Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY

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The International Criminal Tribunal for the former Yugoslavia (ICTY) has made extensive use of national case law in interpreting and applying its Statute and Rules of Procedure and Evidence and in determining points of general international law. It has done so in heterogeneous ways. Sometimes it has used national case law to identify the contents of customary international law. On other occasions, it has referred to national case law in its analysis of general principles of (international) law. And on yet other occasions it has endowed national decisions with an apparent quasi-independent authority that cannot be reduced to a constituent element of either customary international law or a general principle of (international) law.

The practice of the Tribunal reflects the situation in other areas of international law. Illustrative is the weight that has been attached to the judgment of the House of Lords in the Pinochet case. This decision has been extensively cited in pleadings before the International Court of Justice [ICJ] and national courts, and by legal scholars. While some have referred to it to support a rule of customary law, others have considered it as precedent in a way that cannot be explained in terms of the formation of customary law. It appears

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1. R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3), [1999] 2 WLR 827, [1999] 2 All ER 97 (HL)
2. For instance, the case was relied in by Belgium in its oral pleadings in the Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), No. 121, ICJ, Judgment, 14 February 2002.
3. The case was discussed in the decisions on the prosecution of Bouterse in the Netherlands by the Court of Appeals of Amsterdam, 3 March 2000 (Nederlandse Jurisprudentie 2000, 266) and the Supreme Court of the Netherlands, 18 September 2001 (not yet reproduced).
4. At the time of writing the catalogue of the Peace Palace listed over forty articles on the case.

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that national court decisions can be used in a variety of ways in the process of law-making and the determination of the law.

Except for a notable 1929 article by Hersch Lauterpacht and a few more recent scholarly discussions, the question of how decisions of national courts can be construed in terms of the sources of international law has received only limited scholarly attention. The proliferation of national court decisions on matters of international law, and the increasing accessibility of these decisions, makes it important to study more closely the role of national court decisions in international law-making.

This chapter offers a contribution to that objective by examining how the Tribunal has used decisions of national courts in its construction of rules of international law. It explores first how the Tribunal has used national decisions as elements in the construction of—respectively—treaties, customary law and general principles of (international) law. It then reviews the use by the Tribunal of national case law as independent authority in the determination of international law.

Two qualifications concerning the scope of the chapter are in order. First, it is concerned with the use of national case law in the determination of rules of international law. It does not discuss legal determinations that are exclusively relevant to the individual case in which they are applied. Second, the units of analysis of the article are judicial decisions. However, it must be taken into account that in several cases no sharp boundaries can be drawn between judicial decisions and the underlying national legislation. Indeed, the Tribunal itself has not always clearly differentiated between national case law and national law.

7. For example, case law pertaining to sentencing practice in the Federal Republic of Yugoslavia may be taken into account under Article 24 of the Statute (providing that in determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia). In Prosecutor v. Krnojelac, Judgment, Case No. IT-97-25-T, 15 March 2002, para. 505, the Tribunal stated that what is required in considering sentencing practice as an aid in determining the sentence to be imposed must go beyond merely reciting the relevant criminal code provisions of the former Yugoslavia and that the general sentencing practice of the former Yugoslavia must be considered, including consideration of case law. This type of practice is not considered in this article.
8. In Prosecutor v. Kupreškić et al., Judgment, Case No. IT-95-16-A, 23 October 2001, para. 46, the Appeals Chamber considered a mix of case law and national law in determining the rule on admissibility of new evidence in appeal cases. In Prosecutor v. Erdemović, Judgment, Case No. IT-96-22-A, 7 October 1997, in their joint separate opinion Judge McDonald and Judge Vohrah considered a mix of national law and national case law in determining general principles of law pertaining to the defence of duress.

9. Prosecutor v. Tadić, Jurisdiction, Case. Before both the Prosecution have the conflicting position on this. It should be clear to the parties that the purpose of the defences of international law is to offer the Secretary-General of the United Nations the right to present to the Court the case on which: (i) was an international crime; and (ii) the element of international law. This analysis by the statement adopted by the United Nations Assembly is allowed to be taken into account by the Secretary-General, and is authorised to do so, to the extent that it may be authorized to do so.
Decisions of National Courts in the Interpretation of Treaties

The first way to construe the relevance of national case law in the international legal order is to use case law in the interpretation of treaties. The Tribunal has held that in order to avoid violating the principle of *nullum crimen sine lege*, it should either apply rules of customary law or rules from treaties binding on the parties. When the Tribunal resorts to the second option, and has to engage in treaty interpretation, it may consider national case law.

In the *Jelisić* case, the Tribunal interpreted the Genocide Convention. It stated:

> It interprets the Convention's terms in accordance with the general rules of interpretation of treaties set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. In addition to the normal meaning of its provisions, the Trial Chamber also considered the object and purpose of the Convention and could also refer to the preparatory work and circumstances associated with the Convention's coming into being. The Trial Chamber also took account of subsequent practice grounded upon the Convention. Special significance was attached to the Judgments rendered by the Tribunal for Rwanda, in particular to the *Akayesu* and *Kayishema* cases which constitute to date the only existing international case law on the issue. The practice of States, notably through their national courts, and the work of international authorities in this field have also been taken into account.

