Nullum crimen sine consuetudine:
A Few Observations on How the International Criminal Tribunal for the Former Yugoslavia Has Been Identifying Custom

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1.

As Professor Stern wrote in a celebrated article, "la coutume dérange"[1]. In the field of international criminal law, custom troubles the jurist's mind even more deeply. Allusion is here made to the ostensible contradiction between the principle of legality, which requires that the law be clear and accessible, and the obscurities surrounding the process through which customary international law is identified. Having in mind the haziness of the 'instructions' that are supposed to orient the search for customary rules, is it not inevitable that the judge, as he goes down the misty paths taking him to those rules[2], tramples on the principle of legality?

Questions like this cause anxiety to criminal lawyers[3] more than they haunt the experts of international law, who are perhaps more inured to situations in which unwritten law plays a significant role. According to Professor Pellet, the stifling 'excess of codification' that characterises the Statute of the International Criminal Court (ICC) and the Elements of Crimes was the by-product of a "brainwashing operation" pursued by criminal lawyers under the banner of legality[4]. It seems that a more trivial consequence of this mistrust was the omission of any explicit reference to custom in Article 21 of the ICC Statute, where the sources of the applicable law are spelt out. Paragraph 1(b) of the same Article refers, *inter alia*, to the "principles and rules of international law", a broad notion which no doubt encompasses custom, and nothing else, perhaps, given that general principles of law are mentioned separately in paragraph 1(c). Custom is therefore not excluded, yet naming it in the field of international criminal law becomes something of a taboo[5].

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[1] B. Stern, La coutume au cœur du droit international: quelques réflexions, *Le droit international: unité et diversité. Mélanges offerts à Paul Reuter*, Paris, Pedone, 1981, pp. 479-495, at p. 479.

[2] "Ce brouillard, fait d'ambiguïtés et d'embarras, qui entoure le processus coutumier en tant que source formelle …" (G. Abi-Saab, Cours général de droit international public, *Recueil des cours de l'Académie de droit international de la Haye*, t. 207, 1987, pp. 9-464, at p. 174).

[3] See, e.g., J.-B. Herzog, Vingt ans après …, *Revue internationale de droit pénal*, pp. 46-62, at pp. 47-48; M. C. Bassiouni, *Introduction to International Criminal Law*, Ardsley, Transnational Publishers, 2003, at pp. 221-224 ("The problems of legality arise more acutely with respect to the other sources … such as customary international law … [it] needs to be codified"); M. Catenacci, *"Legalità" e "tipicità del reato" nello Statuto della Corte penale internazionale*, Milano, Giuffrè, 2003, pp. 187-196.

[4] A. Pellet, Applicable Law, A. Cassese, P. Gaeta, J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1, Oxford, Oxford University Press, 2002, pp. 1051-1084, at p. 1057.

[5] *Ibidem*, at p. 1071; see also M. McAuliffe deGuzman, Article 21: Applicable Law, O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos, 1999, pp. 435-445, at p. 442.

This seems due to the fact that custom defies precise description by means of what Hart called rules of recognition[6]. Professors Simma and Paulus observed that custom lacks the clarity and predictability of conventional law – two qualities that legal norms must posses under any meaningful interpretation of the *nullum crimen sine lege* principle[7]. In this respect, Professor Verhoeven's opinion is more radical. He challenged the thesis[8] according to which legal norms comport with the principle of legality if, irrespective of their source, they are accessible and their terms sufficiently clear: "how could a private person be satisfactorily informed of the existence or exact content of a customary international rule or of a general principle of law, which the states themselves very often remain largely ignorant of and which are far from constituting for the individuals 'clear' and 'accessible' norms … ?"[9]. If the problem might have been occasionally overstated, its existence cannot be denied.

This paper – which condensates the results of a systematic inquiry into the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY)[10] – argues that the key to the

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[6] It is impossible to recall here the endless disputes over the meaning, or even the exactitude, of the 'theory of the two elements' (general practice and *opinio iuris sive necessitatis*): the fact that the binary conception of custom was endorsed by the International Court of Justice (*locus classicus*: North Sea Continental Shelf Cases, ICJ Reports, 1969, p. 3, paragraphs 71-73) and assimilated by ICTY (see, among many others, the Prosecutor v. Kupreskic, Trial Chamber, Judgement, 14 January 2000, paragraph 591), and the limited scope of the present article, are sufficient reasons to leave it as a background assumption. Studies on international custom are countless: for an excellent bibliography, see G. Cahin, *La coutume internationale et les organisations internationales: l'incidence de la dimension institutionnelle sur le processus coutumier*, Paris, Pedone, 2001. Doctrinal works dealing specifically with custom as a source of international criminal law are far less numerous: see, e.g., B. Simma, A. Paulus, Le rôle relatif des différentes sources du droit international pénal (dont les principes généraux de droit), H. Ascensio, E. Decaux, A. Pellet (eds.), *Droit international pénal*, Paris, Pedone, 2000, pp. 55-80; C. Tomuschat, La cristallisation coutumière, *ibidem*., pp. 23-35; A. Cassese, *International Criminal Law*, Oxford, OUP, 2003, at pp. 28-30; M. C. Bassiouni, *op. cit.* (note 3), 2003, at pp. 1-18.

[7] B. Simma, A. Paulus, *op. cit.* (note 6), pp. 55-69, at p. 60. On the principle of legality in international law, see A. Cassese, *International Criminal Law*, cit., at pp. 139-157; M. C. Bassiouni, *op. cit.* (note 3), at pp. 178-226; M. Catenacci, *op. cit.* (note 3), *passim*; S. Lamb, *Nullum Crimen Sine Lege*, *Nulla Poena Sine Lege* in International Criminal Law, A. Cassese, P. Gaeta, J. R. W. D. Jones (eds.), *op. cit.* (note 4), pp. 733-766; S. R. Ratner, J. S. Abrams, *Accountability for Human Rights Atrocities in International Law : Beyond the Nuremberg Legacy*, 2nd ed., Oxford, Oxford University Press, 2001, pp. 21-25; A. Gil Gil, *Derecho penal internacional (Especial consideración del delito de genocidio)*, Madrid, Tecnos, 1999, at pp. 66-105.

[8] He ascribes to L. Condorelli, Présentation de la Deuxième Partie: la définition des infractions internationales, H. Ascensio, E. Decaux, A. Pellet (eds.), *op. cit.* (note 6), pp. 241-247, at p. 246.

[9] J. Verhoeven, Article 21 of the Rome Statute and the ambiguities of applicable law, *Netherlands Yearbook of International Law*, 2002, pp. 3-22, at p. 22.

[10] The present paper synthesises (with some variations) a much longer article, which is the final product of a research project submitted to the International Criminal Law Agora of the ESIL Inaugural Conference (Florence, 13-15 May 2004): L. Gradoni, L'attestation du droit international pénal coutumier dans la jurisprudence du Tribunal pour l'ex Yougoslavie:

above-stated problem lies in a reconceptualisation of the rule whereby customary international *criminal* law is recognised[11]. It further contends that the ICTY recent case law, which takes the *nullum crimen* jurisprudence of the European Court of Human Rights (ECHR) as a starting point, can be construed as a move in that direction[12]. The *Ojdanic* case, in particular, marks the transition from an 'undeclared methodology' – which will be sketchily reconstructed by detecting objective *regularities*[13] in the Tribunal's behaviour (II) – to the articulation of a judicial discourse about the *rules* supposed to govern the identification of customary law (III).

'régularités' et 'règles', M. Delmas-Marty, E. Fronza, E. Lambert-Abdelgawad (eds.), *Les sources du droit international penal*, Paris, Société de législation comparée, 2004, pp. 24-74 (forthcoming), hereinafter referred to as "*Régularités et règles*".

