By Men, Not Gods: The (Hidden) Evolutionary Interpretation of International Criminal Law in Light of Extrinsic Sources

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> It is, however, important to appreciate why, apart from [the] dependence on language as it actually is, with its characteristics of open texture, we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case … never involved, at the point of actual application, a fresh choice between open alternatives. Put shortly, the reason is that the necessity for such choice is thrust upon us because we are men, not gods.[1]

I. Introduction

Ever since its inception, and throughout the long process of its formation, international criminal law has fundamentally been constructed around the thorny issue of its reconciliation with the principles of State sovereignty and legality.[2] The need for legality in criminal law, which is what interests us here, has three corollaries: the principles of *nullum crimen/nulla poena sine lege*, the non-retroactivity of criminal law, and its strict interpretation. A priori, the latter principle stands in opposition to an evolutionary, or dynamic interpretation.

From a legalistic point of view, setting up a system of international criminal law was made all the more difficult by the fact that, prior to the creation of the (only) permanent International Criminal Court (ICC) in 1998, the establishment

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[1] HLA Hart, *The Concept of Law*, 2nd edn (Oxford, Clarendon Press, 1994) 128.

[2] See generally S Garibian, *Le crime contre l'humanité au regard des principes fondateurs de l'Etat moderne. Naissance et consécration d'un concept* (Genève, Schulthess, 2009).

of ad hoc tribunals had been reliant on non-conventional legal arrangements. These tribunals' statutes derived from an agreement between the victorious States from a global conflict (the military tribunals held in Nuremberg in 1945 and Tokyo in 1946), from a resolution of the UN Security Council (the International Criminal Tribunals for the former Yugoslavia, ICTY, in 1993 and for Rwanda, ICTR, in 1994) or from negotiated agreements between the United Nations and the States concerned (internationalised or mixed criminal tribunals created subsequently). Furthermore, these statutes are far from precise and lack any definition of international criminal legality or of the specific rules to be followed regarding interpretation in this area. In this chapter, we will focus on the work of the International Criminal Tribunals (ICTs), and specifically that of the ICTY. The latter's jurisprudential output has not only been rich, but in many ways pioneering. It is also particularly revealing with regard to the questions of interpretation and legality for the simple reason that it has had to function within a normative framework which is considerably vaguer than that of the ICC, whose statute is conventional, 'legalistic' and much more elaborate.[3]

The 'open' nature of the statutes of the ad hoc jurisdictions cited above and of international criminal law more generally – echoing the idea of *open texture* developed by Herbert Hart[4] – offers judges a decisive role.[5] They are obliged to call upon *extrinsic sources* (sources not forming part of their statutes) at various stages of their reasoning to assist them in the considerable interpretative task they are asked to perform, while at the same time being required to adhere to a strict interpretation of the applicable law.

At first, following the Nuremberg Tribunal experience, there seemed to be a general consensus among commentators – including the French judge Henri Donnedieu de Vabres, in several texts published at the time[6] – that, while necessary, this exceptional international criminal law was nevertheless only a preliminary stage. It was an ad hoc law that was novel, retroactive and imperfect: a law

[3] The ICC Statute (Rome Statute) entered into force on 1 July 2002, comprises a preamble and 13 parts (128 articles in total), including specific provisions on its jurisdiction *ratione temporis* (Art 11), the applicable law (Art 21) and the principle of legality (Arts 22–24). It is notably completed by the Elements of crimes adopted in 2002 to assist the Court in interpreting and applying Arts 6–8bis of the Statute (which establish the crimes within the jurisdiction of the ICC). As a matter of comparison, the ICTY Statute comprises 34 articles and the ICTR Statute comprises 32 articles. Let us recall that the ICTY completed its mandate in 2017, and the ICTR in 2015.

[4] Hart, above n 1, 124 ff.

[5] In this regard, Mireille Delmas-Marty emphasised the importance of controlling their work by suggesting the creation of a *recours en interprétation* before the International Court of Justice (whose role would thus be upgraded in criminal matters) or the ICC (whose criminal specialisation would facilitate the task). See M Delmas-Marty, 'Droit comparé et droit international: interactions et internormativité' in M Chiavario (ed), *La justice pénale internationale entre passé et avenir* (Paris, Dalloz, 2003) 11, 26.

[6] H Donnedieu de Vabres, 'Le jugement de Nuremberg et le principe de légalité des délits et des peines' (1946–47) 27 *Revue de droit pénal et de criminologie* 813; H Donnedieu de Vabres, 'Le procès de Nuremberg' (1947) *Revue de science criminelle et de droit pénal comparé* 171; H Donnedieu de Vabres, 'Le procès de Nuremberg devant les principes modernes du droit pénal international' (1947) 70 *Recueil des cours de l'Académie de droit international de La Haye* 477.

in progress born of the laws of war, which 'are not static, but by continual adaptation follow the needs of a changing world';[7] a law that illustrated the '*caractère évolutif de la jurisprudence pénale internationale*',[8] 'the evolutionary character' of the international criminal case law which was coming into being. The unprecedented experience at Nuremberg[9] obliged legal doctrine to give serious thought for the first time to the meaning and scope of the principle of legality in the context of international law and, by extension, the question of interpretation in *international criminal* matters. Most authors – including such celebrated upholders of legal positivism as Hans Kelsen[10] – were prepared, in this special context, to put the principle of legality in perspective and to limit it by what they termed higher principles on the basis of arguments of a jusnaturalistic nature.[11] This 'elastic' approach[12] to legality sought to justify the necessarily creative and innovative work of the Nuremberg judges, in the name of morality, justice and equity. It would also, soon afterwards, lead to the drafting of Articles 7(2) of the European Convention on Human Rights (ECHR, 1950) and 15(2) of the International Covenant on Civil and Political Rights (ICCPR, 1966), both of which provide for an exception to the principle of legality in the name of the general principles of law recognised by 'civilised nations' and 'the community of nations'.