9. *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 143:

> Before both the Trial Chamber and the Appeals Chamber, Defence and Prosecution have argued the application of certain agreements entered into by the conflicting parties. It is therefore fitting for this Chamber to pronounce on this. It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty (Report of the Secretary-General, paras. 34). It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law. This analysis of the jurisdiction of the International Tribunal is borne out by the statements made in the Security Council at the time the Statute was adopted. As already mentioned above (paras. 75 and 88), representatives of the United States, the United Kingdom and France all agreed that Article 3 of the Statute did not exclude application of international agreements binding on the parties. (Provisional Verbatim Record, of the U.N.SCOR, 3217th Meeting, at 11, 15, 19, UN Doc. S/PV.3217 (25 May 1993)).

Similarly, in the Krstić case, the Tribunal interpreted the Genocide Convention pursuant to the rules of interpretation laid down in Articles 31 and 32 of the Vienna Convention. In addition to the ordinary meaning of the terms, the object and purpose of the Convention, the preparatory work and the circumstances which gave rise to the Convention, as well as recent international practice, the Trial Chamber “also looked for national guidance in the legislation and practice of States, especially their judicial interpretations and decisions”.

This analysis is somewhat awkward, as in both cases the Tribunal indicated that it used the Genocide Convention as customary law, rather than as treaty law. Therefore, it is not clear why it had to resort to Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Nonetheless, the cases are relevant since, given the fact that the Tribunal assumed it “had to apply the Vienna Convention, it considered national case law to be relevant in the interpretation of treaties.

The Tribunal apparently used national case law as “subsequent practice in the application of the treaty which establishes the agreement of the parties of its provisions”, as provided for in Article 31(3)(b) of the Vienna Convention. This construction is not entirely unproblematic. Article 31(3)(b) only allows for use of subsequent practice which “establishes the agreement of the parties of its provisions”. In exceptional cases, widespread and uniform unilateral practices of States may be interpreted as an agreement pertaining to the interpretation of a particular provision of a treaty. While it appears uncommon, there is no a priori reason to exclude the practice of national courts from this category. However, in the case of a multilateral convention such as the Genocide Convention, the threshold in terms of the number of States that engage in any subsequent practice, as well as the uniformity of that practice, should be high. At present, there does not exist sufficiently widespread national judicial practice on the application of the Genocide Convention to come close to what would be required in order to establish agreement of the parties. In the Krstić case, the Tribunal cited six national cases: three decisions of a German court, two of the Polish Supreme Court and one of the United States Military Tribunal at Nuremberg. This clearly is not enough practice to identify agreement as to the interpretation of the Convention.

The Tribunal appeared to recognise that six cases in themselves cannot determine the interpretation of the treaty. It used the judicial decisions to supplement other sources, such as the ordinary meaning of the terms, the object and purpose of the Convention, the preparatory work, and reports of the International Law Commission, General Assembly resolutions and international legal practice. Utilisation of national case law in this manner is not necessarily objectionable, even though technically this is not consistent with the terms of Article 31(3)(b) of the Vienna Convention.

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Decisions of National Courts as Elements in the Formation of Customary International Law

A second way to construe the legal relevance of decisions of national courts is to qualify them in terms of customary international law. As noted above, the drafters of the ICTY Statute intended that the Tribunal should apply, in addition to treaties binding on the parties, rules of customary law, in order to avoid violating the principle *nullum crimen sine lege*. On many occasions the Tribunal has had to determine and interpret customary law and, as part of that exercise, has referred to national case law.

In its judgment in the *Erdemović* case, the Appeals Chamber extensively discussed to what extent national case law provided support for a rule of customary law regarding the availability or the non-availability of duress as a defence to a charge of killing innocent human beings. The Appeals Chamber found that insufficient evidence existed for such a rule. However, it did not dispute the view that had the case law been more uniform and consistent, a rule of customary law could have been based on that case law.

This use of national case law as an element in the identification of customary law is in line with the general understanding of the formation of customary international law. The Permanent Court of International Justice (PCIJ) considered national judicial acts as "facts which express the will and constitute the activities of States". In the *Lotus* case, it expressly considered national case law in terms of its contribution to customary law. In modern interna-


13. *Prosecutor v. Tadić*, supra note 9, para. 143. Also: *Prosecutor v. *Jelisić*, supra note 10 (stating that, in accordance with the principle *nullum crimen sine lege*, the Trial Chamber means to examine the legal ingredients of the crime of genocide taking into account only those which beyond all doubt form part of customary international law).


15. *German Interests in Polish Upper Silesia*, PCIJ Rep., Series A, No 7 (1926), p. 19: "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures", *Prosecutor v. Delalić* et al., Judgment, Case No. IT-96-21-A, 20 February 2001, para. 76.

16. *The Steamship Lotus (France/Turkey)*, PCIJ Rep., Series A, No 10 (1927), pp. 23, 26, 28-29. The ICJ considered national case law in terms of customary law in *Congo-Belgium*, supra note 2, para. 58 ("The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity"). See also the separate opinion of Judges Higgins, Kooijmans and Buergenthal, paras. 22-24 (considering case law as part of State practice with respect to universal jurisdiction).
tional law scholarship there exists no doubt that national case law can be an element in the formation of customary international law. Large parts of customary law, in particular in the field of jurisdiction and immunities, have been developed in accordance with the practice of national courts.