[11] For reasons explained in more detail elsewhere (*cf. Régularités et règles*, I), it is believed that the use of Hart's conceptual apparatus is not misplaced when treating customary international law, provided that "la faiblesse de l'expression formelle de la coutume" is always kept in mind (*cf*. R. Kolb, *Réflexions de philosophie du droit international*, Bruxelles, Bruylant, 2003, at p. 51, apparently quoting Ch. De Visscher, *Théories et réalités en droit international public*, 4th ed., Paris, Pedone, 1970, at p. 171). Some authors maintain that the two elements of international custom can be equated to a secondary rule of recognition (G. Cahin, *op. cit.* (note 6), p. 257; H. Thirlway, The Sources of International Law, M. D. Evans (ed.), *International Law*, Oxford, Oxford University Press, 2003, pp. 117-144, at p. 118), while others deny it (e.g. J. Barberis, Réflexions sur la coutume internationale, *Annuaire français de droit international*, 1990, pp. 9-46, at pp. 17-19). Hart himself could not accept this qualification, for he believed that international law had not attained the structural complexity that is the hallmark of full-fledged normative systems (cf. H. L. A. Hart, *The Concept of Law*, Oxford, Oxford University Press, 1961, at p. 209). Nonetheless, he admitted, first, that in the abstract custom can be encapsulated into a rule of recognition (*cf. ibidem*, at p. 92); secondly, that rules of recognition, like any other, are not immune to ambiguity, so that it is the judge's task to progressively clarify them through interpretation (*cf. ibidem*, at pp. 144-150). More recently, M. Mendelson, The Formation of International Customary Law, *Recueil des cours de l'Académie de droit international de la Haye*, t. 272, 1998, pp. 157-410, at p. 224, spoke of "*informality*, not to say formlessness" of custom. The fact that this author recognised that the doctrine of "spontaneous law" has the merit of "warning us not to expect too much in our search for rules about custom-formation" (*ibidem*, at p. 174), did not prevent him from concluding as follows: "I do not think that there is a complete absence of rules about its formation, or that it is (or should be) whatever we want it to be. It is indeed, in some respects, vague and hazy; but by getting close to it, or even 'inside' it, we can understand it better" (*ibidem*, at p. 399).

[12] On how 'Strasbourg Law' and, more generally, international human rights law, have been influencing the ICTY decisions, see A. Cassese, The Impact of the European Convention on Human Rights on the International Criminal Tribunal for the Former Yugoslavia, *Mélanges à la mémoire de R. Ryssdal*, Köln/Berlin/Bonn/München, Heymanns, 2000, pp. 213-236; E. Lambert-Abdelgawad, Les Tribunaux pénaux internationaux pour l'ex Yougoslavie et le Rwanda et l'appel aux sources du droit international des droits de l'homme, M. Delmas-Marty *et al.* (eds.), *op. cit.* (note 10).

[13] The terms are borrowed from J. Combacau, De la régularité à la règle, *Droits*, 1985, pp. 3-10, but are given a different meaning here.

2.

One significant trait of the ICTY case law is the unusual length at which "applicable law", as a subject-matter, is discussed in the statement of reasons, especially when the Tribunal deals with unwritten law. The indeterminacy of the customary process, combined with the requirements of a fair trial, compels the judges to explain themselves with the greatest care: attracted in the maze of custom, they come back with a logbook in which the discovery of the rule is meticulously described. One way of managing this potential 'information overload' is through a database ranging all the material sources the ICTY referred to in support of its findings of customary status, and a spreadsheet, which enables to test hypotheses of correlation between variables in an efficient way, and to find out regularities or judicial patterns in the pertinent case law[14].

How much practice is needed to make a custom? How many States must concur to it? In answering these questions, vague formulas (e.g., "general practice") are traditionally apposite. The ICTY makes no exception: it never tells us whether the amount of practice it considered *sufficient* to ground a finding of customary status was also *necessary* to that end. Anyway, this does not prevent to see how much practice, and how many States, the ICTY deemed sufficient each time to support such findings. Representing 123 normative propositions, i.e. the totality of those to which the ICTY recognised customary status[15], a first chart (fig. 1) displays the extreme variability of those quantities.

In some instances, the fact that the ICTY contents itself of little, or no, practice is (more or less) plausibly explained out by *qualitative* factors. For example, in some cases of 'obvious' customary status, the ICTY arguably deemed it unnecessary to mention any specific instances of State practice in support of its findings[16]. Furthermore, a certain relaxation of the evidential standards seemed to occur in relation to findings of customary status that are *obiter*[17]. In a single instance, the ICTY grounded the statement that in customary law "violations of Additional Protocol I incur individual criminal liability" on pure analogy, observing that such violations are no less grave than others for which criminal liability is beyond question[18]. In many cases,

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[14] The underlying method is detailed in *Régularités et règles*, II.

[15] Data have been collected until 15 June 2004.

[16] See, among others, the Prosecutor v. Blaskic, Trial Chamber, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, paragraphs 41 (each States is free to determine its governmental structure) and 64 (no State shall interfere in the internal affairs of another State); the Prosecutor v. Delalic, Appeals Chamber, Judgement, 20 February 2001, paragraphs 142-143 (Geneva Conventions of 1949 are part of customary international law); the Prosecutor v. Kordic, Trial Chamber, Judgement, 26 February 2001, paragraphs 449-451 (principle of personal self-defence).

[17] The Prosecutor v. Kupreskic, Trial Chamber, Judgement, cit., paragraphs 619-622; the Prosecutor v. Tadic, Appeals Chamber, Judgement, 15 July 1999, paragraphs 132-136.

[18] The Prosecutor v. Kordic, Trial Chamber, Judgement, cit., paragraphs 168-169: "The Appeals Chamber … had no difficulty in finding that customary law 'imposes criminal liability for serious violations of Common Article 3' of the Geneva Conventions, an article that contains no reference to individual responsibility. […] By analogy, violations of Additional Protocol I incur individual criminal liability in the same way that violations of Common Article 3 give rise to individual criminal liability". But *compare* the Prosecutor v. Delalic, Trial Chamber, Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged between Zejnil Delalic and Zdravko Mucic, 11 November 1996, paragraph 24 ("also in international law analogy

references to the International Law Commission's Draft Code of Crimes against Peace and Security of Mankind (1996)[19], to the Statute of the ICC[20], or to both[21], seem to make up for the inadequacy of evidence of State practice. With regard to the evidential value of the International Law Commission's drafts, the ICTY recalled that the members of that body are appointed by the General Assembly, and that the 1991 version of the Draft Code had been transmitted to governments for comments and observations, without specifying, however, which States reacted and how[22]. As for the Statute of the ICC, in *Furundzija* it was stated that "the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States"[23]. Despite the fact that in most proceedings the crimes charged had occurred well before the adoption of both the ICC Statue and the International Law Commission's Draft Code 1996, on occasion the ICTY relied on them almost as 'authoritative texts', without paying much attention to the question whether these texts actually reflected pre-existing customary norms. In other cases, the task of identifying custom was somehow simplified by the existence of pertinent case law of other international courts and tribunals. When, for instance, the Appeals Chamber refused to uphold the so-called 'Nicaragua Test' for *de facto* State organs, arguing that customary law actually provided for less stringent requirements, it relied on two decisions rendered by German courts, on the case law of the Iran-United States Claims Tribunal, and on the judgment of the ECHR in *Loizidou*[24]. The Appeals Chamber traced no distinctions, however, between judgements already passed when the alleged crimes had been committed and those rendered subsequently (viz. *Loizidou* and the two German decisions).

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is normally inadmissible with regard to substantive rules of criminal law; by contrast, it may be warranted in order to fill possible lacunae in the interpretation and application of international rules of criminal procedure, or of international rules governing penitentiary regimes. […] Furthermore, analogy is not allowed to result in infringements of fundamental human rights or manifestly unjustified restrictions of such rights").

[19] The Prosecutor v. Tadic, Trial Chamber, Judgement, 7 May 1997, paragraphs 675, 678-692, 703-710; the Prosecutor v. Blaskic, Trial Chamber, Judgement, 3 March 2000, paragraphs 220-226; see also the Prosecutor v. Kunarac, Trial Chamber, Judgement, 22 February 2001, paragraph 537. For the International Law Commission's Draft Code, see International Law Commission, Report on the Works of the 48th Session, 1996, UN doc. A/51/10, p. 71.

