

The Use of Precedent as Subsidiary Means and Sources of International Criminal Law

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Abstract

This article examines the use of precedent in the judgments of international criminal courts and tribunals. It finds that although such courts and tribunals have resorted to external judicial decisions as subsidiary means for the determination of rules of law, in some cases, their use of external judicial decisions has been equivocal. Moreover, in two notable cases, these courts and tribunals have unequivocally relied on precedent as a direct source of law. In this context, the article offers some reflections on whether courts may serve as sources for the creation of rules of law. It finds that there does not seem to be any legal basis for the use of external judicial decisions as direct sources of rules of international law. There is, moreover, a danger that regarding external judicial decisions as direct sources may encourage a lax, uncritical reliance on such decisions.

Keywords

international criminal law; sources of law; judicial precedent; subsidiary means; development of the law; judicial creativity

1. Introduction

In his study of the influence of case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and for Rwanda (ICTR) on the International Criminal Court (ICC), Nerlich states that '[t]raditionally, international lawyers have been reluctant to afford decisions of international

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tribunals the character of a source of law in its own right.¹ Nevertheless, in examining the practice of the ICTY, Nollkaemper finds that international criminal judges have, in some cases, endowed judicial decisions from other courts and tribunals (external judicial decisions)² ‘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.’³ This article focuses attention on the manner in which international criminal courts and tribunals (courts and tribunals) have used external judicial decisions and, in particular, whether these have been used as subsidiary means or as direct sources of law. It is also concerned with the question of whether courts may serve as direct sources of rules of international law.

The article is based on a qualitative analysis of some of the final judgments of (1) the ICTY; (2) the ICTR; (3) the Special Court for Sierra Leone (SCSL); (4) the Extraordinary Chambers in the Courts of Cambodia (ECCC); and (5) the ICC. It should be highlighted that the article is exclusively concerned with the use of *external* judicial decisions and does not cover the use of *internal* jurisprudence within the same court.

The article is organized into four parts. The first part examines the use of external judicial decisions as means for the determination of rules of law. The second part examines cases in which the use of external judicial decisions by the courts and tribunals could be characterized as equivocal. The third part discusses two notable cases in which external judicial decisions were used as direct sources of rules of law. And the fourth part offers some reflections on whether courts may serve as sources for the creation of rules of law, in particular, given their role in developing the law. Finally, the article concludes that there does not seem to be any legal basis for the use of external judicial decisions as direct sources of rules of international law. There is, moreover, a danger that regarding external judicial decisions as direct sources may encourage a lax, uncritical reliance on such decisions.

¹ Volker Nerlich, ‘The Status of ICTY and ICTR Precedent in Proceedings Before the ICC’, in Carsten Stahn and Goran Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 315.

² This article makes use of the unimaginative phrase ‘external judicial decisions’ in order to avoid the baggage associated with the notion of ‘precedent’. In this context, see Nathan Miller, ‘An International Jurisprudence? The Operation of “Precedent” Across International Tribunals’ (2002) 15 *IJIL* 483, 489.

³ The author was writing specifically with respect to national judicial decisions. See Andre Nollkaemper, ‘Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY’, in Gideon Boas and William Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff 2003) 277.

2. External Judicial Decisions as Means

The use of external judicial decisions may be characterised as ‘means’ for the determination of rules of law where a court or tribunal ascertains that their legal notions or findings would have been derived from one of the recognized sources of law. This language is based on Article 38(1)(d) of the Statute of the International Court of Justice (ICJ), which states that the ICJ shall apply judicial decisions ‘as subsidiary *means* for the determination of rules of law.’ Although, technically, this Article only constitutes a direction to the ICJ itself,⁴ it is generally considered to reflect customary international law.⁵ Even where new courts and tribunals have incorporated their own provisions on applicable law, the legal basis for their reliance on external judicial decisions has continued to rest, largely, on the customary law rule corresponding to Article 38(1)(d) of the ICJ Statute. Therefore, for instance, although sub-paragraph (2) of Article 21 of the Rome Statute of the ICC provides that the ICC ‘may apply principles and rules of law as interpreted in its previous decisions,’ this sub-paragraph only relates to the ICC’s own previous decisions and not to the Court’s use of external judicial decisions. Similarly, Article 20(3) of the SCSL Statute, which states that ‘[t]he judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda,’ only appears to reinforce the customary law rule that external judicial decisions may be used as subsidiary means for the determination of rules of law. Therefore, as noted, the legal basis for the use of external judicial decisions by these courts and tribunals continues to rest on customary international law as reflected in Article 38(1)(d) of the ICJ Statute.⁶

One of the prevalent views with respect to Article 38(1) of the ICJ Statute is that it establishes two *distinct* lists: sub-paragraphs (a) to (c) provide the formal sources of international law (international conventions, international customary law and general principles of law); and sub-paragraph (d)

⁴ Gerald Fitzmaurice, ‘Some Problems Regarding the Formal Sources of International Law’ in Martti Koskeniemi (ed.), *Sources of International Law* (Ashgate 2000) 173.