In principle, national case law can qualify as both State practice or *opinio juris*.[1] Although the Tribunal has on occasion taken a cautious position,[2] there is no doubt that case law, as acts of the State, can be a form of State practice.[3] As such, it will need to conform to the normal requirements for the formation of customary international law. Under established principles of international law, State practice can only lead to the formation of customary international law if it is sufficiently consistent.[4] This requirement also may affect the assessment of the relevance of national case law for the formation of customary international law. In the *Lotus* case, the PCIJ noted that judgments of municipal courts pertaining to the alleged rule of international law regarding the exclusive competence of a flag State over its ships were in conflict. In view of this, the Court observed that it was hardly possible to see in the national case law an indication of the existence of a rule of international law, as had been contended by the French government.[5] A similarly cautious approach was taken by the Appeals Chamber in the *Erdemović* case. After reviewing national case law on the question of whether duress is a defence to murder, the Appeals Chamber concluded that State practice (consisting mostly of national case law) was far from on that practice.

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17. R.Y. Jennings & A. Watts, eds., *Oppenheim's International Law*, 9th ed., 1992, p. 41; International Law Association (ILA), Statement of Principles Applicable to the Formation of General Customary International Law, principle 9, reproduced in International Law Association, *Report of the Sixty-Ninth Conference* (2000). Elder ideas to the effect that State practice consists only of the practice of those organs capable of entering into binding relations on behalf of the State (related to the view that that customary law was tacit treaty law) now are generally rejected. The same holds for the view that municipal court cases were only evidence of custom, not a force creating custom.

18. These are the necessary conditions for customary law; *North Sea Continental Shelf Cases, (F.R.C. v. Denmark and v. Netherlands), [1969] ICJ Reports 3, paras. 72-74.*

19. Joint Separate Opinion of Judge McDonald and Judge Vohrah in *Prosecutor v. Erdemović*, supra note 8, considering that "to the extent that state practice on the question of duress as a defence to murder may be evidenced by the opinions on this question in decisions of national military tribunals" (para. 50, emphasis added).

20. ILA, Statement of Principles, supra note 17, principle 9; H. Lauterpacht, supra note 5, pp. 84 ff.


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s law can also be qualified in terms of opinio juris.8 Here the
distinction between the application of rules of international law and the appli-
cation ofrules of national law is more relevant. Identification of opinio juris
may be relatively easy when national courts apply what they consider to be
rules of international law. It is to be presumed that a national court applying
rules on the subject, for instance, of jurisdiction or immunities, will consider
that it applies them in a way that is required or permitted by customary international law.
In circumstances where a national court applies rules of national law, quali-
fication in terms of opinio juris may be less evident. The court cannot be pre-
sumed to apply that law with a preconceived notion that the rules that it is
applying are either required or authorised by customary international law. This

23. Prosecutor v. Erdomović, supra note 8, para. 50.
26. This appears less relevant for procedural issues pertaining to the Tribunal; see e.g., Prosecutor v. Blažičić, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR.08bis, 29 October 1997.
27. See e.g., "The Status of the Universal Declaration of Human Rights in International Law", International Law Association, Report of the Sixty-Ninth Conference, 1994, p. 142. Note also that in a number of cases national law or case law in itself is influenced or determined by international law, cf. Prosecutor v. Furundžija, supra note 21, para. 183 (stating that the interpretation by national legal systems of the requirement of impartiality and in particular the application of an appearance of bias test, generally corresponds to the interpretation under the European Convention).
was recognised in the joint separate opinion of Judge McDonald and Judge Vohrah in the Erdemović case:

Not only is State practice on the question as to whether duress is a defence to murder far from consistent, this practice of States is not, in our view, underpinned by opinio juris. Again to the extent that State practice on the question of duress as a defence to murder may be evidenced by the opinions on this question in decisions of national military tribunals and national laws, we find quite unacceptable any proposition that States adopt this practice because they "feel that they are conforming to what amounts to a legal obligation" at an international level. 29

In particular cases, considering case law for the purpose of analysing the formation of customary law may raise problems. Courts may take a position that conflicts with that of other State organs. A decision of a court may reject or adjust a prior act by the executive or, more rarely, the legislature. The court may also take a position that differs from the arguments advanced by the State in the case concerned. The question then may arise whether it is the act of the executive or the act of the court that is relevant to the formation of custom – either in terms of State practice or opinio juris. 30 The International Law Association has taken a position with respect to this matter: "In the ultimate analysis, since it is the executive which has primary responsibility for the conduct of foreign relations, that organ's formal position ought usually to be accorded more weight than conflicting positions of the ... national courts." 31 It would appear, though, that this conclusion will not apply in all circumstances. If, for instance, the executive takes the view that a State official of a foreign country enjoys immunity and the highest courts deny such immunity, it would appear that the judicial practice qualifies as the final legal position of that State.

The Tribunal has not expressly addressed these issues, and its analysis does not make clear whether, in the national case law that it has cited, courts have taken a different position than those of other organs. This may be explained by the fact that most national case law used by the Tribunal has involved criminal cases without a foreign element, in which no prior act of the government was at issue.

A critical question in the assessment of the use of national case law in the identification of customary law is whether the selection of the case law that

28. Hersch Lauterpacht, The Development of International Law by the International Court, 1996, p. 20 (noting that decisions of national courts within any particular state, when endowed with sufficient uniformity and authority, may be regarded as expressing the opinio juris of that state).
29. Prosecutor v. Erdemović supra note 8, para. 50.
30. This also raises the issue of internal consistency; see International Law Association 2000, pp. 733-734.
31. Ibid., p. 729.
32. Prosecutor v. T...
Donald and Judge ess is a defence to our view, under­ on the question of sions on this ques­ aw, we find quite because they "feel­ at an interna­ of analysing the for­ take a position that court may reject or gislature. The court ts advanced by the e whether it is the to the formation of "The International matter: "In the ulti­ responsibility for the ought usually to be national courts."
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has been used by the Tribunal conforms to the requirements of consistency and generality. In some cases the choice of case law strikes the reader as arbitrary and haphazard. In the Tadić case, the Tribunal discussed whether individuals can be responsible for breaches of common article 3 of the 1949 Geneva Conventions. The Appeals Chamber argued that, despite the fact that article 3 itself is silent on the matter, under certain conditions breaches of common article 3 do entail individual criminal responsibility. As far as judicial practice is concerned, the Appeals Chamber supported this conclusion with reference to prosecutions before Nigerian courts. No other judicial practice was considered. Was there none or was it simply not known to the Tribunal?

