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INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Approaching Custom Identification as a Conflict Avoidance Technique: *Tadić* and *Kupreškić* Revisited

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Abstract
International human rights law (IHRL), international humanitarian law (IHL) and international criminal law (ICL) have trouble staying faithful to the two pillars of customary international law – state practice and *opinio juris*. In ICL, the *Tadić* Interlocutory Appeal on Jurisdiction and the *Kupreškić* Trial Judgement have even gone as far as enunciating new models to identify customs. In this article, I show that the approaches to customs' identification postulated in these two cases were conflict-avoidance techniques used by the International Criminal Tribunal for the Former Yugoslavia (ICTY) to bring together IHRL and IHL. The crux of the matter in the *Tadić* and *Kupreškić* cases was that the human rights of the victims of war crimes committed in internal conflicts required that a new approach to customary international law be adopted. Thus, the criminal aspect of IHL (i.e., ICL) was updated, and conceptual conflicts between IHL and IHRL were avoided.

Keywords
customary international law; international criminal law; international humanitarian law; international human rights law; normative conflicts

1. INTRODUCTION

The International Law Commission (ILC) Special Rapporteur on the Identification of Customary International Law, Sir Michael Wood, initially recognized that there might be different approaches to the identification of the rules of customary international law (CIL) in specific fields of public international law, such as international human rights law (IHRL), international humanitarian law (IHL) and international criminal law (ICL).[1] Indeed, many have observed the struggle of these substantive

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[1] M. Wood, First Report on Formation and Evidence of Customary International Law, UN Doc. A/CN.4/663 (2013), para. 19; M. Wood, Second Report on Formation and Evidence of Customary International Law, UN Doc. A/CN.4/672 (2014), para. 28; M. Wood, Third Report on Formation and Evidence of Customary

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fields of public international law to remain faithful to the classic doctrine of identifying CIL.[2] Evidence of the varying approaches to CIL in ICL is easily found in the jurisprudence of the ICTY, in both the *Tadić* Interlocutory Appeal on Jurisdiction and the *Kupreškić* Trial Judgement.[3] In fact, it is these two cases that the Special Rapporteur on the identification of CIL is referring to in his reports when he speaks of different approaches to the identification of CIL.[4]

A significant part of the literature seems to reflect the opinions of the Special Rapporteur on CIL. Steven Ratner, for one, cited the *Tadić* and *Kupreškić* judgments as examples of the 'judicial flouting' of the classical sources doctrine.[5] Their impact is visible even in other ICL jurisdictions than the ICTY. For instance, the Extraordinary Chambers in the Courts of Cambodia, in the *Duch* case, merged the language of *Tadić* and *Kupreškić* to uphold that in ICL 'State practice may actually be less stringent than in other areas of international law, and the requirement of *opinio juris* may take pre-eminence over the *usus* element of custom.'[6] Although some scholars have argued that the strict codification contained in the Rome Statute for an International Criminal Court (Rome Statute) marks the decline of CIL as a source of ICL,[7] there are still some issues, even within the terrain of the International Criminal Court (ICC) where ascertaining CIL plays a vital role.[8] The highly contested Decision on Malawi's Failure to Arrest and Surrender Al-Bashir (where a customary exception to head of state immunity was found[9]), is an example of a case where the ICC's findings could only be defended by adopting, as Kress puts it, a 'modern positivist approach

International Law, UN Doc. A/CN.4/682 (2015), para. 17; see also ILC Report, UN Doc. A/70/10 (2015), Ch. VI, para. 65; the present draft conclusions adopted by the ILC drafting committee discard the fact that the two element approach may differ according to the field of law but acknowledge that the evidence may be assessed taking into account 'the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found'. Draft conclusion 3 [4], Assessment of evidence for the two constituent elements, UN Doc. A/CN.4/L.872 (2016).

[2] J. Wouters and C. Ryngaert, 'Impact on the Process of the Formation of Customary International Law', in M.T. Kamminga and M. Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (2009), 111 at 129–30.

[3] *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, A. Ch., 2 October 1995; *Prosecutor v. Kupreškić et al.*, Judgement, Case No. IT-95-16-T, T. Ch., 14 January 2000.

[4] See First Report, *supra* note 1, para. 70, fn 35; Second report, *supra* note 1, fn 48, 52.

[5] S. Ratner, 'Sources of International Humanitarian Law and International Criminal Law: War/Crimes and the Limits of the Doctrine of Sources', in S. Besson and J. d'Aspremont, *Oxford Handbook on the Sources of International Law* (2016), 912, at 921–2.

[6] *Prosecutor v. Kaing Guek Eav alias 'Duch'*, Appeal Judgement, Case No. 001/18-07-2007-ECCC/SC, A. Ch., 3 February 2012, para. 93.

[7] L. Van den Herik, 'The Decline of Customary International Law as a Source of International Criminal Law', in C. Bradley (ed.), *Custom's Future: International Law in a Changing World* (2016), 230 (among the various arguments Van den Herik makes, this shift is also due to the nature of ICL, and to the future of ICL as mainly residing in domestic trials).

[8] Ibid.

[9] *Prosecutor v. Omar Hassan Ahmed Al Bashir*, Decision Pursuant to the Article 87 (7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court With Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, ICC-02/05-01/09-139, Pre-Trial Chamber I, 12 December 2011; see also Décision rendue en application de l'article 87-7 de le Statut de Rome concernant le refus de la Republique du Tchad d'accèder aux demandes de coopération délivrées par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140, Pre-Trial Chamber I, 13 December 2011.

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to customary international law'.[10] Indeed, CIL is still present in ICL, and it appears to be as malleable as in the times of *Tadić* and *Kupreškić*.

The ICTY Appeals Chamber, in the *Tadić* Interlocutory Appeal, accepted the two element approach to CIL but 'on account of the inherent nature of this subject-matter' discarded operational state practices contrary to *opinio juris*.[11] Thus, it reversed the traditional methodological order in identifying rules of customary IHL applicable in non-international armed conflicts (NIACs).[12] In *Kupreškić*, the ICTY Trial Chamber admitted the insufficiency of state practice to confirm that the prohibition of reprisals is a rule of CIL, but held that '[t]his is however an area where *opinio juris* is decisive to establish a customary rule'.[13] *Tadić* and *Kupreškić* present obstacles to the emergence of a unified approach to CIL.[14] Indeed, both rely on the peculiarity of the area at stake to postulate altered rules on the identification of CIL. This, as Michael Wood puts it, runs 'counter to the systemic nature of international law'.[15]

Arguably, the phenomenon that this article identifies in both *Tadić* and *Kupreškić* can be traced back to the *Advisory Opinion on the Reservations to the Genocide Convention*[16] and it is even more evident in the *Nicaragua* Judgment,[17] where the International Court of Justice (ICJ) was accused by commentators of swapping the means for identifying CIL.[18] The *Nicaragua* Judgment, indeed, spurred a debate amongst international lawyers on the proper methodology to ascertain customary norms under international law. Reacting to the *Nicaragua* Judgment, Kirgis contended that there is a 'sliding scale' relationship between the amount of practice and *opinio juris* necessary to postulate the existence of a customary norm. Concordant state practice and *opinio juris* are described as interchangeable.[19] In 'vital' areas, such as the law on the use of force and IHRL, the requirements of world order may, in Kirgis' view, necessitate 'primary reliance on normative words rather than on a combination of

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[10] C. Kress, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute', in M. Bergsmo and L. Yan (eds.), *State Sovereignty and International Criminal Law* (2012), 223, at 234, 250–4.

[11] *Tadić* Interlocutory Appeal on Jurisdiction, *supra* note 3, para. 99

[12] See for instance, *S.S. Lotus (France. v. Turkey)*, PCIJ Rep. Series A No. 10, Judgment, 7 September 1927, at 21; *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3, at 44.

[13] *Kupreškić* Trial Judgement, *supra* note 3, para. 527.

[14] Second Report, *supra* note 1, para. 28.

[15] Ibid.

[16] *Reservations to the UN Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, [1951] ICJ Rep. 16; mostly appraised for the deductive method of identifying customs, see B. Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International Ad hoc Criminal Tribunals for Rwanda and Yugoslavia* (2010), at 142–7; the *Anglo-Norwegian Fisheries Jurisdiction* case is also to be noted for not requiring complete uniformity, *Fisheries case (United Kingdom v. Norway)*, Judgment of 18 December 1951, [1951] ICJ Rep. 138. Anthea Roberts also refers to *Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12, at 30–57 and *Legal Consequences for States of the Continued Presence of South African in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16, at 31–2. A. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', (2001) 95 AJIL 758, fn 22.

[17] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment of 27 June 1986, [1986] ICJ Rep. 14.

[18] T. Meron, *The Humanization of International Law* (2006), 367. Meron also refers to the Military Tribunal in the Trial of Major War Criminals and the judgement in The High Command Case as initiating this trend.

[19] F. Kirgis, 'Custom on a Sliding Scale', (1987) 81 AJIL 146.

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words and consistent deeds'.[20] Tasioulas adopted Kirgis' 'sliding scale' and integrated within it Dworkin's interpretive theory of adjudication.[21] Tasioulas, therefore, replaced the sliding scale between *opinio juris* and custom with the 'fit' and 'substance' of Dworkin.[22] According to Tasioulas, the element of 'fit' is satisfied if the putative customary norm fulfils the traditional two elements approach to identifying CIL. 'Substance' is determined, on the other hand, by the 'moral soundness' of the customary norm.[23] Finally, Tasioulias posits that 'fit' and 'substance' must be balanced against each other. But, according to Tasioulias, the more compelling the 'substance' is, the less it has to 'fit' within the traditional approach to CIL.[24]

The self-contained approach on CIL identification stipulated in *Tadić* and *Kupreškić* may be seen as fitting within Kirgis' and Tasioulas' 'sliding scale' theories. However, as this article will demonstrate, the ICTY Chambers did not simply find new norms of CIL, merely mixed *opinio juris* and state practice, or inattentively perused the two elements. Rather, the ICTY Chambers have firmly pioneered alternative approaches to the identification of CIL as being the new rules.