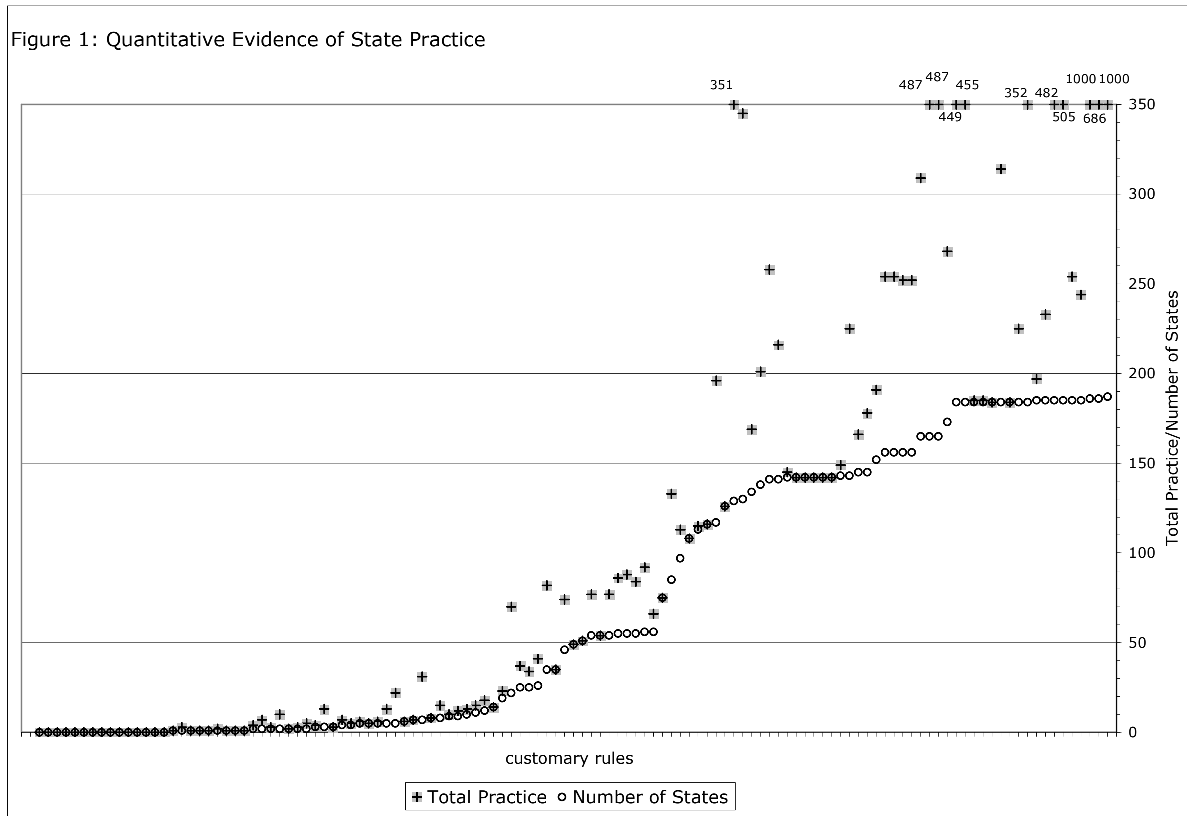
[20] The Prosecutor v. Tadic, Appeals Chamber, Judgement, cit., paragraphs 204-226.

[21] The Prosecutor v. Furundzija, Trial Chamber, Judgement, 10 December 1998, paragraphs 199-216, 217-296, 228-229, 230-231, 236-248.

[22] The Prosecutor v. Tadic, Trial Chamber, Judgement, cit., paragraph 655. For the 1991 version of the International Law Commission's Draft Code, see Yearbook of International Law Commission, vol. II, 2nd Part, p. 98.

[23] The Prosecutor v. Furundzija, Trial Chamber, Judgement, cit., paragraph 227.

[24] The Prosecutor v. Tadic, Appeals Chamber, Judgement, cit., paragraphs 124-129.



It may also be argued that at times the ICTY intentionally muddled the distinction between the identification of customary norms and the interpretation thereof, possibly to avoid criticism for interpreting penal norms extensively, or, more generally, to represent its statements on the applicable law as objective inferences from the sources of law as opposed to subjective interpretations. Even if that distinction may not always be straightforward, there are at least two clear instances in which the ICTY depicted itself as if it were engaged in identifying custom, while it was actually interpreting normative propositions it had already recognised as customary law – as its unconcerned attitude towards practice testifies. In *Kristic*, the ICTY called "customary" the definition of the crime of "extermination" it had worked out mainly on the basis of dictionary entries, borne out by the ILC's Draft Code 1996[25]. In *Jelisic*, when dealing with the definition of "genocide", it stated that in customary international law "a targeted part of a group would be classed as substantial either because the intent sought to harm a large majority of the group in question or the most representative members of the targeted community"[26]. In order to substantiate this 'fragment' of definition, the ICTY merely referred to the conclusions of the Commission of Experts established pursuant to Security Council resolution 780 (1992)[27]. It also mentioned, albeit in a footnote, a single instance of State practice which is paradoxically at odds with the definition it was giving: in fact, according to a statement accompanying the adoption of

[25] The Prosecutor v. Krstic, Trial Chamber, Judgement, 2 August 2001, paragraphs 492-503.
[26] The Prosecutor v. Jelisic, Trial Chamber, Judgement, 14 December 1999, paragraph 82.
[27] See Final Report of the Commission of Experts established pursuant to Security Council resolution 780 (1992), UN Doc. S/1994/674.

the United States' legislation implementing the Genocide Convention, the destruction of a substantial part of the group, in terms of its "numerical significance", is deemed *necessary* to justify a finding of genocide[28].

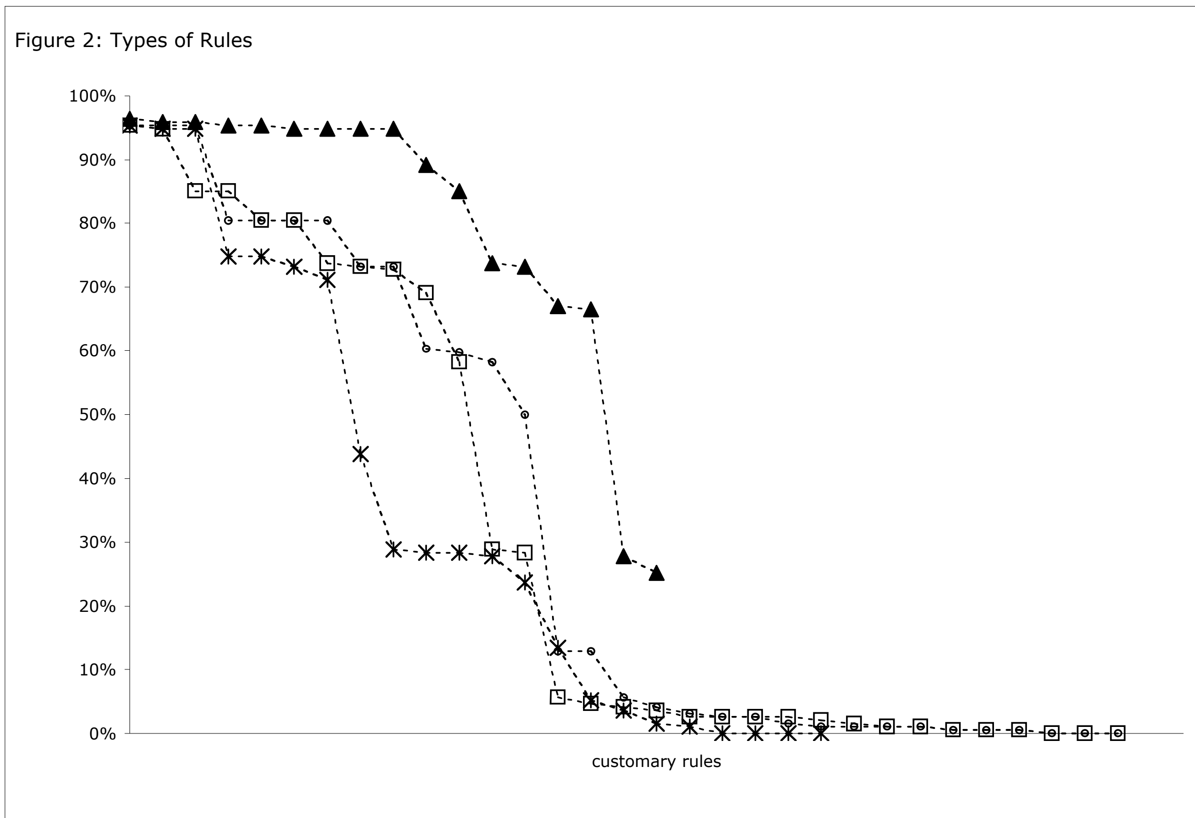
Another qualitative factor that seems to affect, quite pervasively this time, the shifting of the evidential threshold, is the *type of rule* the ICTY is concerned with. Not easily discernible through a case-by-case analysis, this pattern distinctly emerges from a statistical inquiry embracing the whole case law. To that end, the rules to which the ICTY recognised customary status has been classified under four different categories, labelled as follows: *prohibitions* (norms stating that a conduct is unlawful without defining it, i.e. "torture is prohibited"); *criminal liability* (norms qualifying a conduct as criminal under international law); *actus reus* (definitions of the material element of crimes); *mens rea* (definitions of the subjective element of crimes). In the chart below (fig. 2), each category is represented by a 'curve' (whose function is merely to highlight the affiliation of single rules to the same category), while the y-axis describes the percentage of States whose practice was mentioned in support of each finding of customary status.