In the absence of access to world-wide sources on national case law, it is not possible to assess how representative the case law is that has been used by the Tribunal. However, given the amount of armed conflicts, and the number of (potential) transgressions of international humanitarian law, it is implausible that no other evidence of prosecution or, more likely, non-prosecution is available. While the difficulties in obtaining world-wide case law on the matter must be recognised, it would strengthen the persuasiveness of judgments if, in a case like Tadić, the Tribunal would at least make clear what case law it has considered and why it only refers to prosecutions before one or a few courts.

As in the case of treaty interpretation, any shortcomings in the number of available cases may be compensated by other sources. In most cases, national case law is only one source used to determine the content of customary international law. Indeed, in the Tadić case, the Appeals Chamber referred, in addition to the reference to the Nigerian prosecutions, to "many elements of international practice [which] show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts", including national military manuals, and national legislation (including the law of the former Yugoslavia adopted by Bosnia and Herzegovina after its independence). As long as alternative sources are available, the lack of representative case law need not be an insurmountable hurdle.

However, in other cases, the determination of a point of customary law has hinged entirely on a review of limited national case law. A noteworthy example is the discussion by the Appeals Chamber in Tadić as to whether crimes against humanity can be committed for purely private reasons. The Appeals Chamber examined this as a matter of customary international law exclusively by examining case law. It cited and discussed three decisions by the Supreme Court for the British Zone, several decisions of German courts, some decisions of United States military tribunals under Control Council No. 10, and one case of the Canadian Supreme Court, while it considered the decision in

32. Prosecutor v. Tadić, supra note 9, para. 130.
33. Ibid., para. 130.
34. Ibid., paras. 131-132.
the *Eichmann* case to be irrelevant. After briefly considering the "spirit of international criminal law", it then concluded that "the relevant case law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, 'purely personal motives' do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated".

It must be acknowledged that case law on crimes against humanity is scarce. However, it seems doubtful whether cases from so few countries can suffice to constitute uniform and sufficiently widespread State practice. Was other practice considered irrelevant? Or did the Tribunal find that on this point no other judicial practice existed? Without it being necessary for the Tribunal to conduct a truly world-wide assessment of the case law, it would have enhanced the weight of the analysis and the persuasiveness of the conclusion if the Tribunal had indicated why it believed that practice from so few countries and so few courts could constitute the basis for the identification of a rule of customary international law. The absence of such analysis might lead one to conclude that the Tribunal did not use case law as an element in the formation of customary law, but rather as persuasive authority to adopt a particular interpretation that in itself was based on other considerations.

**Decisions of National Courts as Elements in the Identification of General Principles**

A third way in which the Tribunal has construed the international legal relevance of national case law is in identifying general principles of law. These are formed on the basis of principles that are common to all or most legal systems. The Tribunal has made extensive use of this source of international law.

In *Kupreskić*, the Trial Chamber stated that

> any time the Statute does not regulate a specific matter, and the Report of the Secretary-General does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice.

It must be assumed international law, by having recourse

In the *Furundžija* case, the Tribunal decided against relying on additional evidence of customary criminal law or to the standard of reliance on the practice of the Courts therefor based on the cases referred to by the Chamber in the *Ku1*.

The Tribunal has necessarily accepted the principle that principles of law generally as well as by national courts are not to be accepted, for instance, of common purpose

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37. See generally A. Cassese, "The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the ascertainment of general principles of law recognized by the community of nations", in Sienho Yee & Wang Tieya, eds. *International Law in the Post-Cold War World. Essays in Memory of Li Haopei*, 2001, p. 43.
dering the "spirit of relevant case law and humanity make it do not acquire any humanity has been st humanity is scarce. Countries can suffice to rice. Was other practice this point no other the Tribunal to consider have enhanced the conclusion if the so few countries codification of a rule of is might lead one to ement in the formato to adopt a particular tions.

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It must be assumed that the drafts persons intended the Statute to be based on international law, with the consequence that any possible lacune must be filled by having recourse to that body of law.38

In the Furundžija case, the Tribunal noted, in discussing the definition of rape under international law, that no elements other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity (Bestimmtheitgrundsatz, also referred to by the maxim "nullum crimen sine lege stricte"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.39

The Tribunal has indicated that only with due caution will it apply concepts from national law in the international legal order.40 For instance, in the Kupreškić case, the Appeals Chamber relied on general principles to determine the standard of review of factual findings of the Trial Chamber. However, it decided against relying on national concepts in determining under what tests additional evidence reveals an error of fact of such magnitude as to occasion a miscarriage of justice.41

Where it is decided to import principles of national law, it has been generally accepted that practice of national courts can be relevant in the identification of principles of national law. For instance, the PCIJ referred to the "principle generally accepted in the jurisprudence in international arbitration as well as by national courts" to the effect that a party is estopped from relying on its own non-fulfilment of an international obligation.42 The ICTY has accepted, for instance, that national case law can serve to support the notion of common purpose complicity in international criminal law.43