The aim of this article is to demonstrate that explicitly applying and setting out newfangled approaches to identify CIL in the *Tadić* and *Kupreškić* cases was, in fact, a conflict avoidance technique.

In a nutshell, conflict avoidance consists in interpreting away the incompatibility between the apparently conflicting norms.[25] The argument set out in this article is that if one adopts a wide definition of norm conflict – one that includes situations where two norms simply suggest different ways of dealing with a problem – it becomes apparent that the Chambers perceived that they were faced with a conceptual clash between IHL and IHRL. That is, they were torn between the underdeveloped state of customary IHL (and ICL) in dealing with non-international armed conflicts (NIACs) and the demands of IHRL. If the Chambers had applied the traditional method to ascertain CIL, IHL would have prevailed over IHRL. To reconcile both fields, the Chambers adopted a 'modern' approach to ascertain CIL. In doing so, the criminal aspect of IHL was 'updated' and thus converged with the human rights of the victims of war crimes committed in NIACs. This article argues that the ICTY Chambers' 'modern' approach to CIL was inappropriately used as a conflict avoidance tool between two fields that did not in fact, *stricto sensu*, conflict.

This article is composed of four parts. Section 1 outlines how CIL is traditionally identified. Here the author illustrates that the prevailing method on the identification of CIL is the inductive doctrine. However, another methodology exists which is known as 'modern custom'.

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[20] Ibid., at 148.

[21] J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', (1996) 16 *Oxford Journal of Legal Studies* 85. For a critique see J. Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law', (2001) 12 EJIL 627; on Dworkin interpretivism in public international law see B. Cali, 'On Interpretivism and International Law', (2009) 20 EJIL 805.

[22] Tasioulas, *supra* note 21, at 113.

[23] Ibid.

[24] Ibid.; see also Roberts, *supra* note 16, at 757.

[25] M. Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law', in O. Ben-Naftali, *International Humanitarian Law and International Human Rights Law* (2011), 102.

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The article then turns to delineate the varying doctrines on custom identification applied in *Tadić* and *Kupreškić*. We will see that the ICTY Chambers failed to prove that CIL ascertained in the traditional, and perhaps even in the modern sense, supported their findings. Section 2 examines the role played by the Martens Clause in the Chambers' appraisal of the state of CIL. In this section, we will see that the Martens Clause's normative element was used to apply new approaches to custom, as well as providing evidence of *opinio juris*. In Section 3, the concept of norm conflict will be unpacked as it underpins the main argument set out in this article. Section 3 demonstrates that *lato sensu* conflicts allow for an ideological project to be integrated within the applicable law through the prism of interpretation.

The article then turns to review the relationship between IHL and IHRL and demonstrates how both fields of law are applicable law in situations of armed conflict. The author then shows how ICL, through the *ad hoc* tribunals, deals with the relationship between IHL and IHRL. Having set out the applicable law at the ICTY and the inherent tensions between IHL and IHRL in ICL, this article then exposes the norm conflicts that preoccupied the *Tadić* Appeal Chamber and the *Kupreškić* Trial Chamber. In Section 4, it is argued that the doctrine of modern custom was used as a conflict avoidance technique. This article concludes by highlighting the pros and cons of the use of this conflict avoidance technique which has been identified in the article and identifies some of the dangers in employing the conflict avoidance strategy.

2. Pushing out the wheel of customs

In both the *Tadić* and *Kupreškić* cases, the ICTY Chamber explicitly stated that they will apply an alternative approach to identifying and ascertaining CIL. Article 38(1)(b) of the Statute of the ICJ, which has been widely understood as reflecting the 'traditional' approach, requires that CIL be found where there is (i) general state practice; and (ii) acceptance of such practice as law (*opinio juris*).[26] Traditionally the identification of CIL is an inductive process which requires, firstly, ascertaining extensive and virtually uniform state practice and, secondly, evidence, generally in the form of texts and statements, that such practice occurred as recognition of a legal obligation. Conversely, the doctrine of modern custom gives priority to words (*opinio juris*) over deeds (state practice).[27] Though not very new to public international law,[28] it is the process of identifying custom that is said to be modern in that it is deductive.[29] A deductive process focuses primarily on general statements

[26] ICJ Statute, Art. 38 (1)(b) 'international custom, as evidence of a general practice accepted as law'.

[27] N. Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (2014), 14; Roberts, *supra* note 16, at 758.

[28] Though labeled 'modern custom', this method is not new to international law, see E. Posner and J. Goldsmith, 'A Theory of Customary International Law', (1998) 40 VJIL 639, at 672; J. d'Aspremont, 'The Decay of Modern Customary International Law in Spite of Scholarly Heroism', (2015) *Global Community Yearbook of International Law and Jurisprudence* 672.

[29] G. Abi-Saab, 'Cours général de droit international public', (1987) 207 RdC 177; M. Falkowska, 'La coutume dans les statuts et la jurisprudence des juridictions pénales internationales: vers l'émergence d'une nouvelle définition de la coutume internationale?', in M. Arcari and L. Balmond, *Diversification Des Acteurs et Dynamique*

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of rules rather than on actual practices of states. First, it relies on texts and statements, such as General Assembly resolutions and treaties, and transforms these into CIL that binds all states. The methodologies for both approaches are thus opposite. Our two case studies demonstrate that opting to apply one instead of the other could be contingent on the specificities of the field of international law at stake.

3. Ironing out uniformity and consistency: The '*Tadic*' method

The ICTY Appeals Chamber in the *Tadić* Interlocutory Appeal on Jurisdiction found that serious violations of IHL in NIACs gave rise to individual criminal responsibility under CIL. The *Tadić* Interlocutory Appeal on Jurisdiction is undoubtedly one of the most important examples of successful judicial creativity.[30] No other tribunal had found, prior to this groundbreaking decision, that violations of IHL norms applicable in NIACs gave rise to individual criminal responsibility.

Responding to the jurisdictional challenge that the ICTY Statute did not cover NIACs,[31] the Appeals Chamber designed a test with four requirements that must be met for an offence to be subject to prosecution as violation of the laws and customs of war in an NIAC.[32] The two important requirements for the purpose of this article – and the ones that have actually been addressed in detail by the Chamber – are: (i) the existence under the CIL of IHL rules governing NIACs; and (ii) that the violation of such rules gave rise to individual criminal responsibility.

The Appeals Chamber first affirmed that the dichotomy between internal and international armed conflicts (IACs) was preposterous in the human rights age.[33]

Normative En Droit International: Diversity of Actors and Dynamics of International Law-Making (2013). We have seen in the introduction that it has a pedigree in the ICJ jurisprudence dating back to the 1950s, see fn 16–17. Other scholars named what I refer to as 'modern custom' – which I use for the sake of constancy, as Special Rapporteur Wood also adopts this terminology – as 'instant customs': B. Cheng, *Studies in International Space Law* (1997), 125 et seq; R. Bernhardt, 'Principles and Characteristics of Customary International Law', (1987) 205 RdC 247, at 266; or even Grotian Moments, M. P. Scharf, 'Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in times of Fundamental Change', (2010) 43 CILJ 439; and has been characterized by René-Jean Dupuy as early as 1974 as 'coutume sauvage' (wild custom) in constrast to 'coutume sage' (wise custom), R.-J. Dupuy, 'Coutume sage et coutume sauvage', in C. Rousseau, *La Communauté internationale: Mélanges offerts à Charles Rousseau* (1974), 75–87.

30 A. Danner, 'When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War', (2006) 59 *Vanderbilt Law Review* 27–9; W. Schabas, *An introduction to the International Criminal Court* (2011), 124; S. Darcy, 'The Reinvention of War Crimes by the International Criminal Tribunals'. in S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (2010), 118.

31 The Appeals Chamber held that Art. 3 ICTY Statute functioned as a 'residual clause'. This 'residual clause', according to the Appeals Chamber, endowed the ICTY to prosecute all serious violations of IHL, including violations committed in internal armed conflicts, *Tadić* Interlocutory Appeal on Jurisdiction, *supra* note 3, paras. 89–93.

32 *Tadić* Interlocutory Appeal on Jurisdiction, *supra* note 3, para. 94: These four requirements are: (i) a rule of IHL must have been violated; (ii) the rule must have been of a customary character, or if it was a conventional rule it must have been binding on the parties to the conflict; (iii) the violation must have been serious; and (iv) the violation must entail individual criminal responsibility.

33 See Section 6.3 *infra*.

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Hence, the desired outcome of the *Tadić* Chamber became quite evident.[34] Thus, the Chamber employed a tactical move:

> [I]n appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject matter [i.e., IHL in NIACs], reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.[35]

Usually, statements by states, military manuals, and judicial decisions are taken as evidence of *opinio juris*.[36] The Chamber further asserted that inconsistent state practice in the battlefield was irrelevant for the ascertainment of custom,[37] thus removing the requirement that state practice be uniform and consistent.[38] In fact, by erasing all state practice contrary to *opinio juris*, the Appeals Chamber puts enormous emphasis on the latter. Furthermore, in addition to focusing on specific types of state practice that can only be representative of the establishment of the purported norm, the Chamber decided to count them as evidence of *opinio juris*.[39]

Wouters and Ryngaert praised what they coined the '*Tadić* method' as it makes customary norms of IHL easier to find.[40] Indeed, the Appeals Chamber did succeed in establishing many more rules than one might have believed existed at the time.[41] The ICJ had already held that Common Article 3 of the 1949 Geneva Conventions, which applies to NIACs, reflects 'elementary considerations of humanity'.[42] However, the ICTY went one step further and concluded that 'elementary considerations of humanity' make it obvious that '[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife'.[43] Hence, the rules on methods and means of warfare (the sphere of IHL also known as 'Hague Law') that apply in IACs was found to also apply to NIACs. However, as noted by many authors, the actual evidence of the customary character of these rules in NIACs is supported by little more evidence than deduction from principles.[44]

As examples of state practice revealing that minimum rules applied in IACs as well as NIACs, the ICTY Appeals Chamber relied mostly on statements made with

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[34] N. Arajärvi, 'Role of the International Criminal Judge in the Formation of Customary International Law', (2007) 1 EJLS 90, at 100. This refers to 'the willingness of the court to find customary rules aiming for a broader protection of human beings'.

