legality provision in the Rome Statute, Broomhall identified an important silence which is germane to this point. He contrasted the formulation of the legality principle in the 1994 Draft Statute prepared by the ILC with its present formulation in Article 22. Article 39(b) of the 1994 Draft Statute adapted the principle of legality for treaty crimes by requiring that no accused could be found guilty of a treaty crime ‘unless the treaty in question was applicable to the conduct of the accused . . . at the time the act or omission occurred’.<sup>145</sup> Others have remarked that a pragmatic reason for limiting the Rome Statute’s jurisdiction to crimes under international law and not extending it to include treaty crimes ‘was that becoming a party to the Statute would not be contingent on the acceptance of legal instruments defining the substance of such crimes’.<sup>146</sup> The absence of such a provision in the Rome Statute is notable, as it suggests that the crimes within the Court’s jurisdiction are limited to ‘core’ crimes under international law or international criminal law *sensu stricto*.<sup>147</sup> If ‘treaty crimes’ were to be added to the Court’s jurisdiction one day,<sup>148</sup> Broomhall reasons that the legality principle in Article 22 would have to be amended to reflect this.<sup>149</sup> Thus, the principle of legality’s formulation in the Rome Statute is consistent with treating Articles 6, 7, and 8 as largely reflective of customary international law. To the extent that they are not, individuals in the aforementioned circumstances may challenge the Court’s jurisdiction over them.<sup>150</sup>

In addition to Article 22, the large overlap between custom and Articles 6, 7, and 8 is indicated in the statements of key players involved in their drafting. Adrian Bos, who from 1995 to 1998 chaired the *ad hoc* and preparatory committees which carried out drafting of the Rome Statute prior to the Diplomatic Conference, referred to the crimes in the Rome Statute as crimes ‘under international law’.<sup>151</sup> Philippe Kirsch, who chaired the Committee of the Whole at Rome and was the Court’s first President, stated more than once that states intended and generally agreed that ‘the definitions of crimes in the ICC Statute were to reflect existing customary international law, and not create new law’.<sup>152</sup> As for the outcome, he admitted that, while the Rome Statute

<sup>145</sup> ILC, ‘Draft Statute for an International Criminal Court’, *Report of the International Law Commission on its forty-sixth session*, 2 May–22 July 1994, UN GAOR, Supp. 10, A/49/10 (1994), at 43.

<sup>146</sup> Von Hebel and Robinson, *supra* note 122, at 122. Accordingly, Arts 12(2) and 13(b) of the Rome Statute result in the Court having jurisdiction over ‘core crimes’ committed anywhere in the world irrespective of any relevant treaty being ratified.

<sup>147</sup> Broomhall, *supra* note 46, at 729.

<sup>148</sup> On this possibility see ‘Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court’ (1998), UN Doc A/CONF.183/10, Annex I, Res E.

<sup>149</sup> Broomhall, *supra* note 46, at 729.

<sup>150</sup> For a slightly different view see Gallant, *supra* note 51, at 339–340.

<sup>151</sup> Bos, ‘The International Criminal Court: A Perspective’, in Lee (ed.), *supra* note 122, at 469.

<sup>152</sup> Kirsch, ‘Foreword’, in Dörmann, *supra* note 117; Kirsch, ‘Customary International Humanitarian Law, its Enforcement, and the Role of the International Criminal Court’, in L. Maybee and B. Chakka (eds), *Custom as a Source of International Humanitarian Law: Proceedings of the Conference to mark the Publication of the ICRC Study ‘Customary International Humanitarian Law’ (2006)*, at 79, 80. Others agree with this assessment: Danilenko, *supra* note 122, at 1891; Scheffer, ‘The United States and the International Criminal Court’, 93 *AJIL* (1999) 12, at 16; Clark, ‘Article 9’, in Triffterer, *supra* note 46, at 505, 508.

'contains uneasy technical solutions, awkward formulations, [and] difficult compromises that fully satisfied no one',<sup>153</sup> it and the Elements of Crimes 'clearly reflect the *opinio juris* of the international community, further supporting the customary nature of crimes within the Court's jurisdiction'.<sup>154</sup> Herman von Hebel, who chaired the Working Group on the Elements of Crimes, stated that, '[i]n elaborating the definitions [of crimes], one of the major guiding principles was that the definitions should be reflective of customary international law. It was understood that the Court should operate only for crimes that are of concern to the international community as a whole, which meant the inclusion only of crimes which are universally recognized'.<sup>155</sup> He further stated that, on balance, 'the crimes as defined in the Rome Statute will give the Court a broad subject-matter jurisdiction consistent with customary international law and, at the same time, lend support to current developments', thereby suggesting the crystallization of certain norms.<sup>156</sup>

Further, scholars have cautiously described the Rome Statute as roughly congruent with custom. They have variously stated that it is 'a base-level of what customary law is',<sup>157</sup> that, 'while the correspondence with customary international law is close, it is far from perfect'<sup>158</sup> that the law is 'for the most part' customary international criminal law;<sup>159</sup> that some provisions of the Rome Statute 'may be held to *codify* customary international law';<sup>160</sup> but, since it 'is not intended to codify international customary law, one ought always to take it with a pinch of salt';<sup>161</sup> that it 'codifies many rules and principles of IHL [international humanitarian law] as customary criminal law';<sup>162</sup> that drafters 'attempted in many cases to stick as closely as possible to customary international law, wherever it could be identified';<sup>163</sup> that it 'reflects existing practices and affirms current developments in international law';<sup>164</sup> and that the Statute 'essentially embodies customary law, but it does not exhaust it'.<sup>165</sup>

<sup>153</sup> Kirsch and Holmes, 'The Birth of the International Criminal Court: The 1998 Rome Conference', 36 *Canadian Yrbk Int'l L* (1998) 3, at 38.

<sup>154</sup> Kirsch, 'Customary', *supra* note 152, at 80.

<sup>155</sup> Von Hebel and Robinson, *supra* note 122, at 122.

<sup>156</sup> *Ibid.*, at 126.

<sup>157</sup> Cryer, 'Of Custom, Treaties, Scholars and the Gavel: The Influence of International Criminal Tribunals on the ICRC Customary Law Study', 11 *J Conflict & Security L* (2006) 239, at 251, citing R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005), Chs 5–6.

<sup>158</sup> W.A. Schabas, *An Introduction to the International Criminal Court* (2nd edn, 2004), at 28.

<sup>159</sup> Gallant, *supra* note 143, at 817.

<sup>160</sup> Cassese, *supra* note 32, at 14.

<sup>161</sup> *Ibid.*, at 43.