40. Already recognized by the ICJ; see the separate opinion of Judge McNair in International Status of South West Africa Case, Advisory Opinion, [1950] ICJ Reports 148-149; A. Cassese, supra note 37, p. 46.
41. Prosecutor v. Kupreškić, supra note 8, para. 75. For other cases, see A. Cassese, supra note 37, pp. 50 ff.
A particularly elaborate discussion of national case law as evidence of general principles can be found in the decision of the Appeals Chamber in the Kupreskic case. It discussed the standard that applies with respect to the reconsideration of factual findings by the Trial Chamber. It proceeded to examine the degree of caution that is required by a court before proceeding to convict an accused person based upon eyewitness identification made under difficult circumstances. That part of the analysis rests entirely on analysis of domestic criminal law systems and is included in the judgment under the heading "General Principles". The Appeals Chamber cited cases from common law countries: the United Kingdom, Canada, Australia, Malaya, and the United States. It then noted that most civil law countries allow judges considerable scope in assessing the evidence before them, but that in a number of cases courts have emphasized that trial judges must exercise great caution in evaluating eyewitness identification, in particular when the identification of the accused rests on the credibility of a single witness. The Appeals Chamber cited cases from Germany, Austria and Sweden. As to the standard it would apply when considering challenges against factual findings, the Appeals Chamber concluded that where it is “satisfied that the Trial Chamber has returned a conviction on the basis of evidence that could not have been accepted by any reasonable tribunal or where the evaluation of the evidence was ‘wholly erroneous’ it will overturn the conviction since, under such circumstances, no reasonable tribunal of fact could be satisfied beyond reasonable doubt that the accused had participated in the criminal conduct”.

The Tribunal has made clear that the threshold for identification of general principles of law is high, in the sense that it needs to be shown that the principle is part of most, if not all, national legal systems. In the Tadić case, the Appeals Chamber noted:

It should be emphasized that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognized by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case.

44. Prosecutor v. Kupreskic, supra note 8, para. 34.
45. Ibid., para. 38.
46. Ibid., para. 41.
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Also in several other cases the Tribunal took a hard look and concluded that,

in view of differences between legal systems, no general principle could be

i dentified.48

Sometimes, though, the analysis is too thin. In Erdemović, the Trial

Chamber stated, in discussing the defence of duress, that it relied, inter

alia, on general principles of law as expressed in “numerous national laws

and case law”.49 However, the supporting footnote referred exclusively to

French legislation and case law.50

In the Kupreskić case, the Trial Chamber set out to analyse the problem of

cumulative offences. It noted:

Certain criteria for deciding whether there has been a violation of one or more

provisions consistently emerge from national legislation and the case law of

ational courts and international human rights bodies. In other words, it is pos-

sible to deduce from a survey of national law and jurisprudence some principles

of criminal law common to the major legal systems of the world. These prin-

iples have to some extent been restated by a number of international courts.51

However, the analysis appears unbalanced. The Trial Chamber immediately

adopted the test of United States courts (the so-called Blockburger test) as the

guiding principle,52 and considered principles from other jurisdictions as qua-

liﬁcations or exceptions. Why the Blockburger test is adopted up front as the

leading test is not clear. While it may indeed best represent principles drawn

from all major legal systems, the text of the Kupreskić judgment does not

make this clear. As in the case of customary law, the persuasiveness of conclu-

sions based on a relatively narrow set of data would be much enhanced if the

Tribunal would explain why it proceeds in the way it does and why, in this case,

the Blockburger test was considered more authoritative than tests from other

legal systems. In the absence thereof, the conclusion is open to the traditional

critique of resort to general principles that there has been insufﬁcient investi-

ation of the legal systems of the members of the international community.53

The conclusion does not only rest on a neutral analysis of case law or other

national practice, but also on other, more substantive considerations.54

48. Cases mentioned in A. Cassese, supra note 37, p. 49.
49. Prosecutor v. Erdemović, Sentencing Judgment, Case No. IT-96-22-S, 29 November

1996, para. 19.
50. Supra note 48. The case is also noted in A. Cassese, supra note 37, p. 47.
52. Ibid., para. 681.
53. A. Cassese, supra note 37, p. 45.
54. Cf. Prosecutor v. Delalić et al., supra note 15, para. 412, where the rule is put in con-

text of "reasons of fairness to the accused and the consideration that only distinct

crimes may justify multiple convictions".
In some cases, the weight attached to decisions of national courts appears to go beyond their role in the interpretation of treaties or the identification or interpretation of rules of customary law or general principles of law. In his separate and dissenting opinion in the *Erdemović* case, on the question whether duress can be a complete defence to the massacre of innocent civilians, Judge Li determined that there was no applicable conventional or customary international law, and that national laws and practices of various States were so divergent that no general principle of law recognised by civilised nations could be deduced from them. For that reason, "recourse is to be had to the decisions of Military Tribunals, both international and national, which apply international law." After noting that the test put forward by the International Military Tribunal at Nuremberg was never applied, and moreover was vague and had been differently interpreted by academic writers, Judge Li then noted that the decisions of the United States military courts at Nuremberg set up under Control Council Law No. 10 and those of military tribunals and courts set up by other allied countries for the same purpose must be consulted. He considered three judgments of the United States military courts, one of a Canadian military court and two of British military courts. From a study of these decisions, Judge Li identified a number of principles to indicate when duress can be a complete defence. He considered that these principles were "reasonable and sound" and should be applied by the Tribunal.