Subsequently, the Cold War saw the expansion of international human rights law, the adoption of the 1969 Vienna Convention on the Law of Treaties (VCLT), and increasing activity on the part of the UN Security Council. All of this led to the creation of new legal tools that would serve the second generation of ad hoc international criminal tribunals established by the executive organ of the United Nations in the early 1990s. This new flourishing followed almost half a century of drought in the field of international criminal repression. It is important to note that the ad hoc judges who have followed their Nuremberg and Tokyo predecessors have mainly called on international public law and principles of human rights law in their search for elements that would allow them, first, to provide a sound basis for the creation, not to mention the competence, of their tribunals; secondly, to define the constitutive elements of the crimes falling within their competence; and, finally, to justify *a posteriori* their interpretation, which is de facto evolving

[7] *Nuremberg War Crimes Trials* (1947) 1 *Trial of the Major War Criminals* 221 (cited in Judgment, *Kunarac et al* (IT-96-23 & 96-23/1-A) Appeals Chamber, 12 June 2002, para 67).

[8] Donnedieu de Vabres, 'Le jugement de Nuremberg et le principe de légalité', above n 6, 817.

[9] *cf* G Acquaviva, 'At the Origins of Crimes Against Humanity: Clues to a Proper Understanding of the *Nullum Crimen* Principle in the Nuremberg Judgement' (2011) 9 *Journal of International Criminal Justice* 881.

[10] H Kelsen, 'The Rule Against Ex Post Facto Laws and the Prosecution of the Axis War Criminals' (1945) 2 *The Judge Advocate Journal* 8, 8–12 and 46; H Kelsen 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' (1947) 1 *International Law Quarterly* 153.

[11] See S Garibian, 'Crimes Against Humanity and International Legality in Legal Theory After Nuremberg' (2007) 9 *Journal of Genocide Research* 93; as well as *Le crime contre l'humanité*, above n 2, 149 ff.

[12] Donnedieu de Vabres, 'Le procès de Nuremberg devant les principes modernes', above n 6, 512.

and dynamic, of the applicable law. It is on this last point – the jurisdictional justification of a creative interpretation – that we will concentrate here.

In interpreting their statutes, these judges claim that they are simply bringing to light a pre-existing, albeit hidden meaning intended by the 'international legislator' (in other words, sovereign States), made explicit by means of a purely cognitive activity which thereby guarantees that the principle of legality is respected. Their approach to interpretation-as-knowledge involves adopting a position not only with regard to the rules applicable in this area (section II), but also to the very definition of legality within the international criminal law (section III). Their denial that this interpretative work has a creative aspect is accompanied by a dynamic use of extrinsic legal sources, thus illustrating the 'holistic'[13] nature of the process at work here.

II. A 'Reasonable' Interpretation Through an Analogic Application of the Rules of the Vienna Convention on the Law of Treaties

The ICTs legitimise their interpretative work by systematically denying its creative character, in order to counter the criticisms inherited from the Nuremberg trials experience and to bolster the validity of their own existence.[14] In this way, the judges make use of the fiction that they hold no power.[15] Associated with the cognitive theory of interpretation as an act of *knowledge* (as opposed to interpretation as an act of will), this fiction carries the idea that judges abstain from any form of normative creation, thereby protecting the legal security of individuals.[16] It holds that judges merely exercise a competence that is linked to the application of pre-existing international norms – norms that are nevertheless customary,[17]

[13] We borrow this term from G Marceau, 'Evolutive Interpretation by the WTO Adjudicator: Sophism or Necessity?' (2018) 21 *Journal of International Economic Law* 791.

[14] See also the recommendations of the UN Secretary-General in the *Report Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* UN Doc S/25704: 'It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law' (para 29); '[t]he application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law' (para 34, emphasis in the original). A similar question is also discussed in other chapters: MM Mbengue and A Florou, 'Evolutionary Interpretation in Investment Arbitration: About a Judicial Taboo' (ch 23); P Van den Bossche, 'Is there Evolution in the Evolutionary Interpretation of WTO Law?' (ch 20); and MC de Andrade, 'Evolutionary Interpretation and the Appellate Body's Existential Crisis' (ch 21) in this book.

[15] See especially Judgment, *Zejnil Delalic et al* (IT-96-21) Trial Chamber II, 16 November 1998, paras 159–60. See also, notably, the Dissenting Opinion of Judge Rodrigues (para 40) annexed to the Judgment, *Zlatko Aleksovski* (IT-95-14/1) Trial Chamber I, 25 June 1999.

[16] For developments, see Garibian, *Le crime contre l'humanité*, above n 2, 312 ff.

[17] Judgment, *Zejnil Delalic et al* Trial Chamber II, above n 15, para 310.

which is a situation that appears difficult to reconcile with a strictly legalistic approach. In this view, they are thus beholden to

> the well-recognised paramount duty of the judicial interpreter, or judge, to read into the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object …: [t]his rule would appear to have been founded on the firm principle that it is for the legislature and not the court or judge to define a crime and prescribe its punishment.[18]

Indeed, according to the cognitive theory of interpretation developed by the 'Ecole de l'Exégèse', interpreting amounts to uncovering the objective meaning of a norm, a meaning already assigned by the legislator and empirically verifiable, and which simply needs to be *described*, not determined.

