The Contribution of International Criminal Tribunals to the Development of International Law: The Prominence of *opinio juris* and the Moralization of Customary Law

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"Desperately Seeking Customs": To What Extent Does Judicial Creativity Stand in Contrast to the Principle of Legality?

An assessment of the contribution of the international criminal tribunals (ICTs) to the development of international law may not seem to be, at present, a wise choice as a matter for reflection since almost everything has been said and written on the most critical issue: The manner in which these courts interpreted, applied and developed customary international law. The debate often grew around the questions of where and how to draw the line between evolutive interpretation and the creation of new rules by the judges and consequently on the amount of judicial creativity to be considered acceptable for international criminal law to be consistent with the principle of legality.1

In general, it is acknowledged that at least those appointed as judges at the International Criminal Tribunal for the former Yugoslavia (ICTY) and at the

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International Criminal Tribunal for Rwanda (ICTR) had to engage in a partial exercise of judicial creativity.\(^2\) Indeed, some have claimed more bluntly that judicial creativity, that is to say the shaping of relatively vague existing international law rules in order to render them applicable in a criminal context, is the life and blood of international criminal law.\(^3\) This need was implicitly recognized already in the judgment of the International Military Tribunal at Nuremberg where it is said that the “law of war” listed in the IMT Statute is “not static, but it follows by continual adaptation the needs of a changing world”.\(^4\)

The task and opportunity “to assume responsibility for the further rationalization of international crimes”\(^5\) was taken up to a large extent by the ICTY and ICTR in the 1990s. It is impossible to give an adequate account of the approach followed by both the ad hoc ICTs – not to mention the role played more recently by the International Criminal Court or by the so-called mixed or hybrid courts such as the Special Court for Sierra Leone and the Special Tribunal for Lebanon\(^6\) – to the identification or interpretation of applicable law or to the development of new rules. Hence, this paper will only briefly focus on the use by the judges of the two ad hoc Tribunals of pre-existing customary rules to identify their subject-matter jurisdiction, being quite evident

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2 Here is an eloquent statement of Judge David Hunt talking about his experience of sitting on the bench at the ICTY in its early days: “There was no Moses to produce on slabs of stone a code of commandments which were intended to be all-encompassing for all time”, David Hunt, “The International Criminal Court: High Hopes, ‘Creative Ambiguity’ and an Unfortunate Mistrust in International Judges”, 2 Journal of International Criminal Justice (2004) 56, 58.


4 IMT, Judgment of 1 October 1946, in The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (22nd August, 1946 to 1st October, 1946), at 445.

5 According to Judge Abi-Saab the two ICTs were “afforded a unique opportunity to assume responsibility for the further rationalization of international crimes at some distance from the historical and psychological conditions from which they emerged and from the perspective of the evolving international legal order”, Separate Opinion of Judge Abi-Saab, in Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, Part I.

6 This article will only focus on the contributions of the ICTY and ICTR, tribunals established by the United Nations Security Council (SC) in 1993 and 1994. It will not tackle the case-law of the hybrid criminal tribunals nor that of the ICC, the latter, by the way, applies and is bound by a much more developed and detailed set of rules.