It thus appears that Judge Li took the position that legal norms might be inferred from case law, including national case law, and that the criteria for doing so were distinct from the identification of rules of customary law or general principles of law. In his analysis of the opinion of Judge Li, Bing Bing Jia noted that it can be said "with certainty" that the legal rules derived from decisions of national military tribunals "are precedents unless a treaty or a principle of law has emerged ... stating otherwise".

This conclusion can be put in perspective by considering the sources of general international law. Article 38(1)(d) of the Statute of the International Court of Justice provides that "decisions of Military Tribunals, both international and national, which apply international law" are to be considered.ughty to decide whether a treaty or a principle of law has emerged ...

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Footnotes:
55. Separate and Dissenting Opinion Judge Li in *Prosecutor v. Erdemović*, supra note 8, paras. 2–3.
60. Similarly: Bing Bing Jia, "Judicial decisions as a source of international law and the defence of duress in murder or other cases arising from armed conflict", in Sienho Yee & Wang Tieya, supra note 37, p. 77, at p. 78.
DEPENDENT

The recognition of the identification principles of law. In this sense, on the question of innocent civilians, the ICJ and the International Criminal Court have been called for. However, the influence and authority of these courts are often limited by civilised nations. The ICJ has been said to be the court of last resort, but its decisions are not binding on States. The ICJ has been described as a court of last resort, but its decisions are not binding on States.

To international courts, it is now generally accepted that the rigid distinction between sources in paragraphs 38(i)(b) and 38(i)(c), on the one hand, and subsidiary means in paragraph 38(i)(d) is overstated. In the interests of certainty and stability, the ICJ as well as other international courts tend to follow what in previous cases they have considered good law, unless there are cogent reasons to do otherwise. More generally, the distinctions between the application, interpretation and development of law are thin. In some respects, application often will involve interpretation and in that respect development.

It is not immediately obvious that this also holds for decisions of national courts. While there are good reasons why international courts should in principle follow their own previous judgments, these reasons are not applicable to the weight international courts give to previous decisions of national courts. Similarly, although it can be accepted that international courts may develop the law, in the course of application and interpretation, it would not fit the decentralised and horizontal international legal system— in which one State cannot create law binding on another State— to accept that decisions of individual national courts can in themselves develop international law. Also, in other respects the differences between the position of international and national courts appears or the identification principles of law. In this sense, on the question of innocent civilians, the ICJ and the International Criminal Court have been called for. However, the influence and authority of these courts are often limited by civilised nations. The ICJ has been said to be the court of last resort, but its decisions are not binding on States. The ICJ has been described as a court of last resort, but its decisions are not binding on States.

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national courts in the international legal system are significant. The fact that national courts generally will be tied to the national legal system have an outlook that is at least partly national rather than international and generally lack expertise in applying international law makes it implausible to consider precedents of national courts in the same way as decisions of international courts.

Nonetheless, decisions of national courts can be considered as an impartial expression of what these courts believe to be the state of the law. In that respect they may be of practical importance of determining what is the correct rule of international law. National courts have a widespread practice of reference to decisions of courts of other States. This is not because of an interest in other legal systems, but because courts may consider it relevant to "to consult other experience regarding points of detail and applications of international law". In particular when there is a certain convergence between decisions of national courts, decisions may then obtain a certain authority as to the determination of the interpretation of the law that need not be explained in terms of customary law or general principles of law. It appears that it is in this manner that Judge Li considered the weight of decisions of national courts.

Also, practice of the ICTY suggests that in some cases decisions of national courts were indeed considered as authoritative expressions of the state of the law. As noted above, the interpretation or identification of particular rules of international law, whether as treaty law, customary law or general principles, often hinges largely on a few decisions that cannot be explained as either "subsequent practice establishing the agreement between the parties" as evidence of customary law or as indicators of all major legal systems. The few national cases on which the analysis of the Appeals Chamber in Tadić rests, pertaining to whether crimes against humanity can be committed for purely private reasons, cannot possibly provide a basis for customary law. Rather, they are used as independent means to determine the content of a particular rule of international law.

In the Krstić case, the ICTY considered the weight of decisions of national courts. It noted that:

In terms of military Lothar Rendulic v Regulations, which "unless such destructions of war". Rendulic raised the defence by what appeared at Nuremberg con judgment as to the were still justified hands at the time. convicted by a British civilian inhabitant was warranted by the enemy of man evacuation of the the judge advocate this destruction be really the carrying which the accused sions and now was any question of mi

In the Tadić case, it have been connecte Trial Chamber stat are the Nuremberg that emerged from military cour and France, and pt Elsewhere in the s

68. Oppenheim's International Law, supra note 17, p. 42; G. Schwarzenberger, supra note 44, p. 30.
73. G. Schwarzenberger, supra note 42, p. 31.
74. Also Prosecutor v. Krstić, supra note 11, par 514: The Chamber noted it was "fully satisfied that the wounds and trauma suffered by those few individuals who managed to survive the mass executions do constitute serious bodily and mental harm within the meaning of Article 4 of the Statute". As the only support, it referred to the Eichmann District Court Judgment, para. 199, that stated that "there is no doubt that ca
76. Prosecutor v. Tadić, supra note 75, p. 688-6
The fact that, if the system, as have an international and generally plausible to consider the general principle of international law. In that context, what is the correct practice of referring to decisions of international courts is considered as an impairment of the law. In that regard, what is the correct practice of referring to decisions of international law is not explained in terms that it is in this context. National courts, decisions of national courts, is the state of the particular rules of or general principles, known as either "sub-parties" as evidence. The few national cases, rested for purely private law. Rather, they are a particular rule of