⁵ Thus, for instance, Cassese makes reference to the customary law rule ‘corresponding’ to Article 38(1) of the ICJ Statute; see Antonio Cassese, ‘The Influence of the European Court of Human Rights on International Criminal Tribunals - Some Methodological Remarks’, in Morten Bergsmo (ed.) *Human Rights and Criminal Justice For the Downtrodden: Essays in Honour of Asbjorn Eide* (Martinus Nijhoff 2003) 19.

⁶ In this context, the view is taken that the cross-reference to Article 59 of the ICJ Statute (‘[s]ubject to the provisions of Article 59’) binds only the ICJ and does not take on wider application with respect to other courts and tribunals.

specifies the subsidiary means by which rules of law may be determined. For instance, the editors of *Archbold on International Criminal Courts* state that, under Article 38(1)(d) of the ICJ Statute, judicial decisions:

(...) do not constitute ‘sources’ of law. Rather such decisions (...) may be referred to in order to confirm or elaborate the content, application or interpretation of international conventions, international customary law or general principles of law. This is borne out by the language of paragraph (d), which does not seek to create a free-standing source of law, but rather identifies a ‘subsidiary means’ for the interpretation of rules.⁷

From the analysis carried out by this article, and with two notable exceptions, it would appear that these courts and tribunals have generally approached external judicial decisions as means. The use of external judicial decisions as means may generally entail a two-tiered procedure: (1) a court or tribunal would satisfy itself that the legal notions or findings of a given external judicial decision are grounded on a rule of law derived from one of the recognized sources; and (2) the court or tribunal would use such legal notions or findings for guidance in the verification of the existence, state or proper interpretation of the same, or similar, rule of law. The following example seeks to illustrate this two-tiered procedure.

In *Kupreskic et al.*, in considering the interpretation of other inhumane acts under Article 5(i) of the ICTY Statute, the Trial Chamber relied primarily on a first-hand interpretation of the rules of law from which this provision was drawn, namely Article 6(c) of the London Agreement and Article II(1)(c) of Control Council Law No. 10.⁸ However, in this case, the Chamber also supplemented its first-hand interpretation by recourse to the legal notions or findings of external judicial decisions, in particular, the findings of the District Court of Tel Aviv in the *Tarneq* case.⁹ In this respect, the Trial Chamber broadly followed the two-tiered procedure. Firstly, it satisfied itself that, in *Tarneq*, the definition of ‘other inhumane acts’ laid down in the Israeli Law on Nazi and Nazi Collaborators (Punishment) of 1950 had been drawn from the definition of Article 6(c) of the London Agreement. Secondly, the Trial Chamber used the findings of this case for guidance in its own interpretation of Article 5(i) of the ICTY Statute.¹⁰

⁷ Rodney Dixon and Karim AA Khan, *Archbold on International Criminal Courts: Practice, Procedure and Evidence* (3rd edn, Sweet & Maxwell 2009) 12 (para 2-17).

⁸ *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic, also known as ‘Vlado’* (Judgment) IT-95-16-T (14 January 2000) para 562.

⁹ *Tarneq case*, District Court of Tel Aviv (14 December 1951).

¹⁰ *Kupreskic et al.* Trial Judgment (n 8) para 564.

The courts and tribunals have regularly emphasized that external judicial decisions may not constitute direct sources of law. For instance, in *Kupreskic et al.*, the ICTY Trial Chamber held that ‘clearly, judicial precedent is *not* a distinct source of law in international criminal adjudication.’¹¹ Similarly, the SCSL underscored that the decisions of the ad hoc Tribunals do not constitute direct sources.¹² Moreover, the ECCC Supreme Court Chamber, in *Duch*, held that the principle of legality prevented a Chamber from creating new law¹³ and maintained, with reference to the judicial decisions of the ad hoc Tribunals, that such judicial decisions were ‘not, in and of themselves, primary sources of international law’.¹⁴ In their practice, these courts and tribunals have predominantly made use of external judicial decisions as means for the determination of rules of law, rather than as direct sources of that law.

In a large number of cases, external judicial decisions have played a critical role in providing guidance to these courts and tribunals. For instance, in *Furundzija*, Judge Shahabuddeen noted that in interpreting a principle of law, courts and tribunals may ‘see value in consulting the experience of other judicial bodies with a view to enlightening [themselves] as to how the principle is to be applied in the particular circumstances before [them].’¹⁵ And in *Kupreskic et al.*, the ICTY Trial Chamber acknowledged that it had relied heavily on external judicial decisions.¹⁶ According to Cassese, external judicial decisions may not be used as direct sources, but solely as means ‘in order to establish (i) whether a customary international rule has formed, or (ii) whether a general principle of international law exists, or to determine (iii) whether the interpretation of an international rule adopted by another judge is convincing and, if so, applicable.’¹⁷ In view of the specificities of international criminal law (ICL) and the context of

¹¹ *Kupreskic et al.* Trial Judgment (n 8) para 540. Emphasis added.