[35] *Tadić* Interlocutory Appeal on Jurisdiction, *supra* note 3, para. 99.

[36] Arajärvi, *supra* note 27, at 91: Nonetheless, some have also accepted that these elements may count as state practice, e.g., J. Crawford, *Brownlie's Principles of Public International Law* (2012), at 24.

[37] *Tadić* Interlocutory Appeal on Jurisdiction, *supra* note 3, para. 99; this may be read in line with the *Nicaragua* case, *supra* note 17, para. 186.

[38] S. Murphy, *Principles of International Law* (2012), 92–101.

[39] T. Meron, 'Is International Law Moving Towards Criminalization?', (1998) 9 EJIL 18, at 28.

[40] Wouters and Ryngaert, *supra* note 2, at 116, according to them 'The Tadić method takes the Nicaragua method one step further: not only does it play down inconsistent state practice, notably on the battlefield, in the face of more humane verbal state practice and *opinio juris*; it even seems to deem battlefield practice methodologically irrelevant because of its untrustworthiness.'

[41] C. Greenwood, 'International Humanitarian Law and the Tadic Case', (1996) 7 EJIL 265, at 277–9: See also A. Zahar and G. Sluiter, *International Criminal Law: A Critical Introduction* (2008), 93. This discusses how the ICTY came to find that many of the provisions of AP II were rules established under CIL.

[42] See *Nicaragua* case, *supra* note 17, para. 218.

[43] *Tadić* Interlocutory Appeal on Jurisdiction, *supra* note 3, para. 119.

[44] Schlütter, *supra* note 16, at 225; S. Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict', (2011) 22 EJIL 219, at 230.

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respect to the Spanish Civil War (1936–39) and on the *Nicaragua* Judgment.[45] It should be noted, that the ICJ's judgment may only be taken as an indirect example of state practice.[46] In contrast, the ICTY Chamber did not refer to any national court decisions – which would have had more weight as direct evidence of state practice.[47] The ICTY Appeals Chamber also referred to resolutions of the UN General Assembly and the Council of Europe which had declared that Common Article 3 applied to IACs and NIACs. As affirmed by the ICJ, such resolutions may be taken as a form of *opinio juris*, which still needs to be supported by state practice. [48]

Having established the rules applicable in NIACs, the ICTY Chamber turned to the question of whether a violation of these rules entailed individual criminal responsibility. Only two years before the Appeals Chamber's decision, the ICRC and the Commission of Experts on the former Yugoslavia had unequivocally declared that according to CIL the notion of war crimes was limited to situations of international armed conflict.[49] Despite these authoritative opinions, the Chamber affirmed that it had 'no doubt' that CIL imposed individual criminal responsibility for serious violations of IHL in NIACs.[50] Once again, the Chamber referred to the 'elementary considerations of humanity' plus a limited amount of state practice and *opinio juris* to find that serious violations of IHL in NIACs constituted war crimes. The Appeals Chamber then stated that certain 'factors' were retained in the Nuremberg judgment to find that a certain prohibition gives rise to individual criminal responsibility: the unequivocal nature of the rules, the intention of states to criminalize the practices, and the punishment of violations by national courts.[51] In essence, this was a reiteration of a theory of custom that looks primarily for *opinio juris* rather than at state practice.[52] As Schlütter observes, the ascertainment of CIL conducted by the Appeals Chamber in *Tadić* only served to support the general considerations stated in the preliminary stage.[53] That is exactly what modern custom is – a method which 'enabled the ICTY to overcome a fundamental obstacle to its operation, namely the fact

[45] References were also made to the 1967 conflict in Yemen, the statement of the Prime Minister of Congo in 1964 during the civil war in Congo, the 1967 Operational Code of Conduct for Nigerian Armed Forces, and the 1988 statement by the rebels in El Salvador, *Tadić* Interlocutory Appeal on Jurisdiction, *supra* note 3 paras. 105–7.

[46] Schlütter, *supra* note 16, at 225.

[47] See *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, [2012] ICJ Rep. 99, para. 73: 'For the purposes of the present case the most pertinent State practice is to be found in … national judicial decisions …'.

[48] See *Nicaragua* case, *supra* note 17, paras. 184–8.

[49] ICRC, Preliminary Remarks on the Setting-up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, DDM/JUR/442 b, 25 March 1993, para. 4; Final Report of 27 May 1994 of the Commission of Experts established pursuant to Security Council resolution 780 (1992), para. 54. See also Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134 (1995), para. 12.

[50] *Tadić* Interlocutory Appeal on Jurisdiction, *supra* note 3, para. 129.

[51] Ibid, para. 128; see also S. Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (2014), 77.

[52] Meron, *supra* note 18, at 367.

[53] Schlütter, *supra* note 16, at 225. This is scrutinized in detail in Section 6.3 *infra.*

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that individual criminal responsibility had barely been established in international law, and certainly not with regard to crimes committed in an NIAC'.[54]

4. WOULD IT BE EASIER IF WE HAD SOME STATE PRACTICE?: THE *KUPREŠKIĆ* ACCOUNT

During the *Kupreškić* proceedings, some witnesses raised the issue that both camps involved in the situation under examination had committed crimes.[55] Hence bringing the infamous *tu quoque* argument,[56] as well as the possibility of claiming that unlawful acts committed by the defendants were undertaken in reprisal to unlawful acts committed by the enemy, i.e., in an effort to persuade this force to desist from committing further unlawful acts.[57] Having discarded the plea of *tu quoque*,[58] the Chamber addressed the defence of belligerent reprisals against the civilian population.[59]

Belligerent reprisals against the civilian population and objects are prohibited under Articles 51(6) and 52(1), respectively, of the 1977 First Additional Protocol (AP I) to the Geneva Conventions, which applies to IACs.[60] However, as the Chamber acknowledged, important states such as the US, France, India, Indonesia, Israel, Japan, Pakistan and Turkey were not party to AP I.[61] The Second Additional Protocol (AP II), which regulates NIACs more extensively, does not mention reprisals.[62] This ominous silence in AP II on reprisals has been considered as either an affirmation that reprisals have no place in an NIAC, or, on the contrary, as an acceptance of its use in such type of conflicts.[63] It appears that the *Kupreškić* Trial Chamber considered that reprisals constituted part of the legal regime applicable in an NIAC as it affirmed that the purpose of its inquiry was to assess whether the prohibition contained in AP I had 'subsequently been transformed into general rules of international law'.[64]

The Trial Chamber in *Kupreškić* admitted that there was not enough state practice to assert that the prohibition of belligerent reprisals was a customary rule under the traditional doctrine.[65] However, the Chamber then stated that 'under the pressure

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[54] Y. Ronen, 'International Humanitarian Law', in J. Kammerhofer and J. D'Aspremont (eds.), *International Legal Positivism in a Post-Modern World* (2014), 489.

[55] *Kupreškić* Trial Judgement, *supra* note 3, para. 511.

[56] The *tu quoque* argument posits that breaches of IHL being committed by the enemy justify similar breaches by the other party to the conflict: Ibid., para. 515

[57] Darcy, *supra* note 30, at 258: 'Customary international law, however, has long established a number of requirements governing the use of reprisals, such as proportionality and last resort'. See also F. Hampson, 'Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949', (1988) 37 ICLQ 818, at 821–4; V. Bílková, 'Belligerent Reprisals in Non-International Armed Conflicts', (2014) 63 ICLQ 31, at 34–5.

[58] *Kupreškić* Trial Judgement, *supra* note 3, paras. 515–20.

[59] Ibid., para. 515.

[60] Also, the Geneva Conventions I-IV prohibit reprisals against protected persons under the Conventions: Arts. 46, 47, 13, and 33, respectively.

[61] *Kupreškić* Trial Judgement, *supra* note 3, para. 527.

[62] ICRC Rule 148 apparently conceives this silence as implying the non-applicability of reprisals in internal armed conflicts; C.f. see F Kalshoven, *Reflections on the Law of War: Collected Essays* (2007), 826, 828, who argues that AP II is purposely silent on reprisals.

[63] Bílková, *supra* note 57.

[64] *Kupreškić* Trial Judgement, *supra* note 3, para. 527.

[65] Ibid., para. 527.

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of the demands of humanity or the dictates of public conscience' we can resort to modern custom.[66]

Only two examples of state practice were cited by the Trial Chamber: Dutch and US military manuals.[67] As evidence of *opinio juris*, the Chamber referred to General Assembly Resolution 2675 coupled with the absence of arguments to the contrary among states, the adoption of the First Additional Protocol of 1977 and a comment by the ILC to sub-paragraph (d) of former Article 14 of the Draft Articles on State Responsibility of 1995.[68] To be fair, even the existence of *opinio juris* on this issue does not appear to be proven.[69] Hence, one may be tempted to conclude that the prohibition of reprisals against civilians was not warranted by a customary norm but by 'consideration of humanity'.[70]

5. Was it Martens' fault?

Since the customary nature of the findings in *Tadić* and *Kupreškić* are far from established, this section critically explores the role that the Martens Clause may have played in these two decisions. The Martens Clause, as adapted in AP I, states that 'civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.[71] Needless to say, the Martens Clause has been interpreted in various ways. In essence, it has been taken to affirm that even if the applicable law does not prohibit certain conduct, it does not mean that the same conduct is necessarily permitted: This is because persons remain under the protection of the principles of humanity and the dictates of public conscience.[72] It has also been claimed that the Martens Clause gives room, in case of doubt, for interpreting the law in accordance with the 'principles of humanity' and the 'dictates of public conscience'.[73] In this sense, the Martens Clause serves as an interpretative guideline. Cassese and Meron attribute the push towards basing the existence of customary IHL primarily on *opinio juris* to the Martens Clause.[74] Finally, the most radical argument is that the Clause introduced new and free-standing

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66 Ibid., para. 527.

67 Ibid., para. 531, we could even argue that these are not examples of state practice but of *opinio juris*, see Murphy, *supra* note 38, at 92–101.