In the Tadić case, the Tribunal interpreted the term "military reasons", contained in the fourth Geneva Convention and Additional Protocol II, as part of its analysis in what circumstances evacuations of the population are allowed. It noted that:

In terms of military necessity, two World War II cases are relevant. General Lothar Rendulic was accused of violating Article 23(g) of the 1907 Hague Regulations, which prohibits the destruction or seizure of the enemy's property, "unless such destruction or seizure [is] imperatively demanded by the necessities of war". Retreating forces under his command engaged in scorched earth tactics, destroying all facilities that they thought might aid the opposing army. In addition, Rendulic ordered the evacuation of civilians in the area. Rendulic raised the defence of "military necessity", since his troops were being pursued by what appeared to be overwhelming Soviet forces. The U.S. Military Tribunal at Nuremberg concluded that, even though Rendulic may have erred in his judgment as to the military necessity for evacuating the civilians, his decisions were still justified by "urgent military necessity" based on the information in his hands at the time. By contrast, Field Marshal Erich von Manstein was convicted by a British military tribunal of "the mass deportation and evacuation of civilian inhabitants" of the Ukraine. Von Manstein argued that the evacuation was warranted by the military necessity of preventing espionage and depriving the enemy of manpower. This was not found to be a legitimate reason for the evacuation of the population or the destruction of their property. In addition, the judge advocate noted that the Prosecution's evidence showed that "far from this destruction being the result of imperative necessities of the moment, it was really the carrying out of a policy planned a considerable time before, a policy which the accused had in fact been prepared to carry out on two previous occasions and now was carrying out in its entirety and carrying out irrespective of any question of military necessity".

In the Tadić case, the Trial Chamber considered how closely an accused must have been connected to a crime before he or she can be held responsible. The Trial Chamber stated that "the most relevant sources for such a determination are the Nuremberg war crimes trials" and proceeded to identify patterns that emerged from the relevant cases. In particular, it considered cases from military courts of the United Kingdom, the United States, Germany and France, and proceeded to derive general principles from this practice. Elsewhere in the same judgment, the Trial Chamber had to determine the no doubt that causing serious bodily harm to Jews was a direct and unavoidable result of the activities which were carried out with the intention of exterminating those Jews who remained alive.

75. Ibid., para. 526.
76. Prosecutor v. Tadić, supra note 24, para. 674.
77. Ibid., para. 688-690.
definition of persecution under customary international law. Again it relied heavily on national case law:

This is also the approach followed by the Nürnberg Tribunal. Indictment Number 1 contained charges of both war crimes and crimes against humanity and included the statement that "[t]he prosecution will rely upon the facts pleaded under Count Three [war crimes] as also constituting Crimes Against Humanity". Subsequently, in its ruling on individual defendants, the Nürnberg Tribunal grouped war crimes and crimes against humanity together. Similar statements occur in other cases tried on the basis of Control Council Law No. 10, for example, the Trial of Otto Ohlendorf and Others ("Einsatzgruppen case") and the Pohl case. In the Pohl case the court found that for his actions as administrative head of the concentration camps, Pohl was guilty of direct participation in a war crime and a crime against humanity, and that Heinz Karl Fanslau, Hans Loerner, and Erwin Tschentscher had committed war crimes and crimes against humanity because of their association with the slavery and slave labour programme operating in the concentration camps. National cases also support this finding, such as Quinn v. Robinson, both the District Court and the Supreme Court decisions in Eichmann, and the Barbie case. As such, acts which are enumerated elsewhere in the Statute may also entail additional culpability if they meet the requirements of persecution.78

This reasoning cannot easily be explained in terms of customary law. The Tribunal did not even purport to make an attempt to determine world-wide practice and opinio juris. Rather, national case law was used as authority for the interpretation of rules of international law. The national cases were not used as exclusive and independent sources. Rather, use was made of the experience of national courts in the application and interpretation of the law to determine the meaning of the relevant provisions.

In that respect, no sharp distinction between national and international cases need be drawn, as illustrated by the Jelisić case:

From this point of view, genocide is closely related to the crime of persecution, one of the forms of crimes against humanity set forth in Article 5 of the Statute. The analyses of the Appeals Chamber and the Trial Chamber in the Tadić case point out that the perpetrator of a crime of persecution, which covers bodily harm including murder, also chooses his victims because they belong to a specific human group. As previously recognised by an Israeli District Court in the Eichmann case and the Criminal Tribunal for Rwanda in the Kayishema case, a crime characterised as genocide constitutes, of itself, crimes against humanity within the meaning of persecution.79

78. Ibid., para. 701.

Here decisions of national legal matter objectively, the relative national case law significantly to case law in times, appear to be in the Tribunal can, if a resort to national cases of international law, as the Tribunal does in this case, is resorted to as independent support a particular case law) and commonalities in instances the number Tribunal strikes the extent guarantee that the point is illustrated in the Congo-Belgian of subsequent practice (from a relatively small extent). The Congo-Belgian chose not to rely on were convicted. Con
here decisions of national and international courts mutually influence each other without having formal binding authority. 366

**CONCLUSIONS**

National case law significantly influences the development and interpretation of international law. Now that more and more national courts consider international legal matters, and seek to interpret and determine international law objectively, the relative influence of such case law can be expected to increase. This overview shows that case law may in a variety of ways influence the interpretation and identification of rules of international law. It can serve as elements in the identification of subsequent agreement as to the interpretation of treaties, in the identification of either state practice or *opinio juris* required for customary law, as building blocks for the identification of general principles, or as more independent authority for the construction of rules of international law. The Tribunal is free to use the practice of courts in any of these ways and, indeed, to use one and the same case in different ways.