<sup>162</sup> Meron, 'Customary Law', in A. Dworkin and R. Gutman (eds), *Crimes of War 2.0: What the Public Should Know* (2007).

<sup>163</sup> Hunt, 'The International Criminal Court – High Hopes, "Creative Ambiguity" and an Unfortunate Mistrust in International Judges', 2 *J Int'l Crim Justice* (2004) 56, at 67: '[t]he numerous compromises which were made in order to obtain agreement have, however, caused the Statute and the *Elements of Crimes* to diverge substantially from the actual content of customary international law as it existed at the time'.

<sup>164</sup> Lee, 'Introduction', in Lee (ed.), *supra* note 122, at 1, 38.

<sup>165</sup> G. Werle, *Principles of International Criminal Law* (2005), Preface.

### C Article 10 and its Containing Function

If the intent of states was to include only crimes under international law in the Rome Statute, why not expressly state in the Rome Statute that the crimes in the Court's jurisdiction are generally consistent with custom? Codifying customary international criminal law offers judges and states parties certain benefits, including improvements in 'legal clarity and certainty, systematization of the law, coherence, consistency and perhaps the reform of pre-existing deficient law'.<sup>166</sup> It allows states to speak with 'one voice' instead of through 'conflicting, ambiguous and multi-temporal evidence that might be amassed through an examination of the practice of each of the individual States'.<sup>167</sup> However, there are at least four perceived drawbacks to purporting that a treaty codifies an area of law. First, a 'colourable case against a long-established rule of customary law' may be made 'on the ground that it was not expressly stated in the convention'.<sup>168</sup> Thus, if the Rome Statute is referred to as a code of crimes under international law, it might erroneously be argued that conduct expressly excluded from the Rome Statute is not criminal under international law.<sup>169</sup> Secondly, evidence of a 'negative *opinio juris*' may be asserted if many states decline to ratify a 'codifying' treaty or challenge the customary nature of a particular rule, thereby weakening its claim to be reflective of custom.<sup>170</sup> If the Rome Statute expressly stated that it was a code of crimes and few states proceeded to ratify it, the criminality of the codified conduct might be called into question. Indeed, delegates were not prepared to accept wholesale that each and every definition adopted was perfectly reflective of custom.<sup>171</sup> Recall that the outcome in Rome was a 'package deal' which 'fully satisfied no one'.<sup>172</sup> Thirdly, a codifying treaty may have the effect of inadvertently freezing the development of customary international law by 'photographing' the law at a moment in time but 'speaking' in present terms when it is applied to cases.<sup>173</sup> Thus, by calling the Rome Statute a code, the natural growth of international criminal law may be stifled at a critical phase in its development.<sup>174</sup>

It is perhaps for all of these reasons that Article 10 was included in the Rome Statute. It 'was intended to emphasize that the inclusion or non-inclusion in the ICC Statute of certain norms would not prejudice the positions of States on the customary law status of such norms, would not prejudice existing norms of further developments of international law, and would not authorize the ICC to apply existing or new norms omitted

<sup>166</sup> Baxter, *supra* note 130, at 36–37; Schachter, *supra* note 124, at 66.

<sup>167</sup> Baxter, *supra* note 136, at 278.

<sup>168</sup> Jennings, *supra* note 123, at 305.

<sup>169</sup> Consider in this regard exclusion of the prohibition against the use of weapons of mass destruction.

<sup>170</sup> Thirlway, *supra* note 127, at 114–116; Dinstein, *supra* note 127, at 367, referring to this as a 'decodifying effect' and citing J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 58.

<sup>171</sup> Sadat, *supra* note 143, at 916.

<sup>172</sup> Kirsch and Holmes, *supra* note 153.

<sup>173</sup> Baxter, *supra* note 136, at 299; Thirlway, *supra* note 127, at 125.

<sup>174</sup> Jennings, *supra* note 123, at 305; Cassese, *supra* note 45, at 158 (concerned about retrograde elements freezing legal development); Amnesty International, *International Criminal Court: The Failure of States to Enact Effective Implementing Legislation* (2004).

deliberately in the ICC Statute'.<sup>175</sup> Regarding this last point, there was perhaps a fear that if custom were recognized as the direct source of law for the Court's jurisdiction, the perceived creativity of ICTY and ICTR judges might repeat itself with judges of the Court.<sup>176</sup> The source of the Court's jurisdiction is therefore conceptualized as deriving from the Rome Statute, which is the first applicable source of law identified in Article 21. Thus, Articles 6, 7, and 8 bind only the Court and are not intended to create a universally binding criminal code for the international community.<sup>177</sup> They aim to define the Court's jurisdiction and not 'to codify, or restate, or contribute to the development of customary international law'.<sup>178</sup> Further, Article 10 reminds its readers of the general international rule that customary law continues to exist and develop alongside treaty law even where the two contain identical rules.<sup>179</sup> For these reasons, Article 10 has been said to guard against 'the danger of an "encrustation" of international criminal law',<sup>180</sup> but it also 'cuts both ways':<sup>181</sup>

Those who argue that customary law goes beyond the Statute . . . can rely on this provision. It will become more and more important in the future, because customary law should evolve and the Statute may not be able to keep pace with it. . . . But, of course, the logic of Article 10 cuts both ways. To those who claim that the Statute sets a new minimum standard, . . . conservative jurists will plead Article 10 and stress the differences between the texts in the Statute and their less prolix ancestors.<sup>182</sup>

Of course, while Article 10 will likely be invoked in the aforementioned manner, it cannot on its own prevent provisions initially seen as retrogressive or progressive in the Rome Statute from influencing the development of custom. States are naturally drawn to laws which are written and, for better or worse, the Rome Statute is already influencing state practice.<sup>183</sup>

<sup>175</sup> K. Kittichaisaree, *International Criminal Law* (2001), at 52. Recall that, when the draft of Art. 10 was discussed in Rome, agreement had not yet been reached on including the crime of aggression in Art. 5: Trifflerer, 'Article 10', in Trifflerer, *supra* note 46, at 531, 532.

<sup>176</sup> Schabas, 'Customary Law or "Judge-Made" Law: Judicial Creativity at the UN Criminal Tribunals', in J. Doria, H.-P. Gasser, and M.C. Bassiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009), at 77.

<sup>177</sup> Cassese, *supra* note 32, at 14 and 56.

<sup>178</sup> *Ibid.*, at 56.

<sup>179</sup> *Case Concerning Military and Paramilitary Activities*, *supra* note 130; Trifflerer, *supra* note 175, at 533–534.