¹² *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao* (Judgment) SCSL-04-15-T (2 March 2009) para 295 (*RUF* Trial Judgment). See also Robert Cryer, ‘Neither Here Nor There? The Status of International Criminal Jurisprudence in the International and UK Legal Orders’, in Kaiyan Homi Kaikobad and Michael Bohlander (eds.), *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (Martinus Nijhoff 2009) 188.

¹³ *Kaing Guek Eav alias ‘Duch’* (Appeal Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) para 95.

¹⁴ *ibid* para 97.

¹⁵ *Prosecutor v. Anto Furundzija* (Judgment) IT-95-17/1-A (21 July 2000), para. 258 (Declaration Of Judge Shahabuddeen).

¹⁶ *Kupreskic et al.* Trial Judgment (n 8) para 537.

¹⁷ Cassese (n 5) 20. Emphasis omitted.

international criminal proceedings, he observes that ‘this approach is necessary not only for reasons of legal rigour, but also to satisfy the fundamental requirements of the *principle of fair trial*, especially the obligation, derived from this principle, to respect the rights of the accused.’¹⁸

In the practice of these courts and tribunals, external judicial decisions have generally been used to confirm, or to elaborate the content, application or proper interpretation of rules of international law. In this respect, in *Duch*, the ECCC Supreme Court Chamber underscored that, although the principle of legality prevented these courts and tribunals from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification, this principle did not prohibit such courts and tribunals from relying on external judicial decisions which provided an interpretation or clarification of the law.¹⁹

The next part considers cases in which the reliance of these courts and tribunals on the legal notions or findings of external judicial decisions may be described as equivocal.

3. The Equivocal Use of External Judicial Decisions

As noted above, an examination of the theory and practice of these courts and tribunals suggests that they have predominantly used external judicial decisions as means. In some cases, they have used such decisions as auxiliary means, to supplement their own, first-hand interpretations of a given rule of law (thus, as *subsidiary* means). However, in other cases, these courts and tribunals have relied heavily, indeed, at times, exclusively, on the legal notions or findings of external judicial decisions to reach a particular determination, with little or no apparent effort on their part to conduct a first-hand examination of the rule of law in question. Occasionally, moreover, these courts and tribunals have simply concurred with the conclusions reached by other external judicial decisions, adopting them uncritically and wholesale, without following the two-tiered procedure described above. As a consequence, their findings would be heavily reliant on the external judicial decisions and, from a reading of their judgments, it would be difficult to decipher whether they would have regarded them merely as subsidiary means or as direct sources of the rules in question. The following examples are meant to highlight this point.

¹⁸ *ibid* 21.

¹⁹ *Duch* Appeal Judgment (n 13) para 95.

For instance, in the *CDF* case, in clarifying the meaning of the terms ‘widespread’ and ‘systematic’, in the context of crimes against humanity under Article 2 of the SCSL Statute, the SCSL Trial Chamber relied, almost exclusively, on the findings of the ICTY.²⁰ The SCSL Trial Chamber held:

In the Chamber’s view, the requirement that the attack must be either widespread or systematic is disjunctive and not cumulative.²¹ The Chamber is of the opinion that the term ‘widespread’ refers to the large-scale nature of the attack and the number of victims, while the term ‘systematic’ refers to the organized nature of the acts of violence and the improbability of their random occurrence.²² The Chamber adopts the view that “[p]atterns of crimes - that is the non-accidental repetition of similar criminal conduct on a regular basis - are a common expression of such systematic occurrence”²³ and further subscribes to the interpretation of the ICTY Appeals Chamber in the *Kunarac et al.* case (...) ²⁴

On examining the above extract, it seems as though the SCSL Trial Chamber did not attempt to undertake any first-hand interpretation of the phrase ‘widespread and systematic.’ Rather, it relied almost exclusively on external judicial decisions. Indeed, except for two references to the same internal decision,²⁵ the SCSL Trial Chamber’s analysis and findings were based exclusively on ICTY jurisprudence. Moreover, the two-tiered procedure was not followed in this case. Firstly, the SCSL Trial Chamber did not expressly satisfy itself that the external judicial decisions it relied on were grounded on a rule of law derived from one of the recognized sources. Secondly, rather than using the findings of the ICTY decisions for guidance, as a subsidiary means, the SCSL Trial Chamber appears to have borrowed and relied on them uncritically, in many instances, simply adopting or subscribing to the ICTY’s views.

²⁰ *Prosecutor v. Moinina Fofana and Allieu Kondewa* (Judgment) SCSL-04-14-T (2 August 2007) para 112 (*‘CDF Trial Judgment’*).

²¹ Citing the ICTY decisions of, *inter alia*, (1) *Prosecutor v. Limaj, Bala and Musliu* (Judgment) IT-03-66-T (30 November 2005) para 183; (2) *Prosecutor v. Kunarac, Kovac and Vukovic* (Judgment) IT-96-23 & 23/1-A (12 June 2002) para 97; and (3) *Prosecutor v. Kordic and Cerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 93.