68 Ibid., paras. 532–4.

69 Schlütter, *supra* note 16, at 235. The Chamber, however, held that 'elements of a widespread *opinio juris sive necessitates* are discernible in international dealings'. Ibid., para. 532.

70 L. Da Corrias and G. Gordon, 'Judging in the Name of Humanity International Criminal Tribunals and the Representation of a Global Public', (2015) 13 JICJ 97, at 101.

71 AP I, Art. 1(2). The Martens Clause was first adopted in the Preamble of Hague Convention II (1899) and reaffirmed in subsequent treaties. See, for example, Convention Respecting the Laws and Customs of War on Land (1907), Preambles H IV R; Additional Protocol II (1977); United Nations Convention on Certain Conventional Weapons (1980); Geneva Convention I (1949), Art. 63, Geneva Convention II (1949), Art. 62; Geneva Convention III, Art. 142; Geneva Convention IV (1949), Art. 158; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, para. 78.

72 See *Prosecutor v. Hadzihasanovic, Alagic and Kubura*, Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction, Case No. IT-01-47-PT, A. Ch., 27 November 2002, para. 82.

73 T. Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', (2000) 94 AJIL 78, at 87–8; A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky', (2000) 11 EJIL 187, at 212.

74 Cassese, *supra* note 73, at 214; Meron, *supra* note 73, at 88.

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sources of law in IHL, namely 'the laws of humanity' and 'the dictates of public conscience'.[75] The *Tadić* and *Kupreškić* cases both infused the Martens Clause with almost all of these interpretations.

5.1. *Tadić* and the Martens Clause

There was no explicit reference to the Martens Clause in the *Tadić* Interlocutory Appeal Decision but rather to the 'elementary considerations of humanity' as held at the ICJ. Indeed, Tomuschat affirmed that '[o]ne needs no prophetic gifts to conclude that the reasoning of the Court [i.e. ICTY Appeals Chamber] ... was inspired by the famous Martens clause'.[76] The Martens Clause played a role in three forms in the *Tadić* case: Firstly, as evidence that Common Article 3 was part of CIL; secondly, to argue that the dichotomy between IACs and NIACs was senselessness when considered in light of the elementary consideration of humanity; and thirdly, as an evidence that as a rule of custom a violation entailed individual criminal responsibility.[77]

Certainly, the considerations of the Martens Clause as expressed in the 'elementary considerations of humanity' constituted the main evidence to prove the customary character of the Appeals Chamber's findings.[78] However, as set out below, the 'elementary considerations of humanity' did not trigger the Chamber's recourse to 'modern custom'. The 'elementary considerations of humanity' proved instead to be a form of *opinio juris* to which the Chamber gave decisive weight.

5.2. *Kupreškić* and the Martens Clause

In *Kupreškić*, the resort to 'modern custom' was explicitly said to be a result of considerations of the Martens Clause. Indeed, according to the Trial Chamber the application of the Martens Clause by other tribunals:

> Clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.[79]

Despite the Chamber's assertion that custom for the issue at stake may be identified through *opinio juris* solely, it failed to really provide evidence of this element, except for stressing the 'pressure exerted by the requirements of humanity and the dictates of public conscience'.[80] In fact, the *Kupreškić* Trial Chamber's use of the Martens Clause is circular: The Martens Clause opens the door to a theory of custom that places the emphasis on *opinio juris*,[81] and by the same token *opinio juris* against

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[75] M. Salter, 'Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause', (2012) 17 JCLS 403.
[76] C. Tomuschat, *General Course on Public International Law*, (1999) 281 RdC 356.
[77] *Tadić* Interlocutory Appeal on Jurisdiction, *supra* note 3, para. 119.
[78] Schlütter, *supra* note 16, at 225.
[79] Ibid.
[80] Ibid., para. 531; see also Salter, *supra* note 75, at 418.
[81] *Kupreškić* Trial Judgement, *supra* note 3, para. 527.

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reprisals is demonstrated by the Martens Clause.[82] Hence, one might conclude that it is the Martens Clause that prohibited the use of reprisals against the civilian population.[83] The Trial Chamber, however, fell short of providing a standalone status to the Martens Clause. Indeed, it stressed that the 'principle of humanity' and 'dictates of public conscience' have not attained the status of a source of law.[84] If it was neither the Martens clause *per se*, nor a genuine ascertainment of custom, even of modern custom,[85] then it must be something else that justified the Chamber to find that belligerent reprisals were prohibited under CIL.

We will see below that the answer lies in the argument the Chamber offered in addition to the Martens Clause's effect: The conceptual inconsistency between reprisals and the rights to life of the victims of such reprisals. Furthermore, the Trial Chamber integrated the right to life of the victims of belligerent reprisals into its discussion of the principles of the Martens Clause. Many argue, Cassese included, that the Martens Clause has now to be read in line with IHRL.[86] In this sense, IHRL would fill in the details of the vague notions that are the 'principles of humanity' or 'the dictates of public conscience'. In other words, the normative conflict between indiscriminate attacks against civilians resulting from reprisals and the right to life of the victims of such reprisals informed the 'dictates of public conscience'. It is the latter IHRL norm – i.e., right to life – that preoccupies the Trial Chamber and that, under the umbrella of the dictates of public conscience, will form the *opinio necessitatis*.[87]

6. Defining norm conflict

In the foregoing, this article has attempted to show that the *Tadić* and *Kupreškić* cases propounded alternative approaches to custom identification. It has been argued that in both cases the Chamber barely proved that their findings were established rules of CIL and that the Martens Clause does not provide sufficient legal explanations to justify these findings. However, it is also important to decipher why the Chambers decided to flout the traditional approach to custom identification. This article argues

[82] Ibid., para. 531: 'Due to the pressure exerted by the requirements of humanity and the dictates of public conscience, a customary rule of international law has emerged on the matter under discussion.'

[83] See *Nuclear Weapons* case, *supra* note 71, Dissenting Opinion of Judge Shahabuddeen, at 408.

[84] *Kupreškić* Trial Judgement, *supra* note 3, para. 525.

[85] S. Darcy, *Collective Responsibility and Accountability under International Law* (2007), 163–4.

[86] See Cassese, *supra* note 73, at 207, 212; Meron, *supra* note 73, at 84; M. Odello, 'Fundamental Standards of Humanity: A Common Language of IHL and HRL', in R. Arnold and N. Quénivet (eds.), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (2008), 50–1. For instance, in its oral submissions in the *Nuclear Weapons* case, Australia emphasized the role of human rights in shaping the 'dictates of public conscience', arguing that 'international standards of human rights must shape conceptions of humanity and have an impact on the dictates of public conscience': International Court of Justice, Request for Advisory Opinions on the Legality of Nuclear Weapons- Australian Statement, [1996] AYBIL 685, at 699. Judge Weeramantry, dissenting in the same case, recognized the role of the human rights movement in shaping 'the dictates of public conscience'. See *Nuclear Weapons* case, *supra* note 71, Dissenting Opinion of Judge Weeramantry, at 490. In the same vein the Conseil de Guerre de Bruxelles, in the *K.W.* case, noted that 'in its search for the principles of international law resulting from the principles of humanity and dictates of public conscience, it was to be guided by the Universal Declaration of Human Rights'.

[87] A. Skordas, 'Hegemonic Custom?', in M. Byers and G. Nolte (eds.), *United States Hegemony and the Foundation of International Law* (2003), 325–30.

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that the resort to modern custom by the Chambers was expounded as a means to avoid a norm conflict between two bodies of international law, namely IHL and IHRL. Before turning to illustrate how the Chambers dealt with the dilemmas they consider to be exposed to, it is important to first understand what is meant by a 'norm conflict'.

There is a large and longstanding debate in international law regarding what constitutes norm conflict.[88] The consequences of the answer are far-reaching because as soon as a genuine norm conflict is recognized, established principles of norm conflict resolution are supposed to be applied by the adjudicators. This is clearly important when one considers that conflict resolution principles are devices for diminishing the discretional power of the judge or judges who are faced with incompatible norms and have the task of deciding which norm should apply.

While it has generally been asserted that there are two definitions of norm conflict in international law – a broad and a narrow one – Mario Prost points out that in reality three different forms of conflicts have been offered in the literature: *stricto sensu*; *medio sensu*; and *lato sensu*. [89] The narrow definition (*stricto sensu*) considers that there is a conflict only 'where giving effect to one international obligation unavoidably leads to the breach of another obligation or right'.[90] A broader definition (which is, in Prost's lexicon, *medio sensu*) is exemplified by Kelsen's definition: '[a] conflict between two norms occurs if in obeying or applying one norm, the other one is necessarily or possibly violated'.[91] This definition of norm conflict includes not only scenarios of incompatibility between two norms, but also contradictions between permissions and obligations. While the latter definition is broader than the strict definition, Prost identified a third definition of conflict which is even wider (i.e., *lato sensu*). The *lato sensu* notion of conflicts can be taken as the one defined by Martii Koskenniami: '[A] situation where two rules or principles suggest different ways of dealing with a problem'.[92]

The latter definition of norm conflict – which I will now refer to as the wide definition – includes not only scenarios of incompatibility or contradiction between two norms, but also situations where application of one norm simply frustrates the object and purpose of another.[93] In this sense, the term conflict encompasses tensions between opposing concepts and policies underlying the norms or regimes in which the norms are enshrined.[94] Wolfrum and Matz have also advocated for a definition

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88 For a comprehensive overview of the different definitions in doctrinal writings see J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003) 166–74.

89 M. Prost, *The Concept of Unity in Public International Law* (2012), 61–6.

90 E. De Wet and J. Vidmar, *Hierarchy in International Law: The Place of Human Rights* (2012), 2.

91 H. Kelsen, 'Derogation', in H. Klecatsky, R. Marcic and H. Schambeck (eds.), *Die Wiener Rechtstheoretische Schule* (1968), 1438. Pauwelin also defines conflict of norms 'as a situation where one norm breaches, has led to or may lead to breach of, another norm' in Pauwelyn, *supra* note 88, at 199; even Wilfrid Jenks considered that we might have a conflict in situations where norms 'have repercussions upon one another in any other way', Wilfred Jenks, 'The Conflict of Law-Making Treaties', (1953) 30 BYIL 404, however, note that Jenks adopts a stricter definition requiring the impossibility of joint compliance.