<sup>180</sup> Werle, *supra* note 165, at 45, n. 241.

<sup>181</sup> Others have suggested that Art. 10 only cuts one way so as to prevent retrogressive but not progressive definitions of crimes in the Rome Statute from influencing custom: Dinstein, *supra* note 127; Sadat, *supra* note 143, at 918; Cryer, *Prosecuting*, *supra* note 157, at 174–175.

<sup>182</sup> Schabas, *supra* note 158, at 28.

<sup>183</sup> E.g., the Statute of the Iraqi Special Tribunal, enacted by the Coalition Provisional Authority (US and UK), and the governing regulations for the Special Panels for Serious Crimes within the District Court of Dili, enacted by the UN Transitional Administration in East Timor ss 4–6 of UNTAET Reg 2000/15), replicate the definitions of genocide, other crimes against humanity, and war crimes in the Rome Statute. Further, the UN Security Council referred the situation in Darfur, Sudan, to the Court, although Sudan has not ratified the Rome Statute: UN Doc S/RES/1593 (2005). See also Amnesty International, *supra* note 174; Symposium: National Implementation of the Rome Statute of the International Criminal Court, 16 *Finnish Yrbk Int'l L* (2005); Cassese, *supra* note 32, at 14, 17.

In light of the foregoing, it is submitted that Article 10 should not be invoked as a bar to using custom as an interpretive aid. The better legal view seems to be that Article 10 is intended to contain the influence of the Rome Statute on the development of custom but not the influence of custom on the Rome Statute for purposes of interpretation. To assert otherwise would be to deny that it is an authoritative interpretive aid, and many of the terms used in Articles 6, 7, and 8 have a special meaning under customary international law.<sup>184</sup> Article 31(1) of the Vienna Convention requires that the Rome Statute be interpreted in ‘good faith’ and Article 31(4) provides, ‘A special meaning shall be given to a term if it is established that the parties so intended.’ In fact, the use of archaic language in the Rome Statute taken from various treaties was born out of delegates’ desire to include in the Statute existing law and not legislate new crimes.<sup>185</sup> Most importantly, Article 31(3)(c) of the Vienna Convention, which is intended to address the relationship between custom and treaties, requires judges of the Court to ‘take into account . . . any relevant rules of international law applicable in the relations between the parties’. For crimes in the Rome Statute derived from custom, custom is arguably both relevant and applicable.<sup>186</sup> Of course, to temper the possible effects of Article 31(3)(c) on judicial creativity, the principle of legality as expressed in Article 22(2) of the Rome Statute would bar the Court from exercising its jurisdiction over crimes which are excluded from the Rome Statute. In turn, Article 22(3) would operate to ‘prevent the perception that the Statute would rob general international law of its power to criminalize behaviour, or would narrow the scope of any such criminalization outside the ICC regime, such that non-States parties could then claim a greater degree of impunity than would be the case had the Statute not been adopted at all’.<sup>187</sup>

The recognition of custom as an interpretive aid would not undermine the purpose of Article 10 or require the Court to treat Articles 6, 7, and 8 as codifying international criminal law. Article 10 would continue to protect states by affirming that ‘the inclusion or non-inclusion in the Statute of certain norms would not prejudice their positions on the customary law status of such norms’.<sup>188</sup> Thus, two regimes of international criminal law would exist, ‘one established by the Statute and the other laid down in general international criminal law. The Statute also seems to presuppose the partial coincidence of these two bodies of law: they will probably be similar or identical to a very large extent, but there will be areas of discrepancy’.<sup>189</sup> Finally, it has been argued that consideration of custom in the interpretive process would contribute, where possible, to the coherent (as opposed to fragmented) development of international law, something which the Court as a permanent international court of last resort might wish to take into consideration.<sup>190</sup>

<sup>184</sup> Werle, *supra* note 165, at 107.

<sup>185</sup> Robinson and von Hebel, *supra* note 113, at 224–225; ILC, *supra* note 11, at 235.

<sup>186</sup> Art. 21(1)(b) Rome Statute.

<sup>187</sup> Broomhall, *supra* note 46, at 726–727.

<sup>188</sup> Von Hebel and Robinson, *supra* note 122, at 88.

<sup>189</sup> Cassese, *supra* note 45, at 157.

<sup>190</sup> This point is also made by Cryer, ‘Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources’, 12 *New Crim L Rev* (2009) 390. See also McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’, 54 *Int’l Comp LQ* (2005) 279.

### D Article 9(3) and Elements of Crimes that ‘shall be consistent with this Statute’

Having posited that custom is an authoritative interpretive aid, what is its import relative to the Elements of Crimes? It is submitted that judges should recognize a rebuttable presumption of interpretation consistent with custom for crimes in Articles 6, 7, and 8 of the Rome Statute.

The presumption proposed would result in an interpretive relationship between the Rome Statute and custom that is theoretically coherent, consistent with the existing legal framework established by the Rome Statute, reconcilable with alternative conclusions justifiably reached in specific cases (e.g., where a definition of a crime is, for example, based on a constitutive treaty rather than custom), and a useful intellectual technique for resolving conflicts between the Elements and custom.<sup>191</sup> It avoids the result of ‘throwing the baby out with the bathwater’, something which may result if Article 10 is interpreted as foreclosing the influence of custom on the Rome Statute and entailing a hermetically sealed regime in which the Elements of Crimes in all cases reign supreme.

If . . . it would be unwise to give conclusive effect as evidence of the law to the purportedly declaratory treaty, it is still not necessary to swing to the opposite extreme by confining the effect of the treaty wholly to its actual parties. A suitable middle course would be to give *presumptive effect* as evidence of customary law to the treaty purporting to declare the law while allowing the State or individual against whom the treaty is proffered the right to demonstrate that the particular treaty provision invoked does not correctly express the law. If the objecting party fails to sustain that burden, the presumption created by the treaty is not overcome.<sup>192</sup>

A legal presumption is an inference which stands until refuted.<sup>193</sup> It is a form of reasoning which fills a gap and requires that, in the absence of better information, a particular conclusion be drawn.<sup>194</sup> A legal presumption is a *provisional* truth which can be displaced by evidence disproving its validity in a particular case.<sup>195</sup>

If the proposed interpretive presumption were recognized by the Court, at least four caveats would be in order. First, the presumption should not be mistaken for the use of custom to modify the crimes in the Rome Statute or claim jurisdiction over new ones. The purpose of referring to external rules may be to seek clarification of what a treaty provision means as well as to embed the Court’s reasoning in the wider international legal order, thereby promoting coherence within it.<sup>196</sup> These are permissible

<sup>191</sup> Chodosh, ‘An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law’, 28 *Vanderbilt J Transnat’l L* (1995) 973, at 1001–1002.