These judges pointed out in particular that their area of *ratione materiae* competence is set by international customary law as it existed at the time of the facts in question, and that this limitation of their competence is due to a desire to respect the principle of legality, in line with the UN Secretary-General's recommendations.[19] They added that said principle 'does not prevent a court from interpreting and clarifying the elements of a particular crime', nor does it prevent it from relying on previous decisions[20] or 'preclude the progressive development of the law by the court'.[21] However,

> under no circumstances may the court create new criminal offenses after the act charged against an accused either by giving a definition to a crime which had none so far …, or by criminalising an act which had not until the present time been regarded as criminal,[22]

'since the essence of interpretation is to discover the true purpose and intent of the statute in question, invariably, the search of the judge interpreting a provision under whichever system, is necessarily the same'.[23] Finally, they stated that '[i]t cannot be disputed that the cornerstone of the theory and practice of statutory interpretation is to ensure the accurate interpretation of the words used in

[18] ibid, paras 408 ff. This case law is also quoted in the decision of the same Trial Chamber in *Enver Hadzihasanovic et al* (IT-01-47) Trial Chamber II, 12 November 2002, para 60.

[19] *cf* Judgment, *Mitar Vasiljevic* (IT-98-32) Trial Chamber II, 29 November 2002, para 197 and above n 14.

[20] Judgments, *Zlatko Aleksovski* (IT-95-14/1) Appeals Chamber, 24 March 2000, paras 126–27; and *Zejnil Delalic et al* (IT-96-21) Appeals Chamber, 20 February 2001, para 173. See also Judgment, *Mitar Vasiljevic* Trial Chamber II, above n 19, para 196, as well as Decision, *Milan Milutinovic et al* (IT-99-37) Appeals Chamber, 21 May 2003, para 38.

[21] Judgment, *Mitar Vasiljevic* Trial Chamber II, above n 19, para 196 also quoted, notably, in Decision, *Milan Milutinovic et al* Appeals Chamber, above n 20, para 38. On this matter, the Trial Chamber referred to the following case law of the European Court of Human Rights (ECtHR): *Kokkinakis v Greece* Series A no 260-A (1994) 17 EHRR 397, paras 36 and 40; *SW v United Kingdom* Series A no 355-B (1996) 21 EHRR 363, paras 35–36; *CR v United Kingdom* Series A no 335-C (1996) 21 EHRR 363, para 34; *Ecer and Zeyrek v Turkey* (2002) 35 EHRR 672, para 52. See also the decision of the same Trial Chamber, *Enver Hadzihasanovic et al* Trial Chamber II, above n 18, para 58.

[22] Judgment, *Mitar Vasiljevic* Trial Chamber II, above n 19, para 196.

[23] Judgment, *Zejnil Delalic et al* Trial Chamber II, above n 15, para 159.

the statute as the intention of the legislation'.[24] While the primary task of judicial interpretation is to 'ascertain the meaning' of a provision, '[i]n cases of ambiguity, however, all legal systems consider methods for determining how to give effect to the legislative intention'.[25]

Exactly which rules or methods of interpretation are applicable remains to be determined, given that none are cited either in Security Council resolutions or in the preparatory work or statutes of the ICTs. Judges have resolved this question by considering that, even though their statutes are not international treaties in the sense of Article 2(1)(a) of the VCLT, the rules of interpretation set out by the latter in Articles 31–33 apply by analogy.[26] To justify this analogic application they have used two main arguments:[27] first, the ICTs' statutes, which were created on the basis of Security Council resolutions, have their legal basis in the 1945 Charter of the UN, that is to say in an international treaty to which the VCLT rules apply, even retroactively; for, their second argument goes, the latter Convention codifies international custom as far as interpretation is concerned, given that custom derives from rules which are generally accepted by States in the context of their own national law.[28] The justification of the analogic application of the VCLT to these statutes employs what is by any standard an extensive approach to these international texts. Such an approach, along with international rules governing interpretation, is in and of itself enough – notwithstanding the incompleteness (the lack of 'quality') of the international texts in question to ensure the practical impossibility of strict interpretation.

International criminal judges have, to date,[29] made near-systematic use of the rules contained in Articles 31 and 32 of the VCLT, whether this is

[24] ibid, para 160.

[25] ibid, paras 160–61.

[26] See especially, the Joint Separate Opinion presented by Judges McDonald and Vohrah (paras 3 ff) annexed to Judgment, *Drazen Erdemovic* (IT-96-22) Appeals Chamber, 7 October 1997; Judgment, *Zejnil Delalic et al* Trial Chamber II, above n 15, para 1161; Dissenting Opinion of Judge Shahabuddeen (pp 21–22) annexed to Judgment, *Joseph Kanyabashi* (ICTR-96-15) Appeals Chamber, 3 June 1999; as well as the Joint Separate Opinion presented by Judges McDonald and Vohrah (para 15) in the same judgment; Judgment, *Goran Jelisic* (IT-95-10) Trial Chamber I, 14 December 1999, para 61; Decision, *Enver Hadzihasanovic et al* Trial Chamber II, above n 18, para 63.

[27] *cf* notably the above Opinions of Judges McDonald and Vohrah, as well as the Opinion of Judge Shahabuddeen. See also, eg, Judgment, *Goran Jelisic* Trial Chamber I, above n 26, para 61.

[28] This argument aims at justifying the retroactive application of the VCLT (considering that Art 28 of the VCLT establishes the principle of non-retroactivity of treaties).