92 M. Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682, 13 April 2006, para. 25.

93 Prost, *supra* note 89, at 61–6.

94 We may also situate this wide definition within the literature on 'regime interaction' and 'norm collision'; see also K. Blome et al., *Contested Regime Collisions: Norm Fragmentation in World Society* (2016), 34–5.

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of conflict that includes 'conceptual conflicts between different approaches'.[95] The author accepts this overly broad definition as also forming part of what a conflict is, as they show the type of factors that, according to the judge, may 'seem to point to different directions'.[96] Indeed, even in the absence of a direct conflict of norms, judges may attempt to mediate the tensions and minimize the conceptual conflicts they are facing.

The adjudicator, when seeking to rule on a particular issue, must first determine the 'applicable law'. Thus, a *prima facie* assessment will be formed on what are the relevant norms applicable to the specific (legal) issues at stake. A choice is, therefore, taken by the adjudicator to consider and potentially apply such a norm instead of the other norm.[97] By adopting a wide notion of norm conflict we may decipher more exactly the adjudicator's weighing of opposite teleologies.[98]

Pauwelyn rightly stresses that the narrower the definition of conflict one adopts, the less room there is on how to avoid the alleged conflict.[99] When a norm conflict is recognized legal reasoning calls to either seek to harmonize the norms in conflict through interpretation or, if that seems impossible, by applying norm conflict resolutions methods.[100] There are, indeed, different norm conflicts – the apparent ones and the genuine ones. An apparent norm conflict can be avoided, most often by interpretative means. What was then appearing as two contradictory norms is now construed as two rules that are part of the same legal system. The conflicting norm is therefore interpreted as engendering and intended to engender effects in harmony with existing law and not in violation of it.[101]

To properly examine the specific type of conflicts between IHL and IHRL that took place in *Tadić* and *Kupreškić* it is also critical to address the relationship between these two bodies of law and how ICL perceives and deals with the interaction of IHRL and IHL. This is the focus of the following sections of this article.

6.1. The relationship between IHL and IHRL

Despite some initial resistance it has been recognized that IHRL applies at all times, including in times of armed conflict.[102] The ICJ in the *Nuclear Weapons* case acknowledged that IHRL in situations of armed conflict is conditioned by the *lex specialis* of

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[95] R. Wolfrum and N. Matz, *Conflicts in International Environmental Law* (2003), 7.

[96] Report on Fragmentation, *supra* note 92, para. 23

[97] Ibid., paras. 24–5; see also Dworkin's interpretative theory of adjudication, R. Dworkin, *Law's Empire* (1986).

[98] Report on Fragmentation, *supra* note 92, para. 25: 'Focusing on a mere logical incompatibility mischaracterizes legal reasoning as logical subsumption'. The definition of conflict adopted in this article is not in order to make legal practice more responsive to conflicting goals underlying hard ICL cases but to decipher why the *Tadić* and *Kupreškić* Chambers decided to formulate alternative rules on custom identification.

[99] Pauwelyn, *supra* note 88, at 170–1.

[100] When the conflict cannot be avoided, priority rule will be available to the adjudicator, such as *lex specialis*, *lex posterior*, *lex prior*, and *lex superior*. For further explanation of these concepts see Report on Fragmentation, *supra* note 92.

[101] *Case concerning the Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, Judgment of 26 November 1957, [1957] ICJ Rep. 125, at 142.

[102] H. Krieger, 'A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study', (2006) 11 JCLS 265, at 266; L. Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ', in M. Andenas and E. Bjorge, *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (2015), 274–6; *Nuclear Weapons* case, *supra* note 71, para. 25.

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IHL.[103] For instance, the *lex generalis* of IHRL regarding what is an 'arbitrary' deprivation of life is to be assessed under the *lex specialis* rules of IHL.[104] This does not mean, however, that IHL always trumps IHRL. In *The Legal Consequences of the Construction of a Wall*, the ICJ addressed the relationship between IHL and IHRL in the following terms:

> As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[105]

It is only where the two regimes diverge on a specific legal issue that the Court will consider whether the *lex specialis* of IHL should be applied. In *DRC* v. *Uganda*, the ICJ re-cast the relation between IHRL and IHL as one governed by the presumption of co-application, whereby both bodies of law inform the overall legal framework.[106] In the same vein, the UN Human Rights Committee defines the relationship between IHL and IHRL as 'complementary, not mutually exclusive'.[107] The Inter-American Court of Human Rights in *Mapiripan Massacre* v. *Colombia*, espoused a 'convergence' approach, whereby IHL and IHRL either 'complement each other or become integrated to specify their scope or their content'.[108] As a replacement for the *lex specialis* principle the European Court of Human Rights, in *Hassan* v. *United Kingdom*, took IHL into account within its operative regime through the prism of Article 31(3)(c) of the Vienna Convention on the Law of Treaties which calls for interpretation in harmony with other rules of international law.[109] This illustrates how the two spheres of law can be operationally complementary.

With the stark development of both sets of rules, the scope of application of IHL and IHRL increasingly overlaps. Thus, it is not surprising that a legal issue be addressed by both regimes in diverging directions. Furthermore, there is an increasing tendency in legal scholarship to define a norm conflict between these

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[103] *Nuclear Weapons* case, *supra* note 71, at para 25.

[104] Hill-Cawthorne, *supra* note 102, at 279.

[105] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2014, [2004] ICJ Rep. 136, para. 106.

[106] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep. 168, para. 216. See Hill-Cawthorne, *supra* note 102, at 281–2, the author notes that in this case the *lex specialis* rule was not quoted.

[107] Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 11.

[108] *Mapiripan Massacre v. Colombia*, Judgment, Inter-American Court of Human Rights, 15 September 2005, para. 115.

[109] *Hassan v. the United Kingdom*, Judgment, European Court of Human Rights, Application No. 29750/09, 16 September 2014, para. 106. In this case it was held that internee review in IACs could be conducted by a 'competent body', as provided by Geneva Conventions III and IV, instead of a 'court' as required by Art. 5 of the European Convention on Human Rights. The Court nonetheless considered that the competent body 'should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness', as is generally provided under IHRL. The Court, in addition to Art. 31(3)(c), referred to subsequent practice (Art. 31(3)(b) Vienna Convention on the Law of Treaties).

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two regimes on the basis of their different *telos*.[110] Having examined how IHL and IHRL may interact, this article now turns to examine how ICL embraces these two fields.

6.2. What does ICL have to do with IHL and IHRL and their relationship?

International criminal law enshrines the idea of individual criminal responsibility for serious violations of IHL and IHRL. Cassese defines ICL as a 'hybrid branch of law' which sits within public international law, derives principles from criminal law, and brings together IHL and IHRL.[111] As Ambos notes, 'the concept of prosecuting an individual for a specific (macro-criminal) act is derived from criminal law'.[112] This entails that general principles of criminal law such as the principles of legality (*nullum crimen sine lege*), culpability, and fairness are applicable in an ICL trial.[113]

When it established the ICTY, the UN Security Council (UN SC) specified that the Tribunal's mandate was 'bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia'.[114] The list of crimes within the ICTY Statute was not, however, limited to serious violations of IHL. The Tribunal was given jurisdiction over the 'core crimes', that is, war crimes, crimes against humanity, and genocide.[115] The latter two are closer to IHRL than to IHL. While the UN SC appeared to have subsumed IHRL under IHL, many describe their relationship in the opposite sense or simply conflate the two bodies of law when identifying the foundations of ICL.[116] For instance, Bassiouni viewed the internationalization of the criminalization process, including for war crimes, as a form of IHRL enforcement.[117] In his critique of the 'identify crisis' of ICL Robinson, indeed, observed that in ICL prosecution and conviction are often treated as the fulfillment of the victim's right to an effective remedy.[118]

It is held that ICL lies in public international law as the 'core crimes', as well as the principle of direct individual criminal responsibility for committing such crimes, are embedded in sources of international law.[119] While the Rome Statute contains its own set of sources for the Court to apply,[120] the Statutes of the *ad hoc* tribunals did not set a clear hierarchical relationship between the Statutes and other sources of international law. Hence, the *ad hoc* tribunals' sources of law are those of

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[110] Prost, *supra* note 89, at 64, referring to Krieger, *supra* note 102, at 266–8; A. Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law', (2007) 56 ICLQ 623.

[111] A. Cassese et al., *Cassese's International Criminal Law* (2013), 2.

[112] K. Ambos, *Treatise on International Criminal Law: Volume I* (2013), 55.

[113] Ibid.

[114] *Tadić*, para. 72, referring to the Preamble of Resolution 827.

[115] W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone* (2006), 157.

[116] R. Cryer, 'The Interplay of Human Rights and Humanitarian Law: The Approach of the ICTY', (2009) 14 JCLS 513–14.

[117] M.C. Bassiouni, 'The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights', (1982) 9 YJWPO 193. He also includes other transnational crimes in his list.

[118] D. Robinson, 'The Identity Crises of International Criminal Law', (2008) 21 LJIL 925–63.

[119] Ambos, *supra* note 112, at 55.

[120] Rome Statute, Art. 21.