In particular because of the use of national case law as independent authority for the determination and interpretation of international law, the reference to case law in terms of the formal sources of international law can, at times, appear to be routine with limited legal effect. After all, in many cases the Tribunal can, if analysis of the formal sources does not yield anything, still resort to national case law as more autonomous authority. The formal sources of international law do not provide a full account of the methods of judicial determination and interpretation of the law as evidenced in the practice of the Tribunal.

Is the selection of the case law that has been used by the Tribunal truly representative? The Tribunal has relied heavily on a limited range of cases from a relatively small number of States. The requirements for identification of subsequent practice (for treaty interpretation), State practice (for customary law) and commonality between legal systems (for general principles) to some extent guarantee that this is representative. However, as noted above, in several instances the number of cases is limited and the choice of case law by the Tribunal strikes the reader as arbitrary. That problem increases when case law is resorted to as independent persuasive authority and only one or a few cases support a particular interpretation. How are those cases selected and why are they preferred over cases that may point in a different (or the same) direction? The point is illustrated by the discussion on the relevance of national case law in the Congo-Belgium case before the ICJ. Belgium relied on a few cases, but chose not to rely on a case from a Belgrade court in which Western politicians were convicted. Congo noted:

The only case which comes close to the legal position adopted by Belgium is one before a Belgrade court as a result of the conflict in Kosovo, one in which the presidents, prime ministers, foreign ministers and chiefs of staff of the member countries of NATO, together with the Secretary-General of the Organization, were sentenced in their absence for the crime of aggression and war crimes. It is understandable that Belgium was at pains not to mention this precedent, a surprising one to say the least.\textsuperscript{81}

It may be that the selection of cases is based on the intrinsic merit of the decisions or the quality of the courts at issue. But in the absence of explicit reasoning on this point, it is difficult to assess the quality of the judgments of the Tribunal on this point. It would increase their persuasiveness if the Tribunal would better indicate why it chooses the cases that it bases its analysis upon and why such cases provide the basis for the determination and interpretation of rules of international law.

Access to national case law is too incomplete and unbalanced to make proper assessments of the relevant cases and the legal weight thereof. Whatever the merits of the relatively few cases on which the Tribunal relies, they may not provide the basis for a balanced development and interpretation of the law. This points to the importance of an improved access to national case law. The International Law Reports, still the most notable source, contain too few cases to cover world-wide practice in the various fields of international law. The cases reported in the Yearbook of International Humanitarian Law have improved the situation, but also cover only part of the cases relevant to the Tribunal and the International Criminal Court. More work therefore needs to be done to disclose practice across the world, to provide the conditions for a balanced assessment of the relevance of national cases and thereby promote a more balanced development of international law that takes into account the positions of all, or in any case most, States throughout the world.

\textsuperscript{81} Oral pleadings of Congo in Congo-Belgium, supra note 2. From a legal point of view, and unless the intrinsic merit of decisions requires otherwise, in principle no distinction between cases may be made based on political colour. This was rightly noted by Antonio Cassese in his separate and dissenting opinion in Prosecutor v. Erdenovic, supra note 8, para. 39 (noting that the German case law reviewed by him shows beyond any doubt that a number of courts did indeed admit duress as a defence to war crimes and crimes against humanity whose underlying offence was the killing, or the participation in the killing, of innocent persons but that “taking account of the legal significance of this case law does not entail that one should be blind to the flaws of such case law from an historical viewpoint; in other words, whilst one is warranted in taking into account the legal weight of those cases, one may just as legitimately entertain serious misgivings about the veracity of the factual presuppositions or underpinning of most of those cases”). The political basis for selection of case law is also discussed by K. Knop, ibid.
International Criminal Law
Developments in the Case Law
of the ICTY

Gideon Boas & William A. Schabas, editors

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At the dawn of the International Criminal Court, the rich experience of the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) will prove to be the primary source of legal authorities for many years. The creation of the ICTY in 1993 heralded a new-found willingness of the international community to bring to book perpetrators of war crimes and gross or systematic violations of human rights. Written by academics and practitioners, and notably many ‘insiders’ at the ICTY, this volume focuses particularly on the international and criminal law developments that have taken place in the practice and procedure of the Tribunal. Throughout are threads concerning the development and application of international criminal law not only by the ICTY, but also by the ad hoc International Criminal Tribunal for Rwanda and the new International Criminal Court.

William A Schabas holds the professorship in human rights law at the National University of Ireland, Galway, where he is also director of the Irish Centre for Human Rights. Recognised as an authority in the field of international criminal law (Genocide in International Law, 2000; Introduction to the International Criminal Court, 2000), he is editor in chief of Criminal Law Forum. Professor Schabas is also a member of the Sierra Leone Truth and Reconciliation Commission.

Gideon Boas is the Legal Officer for the historical Milošević trial before Trial Chamber III of the ICTY and a member of the Secretariat of the ICTY Rules Committee responsible for dealing with proposals for the amendment and creation of the ICTY Rules of Procedure and Evidence. He has worked in the area of international humanitarian law for the Red Cross, including participating in the ICRC global study into customary international humanitarian law. He is a legal practitioner from Australia.
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