<sup>192</sup> Baxter, *supra* note 136, at 290, emphasis added; Villiger, *supra* note 126, at 246; Thirlway, *supra* note 127, at 99–100. This presumption of Baxter’s was conceived of as a way to address situations where a treaty which is mainly declaratory of custom but not entirely is applied to a non-state party. However, it appears equally useful as an interpretive presumption in the present context.

<sup>193</sup> N. Rescher, *Presumption and the Practices of Tentative Cognition* (2006), at 1.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*, at 4, 7.

<sup>196</sup> French, ‘Treaty Interpretation and the Incorporation of Extraneous Legal Rules’, 55 *Int’l Comp LQ* (2006) 281, at 282–283.

ends which respect the principle of legality. However, it is not acceptable under the guise of clarifying a treaty rule to use an external rule to modify it.<sup>197</sup> As two judges of the International Court of Justice remarked, ‘substantive rules of international law cannot be brought into . . . litigation through the back door’,<sup>198</sup> and one may not ‘invoke the concept of treaty interpretation to displace the applicable law’.<sup>199</sup> The principle of legality as articulated in Article 22(2) of the Rome Statute expressly prohibits this. Thus, only where a customary meaning can be reasonably accommodated by the actual words in the Rome Statute is interpretation consistent with custom appropriate. Secondly, while interpretation in favour of the alleged perpetrator is to be preferred in cases of ambiguity, it is submitted that this imperative cannot be used to thwart the ordinary interpretive process of which the proposed interpretive presumption would form a part under Article 31(3) of the Vienna Convention. Thirdly, in situations where the Elements and custom provide different answers to a legal issue and the presumption has not been rebutted, it is submitted that the interpretation supported by custom should prevail. One way to understand this dynamic is to recall that the Elements must be ‘consistent’ with Articles 6, 7, and 8 of the Rome Statute. If these provisions are presumed to be consistent with custom, a conflict between custom and the Elements would suggest that the Elements are somehow inconsistent with article 6, 7 or 8. An example may be useful to illustrate this point.

In the *Al Bashir* Arrest Decision,<sup>200</sup> Pre-Trial Chamber I used the Elements of Crimes to interpret the crime of genocide in Article 6 of the Rome Statute. The Elements include a requirement that the relevant conduct ‘took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction’. The customary status of this element is controversial, but the Pre-Trial Chamber accepted it and seemed to assume that it is required to do so even if it is incompatible with custom:

[A]ccording to article 21(1)(a) of the Statute, the Court must apply “in the first place” the Statute, the Elements of Crimes and the Rules . . . [T]hose other sources of law provided for in paragraphs (1)(b) and (1)(c) of article 21 of the Statute, can only be applied when the following two conditions are met: (i) there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such *lacuna* cannot be filled by the application of the criteria provided for in articles 31 and 32 of the *Vienna Convention on the Law of Treaties* and article 21(3) of the Statute.<sup>201</sup>

There are a number of difficulties with the cited passage but only four need to be mentioned for present purposes. First, the Pre-Trial Chamber seemed to treat the hierarchy of applicable law set out in Article 21 as the same hierarchy that is to exist when these sources are used as interpretive aids rather than law applied to fill

<sup>197</sup> *Ibid.*

<sup>198</sup> *Oil Platforms*, *supra* note 29, Separate Opinion of Judge Buergenthal, at 270, para. 28.

<sup>199</sup> *Ibid.*, Separate Opinion of Judge Higgins, at 225, para. 49 (see also para. 47).

<sup>200</sup> *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 4 Mar. 2009.

<sup>201</sup> *Ibid.*, at para. 126, emphasis in the original.

gaps, a distinction which the International Court of Justice has struggled with but recognized.<sup>202</sup> Secondly, the Pre-Trial Chamber seemed to give no consideration to the requirement in Article 9(3) of the Rome Statute that the Elements for the crime of genocide must be consistent with its definition in Article 6, which was taken directly from the Convention on the Prevention and Punishment of the Crime of Genocide<sup>203</sup> and is itself reflective of custom.<sup>204</sup> Thirdly, the Pre-Trial Chamber seemed to assert that the Vienna Convention comes into play only if there continues to be a gap after the Rome Statute and Elements have been 'applied' in accordance with Article 21(1)(a).<sup>205</sup> Such an approach incorrectly treats the Elements as binding applicable law rather than an authoritative non-binding aid to interpreting and applying crimes in the Rome Statute.<sup>206</sup> Fourthly, and as a result of the third problem, the Pre-Trial Chamber did not seem to acknowledge the effect of Article 31(3) of the Vienna Convention, which *requires* it to consider as interpretive aids the use of both the Elements of Crimes, which is a 'subsequent agreement between the parties', and custom, which contains relevant and applicable rules of international law:

There *shall* be taken into account . . . :

- (a) *any subsequent agreement between the parties* regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) *any relevant rules of international law applicable* in the relations between the parties.<sup>207</sup>

Article 31(3) contains no hierarchy and clearly does not give the Court any discretion to take only one interpretive aid into account.<sup>208</sup> Where a customary rule of international law is relevant and applicable, both it and the Elements must be taken into account. Applied to this case, Article 31(3) and the presumption of interpretation consistent with custom would have required consideration of the customary status of the aforementioned element for genocide and, if such an element were found to be inconsistent with custom, favour a finding that this element in the Elements of Crimes was inconsistent with the definition of genocide in Article 6 of the Rome Statute.<sup>209</sup> Further, it is submitted that invoking custom as an interpretive aid would not 'significantly erode' the principle of legality as defined in Article 22(2), which does not mention the Elements of Crimes, or Article 9, which requires that the Elements be

<sup>202</sup> *Oil Platforms*, *supra* note 29; ILC, *supra* note 11, at 228–232.

<sup>203</sup> 78 UNTS 277 (1948).

<sup>204</sup> Genocide literature, *supra* note 122; Kress, 'The Crime of Genocide and Contextual Elements', 7 *J Int'l Crim Justice* (2009) 297.

<sup>205</sup> I am grateful to Thomas Weigend for this observation.

<sup>206</sup> Art. 9(1) Rome Statute provides: 'Elements of Crimes shall *assist* the Court in the interpretation and application of articles 6, 7 and 8' (emphasis added).

<sup>207</sup> Emphasis added.

<sup>208</sup> ILC, *supra* note 11, at 214; Sands, *supra* note 4, at 103; French, *supra* note 196, at 301.