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international law[121] – normally considered to be those enumerated in Article 38 of the ICJ Statute, with a particular emphasis on CIL.[122]

As Ambos' quote reveals, ICL is preoccupied with macro-criminal acts, that is, crimes conducted in the context of wide-scale atrocities.[123] It is often, perhaps even typically, believed that only the state has the necessary apparatus to commit war crimes, genocide, and crimes against humanity.[124] This, obviously, creates a tension with the objective element of custom – i.e., state practice – since states are seldom willing and/or able to criminalize and prosecute the conduct of their own officials.[125] This difficulty partly explains the shift to *opinio juris* evidenced in our two case studies.[126] The other explanation, or *leitmotiv*, for the resort to modern custom is reflected by Robinson's observation that ICL is often conceptualized as a form of justice that functions as a means for fulfilling a victim's IHRL-based right to a remedy.[127]

6.3. A sovereignty-oriented versus human-being-oriented approach: *Tadić*

If we are to assume from the foregoing that ICL merges both IHL and IHRL (two fields often clashing in the narrow sense) this section builds upon this and illustrates how the ICTY Appeals Chamber in *Tadić* encountered a clash between these two branches in a wide sense. Before ascertaining the extent of customary IHL norms governing NIACs,[128] the Appeals Chamber proffered some general considerations:[129] Firstly, the Chamber highlighted that there has traditionally been a dichotomy between NIACs and IACs. IHL – a much older branch of law than IHRL – was originally strictly concerned with inter-state relations, leaving internal strife outside its purview. This situation significantly changed with the Geneva Conventions and in particular, Common Article 3 which contained a 'convention in miniature', regulating to a minimum extent the conduct of the parties to an NIAC.[130] By the same token, this slight intrusion in the internal matters of states consolidated the dichotomy between IACs and NIACs.[131] 'This dichotomy', says the Appeals Chamber, 'was clearly sovereignty-oriented'.[132]

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[121] E. Sliedregt, *Individual Criminal Responsibility in International Law* (2012), 8.
[122] W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone* (2006), 75.
[123] Ambos, *supra* note 112, at 55.
[124] M.C. Bassiouni, 'The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities', (1998) 8 TCLB 199; R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (2010), 7.
[125] Bassiouni, *supra* note 124.
[126] For other reasons concerning the nature of state practice see J. d'Aspremont, 'Théorie des sources', in R. van Steenberghe (ed.), *Droit international humanitaire: un régime spécial de droit international?* (2013), 73.
[127] Robinson, *supra* note 118.
[128] See Section 2.
[129] *Tadić* Interlocutory Appeal on Jurisdiction, *supra* note 3, paras. 96–9.
[130] L. Hill-Cawthorne, 'Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict', (2015) 64 ICLQ 293, 294–307. This significant change also developed with AP I and AP II.
[131] C. Hellestveit, 'The Geneva Conventions and the Dichotomy between International and Non-International Armed Conflict: Curse or Blessing for the "Principle of Humanity"?', in K. Larsen, C. Cooper and G. Nystuen (eds.), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (2013), 88–9.
[132] *Tadić* Interlocutory Appeal on Jurisdiction, *supra* note 3, para. 96.

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Secondly, the Appeals Chamber offered the following reasons for blurring the two: (i) civil wars are frequent; (ii) civil wars are cruel and protracted; (iii) civil wars affect every state; and (iv) the outgrowing of IHRL in today's normative environment.[133] The first three reasons are more contextual than anything else. Conversely, the fourth point will prove to be conceptually, if not legally, determinant. With respect to the fourth point, the Chamber observed that '[a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach'.[134] Indeed, this prompted the Chamber to assert that: 'If international law ... must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.'[135] Here, the Chamber is asserting that the 'humanization' of IHL has already taken place, while the Chamber's finding actually constitutes the *big bang* of this process. [136]

In reality, the Chamber is admitting that there is a conceptual clash between the distinction in IHL of NIACs and IACs and the human right of any individuals to be safeguarded and protected from the scourge of wars, including in NIACs.[137] Indeed, the *raison d'être* of IHRL is to limit the power of the state (or the authority exercising jurisdiction) towards its subjects, therefore drastically intruding on intra-state matters. Thus, a regime such as IHL, that affords less protection to victims of intra-state than to those of inter-state conflicts, makes no sense from a human rights perspective.[138]

Furthermore, the obligation to criminalize particularly serious human rights abuses is now firmly rooted in IHRL.[139] Conversely, in IHL, only the grave breaches, which are solely pertaining to IACs, gave rise to such an explicit obligation under the Geneva Conventions.[140] Thus, showing once again the discrimination IHL exacts towards victims in NIACs. To avoid unequal treatment of those who are caught in IACs and NIACs, the Chamber had to harmonize customary rules applicable in NIACs with those applicable in IACs.

In sum, the Appeals Chamber, in propelling the modern custom approach, had one objective, namely to ensure that victims in NIACs had the right to have their perpetrator punished just as they would in IACs. The rudimentary state of IHL in NIACs clashed with the advanced stage of IHRL, albeit the two were not in a *stricto sensu* conflict. ICL's competing anxieties, coupled with the inherent flexibility of the customary process,[141] made the Appeals Chambers' judges feel entitled to avoid this

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[133] Ibid., para. 97.
[134] Ibid.
[135] Ibid.
[136] It is Theodor Meron that came first with the concept of 'humanization' of IHL in 2000, observing the developments at the *ad hoc* tribunals. See T. Meron, 'The Humanization of Humanitarian Law', (2000) 94 AJIL 239.
[137] Hakimi argues that, primarily, it was the human rights challenge posed to the Appeals Chamber that made it assert that IHL appeared to be 'outmoded', see M. Hakimi, 'Custom's Method and Process: Lessons from Humanitarian Law', in C. Bradley (ed.), *Custom's Future: International Law in a Changing World* (2016), 148.
[138] Hill-Cawthorne, *supra* note 130, at 294–307.
[139] A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (2009), 199; the duty to prosecute, however, may not be well settled.
[140] See T. Meron, 'International Criminalization of Internal Atrocities', (1995) 89 AJIL 554, at 559–60; detailing the view of the ICRC and the ILC on this issue.
[141] See F. Mégret, 'The Anxieties of International Criminal Justice', (2016) 29 LJIL 197, at 204–5.

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conceptual clash by watering down the traditional two elements approach to the identification of CIL. The choice to use an alternative method to identify custom was employed to avoid situations where one field, namely IHL, conceptually prevails over the other, IHRL. Instead, through modern customary adjustment, both IHL and IHRL were fused in order to address crimes committed in NIACs and provide justice to the victims.

6.4. Absolutely inconsistent legal concepts: *Kupreškić*

The *Kupreškić* judgment also evinces a deep discomfort in leaving victims of belligerent reprisals without access to international criminal justice. In its reasoning to demonstrate 'the absolute character of the prohibition of reprisals against civilian populations' in all armed conflicts,[142] the Trial Chamber noted the unjust nature of reprisals against the civilian population.[143] In the words of the Chamber: '[I]t cannot be denied that reprisals against civilians are inherently … barbarous'.[144] Their indiscriminate nature was framed as follows: 'The reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights.'[145] The most obvious human right at stake in cases of reprisals is the right not to be arbitrarily deprived of life. Having underlined the unjust character of reprisals, the Chamber affirmed:

> It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights law has occurred. As a result belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts.[146]

By asserting that reprisals against civilians and IHRL are 'absolutely inconsistent legal concepts' the Chamber postulates that it is facing a norm conflict. Indeed, if belligerent reprisal against civilians and the right to life are genuinely conflicting, one norm needs then to prevail over the other.

As Darcy convincingly demonstrated, IHRL precludes reprisals against civilians by governmental forces in an NIAC.[147] IHRL would also have such effect over governmental forces in an IAC, if the state exercises effective control over the enemy civilians.[148] However, IHRL, Darcy acknowledges, would fail to impose a prohibition of reprisals on non-state armed groups.[149] The *Kupreškić* case concerned soldiers of the Bosnian-Croat forces (HVO), a non-state armed group, who waged a military attack against the Bosnian-Muslims in a village in central Bosnia and Herzegovina. Thus, it concerned a category of perpetrators to which only the customary IHL prohibition of reprisals could be applicable.

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[142] *Kupreškić* Trial Judgement, *supra* note 3, para. 513.
[143] Ibid., para. 528.
[144] Ibid., para. 528.
[145] Ibid., para. 529.
[146] Ibid.
[147] Darcy, *supra* note 85, at 179–80.
[148] Ibid., at 181–2.
[149] Ibid., at 180–1.

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The finding that reprisals against civilians is a customary prohibition of IHL had three effects: Firstly, it applied to all actors in any type of conflict; secondly, it avoided recognizing human rights obligations to non-state actors as a whole. Recognition of human rights obligations in general for non-state armed groups would have led to much more political controversies and legal difficulties than demonstrating that there is a customary prohibition of reprisals under IHL.[150] Indeed, even the progressive views, at least at the time, limited human rights obligations of non-state armed group to such groups that exercise territorial control.[151] Thirdly, if not prohibited by IHL, the *lex specialis* rule could have applied in a similar fashion as in the *Nuclear Weapons* case.[152] In essence, the right of not being arbitrarily deprived of life would be adjusted to the specific authorization – the *lex specialis* – to use reprisals in order to force the other party to cease violating IHL.[153] In other words, a genuine conflict between IHRL and IHL took place. Thus, to interpret away the foreseen clash, the Chamber tried at all costs to find that belligerent reprisals against civilians were prohibited under customary IHL.[154]

In sum, by proclaiming a new approach to identifying CIL and consequently finding that belligerent reprisals against the civilian population in NIACs were prohibited, both laws, that is IHL on belligerent reprisals and IHRL on the right to life, converged. The result was that there was no more inconsistency between the legal concepts at stake. If, on the other hand, the Chamber had failed to find this harmonious solution, the *lex specialis* doctrine would have prevailed, in that the right to belligerent reprisals would have superseded the right to life of the victims.

7. Using custom identification as a conflict avoidance technique

Conflict avoidance is a process by which interpreting one norm in light of another norm may disband an apparent conflict. In theory, interpretation should be understood in the sense of Articles 31–32 of the Vienna Convention on the Law of Treaties.[155] In *lato sensu* conflicts, the object to be interpreted is understood in a wide sense. That is, interpretation of the conflicting norms' terms as well as their regimes' *teloi* can be taken into account. However, in *Tadić* and *Kupreškić*, it is not a particular term of IHL that was interpreted but its *telos*, as well as the rules on the identification of CIL. In his report on the establishment of the ICTY, the UN Secretary General (UN SG) made clear that to respect *nullum crimen sine lege* the Tribunal had to apply

[150] S. Sivakumaran, 'How to Improve upon the Faulty Legal Regime of Internal Armed Conflicts', in A. Cassese (ed.), *Realizing Utopia* (2012), 525.