It may be observed that, on average, the evidence of practice for *prohibitions* is quite substantive in comparison to that adduced for norms belonging to the other categories. As the ICTY repeated time and again, the fact that a conduct is illegal under customary international law does not automatically imply that it constitutes also a penal offence under the same body of law[29]. While the ICTY encountered no major problems in 'documenting' the existence of unwritten *prohibitions* – normally, this was achieved by making reference to widely accepted human rights conventions or to the written law of armed conflicts[30] –, to bring forward evidence that prohibitions are matched by a penal sanction has been more difficult. The same can be said of norms that define the objective and subjective elements of crimes. For those rules, conventional practice predating the relevant facts is very limited or non-existent, so that the ICTY was usually bound to infer them from domestic courts' decisions. As will be seen immediately below, there is a strong correlation between the recourse to national judicial practice and (very) low levels of evidence of State practice. In short, one is left with the impression that the height at which the evidential threshold is placed significantly depends on how much evidence supporting customary status is practically available.

[28] The Prosecutor v. Jelisic, Trial Chamber, Judgement, cit., paragraph 82.

[29] See, *inter alia*, the Prosecutor v. Tadic, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 94; the Prosecutor v. Vasiljevic, Trial Chamber II, Judgement, 29 November 2002, paragraph 199; the Prosecutor v. Stakic, Trial Chamber, Judgement, 31 July 2003, paragraph 721; see also, the Prosecutor v. Galic, Trial Chamber, Separate and Partially Dissenting Opinion of Judge Nieto-Navia, 5 December 2003, paragraphs 112-113; *contra* (apparently): the Prosecutor v. Naletilic, Trial Chamber, Judgement, 31 March 2003, paragraph 228, note 609; the Prosecutor v. Galic, Trial Chamber, Judgement, 5 December 2003, paragraph 389.

[30] See, e.g., the Prosecutor v. Kunarac, Trial Chamber, Judgement, cit., paragraph 426 (proportionality principle in the law of armed conflicts), paragraphs 519-520 (definition of slavery); the Prosecutor v. Delalic, Trial Chamber, Judgement, 16 November 1998, paragraphs 446, 452-453, (prohibition of torture), paragraph 476 (prohibition of rape and other forms of sexual violence), paragraph 517 (prohibition of inhumane treatment).



The elements of practice[31] cited by the ICTY in support of customary status have then been classified under six categories: i) ratifications of (or accessions to) treaties; ii) signatures of treaties; iii) resolutions (or other acts) adopted by international organisations; iv) unilateral acts (broadly defined)[32]; v) decisions of domestic courts and tribunals; vi) acquiescence. The relative importance of each category of practice as evidence of custom can be measured at two different levels. A first chart (fig. 3) shows that, overall, conventional practice plays a dominant role. However, as one disaggregates the data – taking account of the differences in the levels of evidence deemed sufficient to warrant findings of customary status – the picture becomes more complex. This is illustrated by two charts (fig. 4a and 4b), which describe different segments of data (for 'high' and 'low' levels of evidence, respectively), and a diagram (fig. 5), which shows the correlation between the level of evidence and two macro-categories of practice, defined as *concerted practice* and *unilateral practice*.

As the level of evidence shifts downwards, unilateral practice, particularly national judicial decisions, acquires pre-eminence. Customary status is then established through an intense dialogue the ICTY maintains with an *élite* of national jurisdictions, whereas not much attention, if any, is paid to the question whether the latter's decisions translate an *opinio iuris gentium*. In other words, those decisions are *formally* regarded as elements of State practice, not as precedents where the customary status of a rule had already been judicially appraised. In substance, however, the ICTY chooses the direct route of making its own the solution embodied

[31] For a brief discussion on what the ICTY means by 'practice', see *Régularités et règles*, II, C).

[32] This category includes all kinds of 'internal documents', e.g. national army manuals.

in a few national precedents, much more than it considers them as pieces of evidence contributing to, but perhaps not reasonably sufficient for, the formation of customary rules[33].

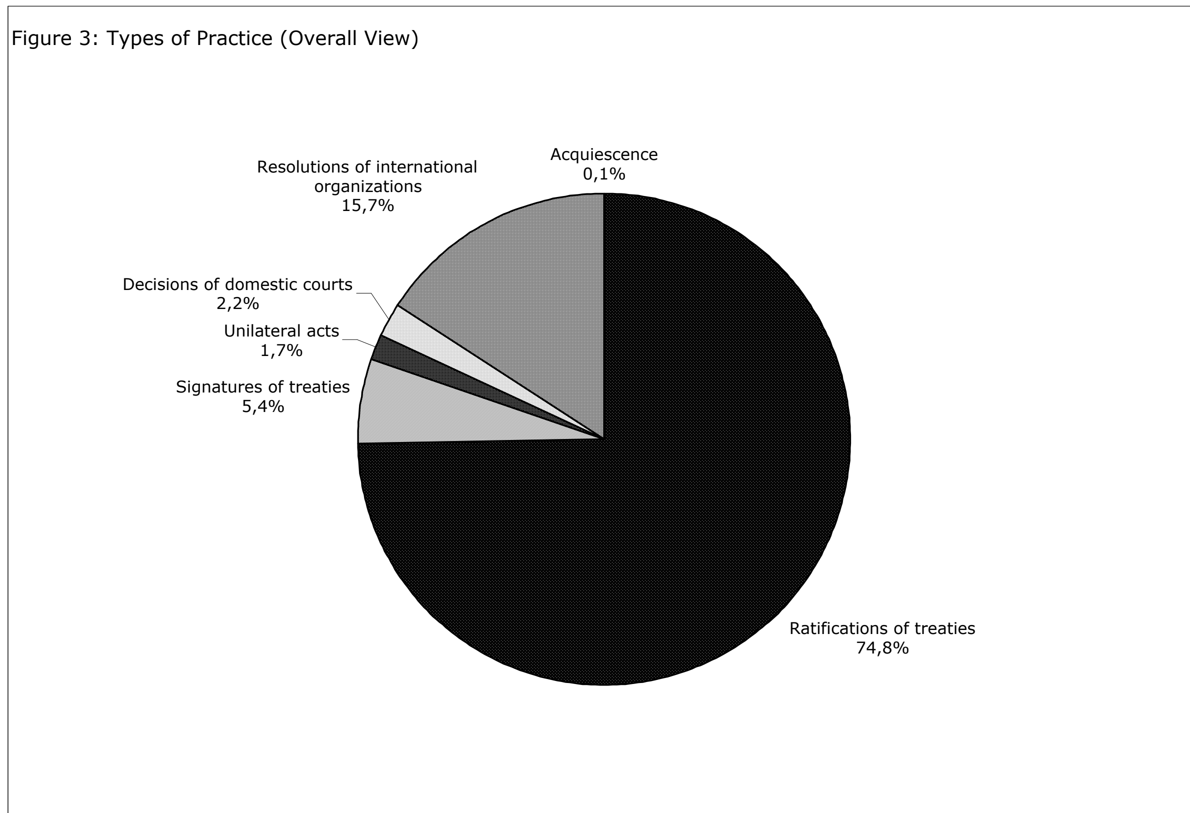


Figure 3: Types of Practice (Overall View)

[33] A. Cassese, The Influence of the European Court of Human Rights on International Criminal Tribunals: Some Methodological Remarks, M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Leiden/Boston, Martinus Nijhoff, 2003, pp. 19-52, at pp. 21-22, calls this a 'savage approach' to the use of national courts' decisions. In a similar vein, see A. Nollkaemper, Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY, G. Boas, W. A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Leiden/Boston, Martinus Nijhoff, 2003, pp. 277-296, at pp. 281-286, 290-296.