<sup>209</sup> For a discussion of this case and policy arguments favouring the consideration of custom see: Cryer, *supra* note 190.

consistent with the Rome Statute.<sup>210</sup> Article 22(2) contemplates that the suspect or accused has fair notice by virtue of the detail in the Rome Statute, and Article 9 permits judges not to apply the Elements in a given case. Further, the separation of powers doctrine which is protected by the principle of legality is not undermined by the Elements guiding but not binding judges, as interpretation of the law is a legitimate judicial function which is recognized in the Rome Statute.<sup>211</sup>

A fourth caveat is that the Elements should not lightly be ignored, as they do contain evidence of the *opinio juris* of the international community and were intended to reflect existing customary international law consistent with Articles 6, 7, and 8 of the Rome Statute.<sup>212</sup> They are therefore the obvious starting point for understanding the definition of a crime in the Rome Statute. As well, because custom is notorious for being vague and lacking in detail, it will not very often be the case that a perfectly clear mental or material element is discerned in customary international law.<sup>213</sup> As international criminal law continues to mature, it is hoped that this will change. More importantly, the Elements of Crimes are praiseworthy for their usefulness as an interpretive aid in at least two respects: (1) as a ‘decoder’ of archaic language in the Rome Statute; and (2) as a ‘detail filler’ of vague or ambiguous terminology in it.<sup>214</sup> As a ‘decoder’, the Elements take outdated customary legal language (e.g., the war crime of killing ‘treacherously’) and give it an ordinary meaning, taking into account modern warfare, but without legislating new crimes.<sup>215</sup> As a ‘detail-filler’, the Elements give content to vague or ambiguous phrases in the Rome Statute, again while taking care not to expand or restrict the crimes stated therein.<sup>216</sup>

Accordingly, while the Rome Statute may create a sub-regime of international criminal law, Articles 6, 7, and 8 should, to the greatest extent possible, be interpreted in a manner which is consistent with custom. As well, care needs to be taken that the experience of judges at the ICTY and ICTR under different circumstances does not cause the pendulum to swing too far in the opposite direction, so that judges consider self-containedness and exclusive reliance on the Elements as ‘safe’ and openness of the Rome system as well as the interpretive assistance of custom as ‘dangerous’. The picture is not so clear cut, not least because it is already being suggested that the Elements are inconsistent with the Rome Statute in places by expanding or restricting

<sup>210</sup> *Al Bashir*, *supra* note 200, at para. 131; Cryer, *supra* note 190, at 402–403.

<sup>211</sup> Arts 21 and 22 Rome Statute.

<sup>212</sup> Kirsch, ‘Foreword’, *supra* note 117, at xiii–xiv.

<sup>213</sup> Lietzau, ‘Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court’, 32 *Cornell Int’l LJ* (1999) 477, at 482.

<sup>214</sup> Robinson and von Hebel, ‘Reflections on the Elements of Crime’, in *Elements of Crimes*, *supra* note 122, at 224 ff.

<sup>215</sup> *Ibid.*

<sup>216</sup> The Elements of Crimes may in places cause more confusion than clarification (see, e.g., nn 5 and 6). The Elements are also said to be creatively ambiguous in places, most famously in respect of the war crime of a direct or indirect civilian population transfer by the Occupying Power into, within, or outside the occupied territory (Art. 8(2)(b)(viii)). Footnote 44 to the Elements of Crimes states, ‘The term “transfer” needs to be interpreted in accordance with the relevant provisions of international humanitarian law.’

the scope of crimes defined in Articles 6, 7, and 8.<sup>217</sup> Thus, while ‘the Elements are not binding *per se*, they will undoubtedly have persuasive force, reflecting the consensus view of the international community; ultimately, however, the judges will have to reach their own understanding of the Statute’.<sup>218</sup> If the interpretive presumption proposed is recognized, this would of course lend momentum to revived interest in the formation of custom, its interpretation, and aids to its interpretation.

### E Article 30 and Mental Elements ‘otherwise provided’

Finally, a discussion of the Elements and custom as interpretive aids would not be complete without a brief mention of Article 30(1) of the Rome Statute, which states, ‘*Unless otherwise provided*, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge’.<sup>219</sup> For example, it has been said that Articles 6, 7, and 8 of the Rome Statute ‘otherwise provide’ mental elements including intent<sup>220</sup> and wilfulness,<sup>221</sup> as well as behaviour conducted ‘wantonly’<sup>222</sup> or ‘treacherously’.<sup>223</sup> However, drafters of the Elements treated only the latter two – ‘wantonly’ and ‘treacherously’ – as otherwise providing and regarded references in the Rome Statute to intent and wilfulness as consistent with the default rule in Article 30.<sup>224</sup> Other parts of the Rome Statute contain references such as ‘should have known’<sup>225</sup> and ‘for the purpose of’.<sup>226</sup>

Paragraph 2 of the General Introduction to the Elements seems, however, to contemplate that instruments *other* than the Rome Statute may ‘otherwise provide’ a mental element for crimes in Articles 6, 7, and 8:

As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in

<sup>217</sup> Trifflerer, ‘Can the “Elements of Crimes” Narrow or Broaden Responsibility for Criminal Behaviour Defined in the Rome Statute?’, in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2009), at 381, 383.

<sup>218</sup> Von Hebel, ‘The Making of the Elements of Crimes’, *supra* note 113, 3, at 8.

<sup>219</sup> Piragoff and Robinson, ‘Article 30’, in Trifflerer, *supra* note 46, 849, at 856, emphasis added (the meaning of ‘otherwise provided’ in Art. 30 was not agreed upon at the Rome Diplomatic Conference).

<sup>220</sup> Arts 6, 7(1)(k), 7(2)(b), 7(2)(e), 7(2)(f), 7(2)(h), 7(2)(i), 8(2)(b)(i), (ii), (iii), (iv), (ix), (xxiv), (xxv), as well as 8(2)(e)(i), (ii), (iii), and (iv).

<sup>221</sup> Art. 8(2)(a)(i), (iii), (vi) and (b)(xxv).

<sup>222</sup> Art. 8(2)(a)(iv).

<sup>223</sup> Art. 8(2)(b)(xi) and (e)(ix), all cited in Werle, *supra* note 165, at 106–107.

<sup>224</sup> I am grateful to Roger Clark for this point. Wantonly is not defined, but the concept of treachery is.