[29] See, eg, in the case law of the ICC: annex I of the Decision, *Thomas Lubanga Dyilo* (ICC-01/04-01/06-102) Pre-Trial Chamber I, 15 May 2006, para 1; Judgment, *Thomas Lubanga Dyilo* (ICC-01/04-168) Appeals Chamber, 13 July 2006, paras 6, 33 and 40; Decision, *Thomas Lubanga Dyilo* (ICC-01/04-01/06-803) Pre-Trial Chamber I, 29 January 2007, paras 276 and 283; Separate Opinion of Judge Georghios M Pikis (para 15) annexed to Judgment, *Thomas Lubanga Dyilo* (ICC-01/04-01/06-824) Appeals Chamber, 13 February 2007; Decision, *Thomas Lubanga Dyilo* (ICC-01/04-01/06-926) Appeals Chamber, 13 June 2007, para 8; Judgment, *Germain Katanga and Mathieu Ngudjolo* (ICC-01/04-01/07-522) Appeals Chamber, 27 May 2008, para 38; Decision, *Germain Katanga and Mathieu Ngudjolo* (ICC- 01/04-01/07-384) Pre-Trial Chamber I, 9 April 2008, paras 6–7; Judgment, *Thomas Lubanga Dyilo* (ICC-01/04-01/06-1432) Appeals Chamber, 11 July 2008, paras 55–56; Decision, *Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09) Pre-Trial Chamber I, 4 March 2009, paras 44 and 126; Decision, *Jean-Pierre Bemba Gombo* (ICC-01/05-01/08-424) Pre-Trial Chamber II, 15 June 2009,

acknowledged or not.[30] Priority is generally given to semiotic interpretation, as applied to language in its 'ordinary sense', which these judges generally term a 'literal' interpretation.[31] However, they also combine this, more often than not, with a 'logical' (or systemic) and 'teleological' (or functional) interpretation. Reference is also made to the preparatory work of the statutes (including that of the ICC) and the draft Codes of the International Law Commission as customary norms in the process of crystallisation (in cases covered by Article 32 of the VCLT, as complementary means of interpretation).[32] The logical and teleological forms of interpretation are the most interesting processes insofar as they involve calling on a very extensive series of texts, in the sense of the list set out in Article 31(2) and (3) of the VCLT, thus going well beyond the 'legalist' recommendations of the UN Secretary-General and involving considerable normative activity on the part of judges. These texts constitute what we term *extrinsic sources*, separate from the law of the ICTs' statutes, which reveal the substantial evolution of international customary law since Nuremberg.

The judges' interpretative work is thus legitimised by the way in which it is defined (uncovering and indicating a pre-existing, yet hidden meaning intended by the legislator) and by the rules employed in the process itself (rules of interpretation set out in the VCLT). The latter rules – literal, logical and teleological interpretations – are, again according to the judges, 'winners' insofar as they guarantee a 'reasonable interpretation'[33] which, while it may not correspond exactly to the principle of strict interpretation in criminal matters as understood in national legal systems, is nevertheless compatible with the principle of legality as conceived at an international level.

paras 361 and 364; Decision, *William Samoei Ruto et al* (ICC-01/09-01/11-373) Pre Trial Chamber II, 23 January 2012, para 289; Judgment, *Thomas Lubanga Dyilo* (ICC-01/04-01/06-2842) Trial Chamber I, 14 March 2012, paras 601 and 979; Decision, *Unnamed applicant* (ICC-RoR216-01/14-2) Presidency, 28 February 2014, paras 22–23; Judgment, *Germain Katanga* (ICC-01/04-01/07-3436) Trial Chamber II, 7 March 2014, paras 43–49; Judgment, *Jean-Pierre Bemba Gombo* (ICC-01/05-01/08-3343) Trial Chamber III, 21 March 2016, para 86.

[30] For an example of the application of those rules of interpretation without the express mention of the 1969 Convention, see Decision, *Dusko Tadic* (IT-94-1) Appeals Chamber, 2 October 1995, paras 71 ff (on literal, teleological, logical and systematic interpretation of the ICTY Statute).

[31] On the confusion made by the judges in between the literal interpretation and the ordinary meaning, see W Schabas, 'Interpreting the Statutes of the Ad Hoc Tribunals' in LC Vohrah et al (eds), *Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese* (The Hague, Kluwer Law International, 2003) 847, 855 ff.

[32] For jurisprudential illustrations of each point, see Garibian, *Le crime contre l'humanité*, above n 2, 317–18.

[33] Judgment, *Zejnil Delalic et al* Trial Chamber II, above n 15, para 170. See also Decision, *Milan Milutinovic et al* Appeals Chamber, above n 20, para 38 where the judges underlined that the principle of legality 'does prevent a court from creating new law or from interpreting existing law *beyond the reasonable limits of acceptable clarification*' (emphasis added). This latter case law was cited in Appeal Judgment, *Kaing Guek Eav alias 'Duch'* (ECCC/SC-001/18-07-2007) Supreme Court Chamber, 3 February 2012, para 95; as well as Judgment, *Case 002/01* (ECCC-002/19-09-2007) Trial Chamber, 7 August 2014, para 16.

III. An 'Elastic' Legality Through a Flexible Application of the Criteria of the European Human Rights Case Law

Since the principle of legality is likewise absent from their statutes, the judges need to define it on the basis, mainly, of the case law of the European Court of Human Rights (ECtHR).[34] The fiction of their lack of power is here based not only on the legitimisation of interpretation, but also on a particular approach – once again 'elastic'[35] – to the principle of legality in international criminal law. The judgments in the *Delalic*, *Vasiljevic* and *Ojdanic* cases are particularly revealing in this respect.