²² Citing the ICTY decisions of, *inter alia*, (1) *Kunarac et al.* Appeal Judgment (n 21) para 94; (2) *Prosecutor v. Blakic* (Judgment) IT-95-14-A (29 July 2004) para 101; and (3) *Limaj et al.* Trial Judgment (n 21) para 183.

²³ Citing the ICTY decisions of, *inter alia*, of (1) *Prosecutor v. Kunarac, Kovac and Vukovic* (Judgment) IT-96-23 & 23/1-A (22 February 2001) para 429; and (2) *Kunarac et al.* Appeal Judgment (n 21) para 94.

²⁴ *CDF Trial Judgment* (n 20) para 112.

²⁵ Namely, *Prosecutor v. Norman, Fofana and Kondewa* (Decision on Motions for Judgment of Acquittal pursuant to Rule 98) SCSL-04-14-T (21 October 2005).

In another example, the ICTY Trial Chamber, in *Čelebići*, relied heavily and equivocally on the case law of the European Court of Human Rights (ECtHR) in fleshing out the elements of ‘exceptional circumstances.’²⁶ In his assessment of this case, Cassese considered that the ECtHR external judicial decisions were, in fact, used as means to assist the ICTY Trial Chamber in its own interpretation of the concept of exceptional circumstances.²⁷ Nevertheless, the author admits that ‘it may be regretted [...] that the Chamber did not point out the legal value and scope of its reference to the case law of the European Court.’²⁸

Similarly, in *Gotovina et al.*, the ICTY Trial Chamber had to consider the elements of plundering and looting of public and private property as an underlying act of persecution.²⁹ The Chamber noted that the Nuremberg Judgment and some other post-WWII cases had established a ‘scale’ test and had only entered convictions for appropriations on a nation-wide scale. However, the Chamber subsequently referred to the *Flick* case,³⁰ wherein the American Military Tribunal had held that the scale of the appropriation was not the critical issue; rather, it was the impact of the appropriation on the victim. The ICTY Trial Chamber then proceeded to adopt this ‘impact’ test from the *Flick* case, while discarding the ‘scale’ test, without providing reasons for its decision. It is not immediately clear, therefore, whether the *Flick* case merely assisted the Trial Chamber in its own interpretation, or whether it was relied on as an independent source of the ‘impact’ test. Indeed, immediately after citing the *Flick* case, the *Gotovina et al.* Trial Chamber went on to state that its findings were ‘[b]ased on the foregoing [...]’³¹

In the examples discussed above, the courts and tribunals did not explain their approaches to the use of external judicial decisions. Even though it would generally appear that these courts and tribunals regarded their use of such decisions to be in conformity with Article 38(1)(d) of the ICJ Statute – for instance, the *Čelebići* Trial Chamber stated that it had relied on ‘the various sources of international law as listed in Article 38 of the

²⁶ *Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as ‘Pavo’, Hazim Delic, Esad Landzo also known as ‘Zenga’* (Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic) IT-96-21-T (25 September 1996) paras 19-31.

²⁷ Cassese (n 5) 32.

²⁸ *ibid* 32-33.

²⁹ See *Prosecutor v. Ante Gotovina, Ivan Čermak, Mladen Markač* (Judgment) IT-06-90-T (15 April 2011) para 1818.

³⁰ *United States v. Friedrich Flick et al.*, American Military Tribunal (22 December 1947), in 6 TWC 1187, 1214-1215.

³¹ *Gotovina et al.* Trial Judgment (n 29) para 1821. Emphasis added.

Statute of the ICJ³² – in practice, their use of external judicial decisions may be described as equivocal.

Such an equivocal approach may, in part, stem from the scarcity of normative guidance on the appropriate use of external judicial decisions.³³ It may also relate, in part, to the backgrounds of the international judges. For instance, Cassese makes the point that judges from common law backgrounds may be more likely to make equivocal use of external judicial decisions.³⁴ Similarly, Bantekas maintains that the vast majority of judges in these courts and tribunals ‘originated from common law backgrounds where precedent is a source of law and they proceeded to apply the same principle in international criminal adjudication, although there is no rule or method to that effect.’³⁵

The next part examines two cases in which external judicial decisions were used as direct sources of a rule of law.

4. External Judicial Decisions as Sources

In the sphere of general international law, a number of authors writing with respect to the judicial decisions of the ICJ have found no difficulty in asserting that such decisions could themselves constitute independent sources of international law.³⁶ However, in light of the specificities of ICL, such an approach to external judicial decisions would be highly problematic, particularly in view of the principle of legality which, *inter alia*, ‘prohibits judges legislating new substantive law.’³⁷ In spite of this principle, there are at least two notable cases, in the sphere of international criminal law, in which external judicial decisions appear to have been used unequivocally as direct sources of rules of law. One case relates to a judgment of the ECCC Supreme Court Chamber and the other to a dissenting opinion

³² *Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as ‘Pavo’, Hazim Delic, Esad Landzo also known as ‘Zenga’* (Judgment) IT-96-21-T (16 November 1998) para 414 (‘Čelebići Trial Judgment’).