Figure 4a: Types of Practice (High Levels of Evidence of State Practice)

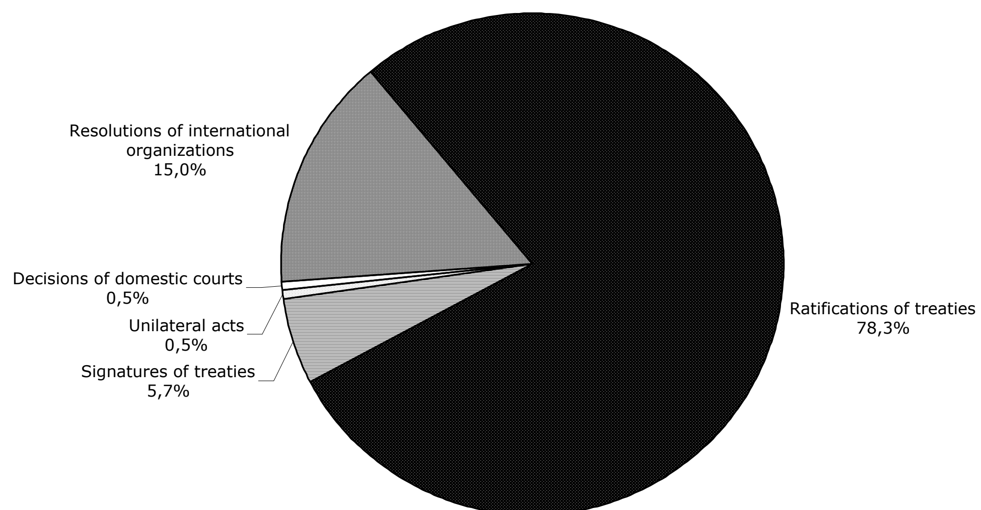


Figure 4b: Types of Practice (Low Levels of Evidence of State Practice)

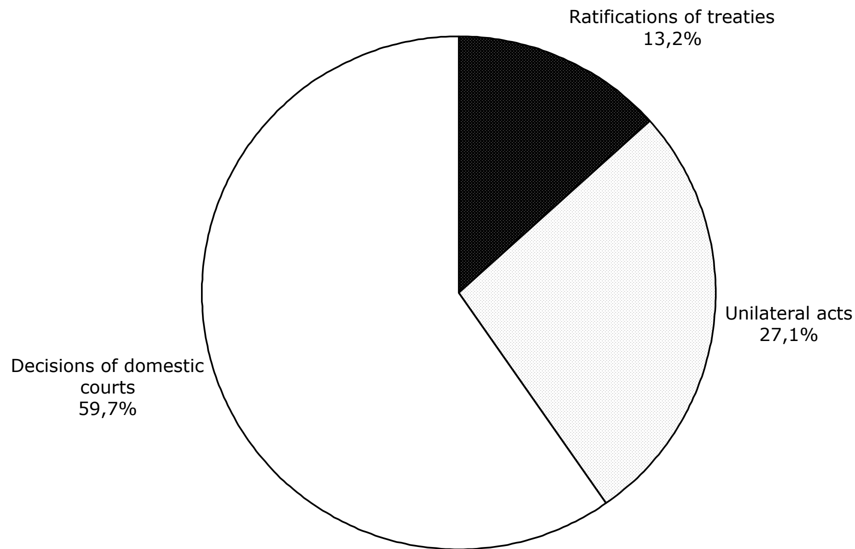
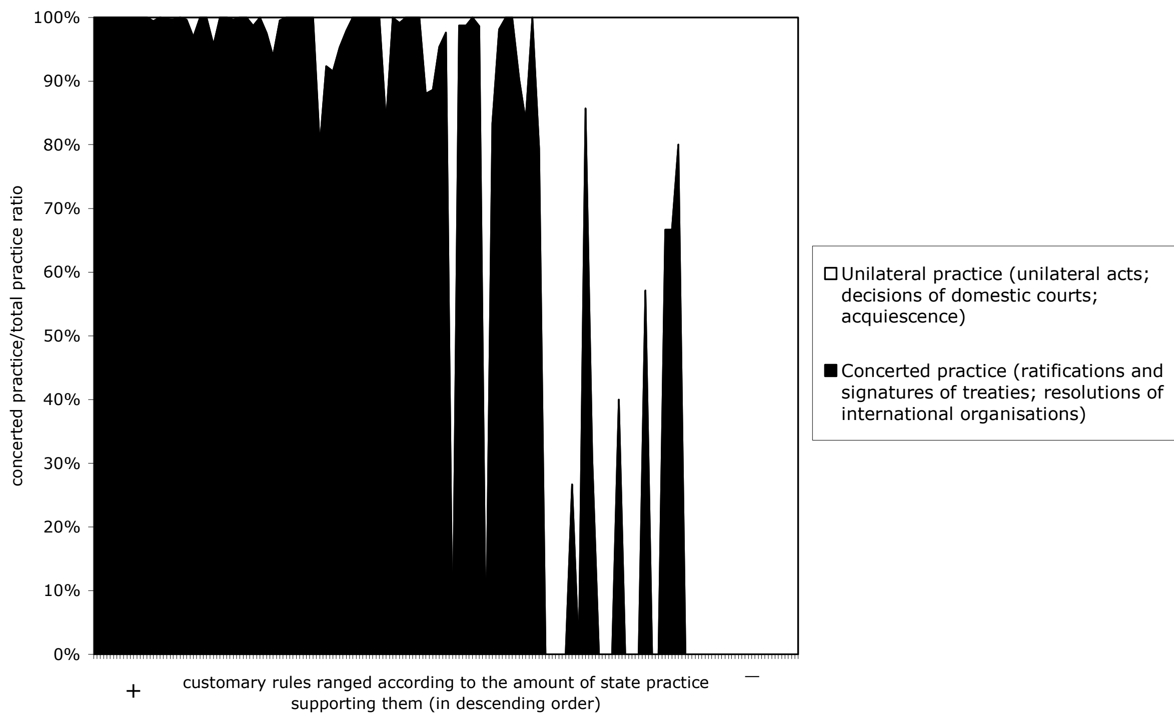
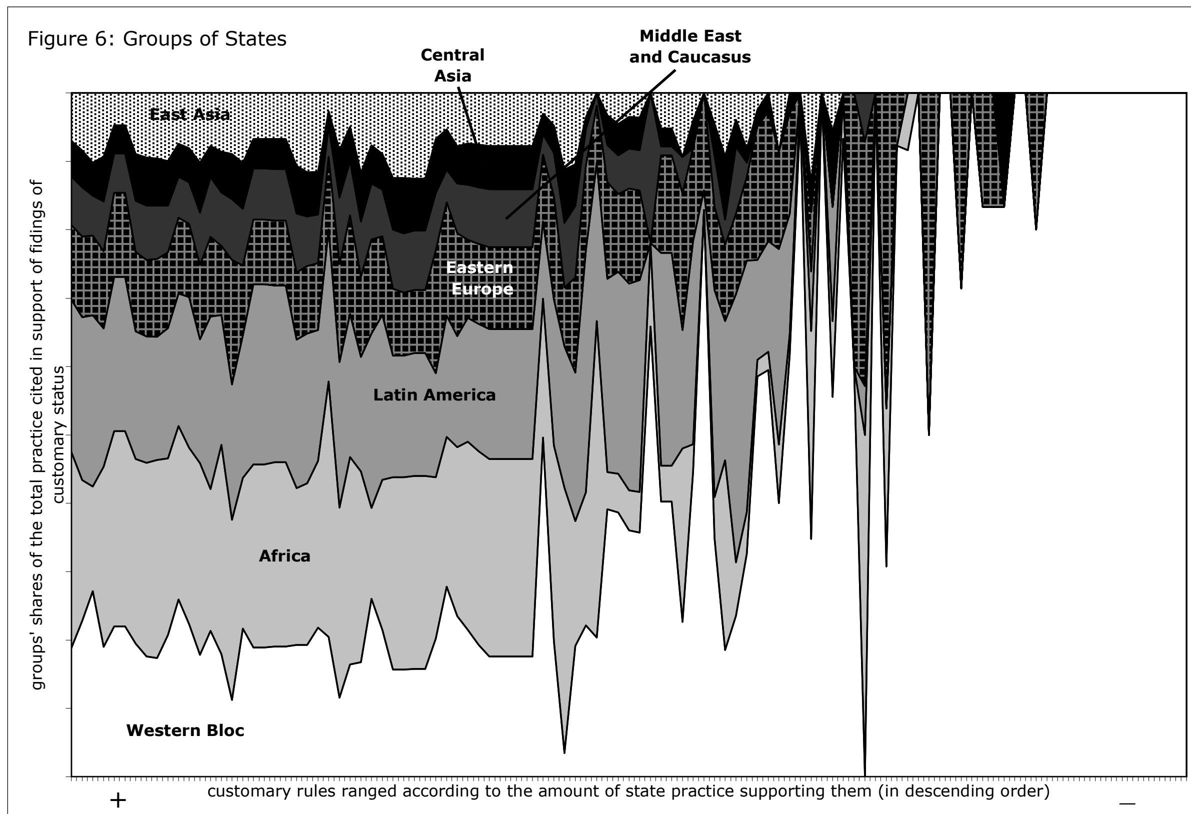