Here, international criminal judges have for the first time taken a position on the question of the definition of the legality from the point of view not just of the *existence* of norms (the legality of the incriminations) but also of their *content* (the legality of the definitions of the crimes) – in other words, of their applicability or opposability to individuals. It was the *Delalic* case which first provided the Trial Chamber of the ICTY with the opportunity to restate the meaning attached to the principle of legality in the 'world's major criminal justice system'.[36] It was subsequently added that

> [it] is not certain to what extent [this principle has] been admitted as part of international legal practice, separate and apart from the existence of the national legal systems … essentially because of the different methods of criminalisation of conduct in national and international criminal justice systems.[37]

It was only later, with the *Vasiljevic* case, that the Trial Chamber judges of the ICTY would refine their positions, beginning with an acknowledgement of the importance of the principle of legality in international criminal law.[38] In it they stressed that the mere fact that incriminations exist under pre-existing international customary law does not make up for the absence of a precise definition

[34] For a critical analysis of the influence of the ECtHR's case law on (international) criminal law, see the symposium co-edited by R Roth and F Tulkens (2011) 9 *Journal of International Criminal Justice* 571. By contrast, on the influence of international criminal law on the work of the European Court, see G Gaggioli, 'The Relevance of International Criminal Law for Interpreting and Applying Human Rights Treaties: A Study of the Case Law of the European Court of Human Rights' in R Kolb and D Scalia (eds), *Droit international pénal*, 2nd edn (Bâle, Helbing Lichtenhahn, 2012).

[35] Above n 12.

[36] Judgment, *Zejnil Delalic et al* Trial Chamber II, above n 15, para 402.

[37] ibid, para 403. See also paras 404–06 on the differences, briefly listed, between national legal systems and the international criminal justice system without expanding on the meaning, per se, of international criminal legality.

[38] The same Chamber affirmed, shortly before, in the Decision, *Enver Hadzihasanovic et al* Trial Chamber II, above n 18, the importance of the principle of legality as a 'fundamental principle' in 'international human rights law' (para 56). The Chamber concluded in the same decision that the Tribunal must comply with this principle, even though its statute 'does not contain a specific article stating this general principle of law' (para 57).

of the crime at the time it occurred:[39] '[the] requirement of sufficient clarity of the definition of a criminal offense [under customary international law] is in fact part of the *nullum crimen sine lege* requirement, and it must be assessed in that context';[40] and 'anything contained in the statute of the court in excess of existing customary international law would be a utilisation of power and not of law'.[41] In spite of this condition, however, it would not be possible to ignore the 'specificity of international law'.[42] For,

> [o]nce it is satisfied that a certain act or set of acts is indeed criminal under customary international law, the Trial Chamber must satisfy itself that this offence with which the accused is charged was defined with sufficient clarity *under customary international law* for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible.[43]

The judges concluded by stating that

> [a] criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.[44]

The applicability of an international criminal norm would thus appear to depend upon the satisfaction of two criteria derived from European case law on matters of legality: namely, the *foreseeability* and the *accessibility* of the law upon which is based the reponsibility of the individual, who is thereby in a position to be cognisant of the criminal nature of his action. The judges consider these criteria to be compatible with the function of the principle of legality in the international legal order, namely to maintain 'a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order'.[45]

[39] Judgment, *Mitar Vasiljevic* Trial Chamber II, above n 19, para 195.

[40] ibid, para 201. The judges referred to the case law of the ECtHR related to the principle of legality: *Sunday Times v United Kingdom* Series A no 30 (1979–80) 2 EHRR 245, para 49; *Kokkinakis v Greece*, above n 21, para 52; *Ecer and Zeyrek v Turkey*, above n 21, para 51; as well as Decision of the European Commission of Human Rights, *X v Austria* (1981) 22 DR 140.

[41] Judgment, *Mitar Vasiljevic* Trial Chamber II, above n 19, para 202.

[42] ibid, para 201.

[43] ibid (emphasis in the original). See also para 193.

[44] ibid, para 193. The Tribunal quoted the following European case law: *Kokkinakis v Greece*, above n 21; *G v France* Series A no 325-B (1996) 21 EHRR 288; *SW v United Kingdom* Series, above n 21.

[45] Judgment, *Zejnil Delalic et al* Trial Chamber II, above n 15, para 405, recalled in the Decision, *Enver Hadzihasanovic et al* Trial Chamber II, above n 18, para 60. This approach reminds us of the one adopted by the ECtHR in the judgments, *Streletz, Kessler and Krenz v Germany* [GC] (2001) 33 EHRR 31 and *K-H W v Germany* [GC] (2003) 36 EHRR 59, which not only confirmed the extensive and constructive interpretation of the principle of legality under the ECHR, but also underlined the limitations of the principle of non-retroactivity in criminal matters when confronted with the transition towards democracy. On this case law, see P Tavernier, 'L'affaire du "Mur de Berlin"' devant la Cour européenne. La transition vers la démocratie et la non rétroactivité en matière pénale' (2001) 48 *Revue trimestrielle des droits de l'homme* 1159. *cf* also above on international criminal legality in the aftermath of Nuremberg.

They have subsequently been clearly confirmed[46] and set out explicitly[47] in the context of the *Ojdanic* case.