<sup>225</sup> Art. 28(a)(i); Trifflerer, ‘The New International Criminal Law – its General Principles Establishing Individual Criminal Responsibility’, 32 *Thesaurus Acroasium* (2003) 633, at 699; Trifflerer, ‘Command Responsibility, Article 28 Rome Statute, an Extension of Individual Criminal Responsibility for Crimes Within the Jurisdiction of the Court – Compatible with Article 22, *nullum crimen sine lege?*’, in O. Trifflerer (ed), *Gedächtnisschrift für Theo Vogler* (2004), at 213.

<sup>226</sup> Art. 25(3)(c).

article 30 applies. Exceptions to the article 30 standard, based on the Statute, *including applicable law under its relevant provisions*, are indicated below.<sup>227</sup>

On its face, this excerpt suggests that all sources of applicable law listed in Article 21 may ‘otherwise provide’ a mental element. Indeed, this is the view of some commentators<sup>228</sup> and it was a deliberate creative ambiguity on the part of the drafters.<sup>229</sup> Others think that the Rome Statute can ‘otherwise provide’ but seem to doubt that the Elements on their own can.<sup>230</sup> It is submitted that, because the Elements must be consistent with Articles 6, 7, and 8 of the Rome Statute and these crimes are presumptively reflective of custom, departures in the Elements from the intent and knowledge elements mentioned in Article 30 must be based on wording found in the Statute or the legal origin of the crime – be it custom or treaty.<sup>231</sup> In other words, the Elements cannot legislate on their own or ‘otherwise provide’ a mental element, as this would violate the consistency requirement in Article 9(3), or at least render it meaningless. Again, an example may be useful.

In the *Lubanga* Decision on Confirmation of Charges,<sup>232</sup> Pre-Trial Chamber I accepted the mental element of negligence indicated in the Elements for the war crime of conscripting and enlisting children under the age of 15.<sup>233</sup> This mental element is clearly a departure from the default elements of intent and knowledge in Article 30 of the Rome Statute. Accordingly, it is submitted that the Pre-Trial Chamber should have provided reasons for how this element is consistent with the Rome Statute, by pointing either to the definition of this crime in the Rome Statute or else to the customary or treaty law it reflects.<sup>234</sup> Where neither the Rome Statute nor the law it reflects

<sup>227</sup> Emphasis added.

<sup>228</sup> Werle and Jessberger, ‘“Unless Otherwise Provided”: Article 30 of the ICC Statute and Mental Elements of Crimes under International Criminal Law’, 3 *J Int’l Crim Justice* (2005) 35; Werle, *supra* note 165, at 106.

<sup>229</sup> Kelt and von Hebel, ‘General Principles of Law and the Elements of Crimes’, in *Elements of Crimes*, *supra* note 113, at 19, 29–30: ‘States were generally reluctant to deviate from article 30 if this would result in a higher *mens rea* but flexible if it would lead to a lower one.’

<sup>230</sup> Schabas, *supra* note 158, at 109; Kress, ‘The Crime of Genocide under International Law’, 6 *Int’l Comp L Rev* (2006) 461, at 485; Heller, ‘Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute: A Critical Analysis’, 6 *J Int’l Crim Justice* (2008) 419, at 435–436; Triffterer, *Gedächtnisschrift*, *supra* note 225, at 226: ‘The words “otherwise provided” in Article 30 can only mean in the Statute’. In an earlier publication, Triffterer hinted at these words having a wider scope: ‘[t]he wording in article 30 paragraph 1 “unless otherwise provided”, covers expressly mentioned exceptions as well as those which can be deduced from the definitions of the crimes or the description of their appearances, as listed, for instance in article 25 . . . the exception must be clearly visible, expressly or by inferences from the wording. Otherwise, such an extensive interpretation is prohibited by article 22 . . .’: Triffterer, *Thesaurus*, *supra* note 225, at 99.

<sup>231</sup> Hinting at this possibility is Elewa Badar, ‘The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Perspective’, 19 *Crim L Forum* (2008) 473, at 500. It is not clear whether Cassese, *supra* note 32, at 74 and Triffterer, *Thesaurus*, *supra* note 225, at 99, also hint at this possibility.

<sup>232</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06, 29 Jan. 2007, at paras 356–359.

<sup>233</sup> Art. 8(2)(b)(xxvi) Rome Statute.

<sup>234</sup> Weigend, ‘Intent, Mistake of Law and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges’, 6 *J Int’l Crim Justice* (2008) 471, at 474.

indicates a mental element, the default mental elements in Article 30 would apply, as the Elements should not be able ‘otherwise [to] provide’.<sup>235</sup>

## 5 Inter-temporal Dilemma<sup>236</sup>

### A Then and Now

Hitherto, nothing has been said about time and interpretation of the crimes in the Rome Statute. If they are largely reflective of custom as it existed when the Rome Statute was adopted, does this mean that they are to be interpreted by taking into account relevant and applicable law as it existed in 1998?<sup>237</sup> In fact, concerns have been expressed that the Rome Statute has ‘frozen customary definitions in a process of rapid evolution’.<sup>238</sup> Others have expressed concern that the definitions of crimes may negatively interfere with the natural growth of custom in this field.<sup>239</sup> As one commentator put it, ‘the content of international law changes and develops continuously – it provides a constantly shifting canvas against which individual acts, including treaties, fall to be judged. Any approach to interpretation has to find a means of dealing with this dynamism.’<sup>240</sup> In this section, consideration will be given to how the inter-temporal rule might inform interpretation of the crimes in the Rome Statute. Indeed, it has already been suggested that some of the Elements of Crimes have been ‘overtaken’ by developments in international criminal law.<sup>241</sup>

The inter-temporal rule dates back to the *Island of Palmas* arbitration and Judge Huber’s famous two-part *dictum*: (1) ‘[a] judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time such a dispute in regard to it arises or falls to be settled’; and (2) ‘[t]he existence of the right, in other words, its continued manifestation, shall follow the conditions required by the evolution of the law’.<sup>242</sup> In a dispute arising between the United States and the Netherlands over title to the Island of Palmas, Judge Huber had to determine whether Spain’s sovereign title to the island obtained through discovery of it in 1648 could be maintained absent effective occupation since that time. Discovery, while valid in 1648 as a means of obtaining legal title to property, was no longer recognized as such under international law when the dispute arose. At the same time, international law had evolved

<sup>235</sup> Clark asserts that Werle and Jessberger, *supra* note 228, ‘grossly misstate the position of the drafters of both the Statute and the Elements when they conclude that “[i]n most cases, the mental element is ‘otherwise provided’”: ‘Elements of Crimes in Early Confirmation Decisions of Pre-Trial Chambers of the International Criminal Court’, 6 *New Zealand Yrbk Int’l L* (2008) 209, at 213, n. 14.