[151] Ibid., at 533; A. Clapham, *Human Rights Obligations of Non-State Actors* (2006); J-M. Henckaerts and C. Wiesener, 'Human rights obligations of non-state armed groups: a possible contribution from customary international law?', in R. Kolb and G. Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (2013), 146, at 157. However, see also D. Murray, *Human rights obligations of non-state armed groups* (2016).

[152] See *Nuclear Weapons* case, *supra* note 71, para. 25.

[153] M. Schmitt, *Essays on Law and War at the Fault Lines* (2011), 112.

[154] Darcy, *supra* note 51, at 165.

[155] Pauwelyn, *supra* note 88, at 245; I am not implying that interpretation in an (international) criminal trial is governed by the Vienna Convention. On this matter see L. Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (2014).

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rules of IHL which were beyond any doubt part of CIL.[156] However, the UN SG did not specify how custom should be identified, arguably because he considered it unnecessary as the traditional method was firmly established and the words 'beyond any doubt' sufficiently expressed the idea that the appraisal of custom needed to be strictly undertaken.

The *Tadić*, *Kupreškić* cases and *inter alia* the ILC's work on the formation of CIL demonstrate that there are no 'hard-and-fast rules for the identification of rules of customary international law'.[157] This lack of codified 'rules' for the formation of customs left a gap which the Chambers could plug with their own alternative approaches.[158] In order to integrate IHRL's spirit into IHL's diverging spirit, the extent of CIL regulating (the criminalization of) conducts in NIAC was enhanced. Given that the traditional method to identify CIL would have failed to achieve this result, the tool to upgrade IHL was, indeed, to deductively appraise CIL.

Milanović describes three means of conflict avoidance: consistent, creative and forced.[159] The *Kupreškić* and *Tadić* cases lie in between creative and forced avoidance. The two cases are far from 'consistent' as they do not 'fit' within the two elements approach to CIL. The *Tadić* case may be seen as creative – as it is making things up – but in a manner that is not completely inobservant of past accounts of how to determine CIL.[160] Indeed, the ICTY defended its use of modern custom by claiming that contemporary practice in the battlefield required it to do so. This is also a technique used in IHRL.[161] For example, despite being widely condemned in official statements, the practice of torture remains endemic. This does not, however, challenge the customary character of the prohibition of torture. The *Tadić* Interlocutory Appeal on Jurisdiction draws on this normative approach. Some years later, the ICRC Study on CIL also used a similar approach,[162] albeit not without severe criticism.[163]

Kupreškić, on the other hand, appears as forced rewriting of how CIL should be identified. Indeed, the conceptual conflict between the scant regulation of IHL and the protection of the human rights of those caught in armed conflict lies at the centre of why a relaxed approach to custom identification ought to be adopted. However, it is the Martens Clause that officially opened the way to adopt a relaxed approach to the identification of CIL and by the same token provided the main evidence that the desired CIL existed. This was certainly a distorted interpretation of the CIL process.

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156 Secretary General Report, *supra* note 49, para. 34.

157 Wood, First Report, *supra* note 1, para. 18. However, he also wrote 'as in any legal system, there must in public international law be rules for identifying the sources of law. These can be found for present purposes by examining in particular how states and courts set about the task of identifying the law'. Ibid, at 17.

158 Note that the ILC had a debate on whether it should issue a guideline on custom identification or a set of rules. See ILC, UN Doc. A/CN.4/SR.3225 (18 September 2014); and UN Doc. A/CN.4/SR.3226 (17 July 2014).

159 M. Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law', (2009) 14 JCSL 459, at 468–70.

160 See *Nicaragua* case, *supra* note 17.

161 Roberts, *supra* note 16.

162 J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, (2005), Volume I: Rules and Volume II: Practice.

163 See, e.g., J.B. Bellinger and W.J. Haynes, 'A US Government Response to the International Committee of the Red Cross's Customary International Humanitarian Law Study', (2007) 89 IRRC 443.

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The main argument of this article is that these alternative methods to custom identification were brought into play in the *Tadić* and *Kupreškić* cases as methods of conflict avoidance. In contrast to a reasonable interpretation of conflicting terms, alternative methods of custom identification are *per se* forced, or at best creative conflict avoidance techniques. What does this conflict avoidance technique mean for international law in general and for ICL in particular? This is the final question that this article now turns to examine.

8. The pros and cons of using custom identification as a conflict avoidance technique

The type of conflict avoidance technique used in *Tadić* and *Kupreškić* does not only concern ICL – it may recur any time the issues in a given legal case are taken from a wider perspective and the applicable law provides loopholes whereby CIL can be instrumentalized to avoid an 'unjust' result.[164] Avoiding conflicts of norms by opting for an alternative method to identify CIL has consequences for the unity of public international law in at least two ways – one positive and one negative: Firstly, it may be argued that the Chambers were moved by an effort to consider the issues at stake as part of a systemic and consistent order. As ICL intermeshes IHL and IHRL, it is not surprising that ICL courts issue decisions that fuse its flesh.[165] Other branches of public international law, such as international trade law or international investment law, have fewer entry points for human rights norms – although human rights concerns are also present.[166] In contrast with ICL or IHRL bodies, WTO Panels and other arbitration tribunals have, so far, interpreted their jurisdiction and 'applicable law' narrowly.[167] Hence, they have often acknowledged only *stricto sensu* conflicts. The *Tadić* and *Kupreškić* cases, on the other hand, epitomize examples of decisions that conceptualized their 'applicable law' broadly; thus, they were concerned with *lato sensu* conflicts. The aim of bringing IHL and IHRL together appeared to the ICTY Chambers as sufficiently urgent to switch to an unconventional method of identifying CIL. In considering their normative environment widely, as the principle of systemic integration enjoins,[168] their models to identify CIL are in fact techniques for harmonizing IHL with IHRL. Some may applaud this endeavour whilst some may not.

Secondly, watering down the two-element requirement of custom poses an enormous risk of fragmentation of international law. The Chambers did not simply apply

[164] See, e.g., United States – Standards for Reformulated and Conventional Gasoline case, WT/DS2/AB/R, 20 May 1996.

[165] See Cassese et al., *supra* note 111, at 2.

[166] It is, indeed, with these concerns in mind that Pauwelyn wrote his seminal book *Conflicts of Norms in Public International Law*, see Pauwelyn, *supra* note 88.

[167] Canada – Administration of the Foreign Investment Review Act, 7 February 1984, L/5504, BISD 30S/140; United States – Imports of Sugar from Nicaragua, 13 March 1984, BISD 31S/67, L/5607; Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, 22 March 1988, BISD 35S/98, L/6268, para. 5.3. See also the panel report on United States – Taxes on Petroleum and Certain Imported Substances, 17 June 1987, BISD 34S/136, para. 5.2.6.

[168] See Report on Fragmentation, *supra* note 92, paras. 422–3.

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and interpret IHL against the background of IHRL.[169] Instead, the Chambers overstepped the mark in using their 'discretion' by defining the rather flexible prescription of how to determine the scope and content of customary IHL. The danger that this conflict avoidance method poses to the international legal order are evident: it shakes the whole structure of the international legal system as it creates primary norms by fecundating new rules of recognition. To be sure, a regime may set a distinct set of secondary norms designed to ensure the proper application and to resolve conflicts of primary norms.[170] The *ad hoc* tribunals did not, however, operate in a fully self-contained regime.[171] Their applicable law had to be confirmed by CIL – one of the classic sources of international law. It needs to be underlined that providing new rules of recognition should not come as a 'technique' to avoid normative conflicts but as concerted rules between law-makers.

Furthermore, if every time a judge is faced with a conceptual conflict she decides to bring forward an alternative theory of custom, it is not only the indeterminacy on what the law is on a certain issue that is at stake, but also how to identify such law. Faced with the same issue, another court or body might rule in a completely opposite manner and thus bring further uncertainties. Certainly, a judge may seek to interpret the terms of the norms to avoid a conflict. But to re-interpret the classical doctrine on the identification of CIL to avoid what appeared to be an unresolvable conflict is a subversion of the conflict of norms theory.

Finally, the conflict avoidance technique used in *Tadić* and *Kupreškić* is particularly troublesome in a criminal trial, where the *nullum crimen sine lege* principle should govern the process of finding the applicable law. Not only should the judge/s determine whether the offence in question existed at the time of the alleged conduct but they should also strictly construe the terms of the offence. Playing with CIL according to one's will renders it impossible for individuals to know whether or not a certain conduct is criminal under international law and which technique will be applied to find this law.

9. Conclusion

This article has argued that in both the *Tadić* and *Kupreškić* cases the ICTY resorted to a modern approach for determining CIL in order to avoid a norm conflict between IHRL and IHL. The words of the Chambers clearly illustrated that such conflicts troubled them. It may be claimed, however, that the conflicts avowed by the ICTY Chambers were just arguments made in addition to other legal norms to convince

[169] Ibid., para. 479.

[170] See generally A. Marschik, 'Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System', (1998) 9 EJIL 212.

[171] It may be argued that the ICTY operated in a sub-system of international law, as it was governed by its Statute and rules. However, the fact that a crime was listed in the Statute was not sufficient; for a crime to fall within its jurisdiction it had also to be established under customary international law. Thus, there was a fall back to general international law. E.g., see Cassese commenting on Art. 8 Rome Statute: 'the Statute would not provide a self-contained legal regime, but would rather presuppose a mandatory examination by the Court, on a case by case basis, of the current status of general international law'. This reasoning would apply to the ICTY Tribunals Statute as well.