Figure 5: Concerted Practice vs. Unilateral Practice

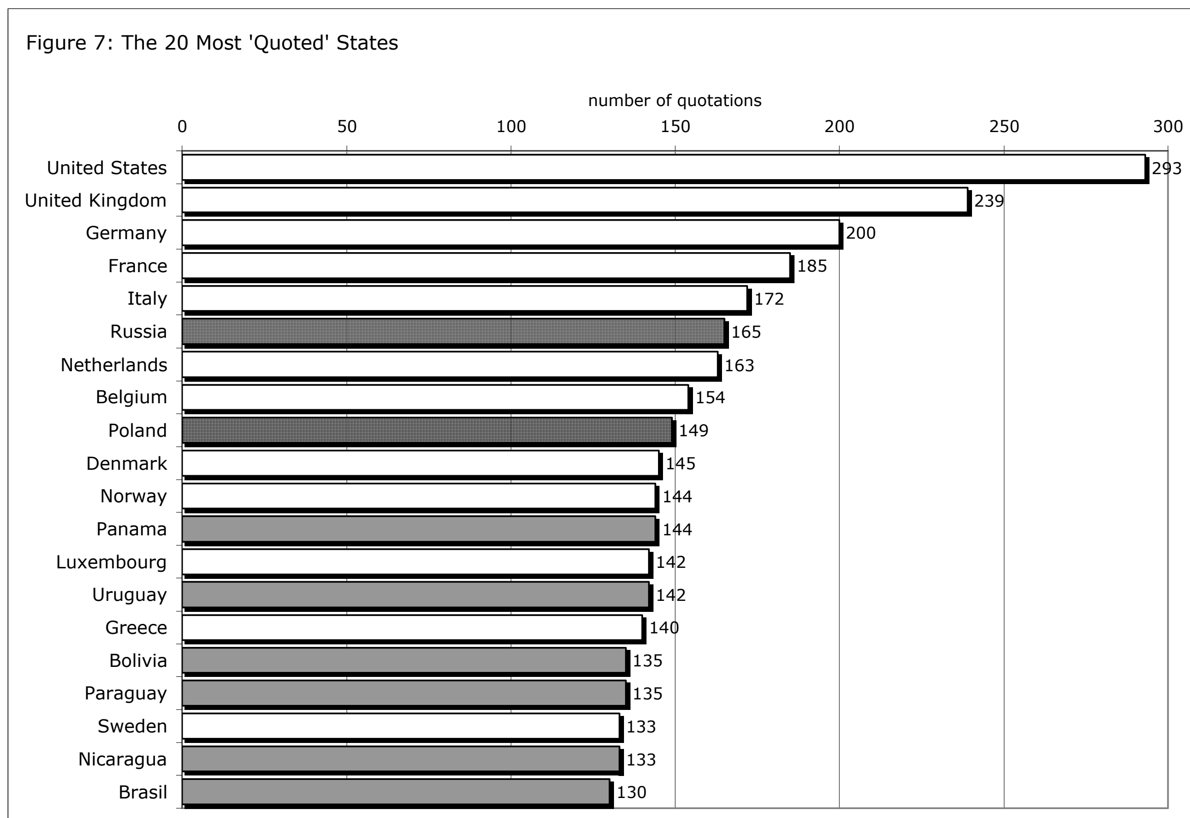


The next step consists in tracing the 'origin' of practice, with a view to obtain a rough estimate of the relative 'influence' that seven groups of States have been exerting on the ICTY case law. To that end, groups have been defined as follows: the 'Western bloc' includes Western Europe, North America, Australia and New Zealand, but also Israel; 'Eastern Europe' is, so to speak, still delimited by the iron curtain; the boundary between 'Middle-East and Caucasus' and 'Central Asia' runs through the Iraq-Iran border; 'East Asia' covers the territories east of Bangladesh; 'Africa' is defined in terms of conventional geography; 'Latin America' embraces both Central and South America.



A 'static' analysis of the practice originating from each group of States yield no meaningful results. Groups are in fact too heterogeneous: Africa includes a large number of States, whereas it is relatively 'small' in terms of population; conversely, East Asia's population is more than twice as large, yet concentrated in relatively few States. If one takes into account that, as seen above, 'concerted practice' is preponderant in the aggregate (*cf.* fig. 5), the forgone conclusion of such an analysis is that the largest group, Africa, stands out also as the most influent. The picture changes dramatically, however, once that the data on the 'origin' of practice are, as in the diagram below (fig. 6), redistributed along a continuum representing the different levels of evidence adduced in support of customary status. As the index of practice moves downwards (rightwards in the diagram), the influence of the 'Western Bloc' keeps rising and becomes unopposed where custom is at its most 'elitist', an occurrence that is by no means rare. A last diagram (fig. 7) takes a look into the groups to find out the twenty States whose practice is more frequently cited by the ICTY (the ranking is based on the number of quotations).

The results of the foregoing inquiry may be summarised as follows. A little amount of practice – in some instances very close to null – has been deemed sufficient to ground a finding of customary status, depending also on the type of norm at issue. Those interested in anticipating the content of customary law as identified by the ICTY, should have kept under scrutiny the judicial decisions coming from a handful of States. Furthermore, the ICTY never tried to offset the paucity of practice by invoking acquiescence – and probably could not do so, since in most cases the internal practice on which it relied had not been (and perhaps was not meant to be) articulated on the international plane; nor did it seek refuge in doctrines of natural law or substantive justice, even though at times the latter may have been an undercurrent. More generally, the judicial patterns outlined above do not fit in a 'theory of custom' openly declared and consistently applied. Only recently the ICTY took the trouble to work out an explicit and fairly transparent conception of custom that is more attuned to the principle of legality.



3.

While, as said above, the watershed is arguably marked by the Appeals Chamber's decision in the *Ojdanic* case, the new approach was in some respects anticipated by the Trial Chamber's judgement in *Vasiljevic*. Using a language clearly reminiscent of the ECHR jurisprudence, the Trial Chamber stated that "a criminal conviction should indeed never be based upon a norm which an accused person could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what acts or omission could engage his criminal

responsibility"[34]. To put it in slightly different words, such a norm, irrespective of its source, must have been at the relevant time sufficiently accessible, and its terms clear enough, so as to allow the accused person "to distinguish the criminal from the permissible"[35]. This two-pronged test of reasonable foreseeability of penal offences, which encapsulates the concepts of accessibility and clarity, is explicitly borrowed from the sophisticated *nullum crimen* jurisprudence of the ECHR[36].