<sup>236</sup> In the literature, the terms contemporaneity and inter-temporality (or intertemporality) are often used interchangeably, although a distinction has on occasion been drawn between the two concepts: Fitzmaurice, *supra* note 36, at 104.

<sup>237</sup> Art. 31(3)(c) VCLT.

<sup>238</sup> Pellet, *supra* note 91, at 1056; Baxter, *supra* note 136, at 299; Thirlway, *supra* note 127, at 125.

<sup>239</sup> Cassese, *supra* note 45; Jennings, *supra* note 123, at 58–59.

<sup>240</sup> McLachlan, *supra* note 190, at 282.

<sup>241</sup> Hunt, *supra* note 163 (commenting on the definition of rape).

<sup>242</sup> *Island of Palmas Case (The Netherlands v. United States)*, 2 RIAA, (1928), ii, 831, at 845.

since 1648 to require effective occupation of land in order to maintain sovereign title to it. While accepting that the law of discovery was valid for creating Spain's legal title to the island in 1648, Judge Huber applied the 'new' law to determine the continued existence of this right and concluded that Spain's title had been lost for failing effectively to occupy the island.

Applying the *dictum* to the law of treaties, commentators have been able to agree that the adoption of a treaty is a juridical fact, but unable to agree on whether Judge Huber's *dictum* mandates interpretation of a treaty in light of the law contemporary with it at the time of its adoption or whether interpretation is required to reflect evolution of the law up to the point where the dispute arose. In terms of jurisprudence, application of the inter-temporal rule has on occasion resulted in treaty terms being interpreted consonantly with the law at the time the treaty was adopted<sup>243</sup> and on other occasions in conformity with law which existed when the dispute arose between the parties.<sup>244</sup> When the ILC was drafting the Vienna Convention, Sir Humphrey Waldock proposed recognizing both parts of Judge Huber's *dictum* as applying to the interpretation of treaties.<sup>245</sup> However, members of the ILC were unable to agree on its meaning.<sup>246</sup> Ultimately, the issue could not be resolved, and Article 31(3)(c) was adopted. It provides, 'There shall be taken into account, together with the context: . . . any relevant rules of international law applicable in the relations between the parties.' Thus, while recognizing that interpretation raises the issue of the entangled relationship between treaty and custom as well as issues of inter-temporality, Article 31(3)(c) deliberately avoids providing a one-size-fits-all solution to either of these problems, perhaps because none exists. On the inter-temporal rule and Judge Huber's *dictum*, Jiminéz de Aréchaga of the ILC said it best:

The intention of the parties should be controlling, and there seemed to be two possibilities as far as that intention was concerned: either they had meant to incorporate in the treaty some legal concepts that would remain unchanged, or, if they had no such intention, the legal concepts might be subject to change and would then have to be interpreted not only in the context of the instrument, but also within the framework of the entire legal order to which they belonged.<sup>247</sup>

<sup>243</sup> *Rights of Passage over Indian Territory (Portugal v. India)*, Judgment [1960] ICJ Rep 6, at 37; *The Grisbadarna Case (Norway v. Sweden)* 11 RIAA (1909) 147, at 159–160; *North Atlantic Coast Fisheries Case (Great Britain/United States)*, 11 RIAA (1910) 167, at 196; *Abu Dhabi Arbitration* [1951] ICJ Rep 144; *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment [1952] ICJ Rep 176, at 185–187.

<sup>244</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion [1971] ICJ Rep 16, at 31; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment [1997] ICJ Rep 7, at paras 104 and 112; *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Judgment [1978] ICJ Rep 3, at 33–34.

<sup>245</sup> Waldock, 'Third Report on the Law of Treaties', *Yrbk Int'l L Commission* (1964), ii, 5, at 8 ff (draft Art. 56).

<sup>246</sup> ILC, Summary Records 729th Meeting, *Yrbk Int'l L Commission* (1964), i, 33 (and an interesting ensuing discussion).

<sup>247</sup> *Ibid.*, at 34, para. 10. See also Mr. Pal's comments at 35, para. 4.

Indeed, although not all are in agreement,<sup>248</sup> this has emerged as the prevailing view in the literature on inter-temporality. It is perhaps the best way to make sense of the jurisprudence on this matter – that it is the intention of the parties that is key to determining whether a treaty term should follow the development of the law.<sup>249</sup> This intent is discerned by examining the text of the treaty and having recourse to the ‘usual methods of interpretation’.<sup>250</sup>

Thus, ‘concrete evidence’ of the parties’ intentions must be found when interpreting the treaty provision in accordance with Articles 31–33 of the Vienna Convention.<sup>251</sup> As well, it has been suggested that courts should be slow and cautious in recognizing a change in custom which impacts on the interpretation of a treaty provision.<sup>252</sup> Based on the relevant case law, the ILC has posited that, where a treaty term is ‘not static but evolutionary’, or ‘generic’, it may reasonably be inferred that states parties intended its meaning to evolve over time.<sup>253</sup> As well, human rights provisions, owing to the intent of states inferred from the object and purpose of human rights protection regimes, have often been subject to evolutive interpretation.<sup>254</sup> It has even been suggested that foreseeability may be relevant to determining whether states parties were aware that law might evolve over time and impact on the interpretation of a treaty provision.<sup>255</sup> However, because locating the intention of the parties on the issue of time is somewhat contrived owing to the fact that states often fail to consider this issue when drafting a treaty, care should be taken in inferring a particular intent.<sup>256</sup>

### B Articles 6, 7, and 8 and Evolving Applicable Law

On balance, it is submitted that states parties should be presumed to have intended that Articles 6, 7, and 8, to the extent possible and without violating the principle of legality, be interpreted in light of relevant and applicable law as it existed when the crime is alleged to have been committed. Article 31(3)(c) of the Vienna Convention should therefore be invoked by judges in this manner. In fact, Article 22(1) provides

<sup>248</sup> J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), at 264–265 with respect to the WTO Agreement; Jessup, ‘The Palmas Island Arbitration’, 22 *AJIL* (1928) 739 (pointing out that an evolutive approach would undermine legal certainty).

<sup>249</sup> Thirlway, *supra* note 132, at 135–143; Higgins, ‘Some Observations on the Inter-Temporal Rule in International Law’, in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century – Essays in Honour of Krzysztof Skubiszewski* (1997), at 173; Higgins, ‘Time and the Law: International Perspectives on an Old Problem’, 46 *Int’l Comp LQ* (1997) 501, at 515–519; Fitzmaurice, *supra* note 36, at 111.