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the community to whom it is addressed. In other words, the human rights revolution is not causing the change but just adding a defence to the whole legal claim made. Indeed, judges may come with normative preferences which they would preserve with a human rights normative.[172] This human rights normative force may be imbued with other humanitarian norms all coming under the umbrella of a 'rhetoric of justice'.[173]

Many factors were outlined by the Appeals Chamber in the *Tadić* Interlocutory Decision to justify its findings. In particular, the claim that the purposive approach adopted by the Tribunal is attributable to its mandate – that is, to prosecute persons responsible for the most serious crimes of concern to the international community as a whole.[174] The UN SC's intent when it established the Tribunal, coupled with a logical and systematic interpretation of its Statute, warranted that the Chamber conclude: 'Article 3 aims to make [the ICTY] jurisdiction watertight and inescapable'.[175] However, this part of the 'analysis' concerned the jurisdiction of the Tribunal and not the customary nature of the rules governing NIACs. As set out above, the most significant step undertaken by the Appeals Chamber in this respect was the application of an alternative approach to identifying CIL. Unlike the UN SC's intent, the Martens Clause and the Nuremberg factors, the human rights revolution in international law was stated in the Appeals Chamber's general considerations. It shortly preceded the paragraph where the Chamber signaled that it will apply a relaxed model of CIL identification. Not only did the Chamber's general considerations constitute the principles from which it deduced the existence of customary norms but they also set the conceptual conflict it was facing.

In the *Kupreškić* Trial Judgement, the Chamber pointed out that reprisals are no longer necessary since other 'means of inducing compliance' have become available: That is, 'the prosecution and punishment of war crimes and crimes against humanity by national or international courts'.[176] The Chamber's efforts to replace the justification of reprisals by the possibility of prosecuting all war crimes perpetrators merely served as a fig leaf to demonstrate that other mechanisms than reprisals existed. It does not, however, intend to be the crux of why custom prohibits reprisals or why only *opinio juris* should be contemplated.

The main argument presented in this article is that a resort to modern custom has been used as a technique to avoid a conflict between the divergent IHL and IHRL regimes involved in the two cases examined (*Tadić* and *Kupreškić*). The *Nicaragua* judgment also falls in this category. However, on the other hand, it could be argued that if these were the only ways to establish that belligerent reprisals are prohibited

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[172] I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012), 198–205.

[173] Ibid.

[174] N. Wagner, 'The Development of the Grave Breaches Regime and of Individual Criminal Responsibility by the International Criminal Tribunal for the former Yugoslavia', (2003) 85 IRRC 351, at 352; M. Swart, 'Is There a Text in This Court? The Purposive Method of Interpretation and the Ad Hoc Tribunals', (2010) 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 767, at 781–2; *Tadić* Interlocutory Appeal on Jurisdiction, *supra* note 3, paras. 71–78 and para. 72, in particular referring to the Preamble of Resolution 827.

[175] Ibid., para. 91.

[176] *Kupreškić* Trial Judgement, *supra* note 3, para. 530.

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in NIACs and that the individuals who committed serious violations of IHL in NIACs are subject to individual criminal responsibility then let us, indeed, compose new customs or use new ways of identifying CIL. One might argue that the end justifies the means. However, in both cases examined, there were actually other means to establish these ends: Firstly, the same findings could have been derived from general principles of law.[177] General principles of law are also a source of international law under Article 38(1) of the ICJ Statute. Moreover, it is widely recognized that individual criminal responsibility for international crimes can be derived from general principles of law without infringing the fundamental principle of *nullum crimen sine lege*.[178] Secondly, many of the reasons for which the ICTY Chambers in *Tadić* and *Kupreškić* resorted to a modern approach to the identification of CIL were said in *obiter*.[179] They were not necessary for the cases at hand![180] The role of the international judge(s) in contributing to the development of international law (as advocated by Judge Lauterpacht) [181] is a known, but divisive issue.[182] Judge Fitzmaurice in his separate opinion in the *Barcelona Traction* case agreed with Lauterpacht when he stated that:

> since specific legislative action with direct binding effect is not at present possible in the international legal field, judicial pronouncements of one kind or another constitute the principal method by which the law can find some concrete measure of clarification and development.[183]

Cassese, for his part, asserted that:

> Since at present, and on a number of political grounds, states are loath to create new rules by treaties, the scope and impact of customary law on international relations is expanding at a rapid pace. However, the difficulty with custom is that, apart from traditional rules, which are undisputed, emerging rules or rules that are indicative of new trends in the world community need, in order to be recognized, the formal imprimatur or a court of law.[184]

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[177] Bassiouni, for instance, argues that the specific crimes, except for persecution *per se*, provided in the London Charter's definition of crimes against humanity existed before 1945 in the world's major legal systems and were thus prohibited as general principles of law. See C. Bassiouni, *Crimes Against Humanity* (2011), 469–70.

[178] E.g., ICCPR, Art. 15(2) and ECHR, Art. 7(2), which provide that any act or omission can be punished if it was 'criminal according to the general principles of law recognised by civilised nations'. Though it may be claimed that they would not meet the principle of specificity, which arguably is also a defect of CIL. See also B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles', (1992) AYIL 8.

[179] R. Cryer, 'Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study', (2006) 11 JCSL 239, at 254–5; Greenwood, *supra* note 41, at 278.

[180] Tadić was not accused of having used prohibited weapons in an NIAC, nor of an attack directed at the civilian population or cultural heritage. Furthermore, the Appeals Chamber could have simply found, as the Trial Chamber did, that the norms existed in CIL without proposing a new method to identify CIL. Finally, it would have been easier to classify the conflict as an IAC. Kupreskić did not formally raise the defence of reprisals which would have allowed the Chamber to decided that reprisals are prohibited because they were not foreseen in the AP I, see Section 1.2.

[181] H, Lauterpacht, *The Development of International Law by the International Court* (1958).

[182] See F. Berman, 'The International Court of Justice as an 'Agent' of Legal Development?', in C. Tams and J. Sloan, *The Development of International Law by the International Court of Justice* (2013), at 7–21.

[183] *Barcelona Traction, Light and Power Company, Limited*, Judgment of 5 February 1970, [1970] ICJ Rep. 3, at 64, para. 2, Judge Fitzmaurice.

[184] A. Cassese, 'The International Court of Justice: Is it High Time to Restyle the Respected Old Lady', in A. Cassese, *Realizing Utopia: The Future of International Law* (2012), 239, 240.

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The role of international courts and judges to determine which rules have passed into the corpus of CIL cannot be undermined. Yet, this does not imply that the methodology of how to identify CIL should be rewritten for each case where legislative actions have been absent: Such a judicial attitude to engage in 'an unbridled resort to customary international law as a catch-all concept' may end up being countered by an excess in formalism while drafting treaties and their applicable law.[185] Furthermore, if international courts alter the two elements approach to custom in order to strongly engage in creating new customary rules – thus somehow portraying themselves as a primary source of law – it may affect 'their authoritative' role as 'subsidiary means for the determination of rules of law'. Ultimately, if international courts and tribunals lose their authoritativeness in shedding light on international legal rules, the job of identifying CIL would become almost impossible.[186]

With the aforementioned in mind, there are sufficient reasons to argue that it was not actually necessary in the cases examined in this article for the ICTY to take an alternative approach to identifying CIL. Nevertheless, if one still has any doubts, he or she should keep in mind the faith of some decisions where custom ascertainment was done unorthodoxly. The ICC Decision on Malawi's Failure to Arrest and Surrender Al-Bashir, mentioned in the introduction to this article, led to a serious objection from the African Union, which still affects the Court's operation in the African continent.[187] Beyond this case, the ICRC Study on CIL, which explicitly (and unnecessarily) referred to Kirgis's 'sliding scale',[188] was severely attacked by the US. And, finally, it must be underlined that the *Kupreškić* case itself is almost a subject of derision.[189]

The lofty endeavour of the *Kupreškić* Trial Chamber and its reasoning, unfortunately, failed to be accepted by the international community. The UK Manual of Military Law, for instance, explicitly discards the *Kupreškić* judgment, holding that 'the court's reasoning is unconvincing and the assertion that there is a prohibition in customary law flies in the face of most of the state practice that exists'. [190] Even the ICRC resisted adopting the finding of the Trial Chamber without reservations.[191] True, the *Tadić* findings on individual criminal responsibility passed the threshold for being retained:[192] Indeed, the Rome Statute expressly incorporates a long list of

[185] Ronen, *supra* note 54, at 497: The strict regulation of the applicable law before the ICC are examples of where thwarting CIL theories lead.

[186] Ronen, *supra* note 54, at 480.

[187] A.S. Knottnerus, 'The AU, the ICC, and the Prosecution of African Presidents', in K. Clarke et al., *Africa and the ICC* (2016), 152–84; D. Tladi, 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98', (2013) 11 JICJ 199–221.

[188] I. Scobbie, 'The Approach to Customary International Law in the Study', in E. Whimshurst and S. Breau, *Perspectives on the ICRC Study on Customary International Law* (2007), 29.

[189] F. Kalshoven, 'Reprisals and the Protection of Civilians: Two Recent Decisions of the Yugoslavia Tribunal', in L.C. Vohrah et al., *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* (2003), 504.

[190] United Kingdom Ministry of Defence, *The Manual of Law of Armed Conflict* (2004), 421, fn 62. For a summary of criticisms see Cryer, *supra* note 170, at 256.

[191] Henckaerts and Doswald-Beck, *supra* note 162, at 523.

[192] However, see Ronen, *supra* note 54, at 497. It is set out here that states have not objected because it is concerned only with criminal responsibility (possibility of low level perpetrators). With regard to state responsibility the situation might change.

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war crimes that can be committed in NIACs.[193] Nevertheless, this did not forestall the drafters from strictly regulating the sources to be applied by the ICC.[194] CIL is almost left aside from the Rome Statute.[195] With respect to IHRL, Article 21(3) of the Rome Statute places it at the top of the law to be applied by the Court.[196] Hence, the drafters intended to ensure that if a conceptual conflict is to take place between the ICC's applicable law and IHRL, the said conflict will have to be interpreted away without the discretion to subvert the traditional doctrine on custom identification.

[193] Rome Statute, Art. 8(c)(e).

[194] See Rome Statute, Arts. 21, 22; nonetheless customary international law may be applied *inter alia* when there is a lacuna in the Statute. It may also be of relevance for defences or *mens rea* questions and has been explored within the framework of customary criminal procedural law, see Van den Herik, *supra* note 7, at 230 .

[195] A. Pellet, 'Applicable Law', in A. Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary* (2002), 1077

[196] Ibid.

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