³³ For a more detailed discussion of this point, see Aldo Zammit Borda, ‘Precedent in International Criminal Courts and Tribunals,’ (2013) 2 CJICL 287, 288.

³⁴ Cassese (n 5) 21.

³⁵ Ilias Bantekas, ‘Reflections on Some Sources and Methods of International Criminal and Humanitarian Law’ (2006) 6 Int’l Crim L Rev 121, 131-132.

³⁶ See, *inter alia*, Robert Y. Jennings, ‘The Judiciary, International and National, and the Development of International Law’ (1996) 45 ICLQ 1, 3-4; Fitzmaurice (n 4) 172-173; Mohamed Shahabuddeen, *Precedent in the World Court* (CUP 1996) 90.

³⁷ Dixon and Khan (n 7) 1258 (para 17-39).

within the ICTY Appeals Chamber. In both cases, after expressly finding that the recognized sources did not point to any applicable rules of law, the referring courts, or individual judges, nevertheless, proceeded to distil particular rules from certain external judicial decisions. In effect, therefore, those decisions constituted the original and direct sources of those particular rules.

The first case relates to the ECCC Supreme Court Chamber's decision in *Duch*, where the Chamber had to determine the appropriate test for regulating adjudication of a multiplicity of offences for the same conduct (*concursum delictorum*), which was an issue of substantive criminal law.³⁸ In this respect, the Chamber firstly noted that neither the ECCC Law nor its Internal Rules expressly addressed this issue. It moreover proceeded to find:

[T]here is *no* treaty or customary international law specifically addressing *concursum delictorum* for international crimes. (...) [Furthermore] it may *not* be said that a general principle of law exists on concurrence of multiple, distinct offences for the same conduct.³⁹

Therefore, although the ECCC Supreme Court Chamber expressly found that it was not possible to identify any existing conventional or customary international law or general principles of law concerning the substantive issue of *concursum delictorum*, it did not decline to determine the matter. Nor did it resolve the ambiguity to the advantage of the Accused.⁴⁰ On the contrary, the ECCC Supreme Court Chamber proceeded to rely on the ICTY *Čelebići* test,⁴¹ considering that this test 'serves the interests of justice by ensuring that convictions entered against an accused reflect, accurately and in full, the extent of his or her criminal culpability.'⁴² In this case, therefore, the *Čelebići* test appears to have been used as an independent source of substantive law. Indeed, the adoption of this test may have been influenced by considerations of substantive justice rather than strict legality.⁴³ Additionally, the Chamber also considered that 'subsequent to the issuance

³⁸ *Duch* Appeal Judgment (n 13) para 289.

³⁹ *Duch* Appeal Judgment (n 13) para 290.

⁴⁰ In this case, the Chamber acknowledged that by virtue of the test it adopted, the Accused could suffer the 'social stigma of being convicted of additional crimes.' It is thus clear that this test was not the solution which best favoured the Accused. See *Duch* Appeal Judgment (n 13) para 295. See also Dixon and Khan (n 7) 1258 (para 17-39).

⁴¹ *Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka 'Pavo'), Hazim Delic, and Esad Landžo (aka 'Zenga')* (Judgment) IT-96-21-A (20 February 2001) para 412-413.

⁴² *Duch* Appeal Judgment (n 13) para 295.

⁴³ *ibid.*

of the *Čelebići* Appeal Judgement in 2001, Chambers in the ICTY, ICTR, SCSL and ICC have uniformly applied the test.⁴⁴

The second case relates to Judge Li's famous dissent in *Erdemovic*.⁴⁵ Judge Li was considering the question of whether duress could be a complete defence to the massacre of innocent civilians at international law. He expressly found that 'with regard to this question, there is neither applicable conventional nor customary international law for its solution.'⁴⁶ Moreover, he also found that municipal law did not provide for a general principle of law in the sense of Article 38(1)(c) of the Statute of the ICJ.⁴⁷

In the absence, therefore, of applicable conventional and customary international law, as well as general principles of law, Judge Li proceeded to have recourse to the decisions of post-WWII courts and tribunals as independent sources of a particular rule of law.⁴⁸ Nollkaemper notes 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.'⁴⁹

From his examination of these post-WWII decisions, Judge Li came to the conclusion that duress constituted a complete defence, subject, however, to the exception that it would not apply to heinous crimes.⁵⁰ In his analysis of this approach, Jia states that 'it appears that [Judge Li's] conclusion was meant to show that rules of law might be crystallized from case law, but that this crystallisation would be achieved in a manner different from that in which a custom is formed.'⁵¹

In the context of ICL, Jia proceeds to argue for an approach to external judicial decisions based on Judge Li's approach, namely, to use external

⁴⁴ *ibid* para 300.

⁴⁵ *Prosecutor v. Dražen Erdemovic* (Judgment) IT-96-22-A (7 October 1997) para 1 (Separate And Dissenting Opinion Of Judge Li).