In the latter case, the Appeals Chamber began by noting that, according to the ECtHR's case law, the criteria of foreseeability and accessibility applying to a given norm depend upon a certain number of factors. In this sense, these criteria are highly relative – as, the Chamber observed, is the principle of non-retroactivity in international criminal law.[48] Digging deeper into this idea, the appeal judges went on to list three distinct types of factors to take into consideration when checking the applicability of an international customary norm, by which is meant the foreseeability and accessibility from the point of view of the individual:[49] the position of the national law of the accused party's country with respect to the incrimination in question; the extent to which comparable precedents can be found in international law; and the 'atrocious nature' of the crimes committed.[50]

It was thus established that the legality of the definitions contained in the law of the ICTs' statutes is to be examined in the light of extrinsic legal sources, which are both national (the first factor) and international (the second factor). As far as the third factor is concerned, although 'the immorality of the appalling character of an act is not a sufficient factor to warrant its criminalisation under international customary law', it 'may in fact play a role …, insofar as it may refute any claim by the Defense that it did not know of the criminal nature of the acts'.[51] On this point, the Appeals Chamber referred to one of its previous rulings (made during the *Delalic* case), which called upon the 'general principles of law recognized by the community of nations' in the sense of Article 15(2) of the ICCPR to counter an argument made on the grounds of illegality by the defense.[52] The nature of the crimes, in the final analysis, merely allows recourse to the general principles of law as justification for the applicability of an international norm, even when the latter is 'textually' incomplete, vague or retroactive. This process of *positivising* a naturalist argument is not new: the premises for it are to be found in the work of the judges at Nuremberg[53] and in the subsequent doctrine relating thereto.[54]

To conclude, then, it would seem that the quality – in the sense of the textual precision – of international criminal law matters little, provided that the

[46] Decision, *Milan Milutinovic et al* Appeals Chamber, above n 20, paras 21 and 37–38.

[47] ibid, paras 38 ff.

[48] ibid, para 39. See also the Separate Opinion of Judge Sidhwa (para 72) annexed to the Decision, *Dusko Tadic* Appeals Chamber, above n 30.

[49] Decision, *Milan Milutinovic et al* Appeals Chamber, above n 20, paras 41–42.

[50] This notion seems to echo the old concept of *mala in se* which designates the acts that are 'bad *per se*', wrongful and illegal by their very nature (in opposition to acts that are *mala prohibita*, wrongful and illegal because they are prohibited by the law). See MS Davis, 'Crimes *Mala in Se*: An Equity-Based Definition' (2006) *Criminal Justice Policy Review* 270.

[51] Decision, *Milan Milutinovic et al* Appeals Chamber, above n 20, para 42.

[52] Judgment, *Zejnil Delalic et al* Appeals Chamber, above n 20, para 173.

[53] Garibian, *Le crime contre l'humanité*, above n 2, 134 ff.

[54] Garibian, 'Crimes Against Humanity and International Legality in Legal Theory After Nuremberg', above n 11.

incriminations are foreseeable and accessible. These very criteria, which are rooted in the case law of the Strasbourg Court, are understood in a flexible manner by the Appeals Chamber of the ICTs.[55] The latter confirmed in its ruling of 16 July 2003 that it is enough, in order to fulfil the first of these, that the accused 'be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision' and, in order to fulfil the second, that in the case of an international tribunal reliance be 'placed on a law which is based on custom'.[56] The foundations of these principles are to be found in extrinsic legal sources, acknowledged from the outset in the *Ojdanic* case through the reference made to the different factors governing the applicability of an international norm.[57] What therefore appears to be the essential element in monitoring the legality of the contents of incriminations, that is to say, the definitions of the crimes set out in the ICTs' statutes which are then 'applied' by judges, is in fact nothing more than the contents of similar definitions found in extrinsic sources.[58]

IV. Conclusion

What we can say for sure is that, aside from the acknowledgement of the evolving character of the law by judges,[59] the actual notion of *evolutionary interpretation* is not, unsurprisingly, referred to explicitly in international criminal case law. A hint of the recognition of its presence can however be found in a ruling by the Appeals Chamber of the Special Tribunal for Lebanon,[60] in which the judges

[55] See also P Manzini, 'Le rôle du principe de la légalité dans la détermination des sources du droit international pénal' in M Delmas-Marty, E Fronza and E Lambert-Abdelgawad (eds), *Les sources du droit international pénal. L'expérience des tribunaux pénaux internationaux et le statut de la Cour pénale internationale* (Paris, Société de législation comparé, 2004) 267.

[56] Decision, *Enver Hadzihasanovic et al* (IT-01-47) Appeals Chamber, 16 July 2003, para 34.

[57] The Appeals Chamber referred to its Decision, *Milan Milutinovic et al* Appeals Chamber, above n 20, paras 37 ff.

[58] For recent confirmation by other international criminal jurisdictions: Appeal Judgment, *Kaing Guek Eav alias 'Duch'* Supreme Court Chamber, above n 33, paras 90–96; Dissenting Opinion of Judge Baragwanath (paras 13 ff) annexed to the *decision on Badreddine Defence Interlocutory Appeal of the 'Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings'* (STL-11-01) Appeals Chamber, 13 July 2016; Appeal Judgment, *Nuon Chea and Khieu Samphân* (ECCC-002/19-09-2007) Supreme Court Chamber, 23 November 2016, paras 758 ff.

[59] See Separate Opinion of Judge Abi-Saab (point 1) annexed to the Decision, *Dusko Tadic* Appeals Chamber, above n 30; Judgment, *Goran Jelisic* Trial Chamber I, above n 26, para 61; Judgment, *Alfred Musema* (ICTR-96-13-A) Trial Chamber I, 27 January 2000, para 228; Judgment, *Kunarac et al* Appeals Chamber, above n 7, para 67; Dissenting Opinion of Judge Schomburg (para 17) annexed to the Judgment, *Blagoje Simic* (IT-95-9-A) Appeals Chamber, 28 November 2006.