Even though the question of the accessibility of customary international law *as such* was not mooted in *Vasiljevic*, the Trial Chamber's reasoning introduced at least two important ideas in this connection: first, the reasonable foreseeability of a penal offence should be judicially assessed from the perspective of the accused person, i.e., of an individual; second, a link is established between the evidence of a widespread State practice – the Trial Chamber spoke of a "vast number" of States[37] – and a presumption of accessibility of customary rules. These ideas will be taken up and further developed in *Ojdanic*.

In that case, the Appeals Chamber opened its reasoning by stating that a form of criminal liability ("joint criminal enterprise") falls within the Tribunal jurisdiction *ratione personae* only if two conditions, among others, are met: first, it "must have *existed* in international customary law at the relevant time"; second, "*the law* providing for that form of liability *must have been sufficiently accessible* at the relevant time to anyone who acted in such a way"[38]. The Appeals Chamber than noted that the accessibility of norms of customary international law might depend on the individual situations of its potential addressees, in particular, on to the content of the national law of the accused: if that law and customary international law are substantially

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[34] The Prosecutor v. Vasiljevic, Trial Chamber II, Judgement, cit., paragraph 193.

[35] *Ibidem*.

[36] *Ibidem*, note 528. The ECHR's pertinent case law includes: Sunday Times v. United Kingdom, Judgement of 26 April 1979, paragraph 49; Margareta and Roger Anderson v. Sweden, Judgment of 25 February 1992, paragraph 75; Kokkinakis v. Greece, Judgement of 19 April 1993, paragraphs 40 and 52; C. R. v. United Kingdom, Judgement of 27 October 1995, paragraphs 33-34; S. W. v. United Kingdom, Judgement of 27 October 1995, paragraphs 35-36; Cantoni v. France, Judgement of 15 November 1996, paragraph 29; Baskaya and Okçuoglu v. Turkey, Judgement of 8 July 1999, paragraph 36; E. K. v. Turkey, Judgement of 7 February 2002, paragraph 34. On this subject, see A. Bernardi, Nessuna pena senza legge, S. Bartole, B. Conforti, G. Raimondi (eds.), *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, Cedam, 2001, pp. 249-306 (with ample references to the relevant doctrine); see also M. Delmas-Marty, Fécondité des logiques sous-jacentes, Id. (ed.), *Raisonner la raison d'État*, Paris, PUF, 1989, pp. 465-497. Since the ECHR has never been called to assess the compatibility between a conviction grounded on customary international law and the principle of legality, the 'transplant' the ICTY effected in *Vasiljevic* can be thought of as something 'experimental'. On the (not so insurmountable) difficulties of transposing the ECHR's *nullum crimen* jurisprudence in the domain of international customary law, see *Régularités et règles*, III, A.

[37] The Prosecutor v. Vasiljevic, Trial Chamber II, Judgement, cit., paragraph 199.

[38] The Prosecutor v. Milutinovic, Appeals Chamber, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, paragraph 21 (emphasis added). The Appeals Chamber mentioned two further conditions: (i) the form of liability in question must be explicitly or implicitly envisaged by the ICTY Statute; (ii) the accused person must have been able to foresee that his or her conduct was a penal offence.

equivalent, then the latter is, so to speak, 'brought closer' to the accused. As the Appeals Chamber put it, the ICTY may turn its attention to domestic law "for the purpose of establishing that the accused could reasonably have known that the offence in question … was prohibited and punishable"[39]. A 'proximity factor' is thus outlined.

While the 'proximity factor' may 'facilitate' the entry of a customary rule into the field of the applicable law, it cannot in itself tip the balance. As the Appeals Chamber made clear, an inquiry into domestic law is aimed at seeking, if need be, no more than complementary indications: "[it] may provide some notice to the effect that a given act is regarded as criminal under international law"[40]. There is in fact one single factor that, when taken by itself, may be decisive in establishing whether or not a customary rule is accessible, namely, the quantity and quality of evidence of State practice supporting it. In *Ojdanic*, the Appeals Chamber observed that an inquiry into domestic law would have been *redundant*, for the existence of the rule at issue was reflected in a "long and consistent stream of judicial decisions, international instruments and domestic legislation which would have permitted any individual to regulate his conduct accordingly and would have given him reasonable notice that, if infringed, that standard could entail criminal responsibility"[41].

The Appeals Chamber identified a third factor that may affect the assessment. As the dearth of written law has traditionally compelled war crimes tribunals to regard "the atrocious nature of the crimes charged" as a reason for concluding that "the perpetrator of such an act must have known that he was committing a crime", so the ICTY may allow for an 'atrocity factor'; yet, while the repugnance of an act may be invoked to reject "any claim by the Defence that it did not know of the criminal nature" of that act, the 'atrocity factor' cannot in itself provide sufficient ground for judgement, as the Appeals Chamber took pains to explain[42]. Its proper role, like that of the proximity factor, is to complement an assessment whose cornerstone remains the appreciation of the evidence of State practice. Anyhow, in *Ojdanic* there is more than an inkling of an overture to doctrines of natural law.

From a theoretical point of view it is submitted that the three factors mentioned in *Ojdanic* should be construed as follows: evidence of State practice and the 'atrocity factor' are better understood as the constituent parts of a *rule of recognition specific to the sub-system of international criminal law*[43], whereas the 'proximity factor' is a parameter whereby the applicability *in casu* of customary rules already established to belong to that legal sub-system is assessed.

The rule of recognition for customary international criminal law is specific in that it is grounded on, and derives its content from, the principle of legality, which compels the judge to look at custom from the standpoint of the individual. This shift of perspective explains why the ICTY has recently been insisting on the need that findings of customary status be based on

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[39] *Ibidem*, paragraph 40. It may be inferred from the words of the Appeals Chamber – "*in particular* the law of the country of the accused" – that the reference it made to that law was not meant to be exclusive of other domestic laws, e.g. the law of the country where the crime was committed.

[40] *Ibidem*, paragraph 41.

[41] *Ibidem*.

[42] *Ibidem*, paragraph 42.

[43] For an in-depth analysis of the different dimensions of validity in legal theory, see F. Ost, M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Bruxelles, Publications des Facultés universitaires Saint-Louis, 2002, pp. 307-383.

substantial and unambiguous evidence of State practice[44]. Furthermore, it is precisely in a perspective hinged upon the individual that the three factors outlined in *Ojdanic* can be seen as forming a coherent set. Other things being equal, the accessibility (or 'visibility') of customary law may be assumed to vary according to the quantity of the evidence of State practice, but also *marginally improved* by the individual's conscience to be subject to rules that, although not part of positive international law, have the same or equivalent content: national law (under the 'proximity factor') and natural law (under the 'atrocity factor') are not applicable *as such* – as substitutes of customary international law; they rather come into play in half-light situations where there are marginal doubts as to the accessibility of custom.

Although the two ancillary factors have been just shown to serve analogous purposes, their theoretical qualifications *must* differ. In particular, as noted above, the 'proximity factor', unlike the 'atrocity factor', cannot be deemed a component of the rule of recognition of customary international criminal law. To posit the converse inevitably leads to contradiction, since certain rules might be recognised as part of customary law or held extraneous to it depending on the *contingent* situation of the accused person, e.g. his or her nationality. In realty, these rules are valid, i.e. they are a part of the legal system, as long as they fulfil the minimum requirement deriving from the combination of the other two factors (evidence of State practice and 'atrocity'), and yet, due to the fact that their accessibility is still imperfect, they are applicable only if the accused person could have been mindful of their existence thanks to his or her presumed knowledge of a national law to which he or she was linked under the 'proximity factor'.

In conclusion, the requirement of accessibility, itself a corollary of the principle of legality, breaks down into a two-limbed rule of recognition *and* a parameter governing the applicability of customary international criminal law. As shown in the diagram below (fig. 8), their interaction gives rise to three categories of norms: a) those accessible solely on account of the evidence of State practice supporting them; b) those which criminalise acts whose revulsion tilts the balance in favour of accessibility in the face of State practice that is *per se* insufficient to that end; c) those whose accessibility ultimately depends on the 'proximity factor'.

