Chapter Seven

Developments in Customary International (Criminal) Law: Implications from the Case Law of the ICJ, the ICTY and the ICTR

I. INTRODUCTION

Close to the end of this study of the development of customary international law and customary international criminal law, it is time to put things in perspective. So far, we have analysed and identified theoretical conceptions of methods of recognition of new customary rules. We then compared the methods of customary law identification with that of other sources of international law and the methods of interpretation and analogy. Thereafter, we demonstrated by an analysis of the case law of the ICJ as well as of the two ad hoc international criminal tribunals which of the methods and rules identified were in fact applied in practice. This analysis of the case law also revealed some of the flaws and disadvantages of the particular theories and methods addressed at the beginning of this study.

However, as this is a study of the development of customary rules, the most important issue has hitherto been missing: a delineation of the direction into which custom as a source of international (criminal) law will most probably evolve or of the perspective that may be drawn for the development of the source of customary international (criminal) law. ¹


The results obtained from our examination of the case law of the ICJ, the ICTY and the ICTR may help to determine the ultimate direction in which custom may develop. There are a few hints which, at first sight, can lead us

¹ This question has also been posed by K. Kress in A. Zimmermann (International Criminal Law) 78. He asked: “The crucial question remains what the recent evolution of international criminal law tells us about the process of the formation of general international law”. 
to conclude that customary international criminal law may indeed evolve into a source of its own, thus evidencing the ‘fragmentation’ of international law. One often cited example which supports this conclusion is the contradictory findings of the ICJ and the ICTY on the level of control needed for the attribution to a state of acts of non-state actors.\(^2\) In particular in the recent *Srebrenica* judgment, the ICJ emphasised that the ICTY’s findings in the *Tadić* case could not be elevated to the level of general international law, and argued that they had to be considered as a rule of *lex specialis* which applied only in international criminal law.\(^3\) There is another aspect which was revealed in our analysis of the case law of the ICJ, ICTY and ICTR which may lead to the same conclusion: the deductive approach was applied by all three courts predominantly in the field of international humanitarian law. It can thus be regarded as an approach to customary international law, which is special to this area of international law and applies as a *lex specialis* approach to this area.

However, this is just one example from the case law of the ICJ, the ICTY and the ICTR. Whether their findings really evidence the growing fragmentation of international law or a trend which approves of certain fundamental values dominating international law-making processes will be examined below. In this regard, the results obtained from our examination of the formation of customary international law in the case law of the ICJ, the ICTY and the ICTR will provide the main evidence.

A. Lessons from the ICJ’s case law

1. Concerning the evidence of new customary international law

One element which may be indicative of the growing fragmentation or constitutionalisation of international law is the evidence utilised by the three courts in their assessment of the formation of a new rule of customary international law. The actual selection of a particular piece of evidence by the courts and its consideration in the process of the formation of a new rule of customary international law can point to the normative weight and importance of this individual piece of evidence. For instance, if the courts prefer