<sup>250</sup> Institut de Droit International, ‘The Intertemporal Problem in Public International Law’, 56 *Annuaire de L’Institut de Droit International* (1975) 536, at s. 4.

<sup>251</sup> McLachlan, *supra* note 190, at 317, citing relevant case law.

<sup>252</sup> T.O. Elias, *The International Court of Justice and Some Contemporary Problems* (1983), at 127–129.

<sup>253</sup> ILC, *supra* note 11, at 203–204.

<sup>254</sup> Higgins, ‘Some Observations’, *supra* note 249, at 181, pointing out that the interpretation of human rights provisions in an evolutive manner is not an exception to the inter-temporal principle but application of it, consistent with the intention of parties.

<sup>255</sup> *Gabčíkovo-Nagymaros Project*, *supra* note 244.

<sup>256</sup> Thirlway, ‘The Law and Procedure of the International Court of Justice: 1954–1989, Part One’, 60 *British Yrbk Int’l L* (1989) 1, at 143.

that no person may be held criminally responsible under the Statute ‘unless the conduct in question constitutes, *at the time it takes place*, a crime within the jurisdiction of the Court’.<sup>257</sup> Similarly, Article 24(2) contemplates changes in applicable law impacting on the Court’s decisions: ‘[i]n the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply’. Implicit in this provision is that all changes in applicable law may be taken into account when interpreting Articles 6, 7, and 8 of the Rome Statute so long as these changes pre-date the alleged commission of the crime. To be clear, while these provisions will usually be invoked in the event of an amendment to the Rome Statute, they may be applied equally where a term in the Rome Statute, such as ‘rape’, is not defined and the meaning of this crime changes after 1998.<sup>258</sup> Where a term, such as ‘deportation’, is defined in the Rome Statute, the principle of legality and Article 22(3) would bar changes to this term under international humanitarian law from altering its definition in the Rome Statute.<sup>259</sup> Further, Articles 10 and 22(3) contemplate custom evolving and Article 21(2) renders custom and treaty law authoritative interpretive aids. In interpreting Articles 6, 7, and 8 in light of relevant and applicable law which exists at the time the alleged crime was committed, Article 22 serves as a reminder that, where the Rome Statute cannot be reconciled with subsequent law, the definitions of crimes in Articles 6, 7, and 8 prevail. Such an approach respects the principle of legality by ensuring that rules are ‘fixed, knowable, and certain’ (because the wording of the Statute does not change).<sup>260</sup> It remains for the ASP to determine whether and when a new crime should be added to the Court’s jurisdiction.<sup>261</sup>

In terms of the object and purpose of the Rome Statute, consideration may be given to the fact that it establishes a permanent criminal court of last resort. This mandate is consistent with the Court interpreting crimes in its jurisdiction in a manner which reflects developments in the legal environment. In this regard, it is interesting to note that some domestic courts interpret and apply criminal law in a manner which is not frozen.<sup>262</sup>

As for the Elements of Crimes, it should be recalled that, during their drafting, France proposed the addition of a ‘commentary’ following the text of the Elements, which would have included references to case law.<sup>263</sup> This idea received some support, but was generally resisted due, *inter alia*, to the ‘concern that such commentaries would inadvertently freeze interpretations and principles of law in time’.<sup>264</sup> Ultimately, states agreed to draft a small number of succinct comments for possible inclusion, which now appear as footnotes in the Elements but do not refer to case law. This approach

<sup>257</sup> Emphasis added.

<sup>258</sup> See Art. 7(1)(g) Rome Statute.

<sup>259</sup> See Arts. 7(1)(d) and (2)(d) Rome Statute.

<sup>260</sup> Raz, *supra* note 59, at 214–215.

<sup>261</sup> Lamb, *supra* note 47, at 753, n. 78.

<sup>262</sup> Ashworth, *Principles*, *supra* note 44, at 67.

<sup>263</sup> Oosterveld, ‘The Elements of Genocide’, in R. S. Lee *et al.* (eds), *Elements of Crimes*, *supra* note 113, at 41, 43.

<sup>264</sup> *Ibid.*

is consistent with the discretion of judges, pursuant to Article 9, not to apply the Elements in a particular case and even to propose amendments to the Elements, perhaps because they have been 'overtaken' by legal developments.<sup>265</sup> If the Rome Statute were to be interpreted and applied in accordance with the law as it existed in 1998, states would arguably not have hesitated to insert relevant references to case law in the Elements of Crimes document.

## 6 Conclusions

The legitimacy of the Court will be influenced by whether judges interpret the Rome Statute in a manner which adheres to the rule of law. In order for the interpretive outcomes reached by judges to be perceived as legitimate, they should appear to be consistently guided by sound methodological reasoning. If judges invoke diametrically opposing canons of interpretation for crimes in the Rome Statute, they may call into question the legitimacy of international criminal law, as they may appear to be invoking a particular interpretive canon because it yields a desired outcome. The task of interpreting the law has been described by one ICTY judge as 'both the most challenging and the most anxiety-ridden part of the job'.<sup>266</sup> This is no wonder. Interpretive outcomes can lead to the imprisonment of individuals, the compensation of victims, contribute to or disturb transitional justice efforts in situation countries, influence the development of customary international law, promote or undermine the coherence of international criminal law as a body of law, encourage or dissuade non-states parties to join the Court, and help to strengthen or undermine the Court's legitimacy as an independent and impartial international judicial organ. Strong critics of the Court have already sounded the alarm about the absence of a method of interpretation to which judges are bound, asserting that 'the Court's discretion ranges far beyond normal or acceptable judicial responsibilities, giving it broad and unacceptable powers of interpretation that are essentially political and legislative in nature'.<sup>267</sup> The strongest response to such an inaccurate and sweeping criticism would be to develop methods of interpretation for substantive and procedural law in this field, perhaps beginning with crimes in the Rome Statute.

<sup>265</sup> Hunt, *supra* note 163.

<sup>266</sup> Wald, *Interview for The Third Branch* (2002), available at: [www.uscourts.gov/ttb/mar02ttb/interview.html](http://www.uscourts.gov/ttb/mar02ttb/interview.html) (accessed 21 Apr. 2010).

<sup>267</sup> Bolton, Former Under Secretary for Arms Control and International Security, 'The United States and the International Criminal Court', Remarks to the Federalist Society in Washington, DC 2002, available at: [www.iccnw.org/documents/USBoltonFedSociety14Nov02.pdf](http://www.iccnw.org/documents/USBoltonFedSociety14Nov02.pdf) (accessed 21 Apr. 2010).