What has been said thus far does not address a potential objection. It may in fact be argued that the foregoing construction is unnecessary, that it can be simplified by apprehending the three factors, without distinctions, as parameters governing the applicability in the filed of international criminal law of rules already recognised as belonging to general customary international law. However, this alternative construction should be discarded, for two connected reasons. First of all, it supposes the existence of rules of *criminal* law that, while belonging to general customary international, are paradoxically inapplicable within the field of international *criminal* law, i.e., in the sole domain where they could be applied. Occam's razor surely would cut away such a redundant, and indeed illogical, category of 'wasted norms'[45]. Secondly, in

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[44] This approach had been foreshadowed in one of the earliest ICTY decisions: the Prosecutor v. Tadic, Trial Chamber, Decision on the Defence Motion on Jurisdiction, 10 August 1995, paragraphs 69 et 73; see also Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN doc. S/25704, paragraph 34: "the application of the principle nullum crimen sine lege requires that the [ICTY] should apply rules of international humanitarian law which are beyond any doubt part of customary law"). *Cf. Régularités et règles*, III, B), 2.

[45] These norms, it might be surmised, may be given 'free access', and used, in other (highly hypothetical) sub-systems of international criminal law or in some domestic legal systems. The

seems that in *Ojadnic* the Appeals Chamber did not even try to ascertain the existence of a norm of customary law before evaluating its accessibility; rather, it *directly* proceeded to that assessment in order to establish whether the rule at issue belonged to customary international criminal law. In fact, the distinction traced *in abstracto* between *existence* and *accessibility* of customary law has been considered here a misleading trait of the Appeals Chamber's decision in *Ojdanic*, and something that needed to be reframed as a matter of theory. It is therefore significant that the Appeals Chamber, in a subsequent judgement, seemed to drop that distinction in substance, while retaining the good side of the '*Ojdanic acquis*', that is to say, the employment of a rule of recognition based on the principle of legality[46].

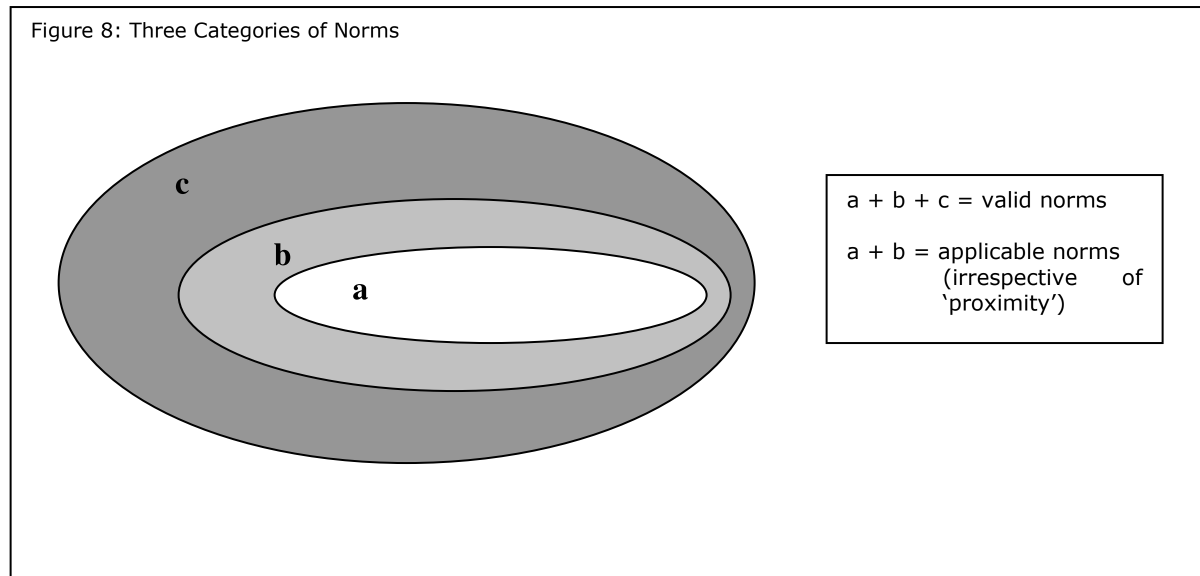

Figure 8: Three Categories of Norms

Different considerations apply to the second component of the principle of legality (as interpreted by the ECHR): the requirement that a norm be clear with regard to its content. Logically, for it to be set against this yardstick, a normative proposition must have already been identified using the rule of recognition outlined in *Ojdanic*. The question whether a penal offence is defined precisely enough to be in line with the principle of legality was prominent in *Vasiljevic*. In that case, the Trial Chamber interpreted 'sufficient precision' as a constitutive element of a norm establishing a penal offence: failing the former, the latter is excluded from the domain of customary international criminal law[47]. It seems therefore that the two requirements that branch off from the principle of legality have the same effect – they determine the

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reasons why general international law cannot serve in this case as a 'dustbin for recyclable norms' are explained in *Régularités et règles*, par. III, B), 3.

[46] *Cf.* the Prosecutor v. Krnojelac, Appeals Chamber, Judgement, 17 September 2003, paragraphs 220 and 223; see also *Régularités et règles*, par. III, B), 3.

[47] The Prosecutor v. Vasiljevic, Trial Chamber II, Judgement, cit., paragraph 203: "In the absence of any clear indication in the practice of states as to what the definition of 'violence to life and person' … may be under customary law, the Trial Chamber is not satisfied that such an offence giving rise to individual criminal responsibility exists under that body of law".

validity/invalidity of a norm in the field of international criminal law[48] –, even though they operate on different planes. Legality *as accessibility* informs a rule of recognition for customary international criminal law; *as clarity*, it constitutes a hierarchically superior norm: it is *ius cogens* intended as international *ordre public*[49]. From a formal point of view, it may be observed that it is its very definition as a standard against which 'ordinary norms' must be assessed, that makes it hierarchically superior. From a substantive point of view, it goes almost without saying that the value underlying both requirements, or the rationale of the principle of legality, resides in the need to preserve as much as possible individual freedom against the impulse (or the rational choice) of limiting oneself for fear of a power that may arbitrarily apply rules whose existence is genuinely uncertain, and/or rules whose content is too indeterminate.

4.

In conclusion, it is appropriate to go back to, and reappraise, Verhoeven's observation: can an individual be reasonably presumed acquainted with customary norms that even governments are normally ignorant of? In principle, this obstacle is overcome by shifting the perspective of the judicial inquiry, as the ICTY did in *Ojdanic*. From this new perspective, it is precisely because one can reasonably assume that the accused person was at the relevant time cognisant of the existence of a rule, that the latter can be said to possess customary status and be applied *in casu*. One should not forget, however, that the less a rule of recognition is precisely defined the more it lays itself open to misuse. Of course, the two-pronged rule of recognition that made its appearance in the ICTY recent case law, the 'proximity factor' that, if need be, ultimately determines the applicability of customary rules, but also the *ius cogens* norm that makes validity of rules of international criminal law conditional on their precision, are not there to 'liquidate' the judge's discretion. It is a truism that all these criteria and parameters do not even come close to a perfect formalisation of custom. Nonetheless, after *Ojdanic*, one should not underestimate the importance of a jurisprudential endeavour to frame, to rationalise, and to make more transparent, the argumentative process through which customary international criminal law is identified and applied.

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[48] *Cf.* M. C. Bassiouni, *op. cit.* (note 3), at p. 225: "In international criminal law there is … a threshold challenge to the presumption or assumption that international criminal law prescriptions are known, or could have been known by the ordinary reasonable persons anywhere in the world. If this threshold challenge is overcome, than a challenge pertaining to the specificity of the normative prescriptions must be met". If only in passing, the author opined that the "validity" of international criminal law should be established on the basis of the principle of legality: "the requirements of the principles of legality create an obstacle to the validity and enforcement of international criminal law" (*ibidem*); "[the] sources of law are … subject to the principles of legality which derive from the general principles of law as applied in international criminal law" (*ibidem*, at p. 4).

[49] The concepts of *ius cogens* and international *ordre public* are not interchangeable, yet their respective domains are partially overlapping: see, exhaustively, R. Kolb, *Théorie du* ius cogens *international: essai de relecture du concept*, Paris, PUF, 2001, pp. 68-83, 98-124, 173-177.