[60] Decision, *Akhbar Beirut SAL Ibrahim Mohamed Ali Al Amin* (STL-14-06/PT/AP/AR126.1) Appeals Panel, 23 January 2015, paras 60 ff where the judges referred to: Decision, *Dusko Tadic* Appeals Chamber, above n 30, paras 96–136 (for a progressive interpretation of war crimes committed in international as well as non-international armed conflicts); Judgment, *Dusko Tadic* (IT-94-1-A) Appeals Chamber, 15 July 1999, paras 163–66 (for a progressive interpretation of the term 'nationals'); and Decision, *Enver Hadzihasanovic* Appeals Chamber, above n 56, paras 10–36 (for a progressive interpretation of command responsibility in non-international armed conflicts).

distinguished between analogy (*analogia legis*), which is rejected, and 'progressive interpretation' (*analogia juris*) – or a 'progressive approach to legal interpretation' – which is considered to be valid. Crucially, this approach is presented as a means of filling the gaps 'by resorting to general principles of international criminal law, or to general principles of criminal justice, or to principles common to the major legal systems of the world'[61] within the limits set, in particular, by the ECHR. Obviously, the objective of such an approach is to avoid a *non liquet*. It is nevertheless possible to consider, along with those who do not agree with the 'gap theory' (which is associated with the cognitive theory of interpretation),[62] that the function of the general principles used in exceptional circumstances to fill in gaps is in fact normative,[63] albeit concealed.

Furthermore, the ICTs have only very rarely invoked the principle of *strict interpretation* and, when they did so, it was above all to affirm that, in criminal cases, the version most favourable to the accused must be accepted. In the *Delalic* case,[64] the judges defined what they termed 'strict construction', according to which the interpreter 'can only determine whether the case is within the intention of a criminal statute by construction of the express language of the provision'. The effect of this is that 'where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of construction fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself'; '[t]his is why ambiguous criminal statutes are

[61] A Cassese et al (eds), *Cassese's International Criminal Law*, 3rd edn (Oxford, Oxford University Press, 2013) 34, quoted by the judges at para 63 of Decision, *Akhbar Beirut SAL Ibrahim Mohamed Ali Al Amin* Appeals Panel, above n 60.

[62] See especially H Kelsen, *General Theory of Law and State* (trans Anders Wedberg) (Cambridge, MA, Harvard University Press, 1945) 146 ff; H Kelsen, *Pure Theory of Law* (trans Max Knight), 2nd edn (Clark, NJ, Lawbook Exchange, 2009) 245 ff.

[63] On the link between the so-called gap theory and the function of general principles, see H Kelsen, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems*, 2nd edn (London, Stevens & Sons Limited, 1951) 533–34; H Kelsen, *Principles of International Law*, 2nd edn (New York, Holt, Rinehart and Winston Inc, 1966) 529; also A Verdross, 'Les principes généraux de droit dans le système des sources du droit international public' in *Recueil d'Etudes de Droit international en hommage à Paul Guggenheim* (Genève, Faculté de Droit de l'Université de Genève, Institut Universitaire de Hautes Etudes Internationales, 1968) 527 ff. For developments, see Garibian, *Le crime contre l'humanité*, above n 2, 350 ff. On the incompatibility with the need of strict construction, see Concurring Opinion of Judge Christine Van den Wyngaert (para 16) annexed to Judgment, *Mathieu Ngudjolo Chui* (ICC-01/04-02/12-4) Trial Chamber II, 18 December 2012, who is 'firmly of the view that treaty interpretation cannot be used to fill perceived gaps in the available arsenal of forms of criminal responsibility'.

[64] Judgment, *Zejnil Delalic et al* Trial Chamber II, above n 15, paras 410 ff. This reference was mentioned in several international criminal cases, eg, see Judgment, *Stanislav Galic* (IT-98-29-T) Trial Chamber I, 5 December 2003, para 93; Declaration of Judge Shahabuddeen (para 3) annexed to Judgment, *Limaj and al* (IT-03-66-A) Appeals Chamber, 27 September 2007; Decision, *Ieng Thirith* (ECCC-002/19-09-2007) Trial Chamber, 17 November 2011, para 80. See also: Decision, *Milan Milutinovic et al* Appeals Chamber, above n 20, para 28; Partial Dissenting Opinion of Judge Shahabuddeen (para 12) annexed to Decision, *Enver Hadzihasanovic et al* Appeals Chamber, above n 56; Decision, *William Samoei Ruto and al* (ICC-01/09-01/11) Trial Chamber II, 5 April 2016, Reasons of Judge Eboe-Osuji, para 433.

to be construed *contra proferentem*'. However, this approach derives neither from Articles 31–32 of the VCLT, nor from the usual interpretative practice engaged in by the ICTs.[65]

Finally, following on from this, while this practice of appealing to international human rights law in the ICTs work is 'quantitatively' significant, 'qualitatively' speaking[66] it is limited by the problem of its transposability into international criminal law. For, while judges have maintained a degree of 'fruitful porousness' ('*porosité fructueuse*') between these two 'conjoined' branches ('*branches siamoises*') of law,[67] they remained conscious of the structural differences between their objects and their purposes.[68] This question of 'transposability' is partially solved by Article 21(3) of the ICC Statute which, in a way, turns the situation on its head: it grants a higher authority to international human rights law, although the latter is considered as a subsidiary source for international criminal law. In this way, it establishes a general condition for the application *and* (more importantly) the interpretation of the applicable law by the ICC, namely the compatibility of this applicable law with 'internationally recognised human rights', in the sense of an enhanced protection of the rights of the accused.[69]

Along much the same lines, the ICC Statute – in a first for international criminal law – formally enshrines the principle of legality (Article 22 *et seq*), in particular the principle of strict interpretation and, in those cases where ambiguity arises, the principle of *in dubio pro reo* (Article 22(2)),[70] thus imposing 'a clear and

[65] *cf* William Schabas who explains that most of the time, judges preferred an interpretation much more favourable to prosecution than to defence, except in very few cases (W Schabas, 'Droit pénal international et droit international des droits de l'homme: faux frères' in M Henzelin and R Roth (eds), *Le droit pénal à l'épreuve de l'internationalisation* (Paris, LGDJ, 2002) 170–71).