⁴⁶ *ibid* para 2.

⁴⁷ *ibid* para 4.

⁴⁸ Relating to the defence of duress. In this respect, Dixon and Khan note that Judge Li 'referred to the decisions of Military Tribunals as a 'source of law' after finding that no general principles of law could be discerned on a particular question'. See Dixon and Khan (n 7) 13 (para 2-18).

⁴⁹ Nollkaemper (n 3) 290.

⁵⁰ *Erdemovic* Appeals Judgment (n 45) para 5 (Separate And Dissenting Opinion Of Judge Li).

⁵¹ 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 and Tieya Wang (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge 2001) 78.

judicial decisions ‘as a source of law.’⁵² It has to be said that Jia does not appear to be arguing for external judicial decisions to constitute a source of law in the technical sense – a formal and binding source of law.⁵³ Nevertheless, Jia’s proposal would appear to be problematic as it may encourage a lax approach to the use of external judicial decisions. According to Jia’s proposal, courts and tribunals would be able to rely heavily on external judicial decisions of other courts and tribunals without critically assessing whether such decisions were, *inter alia*, grounded on antecedent rules of international law. Although Jia concedes that the post-WWII jurisprudence examined by Judge Li must have been based on some antecedent source, according to his proposed approach, whereby external judicial decisions in and of themselves could constitute a source of law, there would be ‘no need’ to retrace such an antecedent source.⁵⁴ As mentioned, this approach would seem to encourage a lax and mechanical attitude to external judicial decisions. In this respect, it is significant that, with the exception of Judge Li, the remaining judges in *Erdemovic*,⁵⁵ ‘all found it possible after reviewing and evaluating relevant post Second World War cases, to discern a general principle of law applicable to the problem at hand, and did not regard the Nuremberg Judgment as a ‘source.’⁵⁶

The next part offers some reflections, in the context of international criminal law, on whether courts may serve as direct sources of such law.

5. Some Reflections on Courts as Sources of Law

Writing in relation to the ICJ, Jennings states that he sees no great difficulty in regarding ICJ precedent as ‘being a source of the law, not merely by analogy but directly.’⁵⁷ However, to hold that judicial decisions may constitute

⁵² *ibid* 94. Emphasis added.

⁵³ Jia underscores that ‘precedents in this field of international law are persuasive authorities, rather than binding decisions. This is clear from the fact that there is no relationship between the military tribunals and modern day international tribunals.’ See *ibid* 95.

⁵⁴ *ibid* 94.

⁵⁵ Namely, President Cassese and Judges McDonald, Stephen and Vohrah.

⁵⁶ Dixon and Khan (n 7) 13 (para 2-18). Moreover, the authors make the point that ‘it is arguable that the Nuremberg Judgment is a source of law by dint of its principles being unanimously adopted by the UN General Assembly: see, Nuremberg Principles: Principle of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (1950), UNGAOR, 5th session, Supp No. 12, UN Doc A/1316 (1950)’; see *ibid*.

⁵⁷ Jennings (n 36) 4.

direct sources of rules of international law would appear to run counter to the approach that '[t]he sources of international law are generally considered to be exhaustively listed in Article 38 of the Statute of the International Court of Justice'⁵⁸ and, in the particular context of ICL, would appear to run counter to the principle of legality.

In accordance with this principle, judicial decisions may only constitute means for the determination of rules of law. The question, however, is how could the law develop through judicial decisions if those decisions were used exclusively as means for its determination? At first blush, there may seem to be an element of circularity. In this respect, Shahabuddeen points out, in relation to the decisions of the ICJ, '[i]f the decisions of the Court cannot make law but can contribute to its development, presumably that development ultimately results in the creation of new law; and, however minute this might be in any one instance, incrementally it acquires mass.'⁵⁹

The apparent contradiction which Shahabuddeen refers to, however, seems to rest on a question of semantics: in particular, what is understood by the creation and development of the law? In the interests of clarity, it may be useful to keep these two, albeit related, concepts distinct. The 'creation' of law is a *legislative* function which, in international law, in the absence of an international legislator or legislature,⁶⁰ is carried out primarily by states through the formal sources of law, namely international conventional and customary law and general principles of law.

In this context, Jennings notes that '[a] court has no purely legislative competence'⁶¹ and, in particular, it should be borne in mind that the principle of legality operates to prevent these courts and tribunals from creating new law.⁶² But saying that courts and tribunals cannot create law is not the same as saying that these courts and tribunals cannot develop the law. In *Duch*, the ECCC Supreme Court Chamber emphasized that nothing prohibited these courts and tribunals 'from interpreting and clarifying the law or from relying on those decisions that do so in other cases.'⁶³ In this

⁵⁸ *Erdemovic* Appeals Judgment (n 45) para 40 (Joint Separate Opinion of Judge McDonald and Judge Vohrah).

⁵⁹ Shahabuddeen (n 36) 68.

⁶⁰ Fitzmaurice (n 4) 60. See also *Prosecutor v. Dusko Tadic a/k/a 'Dule'* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-T (2 October 1995) para 43.

⁶¹ Robert Y Jennings, 'The Judicial Function and the Rule of Law in International Relations' in Roberto Ago (ed.), *International Law at the Time of its Codification* (III, A. Giuffrè, 1987) 144–145.

⁶² See *Prosecutor v. Ojdanić et al.* (Appeal Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise) IT-99-37-AR72 (21 May 2003) para 38.

⁶³ *Duch* Appeal Judgment (n 13) para 95.

respect, one of the staunchest proponents of the view that courts and tribunals cannot create law, Cassese, acknowledged that international criminal judges may ‘undertake a gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.’⁶⁴ In this context, Cassese’s view was based on the following holding of the ECtHR in the case of *Strelezy, Kessler and Krenz v. Germany*:

[H]owever clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances [...] Article 7 of the [European Convention on Human Rights] cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.⁶⁵

The development of the law, rather than its creation, therefore, is generally regarded as a legitimate judicial function. By performing their function of interpreting and applying existing rules of law in relation to the particular circumstances of each case, courts and tribunals inevitably bring about its development. It should be recalled that, through their decisions, courts perform the unparalleled function of converting the law from a formal source into a written and applied state, a process that has been described as ‘a major change’.⁶⁶ Particularly when published, judicial decisions become ‘part and parcel of the legal sense of the community’.⁶⁷

Furthermore, the development of the law could be regarded, not only as a legitimate, but also as an indispensable judicial function. The necessity for courts and tribunals to develop the law, and the related need to use external judicial decisions,⁶⁸ seems to be incontestable. This is so, not only with respect to procedural norms,⁶⁹ but also with respect to the

⁶⁴ Cassese (n 5) 50.

⁶⁵ See *S.W. v. United Kingdom* and *C.R. v. United Kingdom* quoted in the case of *Strelezy, Kessler and Krenz v. Germany* (Applications nos. 34044/96, 35532/97 and 44801/98 (22 March 2011) para 50. See also Dixon and Khan (n 7) 1258 (para 17-39).

⁶⁶ Jennings (n 36) 62.

⁶⁷ Hersch Lauterpacht quoted in Shahabuddeen (n 36) 1.

⁶⁸ Particularly, but not exclusively, in the formative years of such courts, when they would have few internal precedents to draw upon.

⁶⁹ See Goran Sluiter, ‘Procedural Lawmaking at the International Criminal Tribunals’, in Shane Darcy and Joseph Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010) 315.

substantive law. In this context, the ICTY Trial Chamber in *Kupreskic et al.* noted that:

the Tribunal's need to draw upon judicial decisions is only to be expected, due to the fact that both substantive and procedural criminal law is still at a rudimentary stage in international law. In particular, there exist relatively few treaty provisions on the matter. By contrast, especially after World War II, a copious amount of case law has developed on international crimes.⁷⁰

However, courts and tribunals are not permitted to interpret existing law beyond the reasonable limits of acceptable clarification.⁷¹ It should be recalled that the authority of courts and tribunals to interpret and develop particular aspects of the law is a derived power. In this respect, this power has to be used with circumspection and, particularly in the context of ICL, remains subject, *inter alia*, to the principle of legality. Such courts and tribunals may only develop rules of law by reference to, and on the basis of, antecedent law. Even Jennings, with respect to the ICJ, seems to concede this point:

The Court must (...) be seen to be applying existing, recognized rules, or principles of law. Even where a court creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction, the decision must be seen to emanate reasonably and logically from existing and previously ascertainable law. (...) [W]hatever juridical design [the Court] decides to construct in its decision, it must do so, and be seen to do so, from the building materials available in already existing law. The design may be an imaginative artefact, but the bricks used in its construction must be recognisable and familiar.⁷²

Although, clearly, the primary task of any court or tribunal is not to develop the law, but to dispose of a case before it in accordance with the law, 'this is not to say that it is no part of the judge's task to develop the law. It clearly is, not least in international law. But it is to say that any "development" must be necessary for, and incidental to, the disposal of the actual issues before the court.'⁷³ Any such development has to emanate reasonably and logically from existing and previously ascertainable law, in accordance with the principle of legality.

Therefore, although there is some truth in the assessment that 'the difference between making and determining law is one of degree rather than

⁷⁰ *Kupreskic et al.* Trial Judgment (n 8) para 537.

⁷¹ *Duch* Appeal Judgment (n 13) para 95.

⁷² Jennings (n 61) 145.

⁷³ Judge Jennings cited in Shahabuddeen (n 36) 232.

one of kind,⁷⁴ the point is that the concepts of ‘creation’ and ‘development’ of the law ought to remain distinct, and it would appear inaccurate to assert that these courts and tribunals may create new law through judicial interpretation or that their decisions may be used as direct sources of law. They do, however, have the power to legitimately develop the law in a particular area, as long as their interpretations and clarifications are seen to emanate reasonably and logically from existing and previously ascertainable law.