[66] See E Lambert-Abdelgawad, 'Les Tribunaux pénaux pour l'ex-Yougoslavie et le Rwanda et l'appel aux sources du droit international des droits de l'homme' in M Delmas-Marty, E Fronza and E Lambert-Abdelgawad (eds), *Les sources du droit international pénal. L'expérience des tribunaux pénaux internationaux et le statut de la Cour pénale internationale* (Paris, Société de législation comparée, 2004) 115.

[67] P Tavernier, 'Les Tribunaux pénaux internationaux et le droit international des droits de l'homme' in M Delmas-Marty, E Fronza and E Lambert-Abdelgawad (eds), *Les sources du droit international pénal. L'expérience des tribunaux pénaux internationaux et le statut de la Cour pénale internationale* (Paris, Société de législation comparée, 2004) 402.

[68] *cf* Art 31(1) of the 1969 Vienna Convention. For developments, see Garibian, *Le crime contre l'humanité*, above n 2, 329 ff.

[69] Judgment, *Thomas Lubanga Dyilo* (ICC-01/04-01/06-772) Appeals Chamber, 14 December 2006, para 36 (also cited in Judgment, *Thomas Lubanga Dyilo* Trial Chamber I, above n 29, para 602); Judgment, *Thomas Lubanga Dyilo* (ICC-01/04-01/06-773) Appeals Chamber, 14 December 2006, paras 20 and 50; Decision, *Germain Katanga* (ICC-01/04-01/07-257) Pre-Trial Chamber I, 10 March 2008, 7; Judgment, *Germain Katanga* Trial Chamber II, above n 29, para 50; Judgment, *Jean-Pierre Bemba Gombo* Trial Chamber III, above n 29, para 82. See also G Bitti, 'Article 21 and the Hierarchy of Sources of Law before the ICC' in C Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford, Oxford University Press, 2015). More generally, see E Fronza, 'Human Rights and Criminal Law: Reference to the Case Law of Human Rights Bodies by International Criminal Tribunals' in R Kolb and D Scalia (eds), *Droit international pénal*, 2nd edn (Bâle, Helbing Lichtenhahn, 2012).

[70] See especially Decision, *Thomas Lubanga Dyilo* Pre-Trial Chamber I, above n 29, para 303; Judgment, *Germain Katanga* Trial Chamber II, above n 29, para 50 ff; Judgment, *Jean-Pierre Bemba Gombo* Trial Chamber III, above n 29, paras 83–84.

explicit restriction on all interpretative activity'.[71] Some believe that interpretation in the light of the rules of the VCLT – and in particular teleological interpretation entailing consideration of the need to end impunity for the perpetrators – could be antithetical to the principle of legality and its corollaries.[72] Nevertheless, the ICC considered it 'self-evident that the aim of the Statute … can under no circumstance be used to create a body of law extraneous to the terms of the treaty or incompatible with a purely literal reading of its text'.[73] And it affirmed that the VCLT 'provides for a method of interpretation which is both circumscribed and rigorous and which leaves little scope for any risk of misinterpretation of the Statute'.[74]

All things considered, what the judges of the ICTs – and above all the ICTY – have been constructing is, a 'nested' mechanism of interpretation that dynamically puts norms into action through a 'network'. This network is a set of extrinsic sources within which international human rights law occupies a prime position when it comes to contextualising, clarifying and occasionally supplementing, their statute. It nevertheless remains the case that what we have here is in fact evolutionary interpretation hiding its true colours. To paraphrase the legal theorist Michel Troper, following Herbert Hart, it is precisely the negation of the creative character of judicial activity which provides judges with the means to create.[75] They adopt the classical, mechanistic conception of interpretation-as-knowledge to justify their work. However, one inevitably needs to ponder the real nature of their power and to bring into question the ideal of the permanence, completeness and certainty of law. The open texture of law, in particular of an international criminal law in progress, is intrinsically bound up with the very nature of language and the endless new realities to be dealt with. More fundamentally, perhaps, the '[c]anons of 'interpretation' cannot eliminate, though they can diminish, these uncertainties; for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation' – interpretation by men, not gods.[76]

[71] Judgment, *Germain Katanga* Trial Chamber II, above n 29, para 51.

[72] The ICC itself recalled it (ibid, para 54) referring to D Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 933; L Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 *European Journal of International Law* 550; D Jacobs, 'Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories' in J d'Aspremont and J Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (Cambridge, Cambridge University Press, 2014). The Court also referred to the Concurring Opinion of Judge Christine Van den Wyngaert (paras 16–18) annexed to Judgment, *Mathieu Ngudjolo Chui* Trial Chamber II, above n 63.

[73] Judgment, *Germain Katanga* Trial Chamber II, above n 29, para 55.

[74] ibid, para 56.

[75] M Troper, *La théorie du droit, le droit, l'Etat* (Paris, PUF, 2001) 170. See also Hart, above n 1, 135–36.

[76] Hart, above n 1, 126 and 128.