In light of these observations, it is submitted that notions such as judicial ‘creativity’ to describe the interpretations undertaken by some courts and tribunals ought to be used with caution.⁷⁵ In this context, Shahabuddeen draws a distinction between ‘creativity’ and ‘activism’. He considers that ‘judicial creativity (...) fashions new law but, by contrast with judicial activism, does so on the basis of the policy of the law as it can be extracted from the roots of the law.’⁷⁶ However, insofar as an interpretation is extracted from the roots of antecedent law, and so long as it is conducted within the reasonable limits of acceptable clarification, then this would appear to be the exercise of legitimate judicial conduct, grounded not on creativity, but on necessary legal reasoning and judicial interpretation. If, however, the notions of creativity and activism are used as bywords for ‘highly creative interpretative approaches’⁷⁷ which interpret existing law beyond the reasonable limits of acceptable clarification, then such approaches should rather be called for what they are – transgressions of the principle of legality.

6. Concluding Remarks

This article has found that, in the majority of cases, international criminal courts and tribunals have used external judicial decisions as means for the determination of rules of law. However, in some cases, they have relied heavily, indeed, at times, exclusively, on the legal notions or findings of external judicial decisions, with little or no apparent effort on their part to conduct a first-hand examination of the rules of law in question. Their use of external judicial decisions could therefore be described as equivocal.

⁷⁴ *ibid* 77.

⁷⁵ Consider the use of this term, *inter alia*, in Shane Darcy and Joseph Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010).

⁷⁶ Mohamed Shahabuddeen, ‘Judicial Creativity and Joint Criminal Enterprise’, in Darcy and Powderly *ibid* 184.

⁷⁷ Shane Darcy and Joseph Powderly, ‘Introduction’ in Darcy and Powderly (n 75) *ibid* 2.

Moreover, in two cases, the article found that the courts, or individual judges, have appeared to use external judicial decisions as direct sources of rules of international law.

In this context, there does not seem to be a clear legal basis, in either conventional or customary law, for the use of external judicial decisions as direct sources of rules of international law. On the contrary, such use of external judicial would seem to contravene the principles of legality and fair trial, as it would increase the margin for arbitrariness and reduce the foreseeability of such decisions. In this context, Cassese notes:

If the defence knows in advance the legal logic that can and will be followed by the judges, their conclusions may reasonably be anticipated. If, on the contrary, the judges proceed a little “too rapidly”, their reasoning is less foreseeable, and the defence is deprived of the means to reasonably anticipate the judges’ conclusions.⁷⁸

Furthermore, the use of external judicial decisions as direct sources of law would seem to encourage a lax, uncritical reliance on such decisions. This may be particularly problematic if they are relied on wholesale and without appropriate transposition, by courts and tribunals based within very different legal frameworks. This is particularly so when one bears in mind that these courts and tribunals may bring about a development in the law in the context of their very specific legal regimes. For example, Grover underscores that, although the jurisprudence of the ad hoc Tribunals is rich, it would be a mistake for those working at the ICC to import it wholesale because of the distinctiveness of the respective statutes.⁷⁹

In accordance with the doctrine of sources, therefore, judicial decisions may only serve as subsidiary means for the determination of rules of law. This does not only imply, however, that external judicial decisions may not constitute direct sources of international law, but also that these courts and tribunals should, firstly, endeavour to determine rules of law through the *primary* means of judicial interpretation and should only subsequently revert to external judicial decisions as *subsidiary* means. In particular, such courts and tribunals should avoid relying on external judicial decisions mechanically and equivocally, and should ensure that any legal notions or findings borrowed from external judicial decisions be appropriately and expressly transposed to take into account the specificity of ICL and their own legal frameworks.

⁷⁸ Cassese (n 5) 21.

⁷⁹ Leena Grover, ‘A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court’ (2010) 21 *EJIL* 543, 550.

In the final analysis, the use of external judicial decisions as subsidiary means for the determination of rules of law should not be considered as an adequate and complete substitute for a first-hand analysis and interpretation of the relevant rules of law by a referring court or tribunal. In particular, any legal notions or findings derived from external judicial decisions may require extensive analysis and transposition before they may be introduced into their new environment. As Cassese notes, this approach is necessary not only for reasons of legal rigour, but also to satisfy the fundamental requirements of the principle of fair trial.⁸⁰ The use of external judicial decisions should not, therefore, be considered as a ‘quick fix’ solution for the determination of the relevant rules of law. However, when approached with appropriate circumspection, external judicial decisions may provide invaluable guidance in the determination of rules of law by, for example, identifying some of the relevant issues to be considered in a particular case and providing a useful structure for analysis.⁸¹ Ultimately, therefore, the judicious use of external judicial decisions may serve to render a court or tribunal’s analysis more thorough and, thus, persuasive.

⁸⁰ Cassese (n 5) 21. Emphasis omitted.

⁸¹ For a discussion of the assistance which may be derived from the use of external judgments in the domestic sphere, see Christopher McCrudden, ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 OJLS 499, 507.